Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub
11/08/2026 01:08 PM CST

REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

1875-1876.

BY

GUY A. BROWN,
OFFICIAL REPORTER.

LINCOLN:
PACE, WILLIAMS & NORTH, STATE PRINTERS.
1891.

Entered according to Act of Congress, in the Office of the Librarian of Congress, A. D. 1876,

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

In behalf of the People of Nebraska.

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 compiled in 1873 by GUY A. BROWN.

THE SUPREME COURT

OF

NEBRASKA.

CHIEF JUSTICE,

GEORGE B. LAKE.

ASSOCIATE JUSTICES,

DANIEL GANTT,
SAMUEL MAXWELL.

ATTORNEY GENERAL,

GEORGE H. ROBERTS.

CLERK AND REPORTER,

GUY A. BROWN.

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.
THOMAS L. GRIFFEY, - -	Fifth District.
WILLIAM J. GASLIN, Jr.,	Sixth District.

PROSECUTING ATTORNEYS.

J. W. ELLER, - - - -	First District.
J. H. BROADY, - - - -	Second District.
W. J. CONNELL, - - -	Third District.
M. B. HOXIE, - - - -	Fourth District.
J. B. BARNES, - - -	Fifth District.
C. J. DILWORTH, - - -	Sixth District.

SUPREME COURT RULES.

ADOPTED JULY TERM, 1869.

RULE I.

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

RULE II.

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

RULE III.

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

RULE IV.

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

. . . . .)
. . . . .)

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

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

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

[Here insert the petition in full.]

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

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

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

[Here insert the notice in full.]

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

[Here insert answer in full.]

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

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

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

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

[Here insert demurrer in full.]

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

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

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

[Here set out replication in full.]

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

[Here set out copy of motion and affidavit.]

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

In District Court .... County.

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

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

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

[Here insert in full the verdict as rendered.]

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

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

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

[Here insert in full the verdict as rendered.]

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

[Here insert in full the bill of exceptions.]

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

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

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

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

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

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

TABLE OF CASES REPORTED.

PAGE.

Abbott v. Omaha Smelting Co. 416
CORPORATIONS.

Adams v. Nebraska City National Bank 370
CHATTEL MORTGAGE.

American Central Ins. Co., McCann v. 256
Atchison & Nebraska R. R. v. Loree 446
RAILROADS. NEGLIGENCE.

Atchison & Nebraska R. R., Harden v. 521
Atchison & Nebraska R. R., Ray v. 439

Bax, Monteith v. 166
Blake v. Chambers 90
EXECUTORS. TRUST FUNDS.

Blodgett v. Utley 25
LIMITATION OF ACTIONS.

Blum, White v. 555
Bowker, Kennard & Wheeler v. Collins 494
HOMESTEAD.

Boyle, Singleton v. 414
Brong, Handy v. 60
Brown v. O'Brien 195
PARTNERSHIP. EVIDENCE.

Burlington & Missouri R. R. v. Lancaster Co. 293
TAXES. ROAD TAX.

Burlington & Missouri R. R. v. Westover 268
RAILROADS. DAMAGES BY FIRE.

Carson, State Bank v. 498
Carter, Stewart v. 564
Central National Bank, Lacey v. 179
Chambers, Blake v. 90
Christie, Lash v. 262
City of Brownville v. Cook 101
CONSTITUTIONAL LAW.

PAGE.
City of Omaha, Hurford v. 336
Clarke v. Omaha & Southwestern R. R. 458
CORPORATIONS.
Coe, Livingston v. 379
Colby v. Lyman 429
PROMISSORY NOTE. DEFENSE.
Colfax County, Union Pacific R. R. v. 450
Collins, Bowker v. 494
Commissioners of Buffalo Co., The People v. 150
Comstock, Moses v. 516
Converse v. Shambaugh 376
Cook, City of Brownville v. 101
Coppock, Martin v. 173
Curry, The State v. 545

De Lamater, Kittle v. 426
Deroin v. Jennings 97
EVIDENCE. PROVING DEED A MORTGAGE.
Dodge v. The People 220
CRIMINAL LAW. PRACTICE.

Frasher v. Ingham 531
JUDICIAL SALE.

Glore v. Hare 131
APPEALS.

Hahn, Johnson v. 139
Hail, Nichols v. 210
Handy v. Brong 60
ATTACHMENT.
Harden v. Atchison & Nebraska R. R. 521
PLEADING.
Hare, Glore v. 131
Harris, Mercer v. 77
Hoadley v. Stephens 431
ACKNOWLEDGMENT OF DEEDS.
Hodge, The People, *ex rel.*, McMillan v. 265
Holbrook v. Moore 437
STATE BOUNDARIES.
Horbach v. Miller 31
BOUNDARIES. ADVERSE POSSESSION.
Horn v. Queen 108
NEW TRIAL.
Hoselton, Webb v. 308
Hull v. Miller 503
CONSTITUTIONAL LAW.

PAGE.

Huntington, Kellogg v. 96
Hurford v. City of Omaha 336
CONSTITUTIONAL LAW. ASSESSMENTS.

Ingalls, Mulloy v. 115
Ingham, Frasher v. 531
Ives, Painter v. 122

Jennings, Deroin v. 97
Johnson v. Hahn 139
TAXES. DUTY OF COUNTY TREASURER.

Kane v. The People, *ex rel.*, Snyder 509
QUO WARRANTO. EVIDENCE.
Kellogg v. Huntington 96
BILL OF EXCEPTIONS.
Kittle v. De Lamater 426
PROMISSORY NOTE. DEFENSE.
Kountze, Richards v. 200
Kountze v. Train 291
SHERIFF'S FEES.

Lacey v. Central National Bank 179
PROMISSORY NOTE. EVIDENCE.
Lammers v. Nissen 245
RIPARIAN RIGHTS.
Lancaster County, State, *ex rel.*, v. 537
Lash v. Christie 262
PLEADING. PETITION.
Livingston v. Coe 379
ATTACHMENT. CAPTION OF THE WRIT.
Loree, Atchison & Nebraska R. R. v. 446
Lowe, Williams v. 382
Lyman, Colby v 429

Martin v. Coppock 173
AUTHENTICATION OF DEPOSITIONS.
Martin, The People, *ex rel.*, v. 49
Mason, Starring v 367
Mayor, State, *ex rel.*, Roberts v. 260
McCann v. American Central Ins. Co. 256
CONTRACT. SUBSCRIPTION.
McCann v. The State 324
BANKS. LIABILITY OF.
McDowell v. Thomas 542
ARBITRATION.

PAGE.

Menk, Omaha & Northwestern R. R., v. 21
Mercer v. Harris 77
CONTRACT. EVIDENCE.
Miller, Horbach v. 31
Miller, Hull v. 503
Miller, Mills v. 441
Miller v. Mills 362
PARTITION. ACCOUNTING FOR RENTS.
Mills, Miller v. 362
Mills v. Miller 441
CONTRACT. CONSTRUCTION AND EFFECT.
Mills v. Saunders 190
MORTGAGE. INTEREST. EVIDENCE.
Monteith v. Bax 166
FRAUDULENT CONVEYANCE.
Moore, Holbrook v. 437
Morrow v. Sullender 374
PRACTICE. APPEAL. EXCEPTIONS.
Moses v. Comstock 516
PROMISSORY NOTE. PATENT RIGHT.
Mulloy v. Ingalls 115
DEEDS. EXECUTION.

Nebraska City National Bank, Adams v. 370
Nichols v. Hail 210
PRINCIPAL AND AGENT.
SALE. WARRANTY.
Nissen, Lammers v. 245

O'Brien, Brown v 195
Omaha Hotel Co., Rogers v. 54
Omaha, Hurford v. 336
Omaha & Northwestern R. R. v. Menk 21
PRACTICE. FORM OF ACTION.
EMINENT DOMAIN. DAMAGES.
Omaha Smelting Co., Abbott v. 416
Omaha & Southwestern R. R., Clarke v. 458

Palmer v. The People 68
PRACTICE IN CRIMINAL CASES.
Painter v. Ives 122
JURISDICTION OF U. S. COURTS.
FALSE IMPRISONMENT.
People v. Commissioners of Buffalo County 150
BRIDGES. LETTING CONTRACTS FOR.
People, Dodge v 220
People, *ex rel.*, Hunter v. Peters 254
CONTRACTS WITH SCHOOL DISTRICTS.

PAGE.

People, *ex rel.*, McMillan v. Hodge 265
DIVISION OF SCHOOL DISTRICTS.

People, *ex rel.*, Nye v. Martin 49
CONTESTED ELECTIONS. APPEAL.

People, Palmer v 68
People, *ex rel.*, Snyder, Kane v 509
People, Thompson v 524
People, Wright v 407
Peters, People, *ex rel.*, Hunter v 254

Queen, Horn v. 108

Ray v. Atchison & Nebraska R. R. 439
LOCATION OF RIGHT OF WAY.

Rhodes v. The People 524
CRIMINAL LAW.

Rich v. Stretch 186
APPEALS. ATTORNEY'S FEE.

Richards v. Kountze 200
USURY. MORTGAGE TO NATIONAL BANK.

Rogers v. Omaha Hotel Co. 54
MECHANIC'S LIEN.

Saunders, Mills v. 190
Saunders, Wilcox v. 569
School District v. Stough 357
DISTRICT ORDERS. POWERS OF DISTRICT BOARD.

Scott v. Twiss 133
COVENANT.

Seymour, Young v. 86
Shambaugh, Converse v. 376
Shropshire, The State, *ex rel.*, v. 411
Singleton v. Boyle 414
MOTION FOR NEW TRIAL.

Smails v. White 353
APPEAL ACT OF 1875.

Smith v. The State 277
CRIMINAL LAW. PRACTICE.

Starring v. Mason 367
PRINCIPAL AND AGENT. EVIDENCE.

State Bank v. Carson 498
HOMESTEAD.

State, Curry v. 545
State, McCann v. 324
State, Thompson v. 524
State, *ex rel.*, v. Lancaster County 537
COMMENCEMENT FEE IN SUPREME COURT.

PAGE.

State, *ex rel.*, Ferguson v. Shropshire 411
JUSTICES OF THE PEACE. DUTIES.

State, *ex rel.*, Roberts v. Mayor 260
MANDAMUS. OFFICE.

State, *ex rel.*, Roberts v. Weston 216
SALARY OF ATTORNEY GENERAL.

State, *ex rel.*, Tzschuck v. Weston 234
ADJUTANT GENERAL. SALARY.

Stephens, Hoadley v. 431
Stewart v. Carter 564
OFFICIAL BONDS. PRACTICE. APPEAL.

Stone, Sutton v. 319
Stough, School District v. 357
Stretch, Rich v. 186
Sullender, Morrow v. 374
Sutton v. Stone 319
TAX DEEDS.

Thomas, McDowell v. 542
Thompson v. People 524
CRIMINAL LAW. LARCENY.

Tootle, Farleigh & Co. v. White 401
JUDICIAL SALE.

Train, Kountze v. 291
Twiss, Scott v. 133

Union Pacific R. R. v. Colfax County 450
BRIDGE BONDS.

Utley, Blodgett v. 25

Webb v. Hoselton 308
MARRIED WOMEN. MORTGAGE.

Weston, State, *ex rel.*, Roberts v. 216
Weston, State, *ex rel.*, Tzschuck v. 234
Westover, B. & M. R. R., v. 269
White v. Blum 555
CORPORATIONS. CONSTRUCTION OF STATUTES.

White, Smails v. 353
White, Tootle v. 401
Wilcox v. Saunders, ... 569
EVIDENCE.

Williams v. Lowe 382
TRUSTS. PLEADING. EQUITY.

Wright v. The People 407
CRIMINAL LAW. INSANITY.

Young v. Seymour 86
RENDITION OF VERDICT.

CASES CITED BY THE COURT.

PAGE.

Ackley v. Finch, 7 Cow., 290 373
Alanier v. Governor, 1 Texas, 637. 541
Allen v. Everly, 24 Ohio State, 97. 318
Allen v. Gilmore, 13 Maine, 178 47
Allen v. Wheeler, 4 Gray, 123 172
Anderson v. The State, 5 Pike, 445 286
A. T. & S. F. R. R. v. Stanford, 12 Kan., 354 276
Atkyns v. Horde, 1 Burr, 119 46

Babcock v. Beman, 1 New York, 200 185
Babcock v. Eckler, 24 New York, 628 172
Bacon v. Town, 4 Cush., 217 130
Backus v. McCoy, 3 Ohio, 221 138
Bagg v. Jerome, 7 Mich., 145 172
Bailey v. Smith, 14 Ohio State, 603 . . . . . 316, 318
Baker v. Baily, 16 Barb., 56 523
Ballin v. Dillaye, 37 New York, 35 315
Balpin v. Clarke, 17 Vesey, 365 314
Banfield v. Whipple, 14 Allen, 13 172
Bank v. Swayne, 8 Ohio, 286 466
Bank v. Waggoner, 9 Pet., 399 206
Bank of Augusta v. Georgia, 13 Pet., 595 420
Barry v. Mandell, 10 Johns., 586 144
Bartholomew v. Bentley, 1 Ohio State, 41 466
Beale v. Commonwealth, 25 Penn. St., 18 228
Bearss v. Copley, 19 New York, 93 199
Beaty v. Lessee, 4 Pet., 152 466
Beddoe v. Wardsworth, 21 Wend., 120 138
Belknap v. Belknap, 2 Johns. Ch., 472 149
Benedict v. The State, 12 Wis., 313 233
Bennett v. Butterworth, 11 How., 675 580
Beverly's Case, 4 Coke, 123 117
Bingham v. Bigelow, 12 Met., 273 46
Bixby v. Brandige, 2 Gray, 129 127
Blanchard v. Nestle, 3 Denio, 37 117
Bloodgood v. Mohawk, 18 Wend., 63 579

PAGE.

Bond v. The State, 23 Ohio State, 356 551
Boneffe v. Woodberry, 12 Pick., 456 492
Boothby v. Hathaway, 20 Maine, 255 138
Boren v. Commissioners, 21 Ohio State, 323 161
Boston Water Power Co. v. Gray, 6 Met., 131 543
Boswell v. Otis, 9 How., 350 398
Boutwell v. Mason, 12 Verm., 608 492
Bowman v. Cockrill, 6 Kan., 339 324
Boyd v. M'Lean, 1 Johns. Ch., 582 393
Briggs v. Georgia, 15 Verm., 72 349
Brockaway v. Allen, 17 Wend., 41 186
Brower v. Appleby, 1 Sandf., 170 469
Brown v. Bement, 8 Johns., 96 373
Brown v. Commissioners, 21 Penn. St., 37 562
Brown v. The State, 13 Ark., 100 229
Buffalo R. R. Co. v. Cary, 26 N. Y., 77 420
Burnett v. Cincinnati, 16 Ohio, 574 149
Burtch v. Newberry, 10 N. Y., 392 573
Butler v. Miller, 1 Conn., 396 393
Butler v. Palmer, 1 Hill, 328 . . . . . 146, 572

Cadwallader v. Granville, 11 Ohio, 298 394
Calkins v. Calkins, 3 Barb., 310 573
Carpenter v. Longan, 16 Wall., 371 . . . . . 318, 520
Cascoigne v. Thering, 1 Vern., 366 393
Catterlin v. Douglas, 17 Ind., 214 147
Caw v. The People, 3 Neb., 357 555
Central Turn. Co. v. Valentine, 10 Pick., 142 422
Charter v. Stevens, 3 Denio, 33 373
Chase v. The People, 40 Ill., 352 410
City of Jefferson v. Patterson, 32 Ind., 140 149
Clark v. Graham, 6 Wheat., 577 436
Clausen v. Lafrange, 4 G. Greene, 226 580
Clemens v. H. & St. Jo. R. R., 53 Mo., 366 276
Coffing v. Taylor, 16 Ill., 40 444
Cole v. Knight, 3 J. R., 442 146
Collier v. Gamble, 10 Mo., 472 138
Colyer v. Langfort, 1 A. K. Marsh., 237 113
Commercial Bank v. Buckingham, 12 O. S., 402 375
Commissioners v. Mighels, 7 Ohio State, 115 157
Commonwealth v. Heath, 11 Gray, 303 409
Commonwealth v. Kimball, 21 Pick., 376 146
Commonwealth v. Knapp, 9 Pick., 496 550
Commonwealth v. Smith, 10 Allen, 455 466
Commonwealth v. Webster, 5 Cush., 295 554
Commonwealth v. York, 9 Met., 103 553
Conant v. Seneca County, 1 Ohio State, 298 334
Conn R. R. Co. v. Bailey, 24 Verm., 465 444
Cook v. Champlain, 1 Denio, 91 276

PAGE.
Cooper v. Armstrong, 3 G. Greene, 123 580
Cooper v. The State, 16 Ohio State, 333 75
Coppin v. Coppin, 2 P. Wm's, 291 435
Cottrill v. Vandusen, 22 Verm., 511 379
Courcier v. Graham, 1 Ohio, 450 436
Crane v. Hubbell, 7 Paige, 417 206
Crane v. Reeder, 21 Mich., 24 436
Creighton v. Mason, 27 Cal., 728 353
Crisp v. Burberry, 8 Bing., 394 146
Cropsey v. Wiggenhorn, 3 Neb., 108 . . . . . 415, 512
Crowell v. Galloway, 3 Neb., 215 512
Culbertson v. Cincinnati, 16 Ohio, 574 149
Cummings v. Long, 16 Iowa, 42 500
Cunningham v. Freeborn, 11 Wend., 261 172
Cutler v. Davenport, 1 Pick., 81 435
Cythe v. La Fontain, 51 Barb., 186 568

Dallam v. Oliver, 4 Gill, 446 147
Dashwood v. Blythway, 1 Eq. Cases, 317 317
Davidson v. Owen, 5 Minn., 72 67
Davidson v. Rankin, 34 Cal., 503 560
Daviess v. Fairbrain, 3 How., 636 146
Davis v. The State, 7 Md., 152 357
Davis v. Wetherell, 11 Allen, 19 394
Deering v. Boyle, 8 Kan., 525 316
Dexter v. Allen, 16 Barb., 18 146
District Township v. Dubuque, 7 Iowa, 276 . . . . . 349, 422
Downie v. White, 12 Wis., 176 410
Duncan v. Lyon, 3 Johns. Ch., 356 114
Durant v. The People, 13 Mich., 356 . . . . . 274, 529

Early v. Mahon, 19 Johns., 150 206
Eastman v. Wright, 4 Ohio State, 160 582
East Plank Road v. Vaughan, 14 N. Y., 546 422
Elliot v. Jackson, 3 Wis., 649 66
Elliot v. Pearl, 10 Pet., 412 47
Emery v. Maryville, 56 Maine, 315 359
Enos v. Hunter, 4 Gilm., 218 . . . . . 394, 399
Ewing v. Gray, 11 Ind., 64 172
Ex parte Bamsley, 3 Atk., 168 117
Ex parte Cranmer, 12 Vesey, 445 118

Farrer v. Fessenden, 39 New Hamp., 277 47
Fero v. Buffalo, 22 New York, 209 276
Field v. Cook, 16 La. Ann., 153 422
Fische v. Kramer's Lessee, 16 Ohio, 126 318
Fish v. Redington, 31 Cal., 194 523
Fisher v. Otis, 3 Chandler, 83 318
Flanagan v. The People, 52 N. Y., 467 409

PAGE.
Floyd v. Edwards, Cowp., 112 207
Fogg v. Fogg, 40 N. H., 485 496
Folsom v. Carli, 5 Minn., 337 499
Ford v. Williams, 13 New York, 583 172
Fordyce v. Godman, 20 Ohio State, 1 506
Fouts v. The State, 8 Ohio State, 98 286
Franklin v. National Ins. Co., 43 Mo., 491 541
Frear v. Cruikshanks, 3 McCord, 84 30
Freeman v. The People, 4 Denio, 28 409
Frost v. Goddard, 25 Me., 414 369
Frothingham v. McCusick, 24 Me., 403 318

Gadsen v. Johnson, 1 Nott & McCord, 89 30
Gardner v. The People, 3 Scam., 88 550
Gilman v. Woolcock, 13 Wis., 589 206
Globe Ins. Co. v. Boyle, 21 Ohio State, 119 568
Goff v. Papin, 34 Mo., 177 59
Gooding v. M'Allister, 9 How. Pr., 123 568
Goodyear v. Boston, 20 Pick., 410 146
Gordon v. Cornes, 47 N. Y., 608 302
Gouvener v. Mayor, 2 Paige, Ch., 437 147
Graffins v. Totenham, 1 W. &. S., 488 41
Granger v. Swartz, Woolworth's C. C. R., 88 251
Graves v. Graves, 29 N. H., 142 392
Green v. Brown, 3 Barb., 119 199
Green v. Dennis, 6 Conn., 302 420
Green v. Tanner, 8 Met., 411 172
Greenby v. Wilcocks, 2 Johns., 1 57

Hall v. The People, 57 Ill., 313 414
Hamilton v. Cummings, 1 Johns. Ch., 516 149
Hamilton v. State, 3 Ind., 458 414
Hammer v. Neville, Wright's Rep., 169 193
Harkrader v. Lieby, 4 Ohio State, 603 316
Harrison v. Walker, 1 Kelly, 32 146
Hart v. Ten Eyck, 2 Johns. Ch., 100 373
Hartford v. Kennedy, 12 Conn., 506 398
Hartwell v. Root, 19 Johns., 345 83
Henry v. V. & A. R. R. Co., 17 Ohio, 87 . . . . . 470, 489
Hick v. Hinde, 9 Barb., 528 186
Higgins v. West, 5 Ohio, 555 317
Hill v. Black, 1 Beas. Ch., 31 424
Hill v. Higdon, 5 Ohio State, 243 302
Hines v. Leavenworth, 3 Kan., 186 347
Hodgson v. Dexter, 1 Cranch., 347 57
Hogan v. The State, 10 Ohio State, 459 286
Hollingworth v. Barbour, 4 Pet., 475 399
Hopps v. The People, 31 Ill., 385 409
Howard v. Harris, 1 Verm., 190 317

PAGE.

Hoyt v. Howe, 3 Wis., 758 499
Hush v. Trustees, 1 Vesey, 188 149
Hussey v. Bank, 10 Mich., 415 492
Hussey v. Manf. Bank, 10 Pick., 21 398
Hutchins v. State Bank, 12 Met., 421 397
Hynson v. Taylor, 3 Ark., 555 66

Illsley v. Harris, 10 Wis., 95 382
Insurance Co., v. Hodgson, 7 Cranch., 336 114

Jackson v. Bailey, 12 Ill., 161 492
Jackson v. Blodgett, 5 Cow., 296 207
Jackson v. King, 4 Cow., 217 119
Jackson v. Sheppard, 7 Cow., 89 147
Jennings v. Estes, 16 Me., 323 379

Keeley v. The State, 14 Ind., 36 528
Kellogg v. C. & N. W. R. R., 26 Wis., 231 276
Kennebec v. Waters, 34 Maine, 369 469
Key v. Goodwin, 4 Moore & Payne, 341 140
Kinyon v. Duchene, 21 Mich., 500 149
Kirkendall v. Mitchell, 8 McLean, 145 138
Kittle v. De Lamater, 3 Neb., 325 428
Knowlton v. Supervisors, 9 Wis., 417 149
Kyger v. Riley, 2 Neb., 28 218

Laight v. Pell, 1 Edwd. Ch., 577 535
Lamb v. Shays, 14 Iowa, 567 500
Lane v. Bank, 6 Kan., 75 30
Lamb v. Deighton, Amb., 409 393
Lansing v. Goelet, 9 Cow., 346 . . . . . 317, 373
Lawrence v. Lanning, 4 Ind., 194 130
Lear v. Yarnell, 3 A. K. Marsh, 419 206
Leighton v. Walker, 9 New Hamp., 59 146
Lench v. Lench, 10 Vesey, 517 393
Lieby v. Heirs of Ludlow, 4 Ohio, 493 113
Little v. Libby, 2 Greenleaf, 242 47
Little Miami R. R. v. Collet, 6 Ohio State, 182 415
Livingston v. Albany, 41 Georgia, 21 302
Livingston v. Livingston, 6 Johns. Ch., 497 149
Loeffner v. The State, 10 Ohio State, 598 . . . . . 530, 550
Love v. Baehr, 47 Cal., 364 244
Lovell v. Leland, 13 Verm., 581 317
Loyd v. Carter, 17 Penn. St., 216 393

Madison v. Western Plank Road, 7. Wis., 59 466
Maples v. Burnside, 22 Ind., 139 172
Marbury v. Madison, 1 Cranch, 176 579

PAGE.

Marshal v. Betner, 17 Ala., 832 127
Marston v. Hobbs, 2 Mass., 433 138
Martin v. Draker, 5 Watts, 544 492
Mass. Iron Co. v. Hooper, 7 Cush., 187 397
Master v. Miller, 4 Term R., 320 57
Matthews v. Wallwyn, 4 Vesey, 118 318
Maynard v. Hunt, 5 Pick., 243 318
Mayo v. Madden, 4 Cal., 27 581
Mayor v. Newton, 23 Ala., 660 456
McCullough v. Moss, 5 Denio, 580 466
McCullough v. The State, 11 Ind., 424 506
McDonald v. Forsythe, 13 Mo., 551 66
McGill v. Ware, 4 Scam., 24 205
McGregg v. State, 4 Black., 406 550
McNaughten's Case, 10 Cl. & F., 200 410
McPherson v. Rathbone, 7 Wend., 216 378
McReady v. Rogers, 1 Neb., 124 231
Meredith v. Kennard, 1 Neb., 312 555
Merrils v. Law, 9 Cow., 65 206
M'Ghee v. Ellis, 4 Littel, 250 533
Michoud v. Girard, 4 How., 554 94
Miller v. Shaw, 7 Sergt. & Rawle, 136 47
Miller v. Stokely, 5 Ohio State, 196 394
Mills v. Miller, 2 Neb., 317 . . . . . 43, 415
Minga v. Zollicoffer, 2 Ired., 279 66
Missouri v. Kentucky, 11 Wall., 395 438
Mohawk R. R. v. Artcher, 6 Paige Ch., 88 149
Mokelumne Co. v. Woodbury, 14 Cal., 427 . . . . . 422, 560
Moore v. Moore, 38 N. H., 389 392
Morris v. Ward, 5 Kan., 245 501
Muir v. Craig, 3 Blackf., 293 534
Murray v. Hardwicke, 3 W. Black., 859 207
Murry v. Beebe, 4 Sim., 82 314

Nash v. Lull, 102 Mass., 60 518
Nelson v. Lloyd, 9 Watts, 22 378
New London R. R. v. Boston, 102 Mass., 389 146
New Orleans v. United States, 10 Pet., 717 251
Nicholas v. Fearson, 7 Pet., 413 251
Noble v. Cadwallader, 20 Ohio State, 208 . . . . . 470, 489
Nolan's Appeal, 23 Penn. St., 38 170
North v. Turrill, 2 P. Wm's, 144 314
N. M. R. R. Co. v. McGuire, 49 Mo., 490 304

Oakley v. Aspinwall, 3 Comst., 547 579
Oliver v. Eaton, 7 Mich., 113 171
Owens v. Dickerson, 1 Craig & Ph., 48 314

PAGE.
Parker v. Smith, 4 Blackf., 70 147
Parks v. State, 4 Ohio State, 236 589
Parmelee v. Sloan, 37 Ind., 482 394
Parsons v. Bedford, 3 Pet., 446 580
Patterson v. Pease, 5 Ohio, 190 436
Peake v. Wabash R. R., 18 Ill., 88 398
Peck v. The State, 19 Ind., 170 410
Peebles v. Ralls, 1 Little, 24 111
Penrose v. Hart, 1 Dall., 379 193
Penly v. Waterhouse, 1 Clarke, 498 30
People v. Antonio, 27 Cal., 404 529
People v. Burgess, 35 Cal., 115 526
People v. Garhutt, 17 Mich., 23 410
People v. Halsey, 37 N. Y., 348 414
People v. Henessy, 15 Wend., 147 231
People v. Mahany, 13 Mich., 481 . . . . . 357, 506
People v. Mather, 4 Wend., 229 550
People v. Porter, 6 Cal., 26 261
People v. Reynolds, 2 Mich., 422 528
People v. Schermerhorn, 19 Barb., 558 351
People v. Supervisors, 11 Abbott, 104 351
People v. The Mayor, 4 New York, 419 . . . . . 304, 343
People v. Weston, 3 Neb., 323 159
Perry v. Barker, 13 Ves., 198 317
Petit v. Shepherd, 5 Paige Ch., 501 148
Phelps v. The People, 55 Ill., 384 528
Pierce v. Emery, 32 N. H., 508 466
Pierce v. Faunce, 47 Maine, 507 318
Pierce v. State, 13 N. H., 536 550
Pierpont v. Crouch, 10 Cal., 316 146
Piggott v. East Co. R. R., 3 C. B., 229 272
Pixley v. Higgins, 15 Cal., 132 150
Poignard v. Smith, 6 Peck., 177 48
Porter v. Bank, 19 Verm., 410 335
Porter v. Hildebrand, 14 Penn. St., 131 64
Potts v. Blackwell, 4 Jones Eq., 58 318
Powers, In Re., 25 Verm., 261 304
Providence Bank v. Billings, 4 Pet., 563 540
Pullen v. Commissioners, 66 N. C., 364 541

Quackenback v. Danks, 1 Denio, 128 558
Queen v. Bertrand, 1 P. C., 520 227

Rachel v. United States, 6 Cranch., 329 147
Railroad v. Connelly, 18 Ohio State, 166 347
Railroad v. Ryan, 11 Kan., 602 466
Rathbun v. Acker, 18 Barb., 333 147
Raver v. Webster, 3 Iowa, 511 . . . . . 63, 65
Rector v. Rotton, 3 Neb., 176 501

PAGE.
Reeves v. Scully, Walk. Ch., 248 318
Reubens v. Joel, 3 Kern., 493 579
Reynolds, Auditor, v. Taylor, 45 Ala., 420 218
Rex v. Scaife, 2 Den. C. C., 281 228
Rhodes v. The State, 33 Ind., 24 229
Rice v. Welling, 5 Wend., 597 206
Richardson v. Sibley, 11 Allen, 67 466
Ridgeway v. Darwin, 8 Vesey, 66 118
Ritchett v. The State, 22 Ohio St., 405 233
Robbins v. Lincoln, 12 Wis., 8 523
Rockwell v. Elderkin, 19 Wis., 368 581
Rogers v. Rathbun, Johns. Ch., 367 . . . . . 20[illegible]

Sage v. Hawley, 16 Conn., 106 29
Sample v. Coulson, 9 W. & S., 66 392
Sargent v. Franklin Ins. Co., 8 Pick., 90 397
Sawyer v. City of Alton, 3 Scam., 127 541
Schell v. Williams Valley R. R., 35 Penn. St., 204 47
Schenectady v. Thatcher, 11 N. Y., 102 422
Schryver v. Hawks, 22 Ohio State, 308 231
Scofield v. Cleveland, 1 Ohio State, 126 302
Seward v. Jackson, 8 Cow., 433 148
Shaud v. Aberdeen Canal, 2 Dow., 519 149
Sherrard v. Olden, 1 Halstead, 344 111
Shotwell's Case, 27 Cal., 394 526
Sioux City R. R. v. Washington County, 3 Neb., 42 . . . . . 148, 157
Smith v. Acker, 23 Wend., 657 171
Smith v. Bailey, 14 Ohio State, 396 520
Smith v. Brackett, 36 Barb., 574 499
Smith v. Cheshire, 13 Gray, 318 359
Smith v. Morrison, 22 Pick., 433 46
Smith v. Shaw, 2 Wash., C. C., 167 193
Spangler v. Jacobey, 14 Ill., 297 506
Spaulding v. C. & N. W. R. R., 30 Wis., 122 272
Spaulding v. C. & N. W. R. R., 33 Wis., 582 274
Spires v. Hammett, 8 W. & S., 18 193
State v. Auditor, 41 Mo., 25 558
State v. Bryant, 5 Ind., 192 382
State v. Franklin Bank, 10 Ohio, 98 397
State v. Gresser, 19 Mo., 247 528
State v. Johnson, 1 Walker, 392 550
State v. Jones, 9 Am. Rep., 242 410
State v. Judge, 7 Iowa, 202 414
State v. Lawrence, 57 Mo., 574 409
State v. Marlow, 15 Ohio State, 114 512
State v. McCann, 21 Ohio State, 210 541
State v. Merrick, 19 Met., 398 529
State v. Williams, 3 Stewart, 454 550
State v. Wright, 53 Me., 328 550

PAGE.

State v. Swartz, 9 Ind., 121 43
Stevens v. Cooper, Johns. Ch., 429 444
Stewart v. Durret, 3 Mon., 113 111
Stewart v. Ketetlas, 36 N. Y., 392 84
Stewart v. Lispenard, 26 Wend., 303 118
Stewart v. Petree, 55 N. Y., 623 206
Stoever v. Innell, 1 Watts, 258 147
Stokes v. Berry, 2 Salk., 421 47
Story v. Livingston, 13 Pet., 361 193
Strader v. White, 2 Neb., 360 231
Strimpfler v. Roberts, 18 Penn. St., 216 393
Stringfellow v. State, 26 Miss., 127 231
Stucker v. Kelly, 7 Hill, 25 353
Sturges v. Bank, 11 Ohio State, 153 334
Sturges v. Burton, 8 Ohio State, 218 585
Sullivan v. The People, 15 Ill., 233 146
Sunderland, v. Sunderland, 19 Iowa, 329 393
Surtees v. Ellison, 4 M & S., 586 . . . . . 146, 572
Swift v. Williamsburg, 24 Barb., 427 352

Tallon v. Ellison, 3 Neb., 74 373
Taylor v. Tilden, 3 Neb., 339 96
Thacker v. Powell, 6 Wheat., 125 148
The King v. Fowler, 4 Barn & Ald., 275 227
The King v. Hawkins, 10 East, 211 83
The M. P. R. R. v. McCartney, 1 Neb., 404 . . . . . 415, 589
The Monte Allegro, 9 Wheat, 616 535
Thomas v. Owens, 4 Md., 189 218
Todd v. Lee, 15 Wis., 395 316

Underwood v. McDuffee, 15 Mich., 367 146
Upham v. Bank, 15 Wis., 453 496
United States v. Crosby, 7 Cranch, 115 435
United States v. Passmore, 4 Dall., 372 172
United States v. Ward, Woolworth's Rep., 17 127
United States v. Wright, 1 McLean, 409 261

Vanhorn v. Dorrence, 2 Dall., 308 579
Vannerson v. Pendleton, 8 S. & M., 452 112
Voorhies v. Childs, 17 N. Y., 361 580

Wagner v. Dickey, 17 Ohio, 443 100
Walker v. Lessee, 2 Ohio State, 593 582
Watervliet v. White, 1 Denio, 608 185
Weeks v. Milwaukee, 10 Wis., 258 345
Welland Canal v. Hathaway, 8 Wend., 480 422
Wells v. Yates, 44 N. Y., 525 566
Wells, Fargo & Co. v. Preston, 3 Neb., 446 43

PAGE.

Whitney v. Blanchard, 2 Gray, 208 146
Whitney v. Ferris, 10 Johns., 66 379
Williams v. Bank, 7 Wend., 539 424
Williams v. Commissioners, 35 Me., 348 146
Williams v. Penny, 25 Iowa, 438 149
Williams v. State, 18 Ohio State, 46 233
Willis v. Willis, 2 Atk., 71 393
Willmouth v. Crawford, 10 Wend., 343 209
Wills v. Cooper, 2 Ohio, 125 435
Wilson v. Wetmore, 1 Hill, 216 381
Winnipisiogge v. Worster, 9 Foster, 442 581
Winslow v. Merchants Ins. Co., 4 Met., 306 318
Woodbridge v. Detroit, 8 Mich., 291 345
Wright v. Shelby, 10 B. Mon., 5 469

Yale v. Dederer, 22 N. Y., 450 315
Yates v. Little, 6 McLean, 511 54
Yeaton v. The United States, 5 Cranch., 281 147

Zanesville v. Richards, 5 Ohio State, 589 302
Zimmermann v. Rote, 75 Penn. State, 188 519

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1875.

PRESENT:

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

THE OMAHA AND NORTH WESTERN RAILROAD COMPANY, PLAINTIFFS IN ERROR, v. WILLIAM H. MENK, DEFENDANT IN ERROR.

1. **Practice:** FORM OF ACTION. A party who has been damaged by the location of a railroad, through his premises, where the damages awarded have not been deposited with the probate judge, as provided by *Sec.* 97, *Gen. Stat.* 191, may bring his action for the amount of the award, to enjoin the operating of the road across his premises until payment is made, or he may sue in trespass for the unauthorized entry thereon.
2. **Eminent domain:** DAMAGES ALLOWABLE. An award of damages for the location of right of way for a railroad, although not contemplated in the statute (*Gen. Stat.*, *Sec.* 97, p. 191), contained a provision that the party owning the premises, part of which were taken for right of way, might "move back his house" therefrom; *Held*, valid.

3. **Practice**: BILLS OF EXCEPTIONS—should state affirmatively that they contain "all the evidence." To state that they contain "the substance of the evidence introduced bearing upon the issues," is not sufficient.

ERROR to the District Court of Washington County.

William H. Menk brought his action in that court upon an award made in his favor by commissioners under the provisions of section ninety-seven, chapter eleven of the General Statutes, for damages occasioned by the appropriation of a part of lots nine and ten in block thirty-four of the town of Blair, taken by the Omaha and Northwestern Railroad Company for right of way. The award was as follows:

"We the undersigned, disinterested freeholders and commissioners appointed by the probate judge of Washington County to appraise the damages accruing to William H. Menk, by reason of the appropriation of that part of the following real estate taken for right of way by the Omaha and Northwestern Railroad Company situated in Washington County, Nebraska, as shown on the plat or profile of said road filed and attached to this award, to-wit: through a part of lots nine (9) and ten (10) in block thirty-four (34) as shown in location of said line of road on map of the town of Blair, herewith filed and marked "A," including house to be moved back by said Menk, having been duly qualified and having each personally examined said premises on the day and at the time mentioned in the notice hereto attached, did at the office of said probate judge of said county find said damages to amount to the following sum, to-wit: $325. And we hereby award and appraise said damages at the total sum of three hundred and twenty-five dollars. In testimony whereof we have hereunto set our hands," etc.

This award, signed by the commissioners, was filed with the probate judge, but no money was paid into his hands by the railroad company, nor did the probate judge file the award with the county clerk. It appeared in evi-

dence that the road was built substantially in accordance with the plat filed, though Menk testified that he still occupied the premises and never moved the house off the lots. Judgment was given against the railroad company who now bring the cause here by petition in error.

John I. Redick, for plaintiff in error, contended that the facts set forth in the petition could not justify a judgment against the plaintiff in error, because the award of the commissioners exceeded their authority under the statute, of which they were creatures, and they had no power beyond the awarding of a pecuniary compensation; that they had no right to award that Menk should remove his house from the lots, and therefore the award was void; that this award was such a finding as could not be enforced by execution; nor could any appropriation of the property be made until the award was filed with the county clerk, and became a record of the county. In support of these views, counsel cited *Sec.* 97, *Chap.* 11, *Gen. Stat.* 1 *Redfield on Railways*, 381. *Etnier v. Shope*, 43 *Penn., State*, 110.

E. Wakeley argued the cause for the defendant in error upon a brief prepared by *John S. Bowen*, presenting among others the following points:

I. The action was brought on the award. There is no allegation of irregularity on the part of the commissioners, mistake, or any other ground by which the award could be impeached. The proceeding throughout was in perfect conformity to the statute, and no objection or point was raised in the trial or pleadings to controvert the same.

II. The plaintiff may maintain an action for the amount awarded. *Smart v. Portsmouth and Concord Railroad*, 20 *New Hampshire*, 233. *Shelburne v. Eldridge*, 10 *Vermont*, 123. *McAulay v. Western Vermont R. R. Co.*, 33 *Id.*, 311. *Williams v. Jones*, 13 *Mees. & Wels.*, 628.

LAKE, CH. J.

That such an action as this can be maintained cannot be doubted, where the damages are not deposited with the probate judge as the statute requires. The owner of the land thus appropriated has his election either to bring his action for the amount of the award, to enjoin the operating of the road across his premises until payment is made, or to sue in trespass for the unauthorized entry upon his premises.

But it is urged as a fatal objection to this award that it contains a provision that Menk should have the privilege of removing his dwelling house from the condemned premises. It is true that this mode of estimating damages is not contemplated in the statute, and why it was adopted in this particular instance is not disclosed by the record. Very likely it was done at the instance of both parties, who may have considered the house of much greater value to Menk than it could possibly be to the company. At all events I must conclude that the award was satisfactory when made, as neither party saw fit to get rid of it by an appeal to the district court. There is no force in this objection.

The only remaining objection worthy of notice, is, that the finding and judgment of the court is not sustained by sufficient evidence. But it is a sufficient answer to this objection to say, that the record does not purport to contain all the testimony submitted to the judge who tried the cause. To justify a re-examination of a question of fact in this court, it must be shown affirmatively that the entire evidence adduced on the trial below is brought up for inspection here. It is not enough to state, as is done here, that it is "the substance of the evidence introduced, bearing upon the issues." It may be true that all the evidence which the court considered relevant, or material to the issues, has been preserved.

But it is not at all times an easy thing to determine whether particular testimony ought to be admitted or rejected, or whether if received, it should be given any weight in the decision of the case. The only safe rule undoubtedly is to require all the evidence to be preserved, and that the record shall disclose the fact that it has been done. But even if the rule were otherwise, and we should take the evidence contained in this record, as all that could have had any legitimate bearing on the issues presented, still I could not hesitate to declare that the finding of the judge is fully sustained, and that no other rational conclusion could have been drawn therefrom, than the one reached by him.

The judgment of the District Court is clearly right and must be in all things affirmed.

JUDGMENT AFFIRMED.

Mr. JUSTICE GANTT, concurred. Mr. JUSTICE MAXWELL, having tried the cause in the court below, did not sit.

HARRISON H. BLODGETT, PLAINTIFF IN ERROR, v. JOSEPH UTLEY, DEFENDANT IN ERROR.

1. **Limitation of Action**: ABSENCE. The mere temporary absence of a debtor from the state, when such debtor has a usual place of residence therein where service of summons can be had upon him, does not suspend the statute of limitations.
2. ———. The words "usual place of residence," mean the place of abode at the time of service.

ERROR to the district court of Lancaster County.

This action was brought on a judgment rendered in the circuit court of Whiteside County, Illinois, on the 9th day of June, A. D. 1866. The cause was commenced in the district court on the 15th day of November, A. D. 1873. Blodgett, who was defendant there, plead the

statute of limitations, which provides that an action on a foreign judgment can only be brought within five years after the cause of action shall have accrued. *Gen'l Statutes, Sec.* 10, *p.* 525. The following agreed statement of facts appears in the record brought to this court:

"On motion for a new trial, which was overruled, and on error from the district to the supreme court the following facts are agreed to by the parties, plaintiff and defendant:

That the defendant Harrison H. Blodgett came publicly into the state of Nebraska on the 15th day of January, A. D. 1868, and established a domicile; was temporarily absent from the state of Nebraska, four weeks in March, 1868, at Atchison, Kansas, and in different places in Missouri; was again temporarily absent three weeks in April and May, 1868, in different places in Illinois; returned to Nebraska, but was again temporarily absent in July and August, 1868, four weeks in different places in Illinois; then returned to Nebraska, and was again temporarily absent four weeks in November and December, 1868, in different places in Illinois; returned to Nebraska, but was again temporarily absent from the state for three weeks in February and March, 1869, at different places in Illinois and Iowa; again returned to Nebraska, and built a house in Otoe county in April, 1869, on land that defendant then owned. Afterwards, and up to the commencement of this action kept a furnished house there which was the usual place of residence of defendant. In August, 1871, defendant temporarily left the state of Nebraska, and stayed away two weeks in Hamburg, Iowa; returned to the state and was again absent in October and November, 1871, four weeks at different places in Iowa; returned to the state, and was again temporarily absent in the month of May, June, July, and August, 1872, at different times and different places in Missouri and Iowa, all together mak-

ing about three months; then returned to the state of Nebraska, and was again temporarily absent in October and November, 1872, in different places in Kansas for five weeks; that during each and every absence the defendant had a usual place of residence in different places in Nebraska, where service of summons could be had on him, and where at all times defendant had, in Otoe county, Nebraska, real estate subject to attachment; that aggregating these successive absences, and deducting from the period limited by the statute, the action was not barred; if not enough of these absences are to be deducted from that period then the action is barred."

Judgment being rendered against Blodgett for the amount claimed in the petition, he brought the cause here by petition in error.

H. H. Blodgett, the plaintiff in error, *pro se.*

The learned judge who tried this cause in the court below, gave the statute a literal construction, without paying any attention whatever to the service of process, therefore deducting temporary absences when the debtor was at all times subject to the jurisdiction of the state courts. But such a literal construction of the statute without giving any attention whatever to the service of process, the courts have never seen fit to give, but they have universally held that if personal service of summons could be had on the debtor during his absence, it was the legislative intent that the statute would run during such an absence; and the legislative intent will prevail over a literal construction of the statute. *Penley v. Waterhouse*, 1 *Iowa*, 498. *Sage v. Hawley*, 16 *Conn.*, 106. *White v. Campbell*, 22 *Mich.*, 193. *Ford v. Babcock*, 2 *Sandf.*, 527. *Gilman v. Cutts*, 3 *Foster*, 376.

As the agreed statement of facts shows, the plaintiff

in error's absences were but flying temporary absences with a definite return, and that the plaintiff in error had at all times a usual place of residence where service of process could be had, therefore the court below erred in deducting temporary absences.

Pound & Burr, for defendant in error.

In cases which arise under the latter branch of section twenty, chapter 57, p. 526 of the General Statutes, successive absences may be accumulated, and the aggregate deducted from the period limited for the commencement of an action. *Lane v. The National Bank of the Metropolis*, 6 *Kan.*, 74. *Cole v. Jessup*, 10 *New York*, 96. *Phillips v. Holman*, 26 *Texas*, 276. *Vanlandingham v. Huston*, 4 *Gil.*, 125. *Chenot v. Lefevre*, 3 *Gil.*, 637. *Berrien v. Wright*, 26 *Barb.*, 208.

MAXWELL, J.

The agreed statement of facts on which this case was submitted sets forth that "during each and every absence the defendant had a usual place of residence in different places in Nebraska, where service of summons could be had on him."

Section twenty of the code of civil procedure provides as follows: "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, or while he is absconded, or concealed; and if, after the cause of action accrues, he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought." Section sixty-nine provides the mode of ser-

vice of summons. "The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence at any time before the return day."

It is clear that if we are to be governed by the strict literal language of the statute, that the several periods of absence of the plaintiff in error from the state, must be deducted from the five years and ten months during which he has resided in this state, in which case the action is not barred. Do the words "depart from the state," as used in section twenty, mean a mere temporary absence from the state while the debtor's usual place of residence is here, or are they intended to apply to such an absence from the state as entirely suspends the power of the plaintiff to commence his action? We think it was the intention of the legislature to give the creditor five full years to commence his action, and if during that period, the right to proceed in our courts to reduce the claim to judgment is suspended by reason of the absence or concealment of the debtor, the period of *such* absence should not be computed as any part of the time within which an action may be brought. It is one of the grounds for attachment under our code that the debtor "so conceals himself that summons cannot be served upon him," and it is evident that the reason of suspension of the statute of limitations, in case of concealment, is because service of summons cannot be had on the debtor in consequence thereof.

In the case of *Sage v. Hawley*, 16 *Conn.*, 106, the court, in construing the words "without the state," say: "considering this provision as being designed to protect the rights of the plaintiff, in those cases where it was not practicable for him to enforce them by suit, in consequence of the absence of the defendant from the state, its justice and propriety are most obvious. But it is not necessary, nor does justice seem to require, that we should

extend it by construction, so far as to include in the computation of the time limited for bringing suits, those periods when the defendant was personally out of the state, but during which the plaintiff might notwithstanding have commenced a personal action against him, by the judgment in which he would be conclusively bound." *Penley v. Waterhouse*, 1 *Clarke*, 498.

The case of *Lane v. The National Bank of the Metropolis*, 6 *Kan.*, 75, is cited by defendant in error as holding that mere absence from the state is sufficient to prevent the statute from running. From the agreed statement of facts in that case "that said J. H. Lane resided in Lawrence, Kansas, where he kept and maintained a furnished house; that he was a member of the United States Senate; that he was in Washington with his wife and other members of his family from November, 1865, until the middle of June, 1866," it is evident that Lawrence was not his usual place of residence during his stay in Washington. The words "usual place of residence" mean the place of abode at the time of service. *Gadsen v. Johnson*, 1 *Nott & McCord*, 89. If the party is out of the state for a temporary purpose merely, then his residence is still here and service may be made at his usual place of residence. *Frear v. Cruikshanks*, 3 *McCord*, 84.

It appears from the agreed statement of facts, that service of summons could at all times, since the 15th day of January, 1868, have been had on the plaintiff in error at his usual place of residence in this state. So far as appears there has been no suspension of the right of the defendant in error to proceed in our courts and reduce his claim to judgment; and the right to merge his demand in judgment not having been suspended, the court erred in deducting the time the plaintiff in error was absent temporarily from this state. The judgment

of the district court is therefore reversed and cause remanded.

JUDGMENT REVERSED.

GANTT, J, concurred. LAKE, Ch. J., before whom the cause was tried in the district court, said that he fully concurred in the opinion of the court upon the record as it appeared here, but that the evidence was entirely different on the trial below, from that set forth in the agreed state of facts submitted to this court.

JOHN A. HORBACH, PLAINTIFF IN ERROR, v. LORIN MILLER, DEFENDANT IN ERROR.

1. **Practice**: EXCEPTIONS: MOTION FOR A NEW TRIAL. All alleged errors, occurring during the trial of a cause, must be excepted to, and complained of in the motion for a new trial, in order to obtain a review of the same in the supreme court; and error committed by the giving of an oral charge to the jury, instead of reducing such charge to writing, as required by *Gen. Stat.*, 262, is no exception to the rule.

2. **Boundaries**: EVIDENCE: INSTRUCTIONS TO JURY. The identity of a block of lots depended upon the correct location of another block, some distance off, a corner of which had been taken as an initial point in making the survey; and a surveyor testified that in 1857, a fence was erected around the block, of which he had personal knowledge; that the fence was destroyed in 1862; and in making the survey in question, he found the west line and southwest corner, by remains of fence posts, there being old bark and rotten wood about every seven feet; *held*, that the correct location of the initial point was properly submitted to the jury, upon an instruction, that in order to determine whether the fence was built upon the true line of the block, they might take into account the time when it was built, the fact that it was about the time of the survey, when the corners were easily ascertained, and if they believed the testimony warranted it, they might presume that the fence was built on the line of said block.

3. **Limitation of Actions**: STATUTORY CONSTRUCTION. The change in the statutory period for bringing actions for the recovery of real estate, from twenty-one to ten years, made by amendment to Sec. 6 of the civil

code, February 15, 1869, applies to actions brought since the taking effect of the amendment. The time existing between the passage and taking effect of the act, was allowed by the legislature for the purpose of bringing actions on claims then existing, before the same were barred by the new enactment.

4. ———: ADVERSE POSSESSION. The title to land becomes complete in an adverse occupant, when he has maintained an actual, continued, and notorious possession, claiming the same as his own against all persons for the full extent of the statutory period; and the enclosing of such land within a fence, the maintenance of such fence, cultivation of the land, and payment of the taxes on the same, for said period, with said intention, is sufficient in law to constitute adverse possession.

5. **Practice**: OBJECTIONS TO TESTIMONY. Where objection is made to the admission of testimony, the reason and grounds of objection should be stated.

ERROR to the district court of Douglas County.

THE action was commenced by Lorin Miller on the twelfth day of October, A. D. 1872, against John A. Horbach, to recover the possession of a tract of land, describing the same by metes and bounds, formerly known as block 172½ in the city of Omaha. Miller claimed title through Moffat, to whom Horbach and wife had deeded the premises on the sixteenth day of January, A. D., 1858. Horbach claimed title by virtue of an alleged actual, exclusive, adverse, and notorious possession, since April, A. D., 1860, and he further plead the statute of limitations. Upon the trial of the cause before Chief Justice Lake, and a jury, deeds from Horbach to Moffat, from Moffat to Allen, and from Allen to Miller were introduced in evidence, all of said deeds describing the land in controversy as block 172½ in the city of Omaha. Miller, on his own behalf, testified as follows: "I surveyed into lots and blocks this land in controversy, in 1855, for a company calling themselves the Omaha City Company; I surveyed about 1500 acres into streets, lots, blocks, and alleys. The streets running north and south were 80 feet wide, those running east and west were 66 feet wide. We commenced at the northeast corner of the tract and

numbered successively back and forth. The blocks were numbered fractionally to distinguish them from those in the city proper. The size of the lots were 66 by 132 feet south of Napoleon street, and some of them 44 by 132 feet north of Napoleon street. Ten or twelve years ago E. V. Smith resided on block, 128½, and he has resided there ever since. I was with George Smith when he made the survey mentioned in his testimony. When I surveyed the land I took extension Twenty-first street for a base line. Subsequent to this survey I have had a good deal to do with this land. In making the survey we started from the south west corner of block 128½ and run south on Eighteenth street, assuming the streets to be 66 feet wide and the lots 44 feet wide, and then run west to the center of Twenty-first street, and from thence 49 feet west to the corner of block 172½. Afterwards I got Smith to go with me and we re-measured the other way, starting at the same point as before and running west, and then south, assuming the same width of streets as before, and we came out at the same point within an inch. After I got my deed from Allen, in 1868, I and Horbach made an effort to find the corners. When on the ground, Horbach told me where he thought the corners were. I had bought the property and wanted him to go with me so that I could take possession. I took Horbach and Kennedy with me. Smith had found the corner of block 128½ without my being with him, and he showed it to me. I saw no indications of this being the corner, except what Smith showed me, an old post and a small tree which Smith had kept in memory. I saw the trees on the block where Shields used to live. I took Smith's statement as to the starting point. If his base was wrong then this survey would be imperfect."

George Smith, on behalf of the plaintiff, Miller, testified substantially as follows:

"Have been here seventeen years. I am a surveyor.

Did not live much in Omaha in 1858. After that with the exception of one year I lived here. I was not acquainted with the city blocks in Omaha at that time. I don't know from what maps deeds were made. There were two or three lithograph maps then in use. [Map of the Omaha City Company shown witness, and afterwards admitted in evidence under objection on the part of defendant.] I have made a survey and think I have ascertained where block 178½ was. I took the south half of block 128½ as my data. I don't know that this block was fenced in by Shields. I used to see it in 1857 and 1858. I had personal knowledge of the existence of a fence at that time. It was our primitive kind of a fence, posts about seven feet apart and pickets driven in the ground. In 1858, I lived in the house on the block. The fence measured 220 by 284 feet (east and west). Van Smith occupied the enclosure in 1858. There was a tree in the north-east corner of the enclosure, only one tree. There was a frame building in the enclosure fronting on Seventeenth street east. The fence was destroyed in 1859 or 1860. In 1862 there was no fence. In digging up the ground, I thought I found the west line of the fence and the south west corner. I found some old bark and rotten wood about every seven feet. From this I ran a line south and west to what I thought might be block 172½. I dug into the earth about the south west corner and found a remnant of wood that might have been a point of a stake. It was about one inch long and one inch square. It was about eight inches below the surface of the ground. It was very rotten but seemed to have once been sharpened. I staked for Miller, block 172½. I assumed lots to be 44 by 132 feet, and the streets 66 feet wide running east and west, and 80 feet running north and south, except Twenty-first street which was 98 feet and width of lots 44 feet. There were some stakes on the block above where Shield's house stood. I don't know whether

there were any on this block. E. V. Smith removed some of them out of the way. I don't think I have seen any of these stakes since 1856. I know nothing of Horbach's taking any stakes away. I never measured between any two stakes on this plat. I know the distance only from the map and what Col. Miller told me. The map tells nothing and all I know about it is what has been told me. Col. Miller told me that Twenty-first street was 98 feet wide. If he was wrong, then my measurement was wrong. There is now no such block in the city of Omaha as block 172½. I know nothing except by its being checked on the map with pen and ink, and can't swear this point of a stake, I have before testified to finding, was a corner stake. It looked something like one. I don't know that the fence was on the line of lots on block 128½. I never measured between the stakes of any part of Scriptown. I know nothing about the correctness of my starting point of survey except from rumor and the data I have given. I cannot swear this ground pointed out by my survey is the same that was once called block 172½."

B. E. B. Kennedy, sworn as a witness on behalf of the plaintiff, testified as follows:

"I was with Miller and Horbach five or six years ago in an effort to locate block 172½. It was in the spring of 1868, I think. We were all on the ground and Horbach and Miller endeavored to locate this block. They did not agree as to its locality. Afterwards I prepared a quit claim deed for Miller in reference to a settlement. It was conceded the block lay on the west side of Twenty-first street. This block has never been pointed out to me on the surface of the earth."

On the part of defendant, Horbach, Louis Shield testified as follows:

"In 1868 I lived upon Horbach's tract of land. I knew Wilgoskie. I remember Lorin Miller and him coming up there to survey a block that Miller told me

he owned, and they found it in my brick yard. Miller came the first time with Kip. Second time with Wilgoskie. Kip staked it off about 35 feet further north than Wilgoskie did. I heard no objection made to it by Miller about location. Miller told me he had a block there, but would not hurt me. My brick yard lies west of Twenty-first street in Omaha, and one lot north of Nicholas street. Wilgoskie's survey staked it about 35 feet further south than Kip did."

Chauncey Wiltze, testified on behalf of the defendant as follows:

"I was in Omaha in 1856 and 1857. There was very little surveying done. When the Poppleton and Byers map was made, A. D. Jones surveyed the city proper. Sixteenth street north of the creek was 66 feet wide. This was my base of operations in laying off Horbach's addition. I measured some of those lots of the old survey, and I remember there was a variation, they did not hold out to what they purported to be."

John A. Horbach, on his own behalf, testified as follows:

"I had some conversation with Lorin Miller, in the fall of 1856, or spring of 1857. I was then living on land north of creek. The width of streets in Scriptown addition to Omaha was very indefinite. Miller told me there was vacant ground between his survey and the A. D. Jones survey or plat. He could not tell the width of it, but said it varied. I showed him some stakes between Sixteenth and Seventeenth streets near my south line, that did not range or correspond with what map claimed. He said they were not very accurate. I know Sixteenth street was sixty-six feet wide from surveys and measurements made by C. W. Shreve, surveyor, in 1856, in trying to find south line of block 180½, south of my pre-emption. I helped him to measure from stakes on Sixteenth street north of where I lived. Stakes were

oak, marked and numbered with red chalk, and stood 12 to 14 inches above the ground. I obtained width of these streets in endeavoring to determine block 180½, with Capt. Shreve. He was county surveyor. Any one could find stakes on north part of Sixteenth street from where I lived. The fence about what was known as Shields' house, called block 128½, was built by Beeson. There was more than one enclosure by fence. There was a stock corral, and also a lot of hay stacks enclosed with fence. In 1860 I fenced the west part of that eighty acres with post and board fence, four or five boards high. Hunt had a building in the field after it was enclosed. I have paid the taxes on the property ever since. Kennedy came to my office in 1868, as attorney for Miller. He claimed he could identify the property Miller claimed. I told him Miller did not own such property. I never went up to the ground in controversy with Miller to locate a block. I did meet him at one time there and Kennedy was there and we were in my field near Twentieth street, where I had laid out an addition. Miller then said he could not locate it, but spoke of where he thought it was from his recollection. He failed to find it or anything near where it was. He did not claim to have any data whereby it could be located, only in a general way, that it was in the neighborhood of the brick yard. I have kept the fence up to this time. I have never seen Miller at all, except the time I have stated as being in 1868. I never recognized Miller's claim. In fencing in surrounding lands, I necessarily enclosed block 172½."

In rebuttal, Lorin Miller testified as follows:

"When I went there with Kennedy and Horbach, Horbach asked me if I would not take land in some other place, as the block I claimed would interfere with his plat. I agreed to take eight lots in place of these. Horbach wanted pay for taxes and fences, &c. I made

a deed of the block to Horbach, but destroyed it last year."

Horbach, being recalled, testified as follows:

"I demanded of him to pay me from $150, to $250, before I would deed anything. I told Kennedy if Miller would pay me what I asked and guaranty me against any further expense on that old deed, I would give him some lots in my second addition but it was not in quantity half as much as block 172½ as claimed. I never recognized Miller's title at any time and never said I would deed him block 172½, or a like quantity."

The foregoing is the substance of the evidence introduced on the trial of the case. The court, at the request of Miller, gave several instructions, but no exception being taken to some, and the motion for a new trial not alleging error in the giving of others, they were not considered in this court. The instructions passed upon here, are stated in the opinion.

The verdict below was in favor of Miller, and Horbach brought the case here by petition in error.

Clinton Briggs, for plaintiff in error.

I. A portion of the charge given by the court to the jury was not reduced to writing as required by the provisions of the act of Feb. 18, 1873. *General Statutes, Sec.* 58, *p.* 262. This act makes it the imperative duty of the judge to reduce his instructions to writing, before giving the same to the jury, and this cannot be waived by counsel except in open court, and by the entering of such waiver in the record of the case. And the act further provides that if any charge, or parts thereof, are not reduced to writing, it "shall be *error* in the trial of the cause, and *sufficient cause* for the reversal of the judgment rendered therein." The oral charge was certainly of no advantage to Horbach, and the court cannot say

how much, if any, it may have prejudiced his case. It is not necessary to determine this question, for no matter whether the charge is for or against the party objecting, he has the right to have the judgment reversed, and the cause sent back for a new trial; so says the act above mentioned.

II. The verdict is not sustained by sufficient evidence. The petition describes by metes and bounds, a certain piece of land and claims it to be identical with the lots described in the deed. It was therefore incumbent on Miller to show to a reasonable certainty, that the land described in the petition was the identical land covered by the deed, i. e., block 172½. No attempt was made to establish the location of the block by any of the original stakes, or remains of stakes, or anything else around its boundaries. But the attempt is made to establish the boundaries of block 128½, situated a quarter of a mile, perhaps, from the block in controversy. This is done for the purpose of getting a starting point. Now if this starting point was wrong, then everything about the measurement was wrong. We submit that on the evidence here given, that the verdict of the jury should be set aside.

III. The answer denies Miller's title, and then Horbach sets up title in himself acquired by an adverse possession of more than ten years.

1. It was competent for the grantor to interpose this defense as against his grantee or any one claiming under him. *Stearns v. Hendersass*, 9 *Cush.*, 497. *Tilton v. Emery*, 17 *New Hamp.*, 536. *Brackett v. Persons Unknown*, 53 *Maine*, 228.

2. "As a general doctrine it has too long been established to be now in the least degree controverted, that what the law deems a perfect possession, if continued during the whole period which is provided by statute for

the enforcement of the right of entry, is evidence of a fee." *Angell on Limitations*, *Sec.* 380. *Bradstreet v. Huntington*, 5 *Pet.*, 338. *Leffingwell v. Warren*, 2 *Black*, 599.

3. When lands are held by adverse possession for the time prescribed by law, and an entry is made by the holder of the written title such party will be dispossessed, in ejectment brought by the adverse possessor. *Lessee of Devacht v. L. Newsam*, 3 *Ohio*, 57. *Jackson v. Oltz*, 8 *Wend.*, 440. *Gibson v. Bailey*, 9 *New Hamp.*, 168.

4. There are two classes of adverse possessors, one where the entry is under color of title, the other where the entry is without color of right, by a mere intruder. In the former case the possession of the claimant is construed to be co-extensive with the premises as described in his paper title; in the latter case the possession is confined to the lands actually occupied. *Angell on Limitations*, *Sec.* 400. *Bynum v. Thompson*, 3 *Ired., Law*, 578. *Shackleford v. Smith*, 5 *Dana*, 233. *Kile v. Tubbs*, 23 *Cal.*, 431. This case belongs to the latter class.

5. What are the elements of adverse possession? As in the case of an intruder. He must be in the *actual* possession for the period prescribed by the law. The possession must be *continuous*—not interrupted. It must be open and visible. It must be such as to indicate to the owner of the paper title that his possession is usurped, and his property appropriated by another. This gives him a *right of action* against the intruder, and under our law this right of action must continue for ten years before his rights are barred. *Gen'l Stat. Sec.* 6 *p.* 525. The actual possession must be such as to amount to a disseizure. *Miller v. Shaw*, 7 *Sergt. and Rawle*, 129. *Bell v. Longworth*, 6 *Ind.*, 273.

6. But this question is presented. Did Horbach claim the property as his own against everybody else?

If he did not, was it necessary he should do so? In this case the intention of Horbach cannot admit of a doubt. He paid the taxes during the time of his occupation. This is very significant of his intention. *Farrar v. Fessenden*, 39 *New Hamp.*, 268. He maintained a fence around the land. He refused to convey the land to Miller when he demanded a deed. He denied Miller's title. In this suit he claims as owner by virtue of the statute. There is no testimony in the case even tending to show that Horbach ever recognized Miller's title. The most that can be claimed is that there was a talk about a compromise. But this could not prejudice Horbach's rights. *State Bank of Wisconsin v. Dutton*, 11 *Wis.*, 371. *Emerson v. Boynton*, 11 *Gray*, 395.

E. Wakeley, for the defendant in error.

I. No exception was taken or objection made to the *manner* of giving the verbal instruction. In the motion for a new trial, it was not objected that the instruction was verbal. The instructions were in the first instance wholly in writing; that in question was a mere response to an inquiry of the jury, on their return into court, and did not come within the provisions of the statute.

II. The question of identity of the premises was solely one of fact, and on recognized principles, the verdict will not be disturbed, except in a very clear case of error. Counsel opposed, criticizes Smith's testimony as to the "point." My learned and acute friend being more accustomed to investigate "points" of law, than "points" of corner lot stakes, failed to find the "point" in question. A jury of twelve intelligent men had no trouble in discovering it, and I think any impartial investigator, either lawyer or layman, can find it without difficulty from the record.

III. The instructions touching the statute of limitations, were correct; and I do not understand that plaintiff in error excepted to any of them. It is not necessary to parade authorities on the subject of adverse possession. In Angell on Limitations, chap. 31, the authorities are fully cited and largely commented upon. The result of them clearly is, that there must not only be possession, but possession under a claim of right, for the full period of the statute. The fact of Horbach's enclosing the block in controversy, was no evidence that he claimed to own it, for the conclusive reason that he could not possibly enclose his own land completely surrounding Miller's, without enclosing the latter. Taking the evidence all together, the jury were clearly justified in coming to the conclusion that there was no such claim of ownership by Horbach for the whole period of ten years, as to entitle him to the benefit of the statute.

IV. Very many of the authorities hold the amendment of the statute of limitations does not apply to causes of action existing prior to the change. And all of them hold that the new statute does not apply to existing causes of action, unless a reasonable time is allowed after the taking effect of the new law, and before the new period shall elapse. In this case I submit that there was not a reasonable time for bringing the action between the first day of July, 1869, and the time when the ten years after Horbach enclosed the block in controversy expired.

GANTT, J.

The defendant in the court below brings the cause to this court by petition in error, and among the errors complained of, it is urged that the court below erred in giving to the jury the second instruction asked by Miller; also in admitting in evidence declarations of the parties,

relating to an effort to compromise the difference between them in regard to the subject matter of the suit; and in submitting to the jury the question as to the plaintiff's adverse possession of the land in controversy; but from the record it clearly appears that in respect to the ruling and charge of the court upon these matters now assigned for error, there were no exceptions taken by the plaintiff in error upon the trial of the cause in the court below. Therefore, in regard to all these alleged errors, it is only necessary to remark that in order to obtain a review in this court upon any decision, ruling or charge made or given by the district court, the party complaining must take his exceptions thereto at the proper time.

In respect to the third ground alleged for a new trial, it need only be observed that the record clearly shows the instruction asked by the plaintiff in error, was given to the jury as asked, and not refused.

It is also complained that the court erred in giving to the jury the first and fifth instructions asked by the defendant in error, and in giving a portion of the charge orally to the jury, but as these points were not made in the motion for a new trial, under the rule which seems now to be well settled, they must be considered as waived. *The Midland Pacific Railroad Co. v. McCartney*, 1 *Neb.*, 404. *Mills v. Miller*, 2 *Neb.*, 317. *Wells, Fargo & Co. v. Preston*, 3 *Neb.*, 446; and in *State v. Swartz*, 9 *Ind.*, 221, it is said "it is due to the lower court that its errors, if any, be pointed out, so that it may retrace its steps, while the record is yet under its control." It is, however, contended that by statutory provision it shall be error and sufficient cause for the reversal of the judgment, if any charge or instruction, or any portion thereof, be given to the jury by the court without first having reduced the same to writing. This is true, and it is equally true that the admission of illegal or incompetent evidence on the trial of a cause, or the refusal to give an

instruction, or the giving of an instruction to the jury, may be sufficient cause for the reversal of a judgment, yet, under the rule as settled, if the point is not made in the motion for a new trial, it will be considered as waived. Why should a small portion of a charge, orally given to the jury, be made an exception to this rule? We have heard no good reason why it should be, and we think it would be unjust to the court below to make such an exception to the rule.

Upon the question of the identity of the block in controversy, it is insisted that the court erred in instructing the jury that in order to identify it, they might take into account the time when the fence was built on block 128½, the fact that it was about the time of the survey when the corners were easily ascertained and all the other facts given in testimony which throw light upon the question, and if they believed the testimony warranted it they might presume the fence was built on the line of said block 128½. As regards the subject matter of this instruction, we think there is no error; it was in effect only permitting the jury to arrive at a fact from circumstantial evidence. Blackstone says that "next to positive proofs, circumstantial evidence, or the doctrine of presumptions must take place; for when the fact cannot be demonstratively evinced, that which comes nearest to the proof of the fact, is the proof of such circumstances as either necessarily or usually attend such facts. These are called presumptions." This presumption, however, must rest upon facts proved, for, when the main fact in respect of the subject matter in controversy, cannot be proved by direct testimony, such fact is arrived at by the proof of other facts so associated with the fact in question, that in the relation of cause and effect, lead to a satisfactory and certain conclusion. Therefore presumptive evidence consists in the proof of minor or other facts, incidental to or usually connected with the fact sought to be

proved, which when taken together, inferentially, establish or prove the fact in question to a reasonable degree of certainty. We think the instruction was substantially in accordance with the principles of the law as above stated. But in respect to the same question, at the request of the plaintiff in error, the jury were further instructed that unless they believed from the evidence that the land described in the petition, was the identical land described in the deed offered in evidence by the defendant in error, they must find for the plaintiff in error. Hence, it seems clear from the record that the question of the identity of the land in controversy, was fairly and correctly submitted to the jury.

On the sixteenth day of January, 1858, the plaintiff in error, by deed sold and conveyed block 172½ to Samuel Moffat, and after several intervening conveyances of this title by deed, it vested in Miller who now claims title to the land by virtue of his deed to the property. Horbach claims title to the land by virtue of an alleged adverse possession of the same. It is, however, contended on the part of the defendant in error, that such adverse possession must have been for the term of twenty-one years, in order to establish a title to the land, because at the time the plaintiff in error entered into the possession of the land, such period of time was the statutory limitation. But the act of February 12, 1869, changed the statutory period, and limits actions for the recovery of real estate to ten years; and the counsel for plaintiff in error contends that this latter act applies to this case, and fixes the time when his title becomes complete. It will be observed that by this act it is specially provided that it shall not take effect until the first day of July, 1869. Hence it is a question of construction as to what is the effect of this act on existing claims. We think the rule is correctly laid down in the case of *Bigelow v. Bemen*, 2 *Allen*, 497, as follows: "It is well settled that it is competent for

the legislature to change statutes prescribing limitations to actions, and that the one in force at the time suit is brought is applicable to the cause of action. The only restriction on the exercise of this power is, that the legislature cannot remove a bar or limitation which has already become complete, and that no limitation shall be made to take effect on existing claims without allowing a reasonable time for parties to bring action before these claims are absolutely barred by a new enactment." In this case the court held that there was a reasonable and sufficient time given to bring the action between the time of the passage of the act and the time when it took effect. And in *Smith v. Morrison*, 22 *Pick.*, 433, it is held that what constitutes a reasonable time, in such case, is a question within the exclusive province of the legislature to determine. The ground on which the rule seems to be based is, that the right which the defendant has to bar an action by the statute of limitations, does not originate in or flow from any contract, and therefore this change of remedies does not impair private or vested rights which flow from or are incidental to contracts. Therefore these remedies may be altered or changed within reasonable limits, without impairing contracts or private or vested rights. *Bingham v. Bigelow*, 12 *Met.*, 273. In view of these principles of law it seems clear that the legislature, in the act of 1869, fixed the time to bring actions on existing claims to real estate, before such claims should be absolutely barred by the new enactment.

Now it is said that the elements of all title are possession, the right of possession, and the right of property; hence if the adverse occupant has maintained an exclusive, adverse possession for the full extent of the statutory limit, the statute then vests him with the right of property, which carries with it the right of possession, and therefore the title becomes complete in him. In *Atkyns v. Horde*, 1 *Burr*, 119, Lord Mansfield says that "twenty-

one years is a positive title;" in *Stokes v. Berry*, 2 *Salk.*, 421, it is held that this title will support ejectment; and in *Graffins v. Totenham*, 1 *Watts and Sergt.*, 488, it is said that the effect of the statute is such as to transfer to the adverse occupant the title against which it runs. Gibson, J., says that "the title of the original owner is unaffected and untrammeled till the last moment, and it is vested in the adverse occupant by the completion of the statutory bar; the transfer has relation to nothing which preceded it; the moment of conception is the instant of birth." Therefore "the operation of the statute takes away the title of the owner and transfers it in legal effect to the adverse occupier;" and "one who purchases the written title of the owner, buys a title which by operation of law was fairly vested in the adverse occupant." *Schell v. The Williams Valley Railroad Co.*, 35 *Penn. State*, 204.

It is, however, insisted that there must not merely be possession, but that this possession must be under a claim of right for the whole statutory period. This is true; but the question is, what constitutes such a claim of right? In answer to this, it is only necessary to observe that the rule seems to be well settled that acts of notoriety, such as building a fence round the land, entering upon the land and making improvements thereon, raising crops and felling trees thereon, are presumptive evidence and evincive of intention to assert ownership over and possession of the property; and taxation of the land for a series of years to the person claiming it, and the payment of taxes by him are competent evidence tending to show ownership. *Elliott v. Pearl*, 10 *Pet.*, 412. *Allen v. Gilmore*, 13 *Maine*, 178. *Little v. Libey*, 2 *Greenleaf*, 242. *Miller v. Shaw*, 7 *Sergt. and Rawle*, 136. *Farrer v. Fessenden*, 39 *New Hamp.*, 277. *Angell on Limitations*, *Sec.* 395. So is possession made out by placing on the premises buildings and receiving

the rents and profits thereof. *Poignard v. Smith*, 6 *Pick.*, 177.

We think that under these rules of law, there was sufficient evidence offered on the trial to submit the case to the jury, to determine as a question of fact, whether the plaintiff in error had maintained his allegations of adverse possession, and the submissson of the case to the jury was, under the instructions of the court, at the request of the plaintiff in error, that if they believed from the evidence that the plaintiff in error, for ten years next before the commencement of the action, was in the actual, continued, and notorious possession of the land in controversy, claiming the same as his own against all persons, they must find for the plaintiff in error; and furthermore, that enclosing such land within a fence—the maintenance of such fence—cultivation of the land, and payment of taxes on the same for said period, with said intention, is sufficient in law to constitute adverse possession. We are satisfied that under these instructions, the question was fairly submitted to the jury, in accordance with the rules of law above stated, and that in this regard there was no error committed in the court below.

It is assigned for error that the court permitted a map of the town to be offered in evidence by the defendant in error, to the admission of which the plaintiff in error objected. The record does not show that any ground of objection was stated, and therefore it would be difficult for this court to determine, in this case, whether there was or was not error in this ruling of the court. In all such cases the objections should be stated, for if the evidence was admissible for any purpose, it should be admitted: and in this case the admission of the evidence was proper simply to show the jury the arrangement of the blocks and streets of the town, in connection with the testimony of the surveyor.

On the whole we think, as shown by the record there was no error, and the judgment should be affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., concurred. LAKE, Ch. J., having tried the cause in the court below, did not sit.

THE PEOPLE OF THE STATE OF NEBRASKA, EX REL THERON NYE, PLAINTIFF, V. WILLIAM MARTIN, LORENZO A. KIMBALL AND CLEVINS C. KENDALL, DEFENDANTS.

1. **Elections:** PROCEDURE IN CONTESTED ELECTIONS OF COUNTY OFFICERS. The board of justices chosen under Sec. 26 of the general election law, *Gen. Stat.*, 359, in case of the contested election for any county office, should reduce all the evidence given before them to writing, in order to make the same available in case of an appeal to the district court; and though the statute is silent as to whom the custody and control of such testimony shall be intrusted, there is ample inherent power in the appellate court, to compel its production upon consideration of the case there. The trial in the appellate court should be confined to the testimony so taken, though in case of its loss or destruction, neither party would be debarred from introducing necessary evidence to supply such omission.

2. ——: APPEALS TO DISTRICT COURT IN CASES OF CONTESTED ELECTIONS. A party aggrieved by any alleged error of the board of justices, chosen to hear contests relative to the election of any county officer, has his remedy by appeal to the district court, and a writ of mandamus from the supreme court to compel the correction of such error, does not lie against them. The statute regulating appeals in ordinary civil actions governs such appeal, and the appellate court has ample jurisdiction, though the cause must be tried by the judge without the aid of a jury.

THIS was an application to this court, in the exercise of its original jurisdiction, for a writ of mandamus. The facts in the case sufficiently appear in the opinion of the court without setting forth the application at length. The statute regulating contested elections for

county officers, and which is construed by the court here, is as follows:

"SEC. 26. When any candidate or elector chooses to contest the validity of an election, or the right of any person proclaimed duly elected to any county office, such person shall give the like notice required in the preceding section of this chapter, and shall choose one justice of the peace, on his part, and the adverse party shall choose one other justice, and the two parties thus chosen shall choose a third justice of the peace, and the said three justices thus chosen, shall constitute a board to try the matter; said justices, or either of them, shall have power, and are hereby authorized, to issue subpœnas or attachments to all witnesses whose testimony may be required by either party, but the evidence shall be reduced to writing. Said justices may adjourn from day to day, until all the witnesses are heard, and they shall then make their decision thereon; *provided, however*, that if the adverse party shall not choose a justice of the peace as herein provided, then, and in that case, the justice of the peace chosen by the contestant, shall proceed to hear and determine the matter in the manner aforesaid. *Provided, however*, that either party feeling aggrieved at the decision of the said justices of the peace, or justice of the peace, shall have the right to appeal to the district court, the judge thereof, after full hearing of the matter, to render his decision, which shall be final." *General Statutes*, 359.

N. H. Bell, with whom was also *W. H. Munger*, *R. Butler and M. B. Hoxie*, for the relator.

E. F. Gray, for the respondents.

LAKE, CH. J.

This is an application to this court for a writ of mandamus. The relator was a candidate for the office of

county commissioner at the last general election in Dodge county, and one Henry B. Nicodemus was the opposing candidate. Upon a canvass of the returns from the several precincts of the county, by the proper officers, Nicodemus was declared elected by a majority of one vote, whereupon a certificate of election was issued to him, and he entered upon the discharge of the duties of the office, which he still holds, enjoying the emoluments thereof.

On the thirty-first day of October, 1874, the relator served the requisite notice upon Nicodemus to contest the validity of said election, and thereupon the respondents, who are justices of the peace for said county, were duly selected as a board to try the matter in question as provided by section twenty-six of the general election law. *General Statutes*, 359. The trial was had and resulted in a judgment in favor of Nicodemus.

The relator shows that on the trial he produced certain testimony for the consideration of the board, which he deemed material to his case, and that on objection being made by the attorney of Nicodemus, it was excluded. It is now sought by this proceeding, to compel the justices to reassemble as a board, receive the testimony so rejected, and reduce it to writing as the statute directs.

In considering this application, we are called upon to give a construction to section twenty-six of the general election law. This section may be said to embody the evidence of the will of the legislature on the subject of contests in the election of county officers. But in respect of the several questions discussed at the bar, and which necessarily arise, it is by no means easy to say, with certainty, just what the intention of the legislature was.

For instance, what is the authority of this board in the taking of the testimony? Do they act judicially or

ministerially? Can they hear and decide questions as to the admission or rejection of testimony, or are they required to receive whatever the respective contestants see fit to offer? Again, how is the decision of the board to be made known and preserved, and in case of an appeal from their decision to the district court, within what time, and by what particular steps, is it to be done? In respect of all these questions, at least, there is much uncertainty in ascertaining just what was intended.

One thing is certain, however, and this is that the testimony produced before them must be reduced to writing. This the statute positively requires; and we are of the opinion that it was contemplated that the whole of the testimony, which either party might see fit to offer, should be accepted by the board, and given such weight in the decision as they might think it entitled to, and no more. We are of the opinion that in the mere taking of the testimony, the board acted in a ministerial capacity, and that they should have taken and reduced to writing all that either party brought forward, precisely as is provided in section twenty-two of the same act, in contesting the election of a member of the state legislature. It must have been so intended, to the end that if the case should be taken to the district court on appeal, it would not necessitate the re-taking of the proofs. It is true the statute is wholly silent as to how the testimony taken by the board shall be transmitted to the district court in case of appeal; but on this point there is no doubt that there is ample inherent power in the court to compel its production, by the party in whose possession it might be. Again it may reasonably be supposed that each party, in the absence of any express direction, would see to it that his proofs should be preserved, and promptly produced in the appellate court, so as to avoid unnecessary expense and trouble to himself. But suppose a portion, or even

the whole of the testimony should be lost, or destroyed, before the case could be heard in the district court? Would this deprive the party aggrieved of his remedy by appeal? We think not. In such case he would be permitted to bring his witnesses before the court and thus supply the loss. And in case of the rejection of any material testimony by the board we think the same rule would apply. This must be so, or the right of appeal, which the statute gives, would, or rather might, prove to be a barren one.

The statute provides "that either party feeling aggrieved at the decision of the said justices," etc., "shall have the right to appeal to the district court, the judge thereof, after a full hearing of the matter, to make his decision, which shall be final." It will here be observed that there is no restriction whatever upon the power of the court, and no restraint upon the exercise of a sound discretion on every branch of the case, except that it must be tried to the judge without the aid of a jury. We are of the opinion, therefore, that the general rule governing appeals in ordinary civil actions must govern here, and that the whole merits of the controversy are open to examination; that on such appeal the court is expected to pass upon every question, whether of fact or law, which may have been properly raised in any stage of the proceeding, and if it shall be found that proper evidence to which a party was entitled, has been erroneously excluded, or that any other substantial error has intervened to the prejudice of either party, to apply the proper corrective. There can be no doubt that the jurisdiction of the court is ample to prevent any injustice, ultimately, being done.

It may be best to add, that we are of the opinion, it was contemplated by the legislature, that on appeal the parties should be confined strictly to the testimony and proofs taken before the justices of the peace, unless it should be made satisfactorily to appear that some portions so

taken had been lost or destroyed, or that something to which a party was entitled had been wrongfully excluded by the board, in which case it would be proper to permit it to be supplied.

This we think renders it clear that the relator has a complete remedy at law, by appeal, as provided in the section of the statute before referred to, and therefore it is wholly unnecessary to the due administration of justice that the extraordinary remedy here sought should be applied. The writ of mandamus is for these reasons denied, and in this opinion all the justices concur. Judgment will be entered accordingly.

WRIT DENIED.

All of the judges concurred.

MILTON ROGERS, APPELLANT, v. THE OMAHA HOTEL COMPANY, AND OTHERS, APPELLEES.

1. **Practice**: RECORDS FOR SUPREME COURT. Where the finding of the court below upon the facts is not disputed, and the only error complained of is one of law, the testimony taken need not be embodied in the record brought to the supreme court.
2. **A Mechanic's Lien** is assignable, and the assignee thereof may maintain an action to foreclose the lien.
3. ——: The distinction between statutory liens, and common law liens depending on possession, stated.

THIS was an appeal from a judgment of the district court for Douglas County, brought into this court under the provisions of the act of Mar. 3, 1873, *Gen. Stat.*, 716. No notice of appeal was given and the transcript filed in this court did not contain the testimony adduced on the trial of the cause in the court below. *Doane* for Appellees moved to dismiss the appeal for these reasons.

Pending the argument upon the motion to dismiss the appeal, *Woolworth* of counsel for Appellant, without withdrawing the papers in the appeal case, filed a petition in error, which *Doane* likewise moved to dismiss. This was the situation of the cause when called in its regular order on the calender at the present term. The facts are set forth in the opinion of the court.

PER CURIAM. The testimony in such cases as these need not be embodied in records brought to the supreme court, where the finding of the court below upon the facts is not disputed, and the only error complained of is one of law. No notice of the appeal is required by the statute. For these reasons the motion to dismiss the appeal must be overruled.

J. M. Woolworth, for Appellants, then withdrew the petition in error filed as above stated, and the cause being called for argument, insisted that a mechanic's lien, being a personal right, was not assignable, and was extinguished by a transfer of the claim. *Roberts v. Fowler*, 3 *E. D. Smith*, 632. *Fitzgerald v. First Presbyterian Church*, 1 *Mich.* (*N. P.*), 243. *Caldwell v. Lawrence*, 10 *Wis.*, 331. *Ayre v. Revere*, 1 *Dutcher*, 494. *Hawley v. Warde*, 4 *G. Greene*, 36. *Urquhart v. McIver*, 4 *Johns*, 103. *McCombe v. Davies*, 7 *East.*, 5. *Pierson v. Tincker*, 36 *Me.*, 384. *Baum v. Grigsby*, 21 *Cal.*, 172. *Richards v. Leaming*, 27 *Ill.*, 431. 2 *Sugden's Vendors*, 683 (*in*) *d. Jackman v. Hallock*, 1 *Ohio*, 318. *Tiernan v. Beam*, 2 *Id.*, 383. *Brush v. Kinsley*, 14 *Id.*, 20. *White v. Williams*, 1 *Paige, Ch.*, 502.

George W. Doane, for Appellees, contended that the cases cited by the appellant were adjudications upon the assignability of a vendor's lien; that these cases seem to have been that notes had been given and then assigned, or where assignments had been made before suit was

brought; and that said cases turned upon the point of the assignment of the notes, the court holding that such assignment did not carry the lien. The case at bar is different from those cited by appellant, for here the assignment has been made after suit has been commenced, and under section forty-five of the code the action does not abate. *Gen. Stat.*, 529. *Goff v. Papin*, 34 *Missouri*, 177.

MAXWELL, J.

On the fourth day of September, 1872, Milton Rogers filed his petition in the district court of Douglas county against the Omaha Hotel Company, and lien-holders thereon, seeking to foreclose a mortgage on the hotel owned by said company. Samuel Cafferty, Richard Withnell and John Withnell, three of the defendants answered said petition, setting forth that they and one Kahler had furnished certain materials and performed certain labor in and about the erection of said hotel, in pursuance of a written contract, and that on the ninth day of November, 1872, they filed an account of such labor and material in the office of the county clerk of said county.

The court found that there was due said defendants the sum of ten thousand dollars, and the same was a valid and subsisting lien on the hotel building and the lots on which it stands, and that said lien had been assigned by said defendants to one Charles W. Hamilton, with authority to prosecute the same to judgment. Judgment in accordance with this finding was entered in the court below, from which plaintiff appeals.

The only objection raised by the plaintiff is, that a mechanic's lien cannot be assigned so as to entitle the assignee to maintain an action to foreclose the lien. Liens of this kind were clearly defined and regulated in the

civil law, but were unknown to the common law. The proceeding is entirely statutory. The common law right of lien arose in three cases.

First. Where the bailee had bestowed labor or expense to alter or improve chattels.

Second. Where the bailee was compelled to receive the chattels, as in case of a carrier.

Third. Where the party in possession had saved the chattels from peril by sea, or had recovered it after actual loss at sea or capture by an enemy. 2 *Cooley's Blackstone, Book II*, 452, *note.* In all these cases possession was necessary to enforce the lien, and if the bailee parted with the possession, his lien was gone. The courts have held that these liens are personal and cannot be transferred, and it is sought to apply the same principle to mechanic's liens.

At common law the assignment of a chose in action was entirely prohibited: *Coke Litl.*, 266, *a.* 10 *Coke*, 47. *Greenby and Kellogg v. Wilcocks*, 2 *Johns.*, 1. *Hodgson v. Dexter*, 1 *Cranch*, 347; although in equity the assignee might maintain an action in his own name, such an assignment being regarded in equity as a declaration of trust and authority to reduce the interest to possession. In the case of *Master v. Miller*, 4 *Term R.*, 320, the court held: "It is true that formerly the courts of law did not take notice of an equity or trust, for trusts are within the original jurisdiction of a court of equity; but of late years it has been found productive of great expense to send the parties to the other side of the Hall. Wherever this court has seen that the justice of the case has been clearly with the plaintiff, they have not turned him round on this objection. Then if this court will take notice of a trust, why should it not of an equity? It is certainly true that a chose in action cannot strictly be assigned, but this court will take notice of a trust, and consider who is beneficially interested;"

and although an action was thereafter permitted to be maintained in the name of the assignor for the use of the assignee, yet assignments were not favored at law. Section thirty of the code of civil procedure provides that "the assignee of a thing in action may maintain an action thereon in his own behalf without the name of the assignor." Section forty-five provides that "in case of a transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." *General Statutes*, 528, 529. An action of this kind can be maintained by the assignee, unless the lien is strictly personal so that it is lost the moment it is transferred. Our statute provides that after the account is made and filed as required by law, it "shall from the commencement of such labor or furnishing of such materials, and for two years after the completion of such labor or furnishing of such materials, operate as a lien on the several descriptions of structures and buildings and the lots on which they stand." *General Statutes*, 468. Its continuance in no sense depends on retaining possession of the property. It is as complete and ample security for the payment of the debt as a mortgage of the same interest. It depends on no contingency for its continuance during the time prescribed by the statute.

"There are three points to be considered in the construction of all remedial statutes. The old law, the mischief and the remedy; that is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the parliament hath provided to cure this mischief. And it is the business of judges so to construe the act, as to suppress the mischief and advance the remedy." 1 *Blackstone Com.*, 87. The object of the law under consideration, being to secure the claim of

those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions. In many cases those furnishing labor or materials are men of scanty means, depending on their contract with the owner for payment as the work progresses, and the owner failing to discharge his just obligations, the contractor is compelled to assign his right to the money under the contract to raise sufficient means to fulfill his agreement. The fault is with the owner. Shall he also be permitted to take advantage of his own wrong, and have the lien declared invalid because assigned? Under our law, the assignee is subrogated to all the rights of the assignor, and may maintain an action in his own name. In the case of *Goff v. Papin*, 34 *Missouri*, 177, under a statute that appears to be similar to ours, the court held that the assignee of a mechanic's lien and demand, is a party to the contract by substitution, and can enforce it by suit without joining his assignor. There is a clear distinction between common law liens and a lien of this character, they being essentially secret in their character, and depending on possession of the property for their continuance, this is a matter of record and notice to all the world of its existence, and dependent on no condition for its continuance. With all due deference to the authorities cited by the appellant, we are clearly of the opinion that a mechanic's lien can be assigned, and that the assignee takes all the rights of the assignor. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

MR. JUSTICE GANTT concurred. LAKE, Ch. J., having tried the cause in the court below, did not sit.

FRANK HANDY, PLAINTIFF IN ERROR, v. JACOB BRONG, DEFENDANT IN ERROR.

An Attachment, under the code of Nebraska, cannot be maintained in an action of tort.

ERROR to the district court for Seward County.

This was an action of tort. Judgment overruling a motion to discharge an attachment issued in the cause, being given against Handy, defendant in the court below, he brought the cause here by petition in error. The opinion states the facts of the case.

George B. France, for plaintiff in error.

I. An action of tort is one brought to recover damages. The damages are uncertain, unliquidated, and in many cases vindictive, so that a party who brings an action of tort, may be said to seek money, yet his action is not among that class of actions contemplated in sections 198 and 199 of the code, otherwise in a frivolous action for defamation of character, a plaintiff might set forth in his complaint an excessive amount of damages, make an affidavit to that effect, and get a most oppressive attachment against a defendant's property.

II. No plaintiff who brings an action of tort to recover damages, in their nature uncertain, unliquidated, speculative, and perhaps excessive, can specify by affidavit the nature, amount and ground of his claim. If he do so swear, his oath only amounts to the expression of his opinion, which is not sufficient. *Ackroyd v. Ackroyd*, 20 *How. Pr.*, 93.

III. It would be inaugurating a new remedy to allow a plaintiff an attachment against the property of the de-

fendant, in such an action as this, because the said defendant is about to convert a part of his property into money for the purpose of placing it beyond the reach of his creditors. It would be turning such plaintiff into a creditor from the mere fact of his bringing a tortious action. *Hynson v. Taylor*, 3 *Ark.*, 552. *Raver v. Webster*, 3 *Iowa*, 502.

Scott & Boyd, for defendant in error.

I. The remedy by attachment is prohibited in certain cases, which does not include this case. *Gen'l Stat.*, 556.

II. It is the tendency of the new states to enlarge the remedy by attachment, and in some states the language which would limit the remedy to contract only has been replaced by more comprehensive terms. *Davison v. Owens*, 12 *Ohio State*, 158. *Goble v. Owens*, *Id.*, 165. *Drake on Attachment*, *Sec's* 7, 34.

III. The language which forbids the attachment in certain cases, and the form and substance of the affidavit provided by the Nebraska Code, seems to be provided with a view to this class of cases, or else have no meaning. *Gen'l Stat.*, 556.

GANTT, J.

In this action Brong was plaintiff in the court below, and in his petition there filed, he alleges that Handy, the plaintiff in error, did carelessly and negligently set fire to the prairie grass, and that this fire burned up and destroyed a large amount of his personal property, estimating the value thereof at the sum of one thousand dollars. Sometime after the commencement of the action, Brong filed an affidavit for an attachment, setting forth, *inter alia*, his "claim for one thousand dollars for

personal property burned by the negligence of Handy in setting fire to and burning prairie grass in the county of Seward," and the ground on which the attachment is asked is, that Handy "was about to convert a part of his property into money for the purpose of placing it beyond the reach of his creditors." The plaintiff in error moved to discharge the attachment; the motion was overruled, to which ruling and judgment of the court exception was taken at the time. The error now complained of is "that the court erred in overruling the motion to discharge the attachment." Therefore, the only question raised in the case is, can an attachment be maintained in actions for tort, under the provisional remedies of our code?

In the examination of this question, it may be first observed that an attachment is an extraordinary proceeding, and that the allowance of such writ, is a wide departure from the common law. Hence, it seems a well established rule that statutes of this nature are to be strictly construed; but however this may be, it is a principle well founded in reason and sound in policy, that in no case can the force and effect of the statute be extended by implication. The original attachment law of our state was taken from the code of Iowa; it provided that "in actions for the recovery of money," the plaintiff might cause any property of the defendant, not exempt from execution, to be attached, by pursuing the course prescribed; and it further provided that "if the demand was not founded on contract," the original petition should be presented to a judge of the supreme or district court, or the probate judge, to make an allowance thereon of the amount in value of the property that might be attached. Thus stood our attachment law until 1858, when in a re-enactment of the code, that part of the old law, which provided for attachments in actions for tort, was wholly omitted, and therefore, since

1858, the law is, that "the plaintiff in a civil action for the recovery of money, may at or after the commencement thereof, have an attachment against the property of the defendant" by pursuing the course prescribed. In this re-enactment of the attachment law, not only the restrictions, but the entire statutory provision in respect of allowing attachments in actions for tort, are omitted; and, if from this omission in the re-enactment, a conclusion is to be drawn in respect to the intention of the legislature, it seems pretty clear that the purpose and intent of the lawmakers was to restrict the extraordinary proceeding by attachment to actions arising on contract, express or implied. In Iowa, whence our original attachment law was borrowed, in the case of *Raver v. Webster*, 3 *Iowa*, 511, the court say that "to allow an attachment under any circumstances, in actions for tort, is not allowed in many of the states; *and never* unless under some other restrictions than those provided in actions on contract; and hence, under our code, in such actions, some of the officers named must make an allowance of the amount of property to be attached, whereas, in actions on contract, the filing of the affidavit and bond procures the writ. And while we are not inclined to give so strict a construction to any part of the attachment law, as will limit or restrain its full and legitimate operation, we are not disposed to extend its provisions in actions for tort, beyond what may clearly seem to be its intention and purpose. And therefore we would not recognize the right to an attachment in such cases, unless such was evidently the intention of the legislature." It seems, therefore, in Iowa, whence our original law was borrowed, that attachment in actions for tort, could only be maintained under the special provision of the statute allowing it, under certain restrictions which had to be complied with. Hence the section, which simply provides that in an action for the recovery

of money, the plaintiff may cause the property of the defendant to be attached, is viewed as applying only to actions on contract, where the filing of the affidavit and bond procures the writ.

In Pennsylvania, the original attachment was for the recovery of money arising *ex contractu;* the new act of 1836 omits any such clause, and in *Porter v. Hildebrand*, 14 *Penn., State*, 131, Bell, J., in delivering the opinion of the court, says of attachments: "Indeed so far as I am informed it has at no time and no where been esteemed a mode of vindicating every wrong which might be committed. * * * As a peculiar remedy for enforcing payment of debts, * * * it has been found useful, though certainly not unattended with inconvenience, but I have heard no sufficient reason suggested for hazarding the doubtful experiment of conceding the extended efficacy, now, for the first time claimed for it. If such reasons exist, they would be more properly addressed to the legislature, where alone resides the power of extending the sphere of its circle by specially declaring the additional clauses of complaint to which it should be applicable. An attempt by us to extend the circle of its operation, could only be effected by the declaration of a general rule which would bring within its remedial power every species of tort, embracing every injury to persons, to property, and to reputation, including crim. con. assault and battery, and trespass *de bonis asportatis*, a stride which would be more apt to attract admiration of its boldness, than commendation of its wisdom." In this case it was contended that the words of the new statute were "broad enough to comprise all complaints." To this the answer is, "and so they are. Yet the question recurs, were they used in a sense so comprehensive? That they were not, is indisputable from the nature of the remedy, as understood before the act of 1836, and the *absence of any direct expression to indicate an intended*

extension of it, an omission wholly irreconcilable with the imputed legislative design."

But the ground on which the attachment was asked in the case at bar is, that Handy was about to convert a part of his property into money for the purpose of placing it beyond the reach of his *creditors*. Hence, the ground on which the attachment was obtained, under the law, involves the existence of the relative character of creditor and debtor; and it seems to be a settled rule that when this relative character of creditor and debtor is used in statutes in respect of parties to actions, the remedy provided by such statutes is confined exclusively to actions *ex contractu*.

In *Raver v. Webster*, *supra*, it seems that the amended law of 1853, of Iowa, provided that in addition to the causes for which attachments may issue, the writ should be allowed upon the sworn statement of the plaintiff, "that the defendant is about to abscond to the injury of his *creditors*, or that he has property, goods, etc., not exempt from execution, which he refuses to give either in payment or security of said debt." In that case the jury were instructed that the affidavit set forth no sufficient cause for an attachment, for the reason that this provision applied alone to actions founded on contract. It was held that "the spirit, if not the strict letter of the law, favors this ruling," and that the amendatory act "contemplates that the claim sued on shall be liquidated or ascertained, or one which is susceptible of being rendered certain, without the judgment of a court." And it is further said that it cannot be supposed "that the legislature used the word in any other sense than that ordinarily and appropriately attached to it. And thus construed we understand it to mean to owe, or that which is contracted—from *debea*, to owe—*debitum*, contracted —that which is due or owing from one person to another; that for which a person is held or which he is bound to

pay. If a man assaults or beats another; if one shall slander his neighbor, or commit any other act, amounting to a tort or wrong, while he may be answerable in damages, yet we never speak of the amount to which the injured party may be entitled, as a debt."

In *McDonald v. Forsythe*, 13 *Mo.*, 551, it is said the "first section of our attachment law provided that creditors may sue their debtors by attachment. The words (creditor and debtor) do not in ordinary acceptation, nor in strict legal parlance, apply to any other class of demands." *Elliot v. Jackson*, 3 *Wis.*, 649. In *Hynson v. Taylor, et al.*, 3 *Ark.*, 555, it is said that the law "being in derogation of the common law must be strictly pursued. No latitude can be given, calculated to enlarge the remedy, by extending it to cases not embraced by the language adopted by the legislature, fixing the character of the demand upon which suit may be instituted by attachment. Throughout the whole statutory provisions regulating the mode of proceeding by attachment we find the words creditor, debtor, and debt, showing clearly that the relative character of creditor and debtor must have existed at the time; and that the remedy is confined exclusively to actions *ex contractu;* and that by no reasonable construction can it be made to apply to torts."

And in *Minga v. Zollicoffer*, 2 *Ired.*, 279, the language used is, that "neither in common parlance, nor in legal proceedings, is a mere wrong-doer designated as a debtor, nor his responsibility for the wrong classed under the denomination of debts. Debts are the creatures of contracts, and the language of these acts must be exceedingly strained to bring within their operation claims arising not from contract, but from tort." In a very considerable research through the books, I have been unable to find an authority which would warrant a construction of our attachment law, different from the rule enunciated in the authorities which I have so fully cited, except the excep-

tional case of *Davidson v. Owens*, 5 *Minn.*, 72, and in this case the court say that "no state has gone to such an extent as ours, for while other states confine the writ to actions *ex contractu*, Minnesota has overstepped the bounds of precedent, if not indeed of prudence, and allows its issue upon proper showing in all actions for the recovery of money, commenced in the district court, without ever making a distinction between actions in tort and those arising on contract." And in this case, it seems not only to be conceded that the state has overstepped the bounds of precedent, but perhaps also the bounds of prudence, and this is all that need be said with respect thereto. I think no well sustained authority can possibly be found which would favor the issuance of an attachment in an action for tort, upon the bare, uncertain estimate of the plaintiff himself, and under no circumstances without some direct, express statutory provision, clearly allowing such extraordinary proceeding under the necessary restrictions. It certainly would be a dangerous practice, and might lead to great abuse.

One illustration is sufficient. A plaintiff could sue the defendant in action for tort, estimating the damages at thousands of dollars, and by attachment, levy upon the personal property of the defendant to the full amount of the estimate he makes, and hold such property a long time, but when his suit is tried it is clearly shown that he had no cause of action whatever; such proceeding might damage the defendant in such a way that no judgment for money could compensate him. So upon authority as well as uponp rinciple, our attachment law cannot be construed to extend to actions for tort, and therefore the judgment of the district court, in over-ruling the motion to discharge the attachment, must be reversed, the motion sustained and judgment be entered that the

attachment be discharged, and cause remanded for further proceedings.

REVERSED AND REMANDED.

MAXWELL, J., concurred. LAKE, Ch. J., before whom the cause was tried below, did not sit.

ORTIGAL N. PALMER, PLAINTIFF IN ERROR V. THE PEOPLE OF THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Practice in Criminal Cases:** CHALLENGE OF JURORS. Under the provisions of the criminal code of 1873, it is not error to permit a juror to sit in a cause, who, although on oath says "he had an opinion and expressed an opinion," also says, he "could render an impartial verdict upon the law and the evidence." The record disclosing no basis for the opinion, it will be presumed that the court was satisfied that it was merely hypothetical, and not one calculated to bias the juror.

2. ———: EXHAUSTING PEREMPTORY CHALLENGES. A party waiving his right of peremptory challenge, cannot complain of the disqualification of a juror, known to exist at the time of the impaneling.

3. ———: SETTING ASIDE VERDICT. A verdict without evidence to support it, should be set aside; but if the evidence is conflicting, and the issues fairly submitted to the jury, the verdict should not be disturbed.

4. ———: ARGUMENTS OF COUNSEL. If an attorney for a prisoner voluntarily waives his right to argue the case to the jury, he cannot, after they have retired to consider their verdict, insist as a matter of right to have the jury recalled for the purpose of hearing such argument.

ERROR to the district court of Pawnee county.

The plaintiff in error was indicted at the October term, A. D. 1873, of the district court of Johnson county, with George W. Waldo, and Celeste Randall, for the murder of George G. Randall in March, 1873. A change of venue was granted, and the cause transferred to Pawnee county. The plaintiff in error made application to the court for a separate trial, which was granted, and the

cause tried at a special term of court held in Pawnee county during the month of February, 1874. The jury returned a verdict of manslaughter, and fixed the imprisonment of the plaintiff in error, in the penitentiary, at one year. The cause came to this court by writ of error. The trial in the court below occupied several days, and all the evidence contained in the record brought here, is comprised in a bill of exceptions, numbering one hundred and fifty pages. It is impossible to give anything more than the following brief statement of the evidence.

George G. Randall, the deceased, a resident of Johnson county, left his home on the 18th day of March, 1873, being last seen alive on that day by several witnesses, and in June following his body was found in a slough or ravine, some seven miles from his place of residence, and west thereof, in an advanced stage of decomposition, the flesh being nearly gone, and the skull bare. The body lay in a hole some two or three feet deep, one hand across, a gun and stick lying on the body, the skull detached, and part of the cranium broken away. The deceased had on clothing identified as that of his brother, and a pistol or revolver lay under his head. Evidence on the part of the state tended to show that the prisoner had criminal intimacy with the wife of the deceased, and that there had been a difficulty about the matter, the prisoner promising to remain away from Randall's house; that deceased was last seen alive by several of his neighbors, near his house, between eight and nine o'clock of the forenoon of March 18, 1873; that Waldo and the prisoner were both there in the afternoon, the former having borrowed a pistol of Embrie which he offered to return next morning, but did not return until the following week; that Mrs. Randall left the house that afternoon going with the prisoner and Waldo to Ellis's, a neighbor; that the prisoner and Waldo were seen near Palmer's house next day, asleep, or feigning to be so, beside a straw pile;

that no one at this time was at the house of the deceased; that next day after (March 20), a wagon track was noticed by one witness leading up the slough from the direction of Randall's house, by Smith's place, towards where Randall's body was afterwards found; that on March 23, search was made for Randall by his neighbors; that the floor was found to have been recently rubbed and scrubbed, and that there were wet spots and stains on the carpet; that a clean dress of Mrs. Randall's with stains on it, recently washed and yet wet, was found in a box of dirty clothes; that a place shaped like a human body was found in a straw stack near the house; that pants and some old clothes of the deceased, done up in a bundle, were found in a ravine near the house; that at the time the body was found, a stain was seen on the body of the shirt, with holes in the shirt having smooth and evenly cut edges; and that sometime after the disappearance of the deceased, Mrs. Randall and the prisoner left the country and went to Missouri where they were arrested. Knott Randall, a brother of the deceased, testified that deceased was not a very able bodied man, suffering from rheumatism in his hands, seldom walking anywhere, and that deceased was not in the habit of wearing his brother's clothes, but had done so two or three times. On cross-examination this witness testified that they had killed a hog at the house of deceased the day before; that deceased shot the hog at the stable, and that it was dressed at the house, though he could not recollect what clothes the deceased had on, or the dress worn by Mrs. Randall.

The evidence on behalf of the prisoner, given by himself, Mrs. Randall, Waldo, and Rossy Randall, a child seven years of age, was, in substance, that deceased got up early in the morning, ate no breakfast, but carried a note from Mrs. Randall to Palmer; that he was gone about two hours, and when he came back Palmer and Waldo were at the house; that they had a long talk about

Mrs. Randall's going away, that she told him that they could not get along together and that she was going away; that Palmer and Waldo left about noon, and shortly afterwards the deceased went and got his brother's black clothes and dressed himself in them; that he bade the children good bye, put a pistol in the inside pocket of his coat, got a bottle of powder, and a sack of shot, took his gun and started off, going northwest; that the child Rossy was sent for Palmer and Waldo, who came to the house, and took Mrs. Randall up to Ellis'; and the last seen of deceased alive, was when he started off in the manner stated. The mother of the prisoner testified that the prisoner came home before supper, did his chores, and after eating supper, that he and Waldo went off on their horses, not returning until nine o'clock, when they both went up stairs to bed. Two witnesses living two or three miles northeast of the place where the body of deceased was found, testified that they saw a man, dressed in a dark suit of clothes, on the 18th of March, in the afternoon, walking some distance from them in a southwesterly direction, that he went limping in his walk, and had something on his shoulder. They were not acquainted with the deceased.

The testimony of the medical witnesses, as to the cause of the fracture of the skull of the deceased, was conflicting, that of the state tending to show that it resulted from a blow given from without, and that of the defense, that it was caused by a gun shot, the gun being placed at the orbit of the eye, and discharged upwards.

O. P. Mason and J. C. Watson, for plaintiff in error

I. The juror Baughn, was incompetent under the provisions of the statute passed and taking effect February 27, 1873. *Gen. Stat.*, 857.

II. The court erred in not allowing the prisoner to argue his cause to the jury. It is a fundamental principle in this state, that in criminal prosecutions the accused has a right to be heard by himself or counsel.

III. The evidence is insufficient to sustain the verdict or justify a conviction; the verdict is contrary to law and the evidence. Each fact which is necessary to the conclusion must be distinctly and independently proved by competent evidence. *Commonwealth v. Webster*, 5 *Cush.*, 295. The testimony must be such as to satisfy the jury, beyond a reasonable doubt, that the prisoner is guilty of the charge alleged against him in the indictment. *Hiller v. State*, 4 *Blackf.*, 552. *State v. Thompson*, *Wright's R.*, 617. *Sumner v. State*, 5 *Blackf.*, 579. *The State of Iowa v. Collins*, 20 *Iowa*, 86. *Tompkins v. The State*, 32 *Ala.*, 573.

J. R. Webster, *Attorney General*, for the People.

I. The objection taken to the competency of the juror Baughn, cannot be considered by this court for the reason that the bill of exceptions does not show his answer to interrogatories, touching the grounds of such opinion. It is not every crude and ill-founded opinion, that will render a juror incompetent. *Criminal Code*, *Sec.*, 468. It was the province of the plaintiff in error, in preparing his bill of exceptions, to make the ground of the jurors opinion clearly appear. In examining and passing the juror, the presumption is that the court below has done its duty. *Scovern v. The State*, 6 *Ohio State*, 288. *Bethel v. Woodworth*, 11 *Ohio State*, 393. *Broome's Legal Maxims*, 910.

II. It was not error to refuse to recall the jury to hear argument. The defendant may waive his right to be heard. *Criminal Code*, *Sec.*, 478. Sixth.

III. While courts may set aside a verdict as against the weight of evidence, they will rarely disturb the finding of a jury upon the facts. The refusal of the court to do so is not reviewable here, where there is any evidence to sustain the charge. *Hurley v. The State*, 6 *Ohio*, 400. *State v. Cruise*, 16 *Mo.*, 391. *Wolf v. The State*, 11 *Ind.*, 231. *Giles v. The State*, 6 *Geo.*, 276. *State v. Elliott*, 15 *Iowa*, 72.

MAXWELL, J.

The errors assigned in this case are as follows:

1. The court erred in allowing J. B. Baughn to sit as a juror.
2. The court erred in admitting certain testimony.
3. The court erred in excluding certain testimony.
4. The court erred in the instructions given to the jury:
5. The court erred in refusing certain instructions.
6. The court erred in not allowing the prisoner to argue his case to the jury.
7. The evidence is insufficient to sustain the verdict.

The bill of exceptions, states that J. B. Baughn, one of the jurors, stated under oath, that he had an opinion and expressed an opinion, and was challenged for cause by the prisoner; and the said juror on being interrogated by the court, answered "that he thought he could render an impartial verdict upon the law and the evidence," thereupon the court overruled the challenge, to which the prisoner, by his counsel, excepted.

The act approved February 27, 1873, which was repealed by the criminal code taking effect Sept. 1, 1873, provided that "the formation or expression of an opinion or impression in reference to circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be sufficient

ground of challenge for principal cause to any person, otherwise legally qualified, to serve as a juror, upon the trial of such action; *provided* the person proposed as a juror, who may have formed or expressed, or has such opinion or impression as aforesaid, shall declare on oath that he verily believes he can render an impartial verdict, according to the evidence submitted to the jury, on such trial, and that such previously formed opinion or impression will not bias or influence his verdict; *and provided* the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror." *General Statutes*, 857. On the 4th day of March, 1873, an act to establish a criminal code was passed, taking effect September 1, 1873. It contained a provision repealing all acts inconsistent therewith. Section 468 of this code provides that "it shall be good cause for any person called as a juror on the trial of any indictment, that he has formed or expressed an opinion as to the guilt or innocence of the accused; *provided*, that if a juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine on oath such juror, as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor or hearsay and not upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror shall say on oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that such juror is impartial and will render such verdict, may in its discretion admit such juror as competent to serve in such case."

This act excludes all persons offered as jurors who have formed or expressed an opinion in reference to the guilt

or innocence of the accused, unless such opinion has been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor or hearsay, and evidently applies to cases where the opinion is merely hypothetical, and excludes all cases where there is bias or a decided opinion. The juror, Baughn, stated that "he had an opinion and expressed an opinion." The word "opinion" in this connection is frequently used to denote a mere impression, and appears to have been so used in section 468 of the criminal code, above quoted. It is the right of a party accused of crime to be tried by a fair, unbiased jury, so that their minds may be open to those impressions, which the testimony and the law of the case ought to make; but it would be difficult in this age, to find an intelligent man that does not read the newspapers, and from their statements perhaps form an impression or opinion. *Cooper v. The State*, 16 *Ohio State*, 333. If the opinion is merely hypothetical, he is a competent juror; but if the juror shows the slightest bias, he ought to be rejected, notwithstanding he might be willing to swear that he feels able to render a fair and impartial verdict according to the law and the evidence. In this case there is nothing before us to show upon what the opinion of Baughn was based, or whether in fact it was more than a mere impression.

There is nothing in the bill of exceptions showing that plaintiff in error used any of his peremptory challenges. Under the code, a person charged with murder is entitled to sixteen peremptory challenges, against six on the part of the state. Certainly a party on trial cannot complain that one of the jurors, sitting in the case was disqualified, he knowing the fact at the time of impaneling the jury, and waiving his right of peremptory challenge.

The next alleged error, that will be noticed, is that there is not sufficient evidence to sustain the verdict.

The evidence is all embodied in the bill of exceptions. At common law, a new trial could not be granted in any case of treason or felony, but the practice in most of the states of the Union, has been to grant a new trial, in case of conviction, with consent of the prisoner, in any case where it is apparent that a fair and impartial trial has not been had. The code provides for granting a new trial on motion of the defendant, after conviction, on certain specified grounds, one of which is that the verdict is not sustained by sufficient evidence; and it is the duty of the court, where the verdict is clearly without evidence to sustain it, to set it aside and grant a new trial. But if the evidence is conflicting, and the case has been fairly submitted to the jury, the verdict will not be disturbed. So much depends on the manner and appearance of a witness, while giving his testimony, that the question of his credibility must be left to the jury, and a reviewing court will not, in such a case, say from an examination of the testimony, that the verdict is erroneous. That the crime charged in this case was committed at the time and place charged in the indictment, we think is clearly shown, and there is testimony connecting the plaintiff in error with the commission of the offense, as strong as is often found in this class of cases.

The bill of exceptions shows that the counsel, both for the prisoner and the people, by agreement, submitted the case to the jury on the instructions of the court, and without argument. This they had a right to do, and having done so the prisoner's counsel could not afterwards insist, as a matter of right, to have the jury recalled that they might argue their case.

Of the other errors assigned, after a careful examination, we find nothing of which the prisoner can complain. The evidence certainly would have warranted the jury in imposing a much more severe penalty than

has been done by their verdict. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

CHIEF JUSTICE LAKE, concurred. GANTT, J., before whom the case was tried in the court below, did not sit.

SAMUEL D. MERCER, PLAINTIFF IN ERROR, v. HENRY H. HARRIS AND WILLIAM M. FOSTER, DEFENDANTS IN ERROR.

1. **Contract:** CONDITIONS OF SAME: EVIDENCE. Where a building contract provides that the work shall be done under the direction and supervision of an architect "to be testified by a certificate or writing under his hand," such architect is thereby constituted sole arbiter between the parties, and by his certificate, stating "balance due in full of contract price," the owner of the building is bound, no fraud being alleged or proven. In such a case evidence offered to show the character and quality of the materials furnished, and a subsequent certificate stating that the architect could not without detriment to his reputation "sign a certificate for the work being done in accordance with the plans and specifications," is inadmissible.
2. **Practice:** IT SEEMS that merely allowing the jury to take with them documentary evidence during their retirement, is not sufficient of itself, to disturb their verdict.

ERROR to the district court for Douglas County.

This action was brought by Henry H. Harris and William M. Foster, against Samuel D. Mercer, they being the assignees of Rose Brothers, with whom Mercer had entered into a contract for the erection of a dwelling house in the city of Omaha. The contract provided for the erection of the building in accordance with certain plans and specifications made by an architect, said work to be done in a good and workmanlike manner "to the satisfaction of, and under the direction of said architect, to be

testified by a writing or certificate under the hand of said architect." The contract price for the erection of the building in question was $3,375.00, upon which Mercer paid $2867.15. In setting forth the balance due upon this contract, $507.85, it was also alleged that "said architect did and now does refuse to give the certificate above referred to as to the true balance now due and herein set forth, but withholds and refuses his said certificate without just reason or cause." There were also other counts in the petition, setting forth claims for extra work, etc., making the total amount claimed, $934.10. The answer denied that said work was done in a good and workmanlike manner, or in accordance with the contract, and alleged unskillful, inferior and defective workmanship. Upon these pleadings the cause went to trial, and certificate of the architect with acknowledgment of payment of the amount above stated, were introduced in evidence on behalf of Harris and Foster, to the introduction of which the defendant objected. The final certificate of the architect, dated Dec. 12, 1870, with an order, signed by him upon Mercer, to "please pay to Messrs. Rose Brothers the sum of six hundred and two dollars and sixty-six cents, balance in full of contract price," was introduced in evidence, under the objection of the defendant. The defendant offered to introduce in evidence a certificate of the architect dated Jan. 28, 1871, stating a balance due on contract to be $507.85, with the following statement added; "the above statement is correct and includes all the moneys paid and due on account of the original contract. I have examined the work done, and after making all due allowance for the seasoning of the material and settling of the building, etc., I find I cannot, without a decided detriment to my reputation, sign a certificate for the work being done in accordance to the plans, specifications, etc." To this plaintiffs objected, and the objection was sustained. The defendant

also offered other evidence which was excluded. Verdict in favor of Harris and Foster for $937.45. Judgment on the verdict, to reverse which Mercer brought the cause here upon petition in error.

Savage & Manderson, for plaintiff in error.

I. The naked issue presented by the pleadings for the consideration of the jury was: "was the work done in accordance with the contract?" Such being the issue, the orders or statements of the architect offered by the plaintiff below were improperly admitted in evidence. If offered to show payments by Mercer on account of the work done, they were irrelevant and immaterial, because the answer admits such payments and there is no issue upon that point. If offered to show satisfaction on the part of the architect, or in lieu of the certificate required by the contract, they contradicted the express allegations of the petition admitted by the answer.

II. But as certain statements or orders of the architect had been admitted, by what rule of law could the statement dated January 28, 1871, when offered by the plaintiff in error, be excluded?

III. With the allegation on one side that the work was properly done, flatly contradicted on the other, it is difficult to see upon what principle the various questions propounded to Holmes and Richmond were excluded. *Gardner v. Preston*, 2 *Day*, 208. *Marvin v. Keeler*, 5 *Conn.*, 272. *Ogden v. Raymond*, 22 *Id.*, 383.

IV. The jury had no right, under whatever pretense, to take with them to their retirement any portion of the evidence in the case. *Farmers' and Manuf. Bank v. Whinfield*, 24 *Wend.*, 428.

John I. Redick and John D. Howe, for defendants in error.

I. Under the pleadings we could introduce the writings and recover the amounts expressed therein with no possibility of failure; and we could recover beyond that to the extent that we could show we had performed, the allegation that the writings for such amount had been wrongfully withheld, being admitted. The issue was upon the amount not certified. *United States v. Robeson*, 9 *Peters*, 326. *Herrick v. Vermont Central*, 26 *Vt.*, 673. *Snodgrass v. Gavit*, 28 *Penn. State*, 221. *Underhill v. Van Cortlandt*, 2 *Johns, Ch.*, 339. 2 *Story Equity Pleadings*, § § 1457, 1459. *Barlow v. Todd*, 3 *Johns.*, 367. The construction above given is the most favorable one that plaintiff in error can claim. But had the petition alleged that we had performed the contract, and that we held the architect's certificate, this answer could not avail. We allege that this certificate was withheld without just reason or cause. This stands admitted. Hence the effect is the same as though the petition alleged that the certificate had been given.

II. This contract was severable, so that each installment when certified, was an acceptance and execution of the contract to the extent certified. We could have maintained suit for each installment upon this showing. The record shows that the architect expressed himself satisfied with the house. He thereupon gave his writing and certificate for the balance due upon the contract. This closed the contract. No fraud, mistake, etc., having been alleged, the right to recover the full amount certified, it was impossible to overcome. When the defendants in error had shown this, they stopped their case; it was then incumbent upon plaintiff in error to show that there was work, etc., not done pursuant to contract, which had

not been certified. All the evidence was, therefore, obnoxious to the objections. The evidence of a thousand witnesses could not have changed the result. *Everett v. Gray*, 1 *Mass.*, 101. *McAusland v. Cresap*, 3 *G. Greene*, 161. *Demoss v. Noble*, 6 *Iowa*, 530. *Cunningham v. Morrell*, 10 *Johns.*, 203. *Butler v. Tucker*, 24 *Wend.*, 447. *Stewart v. Howell*, 36 *New York*, 393.

III. The evidence of the witnesses, Richmond and Holmes, was offered upon the erroneous theory that plaintiff in error could go back of the certificates, and of all the acceptances of the different parts of the work.

IV. The final certificate introduced in evidence, and the one dated January 28, 1871, clash, and suggest the conspiracy between the owner and the architect, which the evidence on the trial so clearly disclosed. When the former was made, the agency and umpireship of the architect was *functus officio*, and his subsequent certificate was no better than one from a stranger. *Bouvier Ins.*, § 1, 385.

GANTT, J.

Several errors are assigned as reasons for the reversal of the judgment in this case, and they will be examined without any regard to the order in which they appear in the record.

The main ground of defense was that the Rose Brothers did not perform their work in the manner required by the contract, and did not erect and complete the building in a good, sufficient and workmanlike manner. The plaintiff in error offered in evidence the deposition of J. F. Richmond, which was objected to and the objection sustained; he also called Thomas Holmes as a witness and asked him several questions which were objected to, and the objection sustained. The object and purport of

this testimony was to show the character and quality of the material furnished and the work done by the contractors, the Rose Brothers, and the plaintiff in error insists that the court erred in rejecting this testimony. But in regard to the ruling of the court upon these points, it will only be necessary to observe that by the terms of the contract between Mercer and Rose Brothers, the latter were required to "erect and finish the building agreeably to the drawings and specifications made by Charles F. Driscoll, architect, to the satisfaction of, and under the direction of said architect, to be testified by a writing or certificate under his hand." Hence, by the terms of the contract, Driscoll, the architect, was not only made the sole arbiter to decide between the parties to the contract, as to the character and quality of the material furnished for and work done on the building, but the plaintiff in error having required the work to be done under the direction of this architect, he thereby constituted him his agent to superintend the erection of the building. So the only question upon these points is, can the plaintiff in error stand upon or abandon his own contract in this respect, at his own pleasure? We think not. He is bound by his contract, unless he can allege and maintain fraud as between the architect and the contractors; but not having done this, the testimony of these two witnesses, in regard to the subject matter about which they were called to testify, was properly rejected.

It is also insisted that the court erred in admitting in evidence the statements or certificates of the architect, offered by the defendants in error. There are three of these writings testified by the architect. The first is an order drawn by the architect on Mercer, in favor of Rose Brothers, for the amount of the installment then payable under the terms of the contract. This order was paid by Mercer, to whom the contractors receipted for the amount. The second was a similar order, and was like

wise paid and receipted. The third "writing" is headed "statement," and sets forth the contract price of the building and some extra work, and also the payments previously made, and then follows the order of the architect on the plaintiff in error, in favor of Rose Brothers, for the amount found due as "balance in full of contract price." It is not alleged that these certificates or "writings" were obtained by the contractors through fraud or by mistake of the architect, and, hence, it must be presumed that they were executed by the architect in the honest discharge of his duty. *Odiosa et inhonesta non sunt in lege praesumanda*, is a well established legal maxim. So, it is said, that "the law presumes every man, in his private and official character, does his duty, until the contrary be proved; and it will presume all things rightly done," until the presumption is overturned by sufficient proof. 1 *Dom.*, *v.* 3, *tit.* 6, *sec.* 4, *art.* 7. 12 *Wheat.*, 69. *The King v. Hawkins*, 10 *East*, 211. *Hartwell v. Root*, 19 *Johns.*, 345.

The contract price was to be paid in installments as the work progressed towards completion, and the right of payment was made to depend upon the obtaining of the certificate, signed by the architect, under whose direction and to whose satisfaction the work was to be done, to be testified by writing or certificate under his hand. The evidence shows that the architect, if not daily, was frequently present during the progress of the work in the erection of the building, and that he gave the "writing," testified under his hand, as the work advanced. Now, do these writings, or certificates, satisfy the conditions of the contract? We think under the circumstances of this case they do. It is very clear that the contract does not prescribe any form of the "writing" to be signed by the architect, and therefore it was necessarily left with him to adopt his own form, which he did; and the plaintiff in error, by paying

the money and taking the contractors receipt on the first and second "writing," signed by the architect, accepted the form he adopted. The Rose Brothers could not require the payment of this money without this "writing," signed by the architect, and they were not entitled to the "writing," until the work was done to his satisfaction. He was the sole arbiter between the parties; the work was done under his direction; it was his duty to withhold the "writing" until the work was done to his satisfaction, and it must therefore be assumed that it was so done. And when the architect issued the third "writing," with the order for the payment of "the balance in full of the contract price," he thereby testified in effect that the building was completed to his satisfaction, and the issuance of this "writing" seems to have ended his duties under the terms of the contract, for then there was nothing left for him to do.

In *Stewart v. Keteltas*, 36 *New York*, 392, which was a case upon a contract, in regard to the powers and duties of the architect, in all respects similar to the one in the case at bar, the court say; "it was not necessary that the architect's certificate should contain a statement that the work was done agreeable to the drawing and specifications, within the time, in a good, workmanlike, and substantial manner, under his direction and to his satisfaction."

When a man contracts with a builder to erect a dwelling house for him, selects an architect under whose direction he entrusts the superintendence of the work, and requires it to be done to the satisfaction of said architect, to be testified by writing under his hand, and such architect performs such duty, being frequently present during the erection of the building, draws orders on the owner for the payment of the installments of the contract price as they become payable, and when the house is completed, makes a final statement of the matter in writing, declaring the balance due, and draws

an order on the owner in favor of the builder, for the payment of the balance in full of contract price, we think that a certificate, made by the architect long after this has been done, stating that he could not, without detriment to his reputation, "sign a certificate for the work being done in accordance with plans and specifications" should not be permitted to be used in evidence by the owner of the building. Such certificate, without any averment and proof of fraud or mistake, would carry with it strong suspicions of collusion between the owner and the architect. Hence, under the pleadings and circumstances of this case, we think the court properly rejected the one offered in evidence by the plaintiff in error.

Again, it is complained that the court permitted the jury to take with them during their retirement, the "writing," signed by the architect, giving an exact statement of the account between Mercer and the Rose Brothers. It was admitted by plaintiff in error on the trial, that this "paper set forth correctly all the payments which had been made thereon." In the consideration of this question, when we bring into view the fact that this "writing" was made by Mercer's agent, under whose direction the building was erected, and to whose satisfaction the work was to be done, it seems clear that in contemplation of law, this "writing" was in legal effect that of Mercer himself. It could not mislead the jury, and, although we do not now pretend to decide upon the general question or lay down any rule in respect to the court permitting the jury to take any documentary evidence with them during their retirement, yet under the pleadings and proofs in this case, we think the subject-matter of this complaint is not sufficient of itself, to disturb the verdict of the jury, or reverse the judgment thereon.

JUDGMENT AFFIRMED.

Mr. JUSTICE MAXWELL concurred. LAKE, Ch. J., having tried the cause in the court below, did not sit.

WILLIAM P. YOUNG, PLAINTIFF IN ERROR, v. CHARLES W. SEYMOUR AND W. W. WARDELL, DEFENDANTS IN ERROR.

Practice: RENDITION OF VERDICT. During the consideration of a cause submitted to a jury, court adjourned until 9 A. M., of the following day, the judge thereof, at the same time, announcing aloud that the court would be at all times open for the purpose of receiving the verdict of the jury in the case, then being considered by them, if they should agree upon their verdict before midnight. At 11 o'clock, P. M., the judge went to the court room, and in the absence of all the officers of the court except the bailiff in charge of said jury, and in the absence of the parties to the suit and their counsel, received the verdict of the jury, discharged them from further consideration of the case, kept the verdict until the opening of court on the following morning, and, after having read it aloud in open court, handed it to the clerk for entry upon the records; *held*, a privy verdict, and of no force and validity, not having been affirmed by the jury in open court.

ERROR to the district court of Lancaster County.

Seymour and Wardell having brought suit in the court below against William P. Young, the cause was called for trial at the November term, A. D., 1873, of said court, and submitted to the jury at 4 o'clock, P. M., on the third day of that term. About 9 o'clock, P. M., the judge presiding, ordered the sheriff to adjourn the court until 9 o'clock, A. M., the next day, at the same time announcing aloud to the bar that the court would be at all times open for the purpose of receiving the verdict of the jury in this case, if they should agree upon the same before midnight. The court, by proclamation of the sheriff, was then adjourned until 9 o'clock, A. M., of the next day. About 11 o'clock, P. M., the judge went to the court room, pursuant to the announcement by him, and then and there received the verdict of the jury, in the absence of all the officers of the court except the bailiff in charge of the jury, and in the absence of either

of the parties to the suit or their counsel. The jury were then discharged, and at the opening of court on the following day, the judge read the verdict aloud in open court, and handed the same to the clerk for entry upon the records. No objection was made by Young or his counsel to any of said proceedings, nor did they ask to have the jury called or polled. Motion for a new trial being overruled, judgment was rendered on the verdict in favor of Seymour and Wardell for the sum of nine thousand nine hundred and seventy-five dollars and costs. To reverse this judgment, Young brought the cause to this court by petition in error.

M. H. Sessions and N. S. Scott, for plaintiff in error.

I. It is an elementary principle, that the verdict of the jury in criminal causes is to be delivered in with the same form as in civil cases, except that they cannot, in criminal cases give a privy verdict. 4 *Blackstone*, 361. The definition of a verdict and its manner of delivery is very clearly stated by Blackstone, Vol. 3, page 377. A privy verdict is of no force whatever. *Thomas Coke*, 392. *Barrit v. The State*, 1 *Wis.*, 175. A public verdict is one delivered in open court. 2 *Bouv. Law Dic.*, 635. If the record in this case does not show the verdict to be a privy one, then we are at a loss to understand what can in law, constitute a privy verdict. At an unseasonable hour of the night, and at a time when it is "neither the duty or the custom of the parties or their counsel to be in the court room," the judge of the court, with no one present except the jury and the bailiff in charge, receives a verdict from the jury, and then discharges them. Is not this a privy verdict?

II. The jury should not be discharged until the verdict is recorded. *Martin v. Moreback*, 32 *Ill.*, 485.

III. There is no legal verdict, but a public one, delivered openly in court; and until it is received and recorded the jury may alter it. *Warner v. New York Central Railroad Co.*, 52 *New York*, 437. *Root v. Sherwood*, 6 *Johns.*, 67. *Blackley v. Sheldon*, 7 *Id.*, 32. *Fox v. Smith*, 3 *Cow.*, 23. *Hilliard on New Trials*, 193, § 56. *State v. Austin*, 6 *Wis.*, 208. *Labar v. Koplin*, 4 *New York*, 550. *Lawrence v. Stearns*, 11 *Pick.*, 500. *Goodwin v. Appleton*, 22 *Maine*, 458.

IV. The right to poll the jury after they have parted with their verdict, and been discharged, cannot be made available. *Joy v. State*, 14 *Ind.*, 142.

V. It is only the final opinion of the jurors that is to be expressed by their verdict, and the only proper mode of giving their definitive assent to a verdict is in open court, in answer to the usual inquiry made by the clerk. *Meade v. Smith*, 16 *Conn.*, 345.

Seymour & Wardell, pro se.

I. Did the jury render a verdict in open court? They certainly did and no objection was made thereto, and on the next day following, judgment was duly entered thereon in open court, without objection or exception being taken. Admit, for the sake of the argument, that what they say in their affidavits is true, then their failure to except to the taking of the verdict and to the judgment entered thereon, which they admit was in open court, most certainly would operate as an express waiver of said error—if error there was; but the plaintiff in error should have moved in arrest of judgment, and by failing to do so, and allowing judgment to be entered against him without objection, he waived his right to so object thereafter. *Warren v. Glynn*, 37 *New Hamp.*, 340. *Davis & Weathersby v. Hoopes & Bogart*, 33 *Miss.*, 175.

II. Irregularity in taking a verdict is no ground for arrest of judgment, even where objected to at the time, much less if no objection was taken. *Fuller v. Chamberlain*, 11 *Met.*, 503. *Raymond v. Bell*, 18 *Conn.*, 81.

III. All the cases we have examined go to the same extent, that a failure to then and there except to any informality in the taking of the verdict, which would be error in the court below, is the waiver of the same error.

MAXWELL, J.

The only question presented by the bill of exceptions is whether the verdict rendered in the case is a public or privy verdict.

Sec. 290, of the code of civil procedure, provides that "when the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by the foreman. When the verdict is announced, either party may require the jury to be polled, which is done by the clerk asking each juror if it is his verdict. If any one answer in the negative, the jury must again be sent out for further deliberation." Sec. 291, provides that "the verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagree, they must be sent out again, but if no disagreement be expressed, and neither party require the jury to be polled, the verdict is complete and the jury discharged from the case."

Blackstone says "a verdict *vere dictum* is either *privy* or public. A privy verdict is where the judge hath left or adjourned the court, and the jury being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court, which privy verdict is of no force unless afterwards affirmed by a public verdict, given openly in court, where-

in the jury may, if they please, vary from the privy verdict; so that a privy verdict is indeed a mere nullity. 3 *Blackstone*, 377. And it is held that a sealed verdict partakes of all the characteristics of a privy verdict, and is no verdict of itself, but must be affirmed by the jury in open court.

The verdict in this case is clearly a *privy* verdict, and of no force and validity unless affirmed by the jury in open court. The judgment of the district court is therefore reversed and a new trial granted.

REVERSED AND REMANDED.

Mr. JUSTICE GANTT, concurred. Mr. CHIEF JUSTICE LAKE, having tried the cause in the court below, did not sit.

ALEXANDER BLAKE, PLAINTIFF IN ERROR, v. SAMUEL A. CHAMBERS, EXECUTOR OF THE ESTATE OF WILLIS HILL, DECEASED, AND OTHERS, DEFENDANTS IN ERROR.

1. **Executor**: JURISDICTION OF DISTRICT COURT. The district court has jurisdiction over executors, and others holding a fiduciary relation, and may compel the proper application of trust funds committed to their care.
2. ——: MISAPPLICATION OF TRUST FUNDS. A petition alleged that an executor had fraudulently invested assets of the estate in land, taking the title thereto in his own name, never having accounted for the same in his final report to the probate court; *held*, on demurrer, that a creditor of the deceased had an equitable lien on the land, for the payment of the amount due him from the estate.
3. **Statute of Limitations**: FRAUD. In actions for relief on the ground of fraud, the statute of limitations does not begin to run until the discovery of the fraud. *Gen. Stat.*, 525, *Sec.* 12.

ERROR from the district court of Nemaha County.

Petition in equity to subject lots numbered nine, ten, and eleven, of the north-west quarter, and the south-west

quarter of section three, town four, range fifteen east, and the north east quarter of section three, town four north, of range fifteen east, and the south-west quarter of the south-east quarter of section thirty-four, town five north, of range fifteen east, to the payment of a claim held by Alexander Blake against the estate of Willis Hill, deceased, of which Samuel A. Chambers was executor.

The petition of plaintiff alleged that in 1857, Willis Hill died intestate, and willed that his debts be first paid out of his property, and that defendant, Samuel A. Chambers be sole executor; that soon after, said Chambers received letters testamentary, and accordingly entered upon the discharge of his trust; that in 1861, the claim of Sarah and David Crippen against said estate, was duly allowed against the estate by the probate court, since which time it had been duly assigned to the plaintiff; that no part of said claim had been paid; that said Chambers, while acting as such executor, invested the personal property and assets of said estate in the lands above described, and paid for said lands wholly with said personal property and assets, and took the legal title thereof in his own name; that in 1867, said Chambers, as executor, rendered a final account to the probate court, in which neither the said assets nor the lands purchased therewith, were accounted for, and the probate court took neither into consideration at the hearing; that at the hearing of said account, the probate court found that all debts against said estate, except the claim of plaintiff, and small claims in favor of defendants, McPherson and Chastain, had been paid; that all of said claims were valid and subsisting debts against the estate, but there was no available assets in the hands of said executor with which to pay said claims or any parts thereof; that in 1869, an administrator *de bonis non*, with the will annexed, was appointed; that said administrator never received

any assets of said estate, nor ever rendered an account, and there was no record of his having ever been cited to do so, or of his ever having been discharged as such administrator; that said lands were of more than sufficient value to pay all claims and debts against the estate; that plaintiff had no knowledge, notice, nor information of the manner in which said lands were purchased as aforesaid, nor that the same were purchased with said assets, nor the conditions of the title thereto until January, 1874, nor had any of plaintiff's assignors, ever at any time, such knowledge or notice, and plaintiff had ascertained the facts relating to said lands and the purchase thereof since January 1, 1874.

The prayer of the petition was that it be adjudged and decreed that the defendant, Samuel A. Chambers, was a mere naked trustee of the title to said lands, without any beneficiary interest therein, and that the same be charged with the payment of plaintiff's claim, etc.

The defendants demurred to the petition, and upon the hearing thereof before MR. JUSTICE GANTT, the demurrer was sustained and cause dismissed at costs of the plaintiff, who brought the same here upon a petition in error.

J. H. Broady, for plaintiff in error.

I. The court had jurisdiction. The subject is one of trust and fraud—of inherent, original jurisdiction of courts of equity. The probate court has no machinery to grant relief. That court is one of limited jurisdiction, and without general equity powers, cannot touch title to lands, and consequently cannot afford relief in cases like this. *Shoemaker v. Brown*, 10 *Kan.*, 383. *Waples v. March*, 19 *Iowa*, 382. *Harlin v. Stevenson*, 30 *Id.*, 376. *Thompson v. Brown*, 4 *Johns. Ch.*, 633. 1 *Story's Eq. Juris.*, *Sec.* 542.

II. The personal property which went into the land

was charged with the payment of plaintiff's claim, which was a lien thereon to be first paid. The personal property is the primary fund to satisfy debts, and creditors must exhaust it or its proceeds before they can disturb lands descended to heirs. *General Statutes*, 310, *Sec.* 176, *and* 315, *Sec.* 201. 2 *Redf. on Wills*, 865, 868. *Livingston v. Newark*, 3 *Johns. Ch.*, 312.

III. The executor was a mere trustee of said personal property, and plaintiff was *cestui que trust*. *Tiff. on Trusts*, 150, 483 *and* 718, *note* 5. *Michoud v. Girad*, 4 *How.*, 554.

IV. When the executor put the trust assets into lands, then he was a trustee of the lands, plaintiff was the beneficiary, and may subject the lands to the payment of his claim. *General Statutes*, 316, *Sec.* 208–210. *Griswold v. Frink*, 22 *Ohio State*, 79. *Baldwin v. Tuttle*, 23 *Iowa*, 67. *Cook v. Tullis*, 18 *Wallace*, 322.

A more unconscionable proceeding or wrong, which equity delights to remedy, cannot be easily imagined than the case which plaintiff charges in the petition, and which defendants, by the demurrer, admit.

V. The statute of limitations does not obtain as between trustee and *cestui que trust*. *Tiff. on Trusts*, 715–718. *Michoud v. Girad*, 1 *How.*, 560, *Carr v. Bab*, 7 *Dana*, 417. *Bird v. Graham*, 1 *Ired. Eq.*, 196.

VI. The petition charges fraud, which plaintiff did not discover till January, 1874, and the statute of limitations does not begin to run until the discovery of the fraud. *General Statutes*, 525, *Sec.*, 12. *Carr v. Hilton*, 1 *Curtis, C. C.*, 230.

W. T. Rogers, for defendants in error.

LAKE, CH. J.

The defendant, by demurring to the petition, admits that all the material averments therein contained are true. Do the facts thus admitted entitle the plaintiff to the relief which he seeks?

As to the jurisdiction of the district court, over the subject matter of the action there is no doubt. That court is one of general jurisdiction, and its powers are ample, in all cases of fraud by executors or others holding a fiduciary relation, to compel the proper application of trust funds committed to their care.

The defendant, by his demurrer, admits that the real estate mentioned in the petition was purchased by him while occupying the responsible and confidential office of executor, and that it was paid for entirely, out of the personal assets of the estate of his testator, and the title which he still holds taken in his own individual name. This, certainly, was a most glaring fraud on his part, and one of which a creditor of the deceased, whose claim remained unsatisfied, and which ought to have been paid out of such assets, has the right to complain. *Michoud v. Girad*, 4 *How.*, 554.

Our statute provides, and in this case it was evidently intended by the testator, that his personal property should be first applied in payment of his debts, and other lawful claims against his estate, before resorting to his real property for that purpose.

In equity, the assets which thus pass into the hands of an executor are treated as a trust fund, and held by him for the benefit of all persons interested therein, according to their relative priorities, privileges and equities. 1 *Story's Equity Jurisprudence, Sec.* 579. And whenever it is made to appear, that there has been a misapplication of any portion of such trust fund, and it can be clearly traced into the hands of any person affected with notice of such

misapplication, the trust will he held at once to attach in favor of the person who has been wronged. *Id.*, *Sec.* 581.

In this case we experience no difficulty in tracing the assets, nor in regard to the notice of their misapplication, for the executor admits that he paid for this land wholly out of the estate of his testator, and that he is the holder of the legal title, thereby fraudulently acquired.

I am of the opinion, therefore, that the plaintiff has an equitable lien upon this land for the payment of the money due to him from said estate.

As to the statute of limitations, on which some reliance seems to have been placed, it is well settled in courts of equity, in cases like the one under consideration, that the statute will not commence to run until the discovery of the fraud. And in this state such is the statutory rule. *General Statutes*, 525, *Sec.* 12. In this case it is expressly alleged that this fraudulent misapplication of the assets of the estate was not discovered until after the first day of January, 1874, so that, in any event, the statute did not begin to run until after that time, which was but a few days prior to commencing the action.

The judgment must be reversed, and the case remanded to the district court, to be proceeded with in accordance with the views herein expressed.

REVERSED AND REMANDED.

MR. JUSTICE MAXWELL concurred.

AARON W. KELLOGG, PLAINTIFF IN ERROR, v. HUNTINGTON, SHARP & CO., DEFENDANTS IN ERROR.

Practice: ERROR: BILL OF EXCEPTIONS. Exceptions to the opinion of the probate judge upon questions of law arising during the trial, cannot be reviewed upon petition in error, unless the cause is tried by a jury. *Taylor v. Tilden*, 3 *Neb.*, 339, cited and followed.

ERROR to the district court of Lancaster County.

Seth Robinson, (with whom was *Mason & Wheedon*) for plaintiff in error.

Groff & Ames, for defendants in error.

GANTT, J.

This action was commenced in the probate court of Lancaster county. On the trial of the cause no jury was demanded, and it was therefore tried before the probate judge. The case was taken on error to the district court, and is now brought on error here. The only matter complained of as error occurring at the trial of the cause in the probate court is contained in what purports to be a bill of exceptions, signed by the probate judge. Can a bill of exceptions be taken to the rulings of a probate judge, upon questions of law arising during the progress of a trial before him without a jury?

In *Taylor v. Tilden & McFarland*, 3 *Neb.*, 339, this question was fully considered, and it was held that "the statute does not give the right of a bill of exceptions to the ruling of the probate judge or justice of the peace, upon questions of law arising during the trial before them, in cases not tried by a jury, and hence such bill of exceptions cannot be considered in an appellate court, because it is an act without authority of law, and a nul-

lity." It is not necessary again to discuss this question; and as no error appears on the record of the probate judge, and none such is assigned here, the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

MR. JUSTICE MAXWELL, concurred.

JOHN DEROIN, APPELLANT, v. HENRY S. JENNINGS, A. J. RITTER, DANIEL NEFF, AND OTHERS, APPELLEES.

1. **Evidence:** PROVING DEED A MORTGAGE. Evidence that a deed absolute in its terms was intended to be a mortgage, must be clear, consistent and satisfactory.
2. **Pleading:** PETITION: PARTIES. In a petition to redeem lands sold under a mortgage, it must appear affirmatively that the party claiming the equity of redemption was not made a defendant in the action foreclosing such mortgage.

APPEAL from Richardson county.

On the 13th day of September, A. D., 1866, one Joseph Deroin being seized in fee of certain tracts of land in Richardson county, conveyed the same to Henry S. Jennings, by a deed of warranty. Jennings afterwards conveyed portions of said land to the different defendants, and one tract thereof by mortgage to O. P. Mason, who sold and assigned the same to defendant Ritter. This mortgage was foreclosed in the district court, and at a sale of the premises in March, 1869, Ritter became the purchaser Joseph Deroin died in 1867, and in March, 1869, John, his father, and heir at law, filed his petition to redeem said lands, setting forth the facts above stated, alleging that the conveyance to Jennings was intended as a mort

gage security for services rendered by said Jennings as an attorney in defending Joseph Deroin upon a charge of murder, and praying for a reconveyance. The defendants, except Jennings, King, and Rosetta Deroin, filed separate answers denying the allegations of the petition. The tracts deeded to King and Rosetta Deroin, wife of John, as well as that deeded to Ankron were embraced in the tract covered by the Mason mortgage. Some of the defendants alleged that they bargained with Joseph for the purchase of their tracts, paying him therefor, deeds being made by Jennings, with his knowledge and consent. Others of the defendants alleged that they were innocent purchasers without notice. The evidence tended to prove the case made by all of these defendants, and there was also testimony that the mortgage to Mason was executed with Joseph Deroin's knowledge and consent for similar services as an attorney, and that the mortgage was *bona fide* sold and assigned to Ritter, without notice of any equities claimed by John Deroin. The court rendered a decree dismissing the petition and John Deroin thereupon appealed to this court.

George P. Uhl, for Appellant, set forth the general doctrine, that a deed, though absolute on its face, will in equity, be considered a mortgage, if such was the intention of the parties at the time of its execution. *Wilson v. Richards*, 1 *Neb.*, 342. *Villa v. Rodriguez*, 12 *Wall.*, 323. *Murray v. Walker*, 31 *New York*, 399. *Wilson v. Patrick*, 34 *Iowa*, 362. Referring to the evidence, Mr. Uhl claimed that all of the defendants had full and ample notice of the character and nature of the deed made by Joseph Deroin to Jennings, that it was a mere mortgage to secure the latter a reasonable attorney's fee, and that upon payment of such fee, Jennings or his assigns were bound to reconvey.

E. W. Thomas and *J. H. Broady*, for Appellees Ritter, Neff, and Ankron, admitting the general doctrine stated by appellant's counsel, contended that the evidence in such cases must be clear and positive, and the parties to the instrument must have treated it throughout as a mortgage and not as an absolute conveyance, and that from the evidence in this case, the Deroins were estopped from saying that the deed to Jennings was only a mortgage.

Schoenheit & Towle, argued the cause for Appellees Freel and Pruner, but filed no brief

MAXWELL, J.

It is a well settled rule that a deed, though absolute on its face, may be shown by parol to be a mortgage, yet a court of equity will not declare such a deed a mortgage, unless the proof is clear, consistent, and satisfactory, that the object of the transaction was to create a security for the payment of money.

In this case Joseph Deroin conveyed to Jennings by a deed absolute in its terms, and Jennings, at Deroin's request, conveyed forty acres of the tract to Neff and Ritter. Jennings sold portions of the tract to Ankron, Pruner, and Freel, all of whom have answered, denying notice and claiming that they are innocent purchasers for a valuable consideration, and we think the proof fully sustains that view of the case. The judgment of the district court as to those defendants is therefore affirmed.

It is apparent that the deed made by Joseph Deroin to H. S. Jennings, although absolute in form, was intended as a mortgage to secure the payment of a reasonable attorney's fee for defending Deroin on the charge of murder, and that the legal title being in Jennings,

he, with Deroin's knowledge and consent executed a mortgage of a portion of the tract of land in dispute, to Mason to secure the payment of five hundred dollars. Mason testifies that he knew of the character of the transaction between Deroin and Jennings at the time he took the mortgage. The mortgage was sold to Ritter, who had no knowledge of the character of the transaction at the time of the purchase, but had full knowledge at the time he purchased under the decree of foreclosure. The principle is well established, that if a person who has notice, sells to another who has no notice and is a *bona fide* purchaser for a valuable consideration, he may protect his title, although it was affected with the equity arising from notice in the person from whom he derived it. *Story's Equity, Sec.*, 409. But we do not deem the question of notice material in this case. The petition does not allege that John Deroin was not made a party defendant in the suit to foreclose the mortgage, nor is there any proof tending to show that fact. We may perhaps infer that he was not a party, but that is not enough. This is an action brought to redeem the lands sold under the mortgage, and it must appear affirmatively that the plaintiff was not made a party defendant and is not bound by the decree. The law presumes that the proper parties were before the court, and the petition must negative that presumption. A reviewing court never presumes that an inferior tribunal has erred. The presumption is that it has not. Until the contrary is shown by record, every court is presumed to have acted and decided correctly. *Wagner v. Dickey*, 17 *Ohio*, 443. Therefore, the case made by the plaintiff entirely fails to show his right to redeem the land sold under the decree of foreclosure, and the judgment of the district court in that regard is affirmed.

H. S. Jennings, C. C. King, and Rosetta Deroin failed to answer the petition, and thereby admit the truth of

facts stated therein, so far as they may affect themselves. The court therefore erred in dismissing the case as to them, and the case is reversed, so far as it affects these parties in default, and remanded for further proceedings.

JUDGMENT ACCORDINGLY.

CHIEF JUSTICE LAKE, concurred. MR. JUSTICE GANTT, having tried the cause in the court below, did not sit.

THE CITY OF BROWNVILLE, PLAINTIFF IN ERROR, v. MINNIE G. COOK, DEFENDANT IN ERROR.

1. **Cities of the Second Class.** An ordinance passed by a city of the second class, punishing persons who willfully, maliciously, or mischievously meddle with, or trespass upon, the personal or real property of others, is not repugnant to the constitution or laws of the state.
2. ——: PROCESS AND PROCEEDINGS IN POLICE COURTS. A prosecution for the violation of a city ordinance should run in the name of "*The People of the State of Nebraska*," and not in the name of the city.

THIS case came up from Nemaha county. It originated in the police court of the city of Brownville, and was a complaint, under an ordinance of that city, against Minnie G. Cook for maliciously breaking, with a cudgel, five beer glasses of one John Wagner, in his place of business in said city. The proceedings were had on the 5th day of April, A. D. 1873. The defendant plead guilty, and was fined three dollars and costs. A petition in error was filed in the district court upon which the judgment of the police court was reversed and set aside. The city then brought the cause here by petition in error.

T. L. Shick and J. H. Broady, for plaintiff in error.

The ordinance is within the legitimate scope of the police power of the city. *Genl. Stat.*, 147, *subd.* 33. And also within the scope of the general welfare clause, being "expedient for the good government of the city, the preservation of peace, good order," etc. *Genl. Stat.*, 122, *Sec.* 30. It is not inconsistent with the constitution or any law of the state. Nor can the ordinance be considered unreasonable and oppressive. These questions of unreasonableness and oppressiveness may, to some extent, be legislative, and so far as legislative, the decision of the city council is conclusive and absolute. *Dillon Mun. Corp.*, *Sec.* 58, 245. *Sower v. The City of Philadelphia*, 35 *Penn. Stat.*, 231. *Taylor v. The City of Carondolet*, 22 *Missouri*, 105.

E. W. Thomas, for defendant in error.

I. The by-law was unreasonable and unnecessary. In this country, the courts have often affirmed the general incidental power of corporations, but have always declared that ordinances must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state. *Dillon Mun. Corp. Sec.* 253–261. *Commissioners v. Gas Co.*, 12 *Penn. Stat.*, 318. *Stuyvesant v. Mayor, etc., of New York*, 7 *Cow.*, 588; *Mayor v. Thorne*, 7 *Paige Ch.*, 261. *Barling v. West*, 29 *Wis.*, 307.

II. The city of Brownville derives its power from the act to incorporate cities of the second class, and that confers no authority to pass such a by-law as the present. An ordinance, which transcends the power vested in the body which passed it, is void. *Commonwealth v.*

Robinson, 5 *Cush.*, 438. *Rounds v. Munford*, 2 *Rhode Island*, 154.

LAKE, CH. J.

There are but two questions in this case that need be considered. Of these, however, only the one which I shall first notice was discussed at the bar. This relates to the power of the city of Brownville, to pass the ordinance, under which the defendant was convicted and sentenced by the police judge.

The ordinance provides, "that any person who shall willfully, maliciously or mischievously meddle with, or trespass upon, the personal or real property of another, within the corporate limits of said city, shall be liable to a fine of not more than twenty-five dollars and costs, and in default of payment, shall stand committed to the city prison, until the same shall be paid."

Is there any want of authority on the part of the city of Brownville to pass this ordinance? By section thirty of the "act to incorporate cites of the second class, and to define their powers," it is provided, that "the mayor and council shall have the power to enact, ordain, alter, modify, or repeal, any and all ordinances, not repugnant to the constitution and laws of this state, and such as shall be deemed expedient for the good government of the city, the preservation of the peace, and good order, the suppression of vice and immorality," etc., "and such other ordinances, rules and regulations, as may be necessary to carry such power into effect." *General Statutes*, 142.

There can be no doubt that the power here given is ample to authorize the ordinance in question, for it is in no sense repugnant to the constitution or laws of the state, and, if strictly enforced, would certainly tend to the peace and good order of the inhabitants of the city,

which are among the chief objects that the legislature had in view in the establishment of municipal governments.

Acts of the character charged against the defendant, ought certainly to be prohibited, and punished, and especially in cities and villages is a regulation of this kind highly proper, as a protection to the owners of property against the wanton injury or destruction thereof. The owner, to be sure, has his right of action against the trespasser, but, in a majority of cases, probably this would furnish no adequate protection, especially against injuries perpetrated by worthless and irresponsible persons.

Not only, therefore, does the act under which the city was incorporated authorize the passage of this ordinance, but it is also clearly within the established rule applicable to ordinances and by-laws of municipalities, that they must be reasonable, and in harmony with the established principles of the common law.

It was urged upon our attention, with considerable earnestness, that, inasmuch as at the time this offense was committed, there was a general statute in force on the subject of malicious mischief, this should be taken as embodying the entire legislative will on this subject, and therefore that it would be reasonable to presume, not only that no further regulation was contemplated, but that it would be altogether unnecessary and unreasonable. But I think no such presumption exists. Surely, if the general police laws of the state were considered ample by the legislature, for the good and efficient government of the people in every portion of the state, it would hardly have been worth while to establish any local municipal governments whatever. I think the reasonable presumption is rather the reverse of this, and that the people of cities and villages, for various reasons at once apparent to any one, require much more stringent

regulations for their government, than do those of the more sparsely settled districts of the state. In a city, property of every description is much more liable to the depredations, and individuals are far more frequently subjected to petty annoyances, at the hands of the evil disposed, than in the country, and it is the business of these local governments to provide all reasonable protection against them.

It will be observed, however, that the general statute in force at the time was not broad enough to cover this particular offense. It specified the property it was designed to protect, but that which the defendant destroyed was not mentioned. *Revised Statutes*, 1866, 628. On the other hand, this ordinance is general in its terms, embracing property of every description, both real and personal.

But, even as to property falling within the purview both of the statute and the ordinance, the former does not supercede the latter, for it is a principle of very general application, that the same act may constitute an offense both against the state, and the municipal government, and that both may punish it without infringing any constitutional right.

For these reasons, I conclude that this is a valid ordinance, for the violation of which the defendant was liable to the punishment which it imposes.

But another question is presented in the record for our consideration. This prosecution was commenced and conducted in the name of the municipality, and if it should be determined that this course was unauthorized, then it follows that the proceedings before the police judge cannot be sustained, and the judgment of the district court should be affirmed. I think it is clear, on principle, that a prosecution under this ordinance, whereby a fine and imprisonment may be imposed, is a public proceeding, and being such, it can only be con-

ducted in the name of "The People of The State of Nebraska." The fact that the ordinance is limited in its operation to the city of Brownville can make no sort of difference. The primary authority, that which gave to it vitality and force, came from the people, and found expression in the act of the legislature, under which the city was organized. Without this authority, it would have been a mere nullity.

The organization of separate governments for cities and villages, distinct from that of the state at large, is one of the means resorted to, and in fact enjoined upon the legislature by the constitution, for the promotion of the general welfare, not of the particular district embraced within the corporate limits alone, but of the entire state. Good government in every portion of the commonwealth is of the highest concern to every citizen thereof, and in which he must at all times feel a lively interest. Besides, these local governments are in no sense independent of state authority, but in all things are strictly subject to the control of the legislature.

Section ten, article four, of our state constitution, provides that "all process, writs, and other proceedings, shall run in the name of *The People of the State of Nebraska.*"* This, evidently, has particular reference to all those means by which the supreme power in the state is asserted, over either persons, or their property, in whatever mode, or by whatever instrumentality it may be done. And the fact that this power is asserted, must be declared upon the face of the process or proceeding. Nor does it make any difference, as it seems to me, whether such process be issued, or proceeding be taken, by the highest or the lowest of the judicial tribunals created, or authorized by the constitution; it must be done in the name of "The People."

* The constitution taking effect Nov. 1, 1875, provides that process shall run, and prosecutions be carried on, in the name of "The State of Nebraska."

Section one of the same article of the constitution declares that "the judicial power of the state shall be vested in the supreme court, district courts, probate courts, justices of the peace, *and such inferior courts as the legislature may from time to time establish.*" The last clause of this section no doubt includes police courts established by the legislature for the enforcement of city ordinances; and these within their limited jurisdiction, call into action and assert the power and dignity of the state, just as clearly and authoritatively, as can be done by the highest court created by the constitution, when acting within its jurisdiction. This being so, it follows as a necessary sequence, that this proceeding should have run in the name of "The People of The State of Nebraska," and not in that of "The City of Brownville." And I think this must have been the legislative construction of this article of the constitution, for they have nowhere attempted to authorize actions in their nature criminal, or *quasi* criminal, to be brought in the name of the municipality, but, on the contrary, we find it provided in section forty-five of the act to incorporate cities of the second class, that "in all cases not herein specially provided for, the process and proceedings before the police judge, shall be governed by the laws regulating proceedings in justices court, in civil and criminal cases respectively." This would seem to strengthen the conclusion to which I have arrived on this question, for in all criminal, or *quasi* criminal proceedings, before justices of the peace, they are, without exception, to be conducted in the name of "*The People of The State of Nebraska.*"

For the sole reason, therefore, that this prosecution cannot be maintained in the name of "The City of Brownville," the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., concurred. GANTT, J., did not sit.

WILLIAM S. HORN, PLAINTIFF IN ERROR, v. WILLIAM W. QUEEN, DEFENDANT IN ERROR.

1. **New Trial:** JURISDICTION OF COURTS OF EQUITY. Where it would be proper for a court of law to grant a new trial, if the application had been made while that court had the power, it is equally proper for a court of equity to do so, if the application be made when the court of law has no means of granting such trial; but it will only interfere in case of newly discovered evidence, surprise or fraud, or where a party is deprived of the means of defense by circumstances beyond his control.

2. ———: H. commenced an action in the district court, to enjoin the collection of a judgment obtained against him before a justice of the peace, and praying for a new trial of the cause, alleging that he was called away on account of the dangerous illness of his son, during which time service of summons was made by leaving a copy at his residence, that he returned home on the day of the trial, but was too sick to attend thereto on that day and for twenty days thereafter, when it was too late for the court in which judgment was rendered to grant any relief, and that he had a good defense to the action, which was fully set forth. *Held*, on demurrer, that a new trial should be granted.

ERROR to the district court for Lancaster county.

William S. Horn brought suit against William W. Queen alleging in his petition that one A. C. Combs had purchased a tract of land in Lancaster county, by pre-emption certificate, of the Burlington and Missouri River Railroad Company, which Combs afterwards sold and transferred to Horn; that thereupon, under the contract of purchase, he entered into the possession and enjoyment of said premises, a considerable portion of which he broke up and prepared for cultivation; that afterwards one Charles L. Gumaer entered the said tract of land at the local land office, under the provisions of the United States homestead act, although said tract of land was covered by the grant of lands made by Congress to the Burlington and Missouri River Railroad Company, and within the time prescribed by law erected a house thereon

and has continued to reside on said premises; that afterwards the defendant, William W. Queen, made application at the local land office to enter the same tract of land, which application was allowed, but that said defendant Queen never resided on the land, either before or since his alleged homestead entry; that the action of the land officers in allowing said homestead entries was wholly erroneous and wrongful and without any authority of law; that said defendant, after procuring his pretended homestead entry, entered upon the land plowed and broken up by the plaintiff, and of his own wrong, sowed the same with oats, and that when said oats had ripened the defendant again wrongfully and unlawfully entered upon the land and cut and harvested said oats, the defendant well knowing that the plaintiff had broken and plowed the land under claim of title thereto from the railroad company; that plaintiff entered upon the land and took away the oats thereon for his own use, amounting to two hundred and twenty-one bushels, and not exceeding in value twenty-five dollars; that afterwards the defendant Queen commenced an action against the plaintiff to recover the sum of one hundred and fifty dollars, for alleged trespass in entering upon said land and taking away the oats, before A. L. Palmer, Probate Judge, in which plaintiff entered an appearance and the same was by said judge afterwards certified to the district court on the ground that the question of title was raised in the action; that afterwards the defendant commenced another action before C. J. Greene, justice of the peace, for the same alleged trespass in entering upon the land and carrying off the oats raised thereon by Queen, the summons in which action being made returnable on the 25th day of January, 1873, at 10 o'clock, A. M.; that said summons was served by leaving a copy thereof at the residence of the plaintiff; that at the time of the service of the summons the plaintiff was absent in Nemeha

county at the bedside of a sick son; that on the day the summons was returnable the plaintiff returned home, being carried there, himself very sick, and was wholly unable to attend to any kind of business for more than twenty days; that his daughter delivered the summons to him but he was too ill in body at that time to give the matter attention; that he learned the case was adjourned on account of his absence, but that in fact this was not true, for judgment had been rendered against him for the sum of one hundred dollars and costs, upon which execution issued. The plaintiff prayed for a new trial and the allowance of a temporary injunction. To this petition the defendant demurred, and upon argument thereof, judgment being rendered sustaining the demurrer and dismissing the petition, Horn brought the cause here by petition in error.

Seth Robinson, for plaintiff in error.

The rule is, and it has not been changed by the code, that where it would be proper for a court of law to grant a new trial, if the application were made while that court had power to do so, it is equally proper for a court of equity, if the application be made on grounds arising after it is too late for the court of law to administer relief. *Hoskins v. Hattenback*, 14 *Iowa*, 314. *Collyer v. Langfort's Adm'r*, 1 *A. K. Marshall*, 174. *Deputy v. Tobias*, 1 *Blackf.*, 311.

Tuttle & Harwood, for defendant in error.

I. The remedy given by statute is exclusive. *Genl. Stat.*, 685. Courts will not relieve. *Sedgwick on Stat. and Const. Law*, 322.

II. The justice had jurisdiction of the case; the judgment was legally obtained, and is not exorbitant;

courts of equity will not relieve. 3 *Grah. & Wat., New Trials*, 1356.

III. A court of equity will not grant a new trial where the object is simply to reduce the damages. The case at bar amounts to that. *Smith v. Lowry*, 1 *Johns. Ch.*, 320.

IV. A court of equity will not set aside a judgment legally obtained, and grant a new trial, when the petition does not show that the result would be changed if a new trial is had. *Taggart v. Wood*, 20 *Iowa*, 36.

MAXWELL, J.

It has been held that a new trial would be granted, upon a motion for a postponement on the ground of the absence of a witness, when one of the defendants, at the time the case was called for trial and the motion was made, lay sick in Philadelphia, and the other was unable to attend court, each being ignorant of the other's situation, and consequently the requisite proof was not furnished by reason of the absence of the witness. *Sherrard v. Olden*, 1 *Halstead*, 344.

And it was held sufficient to grant a new trial where the plaintiff was prevented from attending court in consequence of his daughter being at the point of death, and several witnesses though summoned were prevented from attending. *Peebles v. Ralls*, 1 *Little*, 24.

And the illness of defendant which prevented his procuring the attendance of material witnesses, or being present himself to move for a continuance, has been held to be ground for a new trial. *Stewart v. Durret*, 3 *Monroe*, 113.

And in general, the absence of a party from unavoidable circumstances, where it is apparent he has a defense

to the action, will be sufficient to authorize a new trial. *Vannerson v. Pendleton*, 8 *Smede & Marshall*, 452.

Blackstone says, "either party may be surprised by a piece of evidence which, had he known of its production, he could have explained or answered; or he may be puzzled by a legal doubt which a little recollection would have solved. In the hurry of a trial the ablest judge may mistake the law and misdirect the jury. The jury are to give their opinion instanter, that is before they separate, eat or drink, and under these circumstances the most intelligent and best intentioned may bring in a verdict which they themselves upon cool deliberation would ask to reverse. * * * Granting a new trial under proper regulations cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision which is the glory of the English law." 3 *Blackstone*, 391.

"But courts do not lend too easy an ear to every application for a review of the former verdict; they must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed and that the decision is not agreeable to the truth and justice of the case. A new trial will not be granted where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections which do not go to the real merits. It is not granted in cases of strict right or *summum jus* where the rigorous exaction of extreme legal science is hardly reconcilable to conscience. Nor is it granted where the scales of evidence hang nearly even." 3 *Blackstone*, 392.

In the early history of the common law the principal remedy for the reversal of a verdict unduly given was by writ of *attaint*, but the hardships connected therewith seem to have led the courts first to modify verdicts, and afterwards to grant new trials.

The grounds for a new trial under our statutes are substantially the same as at common law. There is also a provision in our statute that where the grounds for a new trial could not with reasonable diligence have been discovered until after the term at which the verdict, report of referee, or decision, was rendered or made, the application may be made by petition filed as in other cases, on which a summons shall issue, etc., but no petition shall be filed more than one year after the final judgment is rendered; yet equity will grant relief in a proper case where fraud has been practiced by the successful party in obtaining the judgment, or where from accident or unavoidable circumstances, without fault on the part of the party applying therefor, a full and fair trial has not been had. But courts of equity have always proceeded with great caution in awarding new trials at law. At the present day they are seldom applied to for that purpose, as courts of law are liberal in exercising the same jurisdiction, and it has been held to be unconscionable and vexatious to bring into courts of equity a discussion which might have been had at law. 1 *Schoales v. Lefroy*, 20. But in general where it would be proper for a court of law to have granted a new trial, if the application had been made while that court had the power, it is equally proper for a court of equity to do so, if the application be made when the court of law has no means of granting a new trial. *Colyer v. Langfort*, 1 *A. K. Marshall*, 237. It will only interfere however, in case of newly discovered evidence, surprise, fraud, or the like, where the party is deprived of the means of defense by circumstances beyond his control. 1 *Litt.*, 140. 2 *Bibb.*, 241.

In the case of *Lieby v. Heirs of Ludlow*, 4 *Ohio*, 493, the court held that "before a court of chancery will order a cause to be reheard at law they will require the complainant to show that he used due diligence in pre-

paring and conducting his defense at law, and that he was prevented from then making it, by circumstances beyond his control." The same rule is laid down in *Insurance Company v. Hodgson*, 7 *Cranch.*, 336. *Duncan v. Lyon*, 3 *Johns. Ch.*, 356. We think this is clearly the law that a party must have done all that he could under the circumstances, that he has not been negligent, and that he must show he has a defense to the action.

In this case the demurrer admits as facts that the plaintiff was called away to Nemeha county to see his son who was dangerously ill, that he returned on the day of the trial, when he received a copy of the summons, but that he was too ill in body to give the matter any attention, and that the illness continued with a slight intermission for more than twenty days. The demurrer also admits that the plaintiff was the assignee of the certificate of purchase of the tract of land from the railroad company, and had broken up the land on which the grain was raised; that the defendant Queen having made a second homestead entry, the first one by Gumaer being uncanceled, of the tract of land, yet that he never resided on the land or complied with the provisions of the law. Taking these facts as true, the plaintiff had a defense to the action, and it is clearly against equity to refuse him an opportunity of a fair trial.

We think a sufficient excuse is shown for the failure of the plaintiff to appear and defend the action, or to seek to set aside the default, or to appeal. A party cannot be guilty of negligence who is too ill to give the matter any attention, and the law does not require the performance of impossible conditions. The object of the law is to administer justice. To secure this object new trials are granted. In this case, after the expiration of ten days the court in which the action was tried could grant no relief whatever. This is clearly a case calling for the

interposition of a court of equity, subject to such terms as to payment of costs as may be prescribed by the district court. The judgment of the district court is reversed and cause remanded for further proceedings.

REVERSED AND REMANDED.

GANTT, J., concurred. LAKE, Ch. J., did not sit.

THOMAS F. MULLOY, APPELLEE, v. OSCAR P. INGALLS AND CATHERINE L. INGALLS, APPELLANTS.

1. **Deeds**: EXECUTION. In the absence of fraud, mere imbecility or weakness of mind in a grantor, however great, will not avoid his deed, unless there be evidence to show a *total* want of reason or understanding.

2. ——: WITNESSES. The presence of the attesting witness to a deed or mortgage, at the time it is subscribed by the parties thereto, is not essential, if he is immediately afterwards told by them that such instrument is their agreement, and is by them requested to subscribe the same as a witness.

APPEAL from the district court of Douglas county.

The district court having rendered a decree foreclosing a mortgage executed by the defendants, Catherine L. Ingalls brought the cause here to reverse that decree. The facts fully appear in the opinion of the court.

E. Estabrook, for the appellant, contended that Catherine L. Ingalls, at the time of the execution of the mortgage in question, was not of sufficient capacity to convey or to execute the same. Such want of capacity is sufficient ground for avoiding the contract. *Lincoln v. Buckmaster*, 32 *Vermont*, 653. *Jackson v. King*, 4 *Cow.*, 207. *Matter of Barker*, 2 *Johns. Chan.*, 232. *Gates v. Meredith*, 7 *Ind.*, 440. *Hale v. Hills*, 8 *Conn.*, 39.

Seamer v. Phelps, 11 *Pick.*, 304. *Ridgeway v. Darwin*, 8 *Vesey*, 65. *Ex parte Cramer*, 12 *Vesey*, 445. *Hovey v. Hobson*, 55 *Maine*, 256. *Coleman v. Frazer*, 3 *Bush*, (*Ky*), 300.

The mortgage was not subscribed in the presence of the witness. *General Statutes*, 872. 3 *Washburn on Real Property*, 248, *Sec.* 11; 426, *Sec.* 546. *Hollenback v. Fleming*, 6 *Hill*, 306. *Henry v. Bishop*, 2 *Wend.*, 575.

Savage & Manderson, for Mulloy, the appellee.

I. No fraud, imposition, surprise, or inadequacy of consideration having been alleged, the appellate court before reversing the decree of the court below, must be satisfied that Mrs. Ingalls was, at the time of the execution of the mortgage, *non compos mentis*. No weakness of mind, no low degree of intellect, no petulance or childishness from illness, no reduction of the extent or power of her faculties from a normal condition, will be sufficient, unless they amount to the total loss of understanding, which the law recognizes as insanity. *Stewart v. Lispenard*, 26 *Wend.*, 255. *Blanchard v. Nestle*, 3 *Denio*, 37. *Staples v. Wellington*, 58 *Maine*, 453. *Lozear v. Shields*, 23 *New Jersey Equity*, 509.

II. The witness to a deed need not be present at the moment of execution, if called on immediately afterwards, and requested to attest. *Munns v. Dupont*, 3 *Wash., C. C. R.*, 31, 42. *Hollenback v. Fleming*, 6 *Hill*, 303. *Parker v. Mears*, 3 *Esp., R.*, 171. 3 *Washburn on Real Prop.*, 3 *Ed.*, 248.

GANTT, J.

The plaintiff instituted suit in equity against the defendants to foreclose a mortgage, and his petition is

in the usual form in such cases. There was a default as to the defendant O. P. Ingalls; and the defendant Catherine L. Ingalls makes defense to the suit on the ground, as alleged in her answer, that at the time she signed the mortgage, "she was so prostrated both in her mind and body by sickness that she was thereby deprived of her reason, and could not and did not agree in mind to the execution of said mortgage;" or in other words, as it is contended, that by reason of weakness of mind caused by sickness, the defendant had not sufficient capacity to convey or to execute the instrument. The question then, presented by the record before us, is, was this defendant, at the time she signed and acknowledged the mortgage, *non compos?*

Lord Coke defines *non compos mentis* "to be a person who was of good and sound memory, and by the visitation of God had lost it," or "he that by sickness, grief, or other accident, wholly loseth his understanding." *Beverly's Case*, 4 *Coke*, 123. *Coke Litt.*, 247a. And Lord Hardwicke says that "being *non compos*—of unsound mind—are certain terms in law, and import a total deprivation of sense. Now weakness does not carry this idea along with it; but courts of law understand what is meant by *non compos*, or insane, as they are words of a determinate signification." *Ex parte Bamsley*, 3 *Atk.*, 168. And where statutory provisions do not change this doctrine, the current of authority seems to be uniform in sustaining the rule as above stated; and therefore in legal parlance, these terms mean in respect to the condition of the mind of a person, a total want of understanding.

Deeds of all such persons are void; but mere imbecility or weakness of mind, however great, will not avoid a deed or contract unless there be evidence to show a total want of reason or understanding, because, as is said in *Blanchard v. Nestle*, reported in 3 Denio, 37,

"our law does not distinguish between different degrees of intelligence. It does not deny to a man of very feeble mind the right to make contracts and manage his own affairs. In the absence of fraud, mere imbecility in the grantor, however great it may be, will not avoid his deed." Hence, there is no grade of understanding between the highest and the lowest, which incapacitates a man from making a contract where there is no fraud, imposition or undue influence practised upon him. And I may repeat, as is so well said by Verplanck, Senator, in *Stewarts Ex'rs v. Lispenard*, 26 *Wend.*, 303, "to establish any standard of intellect or information, beyond the possession of reason in its lowest degree, as in itself essential to legal capacity, would create endless uncertainty, difficulty, and litigation, would shake the security of property, and wrest from the aged and infirm that authority over their earnings or savings which is often their best security against injury and neglect. If you throw aside the old common law test of capacity, then proofs of wild speculation, or extravagant and peculiar opinions, or of forgetfulness or prejudices of old age, might be sufficient to shake the fairest conveyance, or impeach the most equitable will. The law therefore, in fixing the standard of positive legal competency, has taken a low standard of capacity; but it is a clear and definite one, therefore wise and safe. It holds, in the language of a late English Commentator, that weak minds differ from strong ones only in the extent and power of these faculties; but unless they betray a total loss of understanding, or idiocy or delusion, they cannot properly be considered unsound." *Shelford on Lunacy*, 39.

But it is said that under the rulings of the court, in the cases of *Ridgeway v. Darwin*, 8 *Vesey*, 66, and *Ex parte Cranmer*, 12 *Vesey*, 445, a different doctrine was laid down which now prevails. It seems that in these

cases the court assumed jurisdiction to issue a commission to inquire into the fitness of a person to govern himself and manage his affairs, who was under that imbecility of mind which is not strictly insanity, but rendered him liable to be robbed; and in the latter case the Lord Chancellor said he thought "there ought to be an act of parliament, not from any defect in jurisdiction, but on the immense moment, that the Lord Chancellor should not assume an authority that does not belong to him by the ancient jurisdiction, and that may press sorely on the liberty of the subject." But on the strength of a former case the chancellor said: "I will protect this gentleman, by granting a *melius inquirendo*, to see whether he is fit for the government of himself, and the management of his affairs." And although this doctrine seems now to prevail, yet it does not impair the rule as above stated, for deeds or contracts in these exceptional cases, as is said in *Stewart's Ex'r v. Lispenard*, "have been held void, not because the person making them was incapable of a valid consent to any act or contract, but because the whole transaction taken together, with all its facts, of which the proof of mental weakness was one, showed that the consent, the very essence of the contract, was wanting to that particular act, and because of the relative character of the will or contract itself, and of all the external circumstances in proof to the mental capacity of the party." So, in such cases, the sound and disposing mind, of whatever degree of intelligence it may be in other respects, was wholly deprived of understanding in regard to the special matter; or the whole transaction was the result of fraud, abuse of confidence or delusion. In *Jackson v. King*, 4 *Cow.*, 217, it is said that the question of the validity of a deed, executed prior to a commission of this nature, would not be in the least affected by such commission. It must be shown that the grantor was *non compos*

within the legal acceptation of the term; that it was not a partial, but an entire loss of the understanding; for the common law seems not to have drawn any discriminating line by which to determine how great must be the imbecility of mind to render a contract void, or how much intellect must remain to uphold it." *Blanchard v. Nestle*, 3 *Denio*, 41.

We think that under the above rules of law, the evidence taken in the case at bar falls far short of showing a total want of understanding in the defendant at the time she executed the mortgage. B. Reed, the notary public, who is the subscribing witness, and who took the acknowledgment of the parties to the instrument, testifies that he conversed with her at the time; asked her about her health; that he put to her the usual formal questions in taking her acknowledgment, and that she answered in a natural manner, and just as she would when well. This evidence is not at all impaired by that of the daughter of the defendant, who thought her mother was at the time "childish," which means simplicity, or weakness of mind. The term "childish" certainly expresses a degree of reason or intelligence, and while this witness may have believed it was of a very low degree, others might have greatly differed from her opinion and placed it much higher; hence we see the necessity and the correctness of the rule, that there is no grade of understanding between the highest and lowest which incapacitates a person from making a contract, when no fraud is proven. In this case, neither fraud, delusion, nor undue influence was set up as ground of defense, or attempted to be proved. Indeed, there is not the slightest proof tending to show that any artifice, improper influence or fraud was practiced on this defendant to induce her at the time to execute the instrument.

Again it is said, and urged as ground of defense, that the

mortgage was not signed by the parties in the presence of the subscribing witness, and that therefore he is not a good attesting witness. This witness testifies substantially that he was called to the house of the parties to subscribe the mortgage as witness thereto, and to take their acknowledgment, and that when he went into the room the defendant had a pen and the mortgage in her hand; that he could not say positively he was present when she signed it, but thinks she was signing it when he went in, and that she handed to him the pen, and he was requested to witness her signature and he did so. Under these facts we have no doubt that he was a competent witness to prove the execution of the instrument by the parties. And it is not material whether it was signed by the parties in his presence or not, if he was immediately afterwards called on by them to subscribe his name as a witness to it. He was the person agreed upon by the parties to be the only witness to prove it. And the rule seems to be now well settled that it is not essential that such witness should be present at the time the parties subscribe their names to the instrument, for, if afterwards he is told by the parties that the instrument is their deed or agreement, and is by them requested to subscribe the same as a witness to it, that, in law will be sufficient, and in such case, the execution of the instrument and the subscribing by the witness will be considered as parts of the same transaction. The decree of the court below should be affirmed.

DECREE AFFIRMED.

MAXWELL, J., concurred. LAKE, Ch. J., did not sit.

EDWARD PAINTER, PLAINTIFF IN ERROR, v. EZRA IVES, DEFENDANT IN ERROR.

1. **Jurisdiction of United States Courts in Nebraska.** The federal courts have no jurisdiction of the crime of larceny, alleged to have been committed on an Indian reservation in the state of Nebraska.

2. ———. All the territory embraced within the boundaries of the state, was withdrawn from the jurisdiction of the federal courts, by the act admitting the state into the Union.

3. **False Imprisonment:** MALICIOUS PROSECUTION: PLEADING: SUFFICIENCY OF PETITION. Although an action for malicious prosecution cannot be maintained, if the proceedings complained of were had by a court having no jurisdiction, yet a petition alleging that in consequence of such proceedings plaintiff was arrested, imprisoned, etc., is sufficient as a complaint for false imprisonment.

4. ———: EVIDENCE. In such an action, the information made by the defendant, upon which the warrant issued for the arrest of the plaintiff, is admissible in evidence.

5. ———: ———: INSTRUCTIONS TO JURY. There being evidence before the jury showing that plaintiff was arrested by a sheriff, at the request of the officer holding the warrant who had telegraphed him for that purpose, and imprisoned in jail until the arrival of such officer, the defendant asked the court to charge the jury, that "in estimating damages, in case the jury found for the plaintiff, they should not consider the fact of such imprisonment." *Held*, properly refused.

6. ———: DEFENSE. One who procures the arrest and imprisonment of another, upon void process, is liable in an action for false imprisonment, and mere good faith in making the affidavit, by virtue of which the arrest is made, is no defense.

THIS action was commenced in the district court of Washington county, on the seventeenth day of July, 1873, by Ezra Ives against Edward Painter. The petition alleged that on the tenth day of July, A. D., 1873, the said defendant, Painter, willfully and maliciously, and without probable cause, filed a complaint under affirmation with one William L. Peabody, a United

States commissioner for the district of Nebraska, which complaint was as follows:

UNITED STATES OF AMERICA, } ss.
DISTRICT OF NEBRASKA. }

The information and complaint of Edward Painter, U. S. Indian agent of Omaha tribe in said district, taken on his solemn affirmation before William L. Peabody, United States commissioner for the district of Nebraska, the 10th day of July, 1873, who upon his said affirmation says that he has just and reasonable grounds to suspect and believe that Ezra Ives, on or about the first day of January, 1872, at the Omaha reservation within the district of Nebraska aforesaid, and within the jurisdiction of the United States district court, for said district of Nebraska, did take, steal, and carry away one dark brown or black Indian pony, the property of "Nehatta" belonging to said Omaha tribe, and further saith not.

E. PAINTER, *Indian Agent.*

Subscribed in my presence, and sworn to before me, at Omaha in said district, this 10th day of July, 1873.

WM. L. PEABODY,
U. S. Com., for the Dist. of Nebraska.

That by reason of the filing of said complaint and by the procurement of said defendant, the said William L. Peabody, a judicial officer of the United States of America issued a warrant for the arrest of the plaintiff, and placed the same in the hands of the United States marshal, who in obedience to said warrant, on the 14th day of July, 1873, arrested the plaintiff and incarcerated him in the county jail of Washington county, Nebraska, and on the 15th day of July, 1873, conveyed the plaintiff to the city of Omaha, where on the 16th day of

July, 1873, an examination into the truth of the charges contained in said information was had before the said United States commissioner, who thereupon discharged the plaintiff from custody, after he had been imprisoned for the space of forty-eight hours; that plaintiff had always borne a good reputation for honesty, and before the time first above stated, was never suspected of the crime of larceny; and that the defendant well knowing these facts, and contriving to injure the plaintiff, did without probable cause procure the arrest and incarceration of the plaintiff, to the damage of the plaintiff in the sum of ten thousand dollars.

The defendant answered that he did not maliciously and without probable cause, etc., make said complaint; that he did not falsely and maliciously cause the arrest of plaintiff; that there was probable and reasonable cause for making the complaint, etc.; that defendant asked the advice of counsel, etc.; and that he acted in good faith, etc.

Upon the trial of the cause, after the plaintiff had rested his case, the defendant moved for a non-suit on the ground that the evidence upon which the action was based, to-wit: the complaint made by the defendant, showed upon its face that the United States Commissioner had no jurisdiction of the crime charged, which motion the court overruled. The jury returned a verdict in favor of plaintiff for the sum of five hundred dollars, upon which judgment was entered. The defendant, Edward Painter, brought the cause here by petition in error. The evidence and instructions to the jury, passed upon here, are contained in the opinion.

James Neville, for plaintiff in error.

I. The defendant in error should have made the allegations in his petition conform to the facts necessary to

be stated in a case of trespass under common law pleading. No action for malicious prosecution can be sustained upon a complaint where the court, before whom the complaint was made, had no jurisdiction of the offense charged therein. *Bixby v. Brandige*, 2 *Gray*, 129. *Butler v. Potter*, 17 *Johns.*, 145. *Stone v. Crocker*, 24 *Pick.*, 87. *Parker v. Farley*, 10 *Cush.*, 279. *Sayles v. Briggs*, 4 *Met.*, 421.

II. If the prosecution never legally existed, then it cannot be malicious prosecution, but simply a trespass. *Marshal v. Betner*, 17 *Ala.*, 832. 1 *Hilliard on Torts*, 415.

III. The rule is confined to cases where the proceedings complained of are void. 1 *Hilliard on Torts*, 426.

IV. The plaintiff in error is not chargeable with the unlawful acts of the officer in charge of the warrant. *Johnston v. Sutton*, 1 *Term R.*, 544.

Carrigan & Osborn, for defendant in error.

I. The action is for trespass against the person, and in our state is not governed by rules of the common law respecting actions. The declaration is but a plain statement of facts, and the gist of the action is the injury. It then follows that if the defendant received an injury to which the plaintiff contributed, the action can be maintained.

II. It may be urged, however, that the prosecution must be ended before such action can be maintained, or before the right of action accrues; but how can a prosecution end which has never been commenced before a legally constituted tribunal? Admit this, yet the injury is the same—the malice equally apparent. 2 *Greenleaf*

on Evidence, *Sec.* 449. *Morris v. Scott*, 21 *Wend.*, 281. *Humphrey v. Case*, 8 *Conn.*, 101. *Stone v. Stevens*, 12 *Id.*, 219. *Chambers v. Robinson*, 1 *Strange*, 691.

III. It is not in *all cases* necessary to prove the termination of the prosecution. *Sperly v. Warner*, 9 *Ohio*, 103. *Fortman v. Rottier, et al.*, 8 *Ohio St.*, 548.

IV. When a party applies for process which an officer has no power to issue, or fails to comply with the requirements of the law, in order to confer jurisdiction upon the officer to issue, there is some propriety in holding him as well as the officer liable. *Hall v. Munger*, 5 *Lansing*, 100.

V. All who aid, command, advise, or countenance the commission of a tort by another, or who approve of it after it is done, are liable, if done for their benefit, in the same manner as if they had done the tort with their own hands. *Judson v. Cook*, 11 *Barb.*, 642. *Brown v. Chadsay*, 39 *Barb.*, 253.

LAKE, CH. J.

One of the principal questions argued at the bar, and the one chiefly relied on for a reversal of the judgment of the court below, relates to the jurisdiction of the United States Commissioner over the offense with which Ives was charged.

It was urged on behalf of plaintiff in error, that an action for malicious prosecution cannot be maintained, where the proceedings complained of were had in a court having no jurisdiction of the subject matter of the suit. And this seems to be the correct rule when applied to an action for malicious prosecution, strictly speaking, where an injury to the plaintiff's character or reputation,

caused by the unauthorized proceedings, is the only wrong complained of.

In *Bixby v. Brandige*, 2 *Gray*, 129, it was directly decided, that the record of a prosecution and acquittal before a justice of the peace, who had no jurisdiction of the case, was not sufficient to maintain the action. *See also*, *Marshall v. Betner*, 17 *Ala.*, 832.

The commissioner, before whom the complaint of Painter was made, took cognizance of the alleged offense, on the supposition doubtless, that the jurisdiction belonged exclusively to the federal, and not to the state courts. In this however he erred. The fact that the crime was committed on an Indian reservation, is not, of itself, sufficient to give the federal tribunals jurisdiction thereof. *The United States v. Ward*, *Woolworth C. C. Rep.*, 17.

On the 19th day of April 1864, Congress passed "AN ACT to enable the people of Nebraska to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original States." 13 *U. S. Statutes at Large*, 47. The second section of this act provided what the boundaries of the proposed state should be, and they embraced the reservation in question. This act further declared, in substance, that the state of Nebraska should consist of all the territory included therein, without any exception or restriction whatever. It is true that this proposition was not accepted within the time limited by the act, but when, in February 1866, our present constitution was framed with the view of asking Congress to admit us, reference was distinctly made thereto by section six of the schedule, as follows: "This constitution is formed, and the state of Nebraska asks to be admitted into the Union on an equal footing with the original states, on the condition and faith of the terms and propositions stated and specified in an act of Congress, Approved April 19,

1864, authorizing the people of the territory to form a constitution and state government, the people of Nebraska hereby accepting the conditions, in said act specified."

And, again, in the act of admission, we find, that special reference is made to said enabling act, and it is distinctly asserted, "that the said state of Nebraska shall be, and is hereby declared to be entitled to all the rights, privileges, grants and immunities," in said act contained, and "is hereby admitted into the Union on an equal footing with the original states, in all respects whatever." *General Statutes*, 72.

Now it is only within those particular places mentioned in the sixteenth subdivision of section eight, article one, of the federal constitution, that Congress can provide general police regulations for the government of the people. All other places are within the exclusive control of the state government, to whose legislation we must look for the punishment of all ordinary crimes and misdemeanors. From this it would seem clear that at the date of our admission into the Union, every portion of territory within the prescribed boundaries of the state, the Indian reservations included, became subject to its laws, and that for the punishment of all ordinary crimes, such as that under consideration, resort could alone be had to state laws, administered by the proper state courts. I conclude therefore that the commissioner assumed a jurisdiction which he did not in fact possess, and that all his acts were *coram non judice*, and merely void.

But while it is doubtless true, that these proceedings would not sustain an action for malicious prosecution, under the rule above recognized, still I think the petition states a good cause of action. In addition to all that would be required in that form of action, it is expressly alleged that in consequence of such prosecution, in fact,

in pursuance thereof Ives was arrested and thrown into jail, and put to great trouble and expense in procuring his release from said imprisonment. Thus a clear case of false imprisonment is set out, for which the plaintiff in error was surely liable, for it was by his direct procurement that the illegal warrant, under which the defendant in error was arrested and imprisoned, was issued. At the common law this would have sustained an action for trespass, this being the appropriate remedy for an arrest under a void process, or where the court had no jurisdiction of the subject matter of the suit, and the proceedings, therefore, were simply void. This being so, it follows that the several rulings of the court below, as to the sufficiency of the petition, were entirely correct and must be sustained.

But it is further claimed that the court erred in the admission of certain testimony to the jury. On this point the record shows, that the defendant in error offered in evidence the information made by Painter, on which the warrant for his arrest was issued, and under which he was incarcerated in jail. The making of this complaint was a material averment, introduced for the purpose of showing the connection of plaintiff in error with the arrest which followed, and had it been denied, must have been proved as a part of Ives' case. Not only is there no denial, however, on the part of Painter, that he made the affidavits, but he expressly admits it to be true, and asserts that he made it in the utmost good faith. While therefore this proof was wholly unnecessary, under the issues, it was not error to permit it to go to the jury. It could have done no possible harm.

The admission of the testimony of Rice Arnold, is also assigned for error. This testimony related to the arrest and imprisonment of the plaintiff, and I can see no good reason why it should not have been given to the

jury. But even if there were good reason for excluding it, no objection having been made, on the trial, to its admission, it is now too late to complain.

The court was requested, on behalf of the plaintiff in error, to instruct the jury, that in estimating damages, in case they found for Ives, they should not consider the fact of his imprisonment in jail at Blair. The instruction was refused and an exception duly taken. It was probably asked for in view of the testimony of the witness Arnold, who had sworn, in substance, that as sheriff of Washington county, he arrested the defendant in error and held him in custody, at the request of the deputy United States Marshal, to whom the warrant had been delivered for service, who had telegraphed to him for that purpose. I think it is sufficiently plain from the record, that whatever was done by Arnold was the legitimate result of the suing out of the warrant by the plaintiff in error. But even if the record were not entirely satisfactory on this point, inasmuch as it does not appear that all the evidence on this branch of the case has been preserved, the presumption is, that it was ample to warrant the instruction.

The court was further requested to charge that "it was the duty of the jury to find for the defendant if they believe he acted in good faith, and with an honest motive, in making the complaint." This was very properly refused. Mere good faith on the part of Painter, in making the affidavit by virtue of which Ives was wrongfully arrested and imprisoned, would constitute no defense in an action of this kind, for the injuries actually occasioned thereby. *Lawrence v. Lanning*, 4 *Ind.*, 194. *Bacon v. Town*, 4 *Cush.*, 217.

Several other exceptions were taken to the judges charge, but they did not seem to be relied on by counsel, and we shall not notice them. On the whole we think the law was laid down correctly, and seeing no rea-

son for disturbing the verdict, the judgment should be affirmed.

JUDGMENT AFFIRMED.

GANTT, J., concurred. MAXWELL, J., did not sit.

KATE M. GLORE, ADMINISTRATRIX OF THE ESTATE OF ROBERT GLORE, DECEASED, APPELLEES, v. GEORGE B., AND JULIA M. HARE, APPELLANTS.

Practice: APPEAL. An appeal taken on the 22d of August, from a judgment rendered February 21st, is not within the six months prescribed by the act of Mar. 3, 1873. Gen. Stat., 716.

MOTION to dismiss appeal.

E. F. Warren, for the motion, cited *Faure v. United States Express Co.*, 23 *Ind.*, 48. *Bigelow v. Wilson*, 1 *Pick.*, 485. *Verges v. Roush*, 1 *Neb.*, 345. *Wiggins v. Peters*, 1 *Metc.*, 127. *Avery v. Stewart*, 2 *Conn.*, 72. *Redgrave v. Baptist Church*, 1 *Neb.*, 345.

William McLennan, contra.

LAKE, CH. J.

The statute now governing appeals to this court was passed March 3, 1873, and section one of the act provides as follows:

"That in all actions in equity either party may appeal from the judgment or decree rendered, or final order made by the district court, to the supreme court of the State. The party appealing shall, *within six months after* the date of the rendition of the decree * * * * procure from the clerk of the district

court, and *file in the office of the clerk of the supreme court*, a certified transcript of the proceedings had in the district court, containing, etc., * * * and have the same properly docketed in the supreme court. *And on failure thereof*, the judgment or decree rendered * * * * shall stand and be proceeded in *as if no appeal had been taken.*"

For some purposes the whole term of court is considered as one day, no matter what time the act is done. We are however, of the opinion that the word "date" in this statute has reference to the day when the decree is actually rendered. In this case the decree was rendered Feb. 21, 1874, and transcript filed here August 22, 1874. Is this within the time prescribed by statute? We think not. The rule of computation is to exclude the first day, then count the full number of days or months to be computed. One month would terminate 21st day of March, and six months on the 21st day of August. This transcript is filed one day after, and is consequently too late. We can no more extend the time one day than six months. The law requires diligence. If the clerk below fails to make up the transcript in time, the appellant should appear here and suggest that fact. If he files transcript after the time prescribed, he cannot complain of negligence of the clerk.

APPEAL DISMISSED.

WINCHESTER D. SCOTT, PLAINTIFF IN ERROR, v. EMMA TWISS, AND GEORGE FAULKNER, SHERIFF, DEFENDANTS IN ERROR.

1. **Covenant**: INCUMBRANCES. A petition alleged that a guardian, from whom plaintiff's grantor derived title, "procured the sale of the premises by order of the proper court, as it is said, but as it now appears there is no record of any of the proceedings of such guardian sale, as required by law, and so far as the proper records show nothing appears properly and according to law." *Held*, on demurrer, insufficient as an allegation showing a breach of covenant against incumbrances.

2. ——: SEIZIN. If a grantor, at the time of conveyance, is in exclusive possession under claim of title, the covenant of seizin is not broken, until the purchaser or those claiming under him are evicted by title paramount.

ERROR to the district court of Richardson county.

The opinion states the case.

Schoenheit & Towle, for plaintiff in error.

I. At common law, a person could not convey property by covenant of seizin, without being in actual possession thereof; and hence that covenant run with the land and was a covenant for possession. This principle was supported by various acts of champerty in England, and in some of the states of this country, and by reason of which it was held by the courts in some states, that no action was maintainable before eviction. This principle has in terms been abrogated in this state. *General Statutes*, *Sec.* 31, *p.* 877. The courts, in most of the states, hold that the covenant of seizin is a covenant of indefeasible title—that the word is synonymous with right—that it runs with the title, and is broken as soon as made. *Rawle on Covenants*, 20, 26, 27, 48. *Richardson v. Dorr*, 5 *Ver.*, 21. *Mills v. Catlin*, 22 *Ver.*, 106. *Lockwood v. Sturdevant*, 6 *Conn.*, 385. *Com-*

stock v. Comstock, 23 *Id.*, 349. *Parker v. Brown*, 15 *New Hamps.*, 186.

II. In an action upon the covenant of seizin it is unnecessary to aver eviction or lay special damages. *Rawle on Covenants*, 54–56. *Abbott v. Allen*, 14 *Johns.*, 248. *Sedgwick v. Hollenbeck*, 7 *Id.*, 376. *Bird v. Allen*, 3 *English*, 368. *James v. Life Ins. Co.*, 6 *Blackf.*, 525. *Latham v. McCann*, 2 *Neb.*, 276.

III. The facts stated in the petition are sufficient to support this action, and the demurrer does not reach other defects. *Mills v. Rice*, 3 *Neb.*, 76.

Groff & Ames, for defendants in error.

I. The covenants in the deed of defendant Twiss, a breach of which the plaintiff seeks to establish in this action, are the covenants of "seizin" and "right to convey." A covenant against incumbrances is alleged, but there can be no pretense of its breach, as an incumbrance is not an outstanding paramount title or the converse, but is a burden or charge upon the premises, as a mortgage, lien for taxes, or, more doubtfully an easement. 1 *Bouvier's Law Dic.*, 468.

II. The petition shows that at the time of the sale by the defendant, she was in possession of and claiming title to the same under a valid deed thereof from one Charles Gagnan. This constituted a seizin of such a nature, that by a continuous and undisturbed possession by her and her grantee during the term of the statutory limitation, it will enure as an adverse possession and ripen into a perfect title, which is all that is required by the covenant. 2 *Washburn's Real Property*, 503. *Marston v. Hobbs*, 2 *Mass.*, 438. *Backus v. McCoy*, 3 *Ohio*, 220. *Hamilton v. Wilson*, 4 *Johns.*, 72. Consequently there is no breach.

III. If, however, the court is of the opinion that the outstanding paramount title (admitting for the sake of argument only that such a title exists) constituted a breach, then the covenant was broken and a cause of action accrued thereon at the time of the delivery of the deed, the breach being entire in the first instance and giving a personal cause of action. 4 *Kent Com's*, 471. *Bingham v. Wiederwax*, 1 *New York*, 509. 1 *Parson's Cont.*, 199. *Marston v. Hobbs*, 2 *Mass.*, 439.

MAXWELL, J.

The petition alleges that on the first day of April, 1867, the defendant, Emma Twiss, sold and conveyed by deed in fee simple to the plaintiff the north half of section nineteen, town one, range eighteen east, in Richardson county, and that she covenanted with said plaintiff that she was lawfully seized of said premises, that they were free from incumbrances, and that she had good right and lawful authority to sell and convey the same; that plaintiff paid, at the time of the purchase, the sum of three thousand dollars, and secured the balance, being one thousand dollars, by a mortgage on the premises; that a decree of foreclosure of said mortgage, for the sum of twelve hundred and sixty-four dollars and seventy-seven cents, was obtained in the fall of 1873; that an order of sale was duly issued to George Faulkner, sheriff of Richardson county, commanding him to sell said premises to satisfy the said decree; that at the time of the execution of said deed to plaintiff there was a defect in the title to said premises, and said defendant Twiss was not well seized of said premises and she had no good right and lawful authority to sell the same, and the same was not free from incumbrance, in this, to-wit: that one Emmanuel Buler, a half-breed Indian, by virtue of the treaty of Prairie Du Chien, had allotted to him said

premises, and in the year 1860 a patent was issued to said Buler for the same, he being at that time seven years of age; that in the year 1865, Eli Bedard, as guardian of said Emmanuel, procured the sale of the premises as such guardian, *by order of the proper court, as it is said, but there is no record of any of the proceedings of such guardian sale, as required by law, and so far as the proper records show, nothing appears properly and according to law*, except the guardian's deed for said tract of land to one Charles Gagnan, from whom Emma Twiss derived title, having purchased said premises and received a deed therefor; that Emma Twiss well knew, at the time of the sale of said premises to the plaintiff, of the defect in the record, but plaintiff was not aware of the same, but relied on the covenants and representations of said Emma Twiss; that said defendant resides somewhere in California, and plaintiff is informed and believes is entirely insolvent; that Emmanuel Buler is about the age of twenty-one years and is a resident of Canada, and plaintiff has no means of obtaining a title to said premises from him, and is in danger of being harassed, by a suit of said Buler or his assigns, for the possession of said premises, and without said record being procured and perfected, upon which said title rests, plaintiff is in danger of losing said premises; that said Emma Twiss is bound in equity to perfect said title, and should do so before being permitted to collect said purchase money, plaintiff being without any remedy at law to compel said Emma Twiss to refund to plaintiff any part of said purchase money, wherefore plaintiff prays for an injunction, etc.

The defendant demurred to the petition, on the ground that the facts stated in the petition are not sufficient to constitute a cause of action. The district court sustained the demurrer, and dismissed the petition, to which the

plaintiff excepted, and the cause is now brought to this court by petition in error.

A covenant against incumbrances is defined to be one which has for its object security against those rights to, or interest in, the land granted, which may subsist in third persons to the diminution in value of the estate, though consistent with the passing of the fee of the estate. 2 *Greenleaf Ev.*, *Sec.*, 242. 1 *Bouvier Law Dic.*, 406.

The mere existence of an incumbrance constitutes a breach of the covenant, without regard to the knowledge of the grantee of its existence, but a party, in order to recover, must distinctly set forth in his petition the facts on which he bases his claim for relief. A demurrer only admits the facts stated in the petition, not inferences or conclusions. No facts are stated in the petition in this case, that negative the regularity of the sale by the guardian. It is stated that there is no record of the proceedings prior to the deed from the guardian to Gagman, and "*as far as the proper records show, nothing appears properly and according to law.*" The object of the petition appears to be to require the defendant to perfect the record. The statute of 1871, (Laws 1871, 216) provides the mode of supplying lost records on the half-breed tract in Richardson county, and, independent of the statute, on a sufficient statement of the loss or destruction of the records, a court of equity would afford relief; but in this case there is no sufficient statement of facts showing an incumbrance.

It is contended by the plaintiff, that the defendant was not seized of the premises in question, at the time of conveyance, therefore the covenant of seizin is broken, and the plaintiff is entitled to recover whatever damages he may have sustained by reason of the breach. The defendant contends that the covenant of seizin, if broken at all, was broken at the time of the conveyance, and

does not run with the land, and is merely a chose in action, against which the statute of limitations has run.

It is a general rule of law, that where no interest whatever passes from a grantor by a conveyance, the covenants contained in the deed cannot run to a subsequent assignee. In such case, the covenants are merely personal and not assignable at common law. But if the grantor, at the time of the conveyance, was in the exclusive possession of the premises conveyed, under a claim of title, even if adverse to the owner, the covenant of seizin is not broken, until the purchaser or those claiming under him are evicted by title paramount. In such case, the covenant of seizin is a real covenant annexed to the land, and passes with it to the assignee, to be enforced by him who is evicted by title paramount. *Marston v. Hobbs*, 2 *Mass.*, 433. *Backus v. McCoy*, 3 *Ohio*, 221. *Kirkendall v. Mitchell*, 8 *McLean*, 145. *Collier v. Gamble*, 10 *Missouri*, 472. *Boothby v. Hathaway*, 20 *Maine*, 255. *Beddoe v. Wardsworth*, 21 *Wend.*, 120.

In this case, for aught that appears in the petition, the defendant Twiss was in the exclusive possession of the premises, under a claim of title, at the time of the conveyance to the plaintiff, and the plaintiff has remained in the quiet and peaceable possession thereof, ever since. Clearly, there has been no breach of the covenant of seizin. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

CHIEF JUSTICE LAKE, concurred. GANTT, J., did not sit.

HARRISON JOHNSON AND WIFE, PLAINTIFFS IN ERROR, v. W. J. HAHN, COUNTY TREASURER, DEFENDANT IN ERROR.

1. **Taxes**: CONSTRUCTION OF STATUTES: DUTY OF COUNTY TREASURER. A failure on the part of the county treasurer to first exhaust the personal property of a delinquent tax payer, under the act of June 6, 1871, (Gen. Stat., 916), renders a sale of the realty illegal and void.

2. ———: ENJOINING SALE. Equity will enjoin the sale of realty for taxes, under the statutes of this state, if the owner has personal property out of which such taxes can be collected.*

ERROR to the Douglas county district court.

On the fourth day of September, 1871, the plaintiffs in error commenced suit against the defendant in error to restrain the sale of certain real estate which the defendant as county treasurer offered for sale for the taxes of 1870. The petition alleged, that from the time such tax became due the plaintiffs had and still have an abundance of personal property in the county of Douglas, out of which the tax could have been made. It was also alleged, that in the year 1869, the county commissioners submitted to the electors of the county, a proposition to issue the bonds of the county to the Omaha and Northwestern and the Omaha and Southwestern Railroad Companies, to a certain amount; that upon canvass of the votes polled at said election, the said commissioners declared the proposition carried, and in January, 1870, issued the bonds to said railroad companies; that a part of the tax for which the land of plaintiffs was offered for sale, was to pay the interest on said bonds, and that the levy of such tax was unauthorized by law, illegal, and void. Various irregularities in respect to the proceedings of the assessor, and in respect to the proceedings of the county commissioners were also alleged in the petition.

*Overruling, *Hallenbeck v. Hahn*, 2 *Neb.*, 377.—REPORTER.

The defendant filed a general demurrer, which was sustained by the district court, and judgment dismissing the petition having been entered the cause was brought here by petition in error.

At the time of filing the petition in the court below, the legislative acts relative to the collection of taxes were as follows:

"SEC. 49. No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation under the laws of this state, to attend at the treasurer's office, at the county seat, and pay his taxes, and if any person neglect so to attend and pay his *personalty* taxes, until after the first day of May next succeeding the levy of the tax, the treasurer is directed to levy and collect the same, together with the costs of collection, by distress and sale of personal property belonging to such person, in the manner provided by law for the levy and sale of property on execution, and the treasurer shall be entitled to the same fees for services as are allowed by law to sheriffs for selling property under execution." *Laws of* 1869, 199.

"SEC. 50. On the first day of May of the year after which taxes shall have been assessed, all unpaid *state, county, school, precinct, city, and village taxes, except city* taxes *in cities of the first class*, shall become delinquent, and shall draw thereafter one per cent. per month interest, *which interest shall be collected the same as the tax so due, and it shall be the duty of the county treasurer, or any other person charged with the collection of delinquent taxes, to proceed as soon after the first day of May, as practicable, to make such delinquent tax out of the personal property of such delinquent, if any such property can be found; and this provision shall apply as well to the taxes assessed on real estate, and remaining unpaid, as to delinquent taxes assessed on personal property, and the remedy to be pursued shall*

be the same as provided in sections forty-nine and fifty-two of this act; and the treasurer shall be entitled to five per cent. additional compensation for making such collections, to be paid by such delinquent, and also the fees now prescribed by law." *Laws of* 1871, 81.*

"SEC. 51. Taxes upon real property are hereby made a perpetual lien thereupon, *commencing from the first day of March of the current year*, against all persons and bodies corporate, except the United States and this state." *Laws of* 1871, 82.*

"SEC. 52. When the treasurer distrains goods, he may keep them at the expense of the owner, and he shall give notice of the time of their sale, within five days after the day of the taking, in the manner that constables are required to give notice of the time of the sale of personal property on execution; and the time of the sale shall not be more than ten days from the day of the taking; but he may adjourn the sale, from time to time, for a period not exceeding three days, and shall adjourn once at least when there are no bidders; and in case of an adjournment, he shall put up a notice thereof at the place of sale." *Laws of* 1869, 200.

"SEC. 54. Whenever, in the collection of any district, town, city, or local tax, which may have been levied according to law, the collector is not able to make the tax by *distress and sale of personal property*, and real estate is to be sold for the same, it shall be the duty of the collector of the tax to send such delinquent list to the county treasurer on or before the fifteenth day of July of each year, and the county treasurer shall receive the delinquent list, and advertise the same at the same time he advertises the sale of real estate for delinquent taxes, as hereinafter provided."

* These sections are amendatory of sections 50 and 51 of the act of 1869, page 199. The amendments consisting of that part in italics.—REPORTER.

G. W. Ambrose and *E. Estabrook*, for plaintiffs in error, and *J. M. Woolworth*, intervening on behalf of parties holding bonds issued by counties to railroad companies, made substantially the same arguments as in *Hallenbeck v. Hahn*, 2 *Neb.*, 377.

J. C. Cowin, for defendant in error.

An injunction will not lie to restrain the collection of a tax upon the facts stated in plaintiffs' petition.

1. The burden of proof is on the plaintiff, and he must point out and establish the errors or defects upon which he grounds his claim to have the proceedings set aside, and if he fails to do so a court of equity will not interfere. *Bloodgood v. M. & H. R. R. Co.*, 18 *Wend.*, 32.

2. There has been such laches on the part of the plaintiff, in making no objection to the issue of said bonds, and permitting them thus to go into the hands of bona fide holders, that a court of equity will not now grant the relief prayed. *Kellogg v. Ely*, 15 *Ohio State*, 64.

3. A court of equity will not restrain the collection of an illegal tax on the ground that it is a lien on real estate and will cast a cloud upon the title, if the invalidity of the tax appears on the face of the proceedings to impose it, and no extrinsic evidence is requisite to show such invalidity. *Dows v. The City of Chicago*, 11 *Wall.*, 108. *Susquehanna Bank v. Supervisors of Broome Co.*, 25 *New York*, 314.

4. Nor will a court of equity restrain the collection of a tax, where the injury caused by the injunction will be greater than the benefit to plaintiff. 33 *Conn.*, 404. 14 *New Jersey Equity*, 452. 16 *Id.*, 442. 17 *Id.*, 114.

5. Where the statute provides a remedy, a court of equity will not interfere. *Macklot v. The City of Dav-*

enport, 17 *Iowa*, 379. *Brewer v. City of Springfield*, 97 *Mass.*, 154. *Lash v. Adams*, 10 *Cush.*, 252.

6. Plaintiff has a remedy under the statute. *General Statutes*, 924, *Sec.* (70.)

GANTT, J.

The questions raised by the allegations of the petition in respect to the issuance of the county bonds to the railroad companies, and in regard to the irregularities in the proceedings of the assessor and county commissioners, it is deemed not necessary to now bring into review in this court. The demurrer admits that the plaintiffs had, at the time the tax became due, and still have, sufficient personal property, out of which the tax could have been made, and the important question now for consideration is, is such a showing of personal property, owned by the plaintiffs, sufficient ground to restrain the sale of their real property, until this personal property is first exhausted? It is true, section forty-nine of the act of February 15, 1869, provides that if any person neglects to pay his *personalty* tax, the treasurer shall collect the same by distress and sale of personal property; but section fifty-four, however, provides that when in the collection of any town, city or local tax, the collector is *not able to make the same by distress and sale of personal property*, he shall send the delinquent list to the county treasurer, where it is to be collected in the manner set forth in that section. Section fifty-one makes taxes upon real property a lien thereon, without any distinction as to whether such tax is general or local, and then follows section fifty-two, which without any limitation of taxes upon real or personal property, provides that when goods are distrained, the treasurer may keep them at the expense of the owner until the sale of them, and further provides the manner in which the sale shall be made. This last section hardly seems to stand as an addendum

to section forty-nine, for it is general in its terms, and when taken in connection with section fifty-four, and the object and purpose of the revenue laws, viewed in the light of the rules of the common law in regard to the liability of lands for the payment of debts, it would seem pretty clear that the legislative intention was to first exhaust the personal property of the tax payer in the collection of taxes.

It is said that it is the policy of the law to resort to the land itself, only when all other remedies fail to enforce a satisfaction of the tax. And it would hardly be just to charge the legislature with the inconsistency of providing that in some cases the taxes upon realty should be made by distress and sale of personal goods, while in other cases, the payment of such taxes should, in the first instance, be enforced by the sale of real estate. It is not the duty of courts to so construe statutes. It is said that "statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make innovations upon the common law further than the case absolutely requires. This has been the language of courts in every age." 1 *Kent Com's*, 464. *Barry v. Mandell*, 10 *Johns.*, 586. And it has always been the doctrine of the common law to protect the domicile of the subject or citizen. By the common law only goods, chattels, and profits of lands could be taken on execution. 2 *Roll., Abr.*, 475. 2 *Bac., Abr.*, 686. And ever since lands by statute were first made liable to execution for the payment of debts, it was and still is the rule, that the personal property of the debtor must be exhausted before his real estate can be taken. It is not, therefore, to be presumed that the legislature, in providing for the collection of taxes, have so greatly departed from the long settled rules of the law. Would a fair construction and precise observance of the require-

ments of the act of 1869, require such a departure from the rules of law which has protected the real property of the subject and citizen in all ages of the world's history, where mankind have pretended to be governed by law?

It is "laid down as a universal rule in the collection of taxes assessed upon lands of residents, that the person or personal estate of the delinquent is the primary fund out of which the tax must be paid," and that this rule can only be changed by positive statutory law. *Blackwell on Tax Titles*, 171.

But however much any person may doubt the power of the treasurer, under the act of 1869, to first exhaust the personal property of the delinquent tax-payer in the county, there can be no doubt that under the first section of the act of June 6, 1871, which is amendatory of section fifty of the act of 1869, it is his imperative duty to do so. The tax stated in the petition became delinquent May 1, 1871, and the amendatory section makes it *the duty of the county treasurer*, as soon after the first day of May as practicable, to make the delinquent tax out of the personal property of the delinquent, and this provision applies to taxes assessed on real estate, and remaining unpaid, as well as to delinquent taxes on personal property. *General Statutes*, 916.

The act of June 6, 1871, took effect and went into force three months prior to the time fixed for the sale of the lands of the plaintiffs, and nearly two months before their lands were advertised for sale, and there is no saving clause in the act. So, if it be assumed that the act of 1869 required the sale of real estate for the payment of delinquent taxes, without first exhausting the personal property of the tax-payer in the county, then it is clear that such provision of that act, if not in direct terms, was by implication repealed by the act of 1871—some two months before the lands of plaintiffs were advertised for sale by the defendant.

It is said in *New London R. R. Co. v. Boston and Albany R. R. Co.*, 102 *Mass.*, 389, that "the law does not indeed favor a repeal by implication, but a later statute, containing provisions, though merely affirmative, plainly repugnant to those of the former statute, repeals it as absolutely as by a negative clause." *Goodyear v. Boston*, 20 *Pick.*, 410. *Whitney v. Blanchard*, 2 *Gray*, 208. Even the jurisdiction of a superior court may be ousted by necessary implication as well as by express terms. *Cole v. Knight*, 3 *J. R.*, 442. *Crisp v. Burberry*, 8 *Bing.*, 394. And in the case of *Pierpont v. Crouch*, 10 *Cal.*, 316, it is held that such repeal may be by implication as well as in direct terms, and that where two acts are passed at different times, not in terms repugnant, yet if it is clearly evident that the last one was intended as a revision or substitute of the first, it will repeal the first to the extent in which its provisions are revised or substituted. *Daviess v. Fairbrain*, 3 *Howard*, 636. *Sullivan v. The People*, 15 *Ill.*, 233. *Leighton v. Walker*, 9 *New Hamp.*, 59. *Dexter v. Allen*, 16 *Barb.*, 18. *Commonwealth v. Kimball*, 21 *Pick.*, 376. *Harrison v. Walker*, 1 *Kelly*, 32. *Sedg. on Stat. and Const. Law*, 2*d Edition*, 104. So in *Key v. Goodwin*, 4 *Moore and Payne*, 341, 351, Tindall, C. J., says, that "the effect of a repealing statute I take to be to obliterate the statute repealed as completely from the records of parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law." *Sedg. on Stat. and Const. Law*, 2*d Edition*, 108. *Williams v. County Commissioners*, 35 *Maine*, 348. *Butler v. Palmer*, 1 *Hill*, 333. *Underwood v. McDuffee*, 15 *Mich.*, 367. *Surtees v. Ellison*, 4 *Maul. & Sel.*, 586. The effect of such clause on a previous statute which imposes a pen

alty, or confers jurisdiction, even in civil cases, is not denied. In the first case the penalty is gone, though the repeal takes place while the prosecution for it is pending. *Yeaton v. The United States*, 5 *Cranch*, 281. *Rachel v. The Same*, 6 *Id.*, 329. *United States v. Passmore*, 4 *Dall.*, 372. *Commonwealth v. Kimball*, 21 *Pick.*, 375. In the latter, although the party may have instituted suit, and it be pending at the time of the repeal, the jurisdiction is gone, and with it all his rights. 1 *W. Black.*, 451. *Stœver v. Innell*, 1 *Watts*, 258.

According to these well established rules of construction of statutes, it is clear that the act of June 6, 1871, obliterated as completely from the records of the statutes as if the same had never existed, all authority, whether assumed by construction or given in direct terms, which the treasurer prior to that time had by statute, to sell real estate for taxes, without first exhausting the personal property of the tax payer. In the language of this last act, "*it shall be the duty* of the county treasurer" or person charged with the collection of the delinquent taxes, to proceed and make such tax out of the personal property of such delinquent; and so long as a sufficient amount of such personal property can be found in the county, and be distrained and sold for such tax, a sale of the land would be illegal and absolutely void. *Catterlin v. Douglas*, 17 *Ind.*, 214. *Rathburn v. Acker*, 18 *Barb.*, 333. *Dallam v. Oliver's Executors*, 4 *Gill*, 446. *Gouveneur v. Mayor of New York*, 2 *Paige, Ch.*, 437. *Jackson v. Sheppard*, 7 *Cow.*, 89. *Parker v. Smith*, 4 *Blackf.*, 70.

The express purpose of the statute is, and it seems to be the universal rule of law unless changed by positive statute, that if coercive measures become necessary they shall, in the first instance, be directed to the personal property, and the real estate on which the tax is imposed shall not be resorted to, until the personal

property is first exhausted; and this requirement of the law must be strictly pursued. In *Thacker v. Powell*, 6 *Wheat.*, 125, it is said, "that no individual, or public officer, can sell and convey a title to the land of another, unless authorized to do so by express law, is one of those self evident propositions to which the mind assents without hesitation; and that the person invested with such power must pursue with precision the course prescribed by law, or his act is invalid, is a principle which has been repeatedly recognized in this court."

It need only be further observed that the act of June 6, 1871, having prescribed in direct, positive, terms, the course which the treasurer must pursue, in the collection of delinquent taxes, it excludes all other modes of procedure. *Sioux City & Pacific R. R. v. Washington Co.*, 3 *Neb.*, 42. Hence the course pursued by the defendant in offering plaintiffs' land for sale for taxes, when it is admitted that they had sufficient personal property in the county, out of which such tax could have been made, was without authority of law, and would only have cast a cloud on the title of the plaintiffs.

The next inquiry is, will a court of equity interfere and restrain such sale of real estate? It cannot be doubted that a court of equity has power to order to be delivered up and canceled a deed made for the property on such sale; and is not the jurisdiction of the court to enjoin the sale co-extensive with its jurisdiction to set aside the deed and order it to be canceled? In *Pettit v. Shepherd*, 5 *Paige, Ch.*, 501, it is held that the court having this jurisdiction to set aside a sheriffs deed as forming an improper cloud upon title to real estate, it follows as a necessary consequence that the court has jurisdiction to prevent such shade from being cast upon the title, when the defendant evinces a fixed determination to proceed with the sale upon execution.

And it is a principle long and well established that though there may be a remedy at law, yet a court of equity has an undoubted jurisdiction to interfere by injunction, in cases where public officers are proceeding illegally and improperly, under claim of right, or where the exercise of such jurisdiction is necessary to prevent multiplicity of suits. *Mohawk & Hudson R. R. Co. v. Artcher*, 6 *Paige, Ch.*, 88. *Belknap v. Belknap*, 2 *Johns., Ch.*, 472. *Livingston v. Livingston*, 6 *Id.*, 497. *Hamilton v. Cummings*, 1 *Id.*, 516. The same doctrine is held by the courts of England, and in *Hush v. Trustees of Morden College*, 1 *Vesey*, 188, Lord Hardwicke allowed an injunction to restrain commissioners from entering upon the lands of another to dig gravel, as it was not within their authority, although by such act they were as much trespassers as private persons and might be responsible at law, because the remedy at law would not be equal to the remedy in a court of chancery. So in *Shaud v. The Aberdeen Canal Co.*, 2 *Dow.*, 519, Lord Elden held that if the commissioners exceeded their powers, they became trespassers, but chancery would restrain them by injunction, and keep them strictly within the limits of their powers.

In *Burnet v. Cincinnati*, 3 *Ohio*, 87, the bill alleged that under proceedings illegal and void, but under a legal color, the defendant was about to sell part of the real estate of complainant, for the payment of a tax, and prayed an injunction. The injunction was allowed and maintained. *Culbertson v. Cincinnati*, 16 *Ohio*, 574. *Jones v. Same*, 18 *Id.*, 323. *Knowlton v. Supervisors*, 9 *Wis.*, 417. *Kinyon v. Duchene*, 21 *Mich.*, 500. *Williams v. Penny*, 25 *Iowa*, 438. *City of Jefferson v. Patterson*, 32 *Ind.*, 140.

Now according to these well settled principles, I think it is clear when the defendant, under the facts admitted in the case at bar, evinced his fixed determi-

nation to sell the lands of the plaintiffs for taxes, such proceedings on his part was sufficient to call into exercise the jurisdiction of the court to prevent by injunction such sale, which could only result in a conveyance, creating a cloud upon the title of the plaintiffs. *Pixley v. Higgins*, 15 *Cal.*, 132.

The judgment of the district court must be reversed, and the cause remanded for further proceedings.

JUDGMENT REVERSED.

MAXWELL, J, concurred. LAKE, Ch. J., dissented.

THE PEOPLE OF THE STATE OF NEBRASKA, EX REL., CHRISTOPHER PUTNAM AND AMOS D. GEORGE V. COMMISSIONERS OF BUFFALO COUNTY, AND THE KING BRIDGE COMPANY, OF TOPEKA, KANSAS.

1. **County Commissioners**: ERECTION OF PUBLIC BUILDINGS AND OPENING ROADS. In letting contracts for the erection of county buildings, and for the improvement of such roads as may be of general necessity, county commissioners must award the same to the lowest responsible bidder.

2. ——: BRIDGES: LETTING CONTRACTS FOR. Public bridges are parts of public roads, and the provisions of Sec. 16, Chap. 67, Gen. Stat., requiring contracts for the construction of roads to be let to the lowest competent bidder, apply to the letting of contracts for the erection of bridges; and it is the duty of county commissioners to adopt plans and specifications, in advance of the letting, as a basis on which bids may be received. LAKE, CH. J., *dissenting*.

3. **Construction of Statutes.** Whenever a statute requires the performance of an act for the sake of justice or the public good, the word "may" is the same as "shall," and imposes a positive and absolute duty.

4. **County Commissioners**: ACTION AGAINST. Where precinct or county bonds are placed at the disposal of county commissioners for the purpose of erecting a wagon bridge over the Platte river, it is their duty to let

the contract for the construction of the same to the lowest responsible bidder; failing to do so, such bidder or a tax-payer of the county may maintain an action to compel them to so award the contract.

5. ——: The commissioners have no authority to require each bidder for the erection of a bridge to accompany his bid with his own plans and specifications, they adopting such plans as they see fit and accepting the bid accompanying the same, no opportunity being given to others to bid on such plans. Such conduct opens the door to corruption, favoritism, and fraud; and a contract awarded on such a letting is void.

THIS was an application to this court for a writ of mandamus. It was based upon affidavits setting forth that the county commissioners of Buffalo county, having determined to erect a bridge across the Platte river at Kearney Junction, for the erection of which precinct bonds had been voted, met on the 29th day of July, 1873, not as a board of commissioners, but informally, and examined plans and specifications submitted to them by the King Wrought Iron Bridge Company and by Henry T. Clarke; that on the following day the commissioners being in regular session, after considering the respective bids, awarded the contract for the erection of the bridge to the King Company for $13.00 per lineal foot, whereas the bid of Henry T. Clarke was for $8.75 per lineal foot; and the relators prayed that said award be set aside and the contract be made with Clarke.

An alternative writ was allowed and upon the return day thereof, the commissioners filed their answer thereto in substance as follows:

"The defendants say that they met unofficially on the 29th day of July, 1873, to receive bids for the construction of said bridge; that the said Henry T. Clarke and George E. King met with these defendants on that day for the purpose of making bids for the erection and construction of said bridge; that Clarke was there in person to bid on his own behalf and King to bid on behalf of the King Wrought Iron Bridge Company of Topeka Kansas; that prior to that time said parties were

notified by the said defendants to furnish their own plans and specifications to accompany their respective bids, and each of them; that the commissioners would not furnish plans and specifications for said bridge, but desired to have the bidders for the contract of erecting and constructing the same to furnish their own plans and specifications; that at the time of making the bids of the said Clarke and the said King it was understood between them and each of them, and the said commissioners, that the said Henry T. Clarke and the said George E. King were each to furnish plans and specifications to correspond with each of their respective bids; that there was no understanding or agreement of any kind or nature whatever between the said Clarke and the said King or either of them, and the said commissioners, by which bids were to be made and received with reference to any particular plan; that said commissioners did not agree, on the 29th day of July, 1873, upon the character of said bridge, but that both Clarke and King were at liberty to submit any kind of plans and specifications, and many kinds of plans and specifications, accompanying each of the same with the price thereof, and were requested to furnish various and different plans and specifications together with the corresponding price of each separate plan and specification for said bridge so that the commissioners might have an opportunity to select from the various and different plans and specifications with the corresponding prices, the best plan and specification for the price; that the commissioners prior to the 29th of July, 1873, and on that day before any bids had been made, stated to said Clarke and the said King that they reserved the right to reject any and all bids; that it is wholly untrue, as alleged by the relators, that the defendants on the 30th day of July, 1873, sitting as the county commissioners of the said Buffalo county, received bids upon, or with reference to, any

particular plan or character of bridge, but that all bids received on that day, and before that time, were received without reference to any particular plan or character of bridge except such plans and specifications as accompanied each bid; that prior to the 29th day of July, 1873, and on that day, and before any bids were received, it was stated by the commissioners in the presence and hearing of the said Clarke and the said King and to each of them, that bids for the erection and construction of said bridge must be made for bonds, and not otherwise; that the commissioners did not wish to sell the bonds themselves and would not sell them; that whoever built the bridge must take Kearney precinct bonds for his pay, and the bonds of said Buffalo county, if $30,000.00 in bonds of said precinct should not be sufficient, provided always that the electors of Buffalo county should vote the additional bonds if the same should be required; that Clarke contrary to the notice previously given him, and contrary to repeated and frequent requests made to him by the commissioners to bid to erect and construct said bridge for a certain price in bonds, made three bids to erect and construct the bridge each of which was a bid for cash and not for bonds, and that said Clarke wholly failed to make any bid whatever in bonds; that it is untrue as alleged by the relators that Clarke at the time he made his bids for $8.75 per lineal foot included therein an offer to receive the bonds of Kearney precinct and the bonds of Buffalo county or either of them in payment of said work; that after the contract was awarded, Clarke for the first time offered to receive said bonds in payment for the work at less than par value, and that he made no offer to receive the same at a discount or otherwise until after the contract had been awarded to the King Bridge Company."

It was also alleged in the answer that the plans offered by Clarke were vague, uncertain and indefinite, while

those of the King Company were good and sufficient plans and specifications upon which to erect a suitable bridge; that the bonds of the precinct had been delivered to the King Company, and by them sold to third parties; and that the bonds were delivered long prior to the application for this writ, and that the company had constructed under their contract about one-third of the bridge.

Upon the coming in of the answer, considerable testimony was taken orally before the court. The different plans proposed by Clarke were offered in evidence, and the facts relative to the meeting of the commissioners and their acceptance of the bid made by the King Company proven as set forth in the opinion of the court.

The statutes relative to the powers and duties of county commissioners in regard to roads and bridges are found on pages 953 and 954, General Statutes 1873, and are as follows:

"SEC. 15. One-third of all moneys paid into the county treasury in the discharge of road tax, shall constitute a county road fund, which shall be at the disposal of the county commissioners for the general benefit of the county, for road purposes; the other two-thirds of all moneys paid into the county treasury in discharge of road tax, shall constitute a district road fund, which shall be expended only in that district from which it was collected, and only for the following purposes:

First. For the construction and repair of *bridges and culverts.*

Second. For the payment of damages of the right of way of any county road.

Third. For the payment of wages of supervisors, and for the expense of procuring the necessary guide-boards.

Fourth. For the payment of the wages of commissioners of roads, surveyor, chainmen, and other persons engaged in locating or changing any county road.

Provided, however, that the county commissioners shall have power, upon receiving a petition signed by at least two-thirds of the qualified electors of any district, to order that any road moneys in the treasury belonging to the district be expended in any other district, under the direction of the supervisor thereof.

Provided, further, that the county commissioners may levy an additional cash tax for bridge purposes, not to exceed five mills on the dollar of the assessed value of all taxable property, to be levied and collected as other taxes, which special tax, when so collected, shall be exclusively applied to building or repairing permanent and substantial culverts or bridges, under the direction of the county commissioners."

"SEC. 16. The county commissioners may let contracts to the lowest competent bidder for the improvement of such roads as may be of general necessity, and pay for the same by orders on the county treasury, payable out of the county road fund; but no contract shall be entered into for a greater sum than double the amount of money on hand in the county road fund; and every bidder before entering on any work pursuant to contract, shall give bond to the county, with at least two good and sufficient sureties, in any sum double the amount of the contract; which bond shall be approved by the county commissioners, conditioned for the faithful execution of the contract."

J. M. Woolworth, for the relators.

Hamer & Conner, for the commissioners, contended, *inter alia*, as follows:

I. The application for the writ is insufficient because the affidavits on which the application is made fail to show that the relators are tax payers or have any interest in the letting of the contract. The affidavits allege

the adoption of a certain plan by the commissioners, but fail to show that either of the bids of Henry T. Clarke were made upon the plan so alleged to have been adopted.

II. A rule to show cause why a mandamus should not issue to an inferior court is never granted unless a *prima facie* case is presented requiring the interposition of the supreme court. *Ex parte Taylor*, 14 *Howard*, 3.

III. If Clarke ever had any claims to the contract, he forfeited them by delay. For aught that appears in the writ the bridge was built and paid for months ago. The delay is fatal. *Kellogg v. Ely*, 15 *Ohio State*, 64. *Ingerson v. Berry*, 14 *Id.*, 322.

IV. The testimony discloses the fact that the commissioners considered the plans and specifications of Clarke insufficient and unfit for a bridge. When the bid would be such as to defraud the county or state the board may use discretion, and mandamus will not lie to compel the board to award such contract. *The People v. The Contracting Board*, 33 *Barb.*, 511. *Id.*, 33 *New York*, 382.

V. The statute confers authority to determine the merits of the proposed respective structures of competing bidders for public buildings and bridges upon the county commissioners, and having general authority to contract for and on behalf of the county this power to select must be with the commissioners. A lawful discretion vested in an individual officer or corporation can not be destroyed or limited by the writ of mandamus. *Ex parte Black*, 1 *Ohio State*, 30. *Moses on Mandamus*, 104. *The United States v. Guthrie*, 17 *Howard*, 284.

J. C. Cowin, for the King Bridge company argued that the writ did not state facts sufficient to warrant the issuance of a peremptory writ of mandamus, and that the King Company was an improper party to this proceeding.

MAXWELL, J.

A board of county commissioners are held to be a *quasi* corporation, a local organization which for purposes of civil administration is invested with a few of the functions characteristic of a corporate existence. *Commissioners of Hamilton County v. Mighels*, 7 *Ohio State*, 115. A grant of powers to such a corporation must be strictly construed. *Id.*, *Treadwell v. Commissioners*, 11 *Id.*, 190. And in a recent case this court held that "the grant of powers to such officers must be strictly construed, because when acting under special authority they must act strictly on the conditions under which the authority is given. They can only exercise such powers as are especially granted, or as are incidentally necessary for the purpose of carrying into effect such powers; and where the law prescribes the mode which they must pursue, in the exercise of these powers, it excludes all other modes of procedure." *The Sioux City and Pacific R. R. v. Washington County, etc.*, 3 *Neb.*, 42.

Section 9 of Chap. XII, Revised Statutes, 1866, in force at the time this contract is alleged to have been entered into, provided for advertising for bids for building a court house, jail, and offices for register of deeds and county clerk, the advertisement for bids to contain plans and specifications for such buildings, and the contract to be let to the lowest responsible bidder.

An act approved October 29, 1858, provided the mode of locating, changing, or discontinuing county roads.

Laws 1858, 229. Section four of the act supplemental to the same, approved January 11, 1860, provided that county commissioners "may let contracts to the lowest and best bidder for the improvement of such roads as may be of general necessity, and pay for the same by orders on the county road fund, but no contract shall be entered into for a greater sum than double the amount of the fund on hand at the time of letting the same." *Laws* 1859, 51. In 1862 the law was again amended, and section sixteen as it now exists was adopted. *Laws* 1861-62, 80. In 1866, section fifteen was further amended to allow county commissioners to levy an additional cash tax for bridge purposes, not to exceed five mills on the dollar on the assessed valuation, for building and repairing permanent and substantial culverts and bridges, under the direction of the county commissioners. *Revised Statutes* 1866, *page* 346.*

The word "road" is generally applied to highways, and as a generic term it includes highway, street, and lane. *Webster Dic.*, 1144. A public bridge is a part of a road, and this without regard to its length or cost. It is a well known fact that a very large proportion of the expenditure necessary to be made by the several counties for the improvement of roads in this state, is required for the construction of bridges and their approaches, and we cannot presume that the legislature intended the law to apply to grading alone, and that bridges and their approaches should be excepted from the operation of the law.

The fund in this case is derived from precinct and county bonds placed under the control of the county commissioners of Buffalo county for the purpose of erecting a public bridge over the Platte river. In the expenditure of this fund, the commissioners should be governed by the same rules in letting the contract, that they would

*Same section now in force. Gen. Stat., 953, 954. *Ante p.* 154.

be in letting contracts for public bridges to be paid for out of the road fund. But it is contended that the provisions of the statute that the commissioners *may let* contracts to the lowest responsible bidder is simply permissive, and not mandatory. Judge Dillon says, "the cases sustain the doctrine that what public corporations or officers are empowered to do for others, and which is beneficial to them to have done, the law holds they ought to do. * * * The power in such cases is conferred for the benefit of others and the *intent* of the legislature, which is the test in such cases, ordinarily seems, under such circumstances, to be, to impose a positive and absolute duty." *Dillon on Municipal Corporations, Sec.* 62. Wherever a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as *shall. Carth.*, 293. *Salk.*, 609. *Skin.*, 370.

In the case of *The People, ex rel., v. Weston, Auditor*, 3 *Neb.*, 323, the rule is laid down that in the interpretation of statutes, "the law is the best expositor of itself, that every part of it is to be taken into view for the purpose of discovering the mind of the lawgiver, that the details of one part may contain regulations and subject matter restricting the intent of general expressions or words in another part of the same law, and hence, that every part of the law is to be considered and the legislative intent is to be extracted from the whole of it." But it is contended that the fund derived from the tax of five mills on the assessed valuation, to be expended under the direction of the county commissioners in the construction of bridges and culverts, is excepted from the operation of the law requiring contracts for the improvement of roads to be let to the lowest competent bidder, and that the law applies exclusively to contracts which are to be paid out of the road fund. It is only necessary to say that the amendment providing for a tax of five

mills on the dollar, to be expended for bridges and culverts, took effect July 1, 1866, as an amendment to the *road* law, and the fund so provided is an additional *road* fund to be exclusively applied, however, in the erection and reparation of bridges and culverts. The money is to be expended under the direction of the county commissioners. A certain portion of the fund known distinctly as the road fund is apportioned among the several road districts, to be expended under the direction of the supervisors thereof; and the provision that the fund, raised by the tax of five mills for bridge purposes, should be expended under the direction of the county commissioners, is evidently intended to prevent any portion of that fund from being distributed to road supervisors for the use of their respective districts. Taking the entire law together, we think it is very clear that the provision requiring contracts for opening and improving roads to be let to the lowest competent bidder, applies to all contracts of that kind, including contracts for the erection of bridges and culverts, they being a part of the road. So, from the necessity of the case, it follows, that plans and specifications must be adopted in advance as a basis on which bids may be received.

In this case it appears from the evidence that the commissioners met in secret session, several miles away from the county seat, on the day preceding that for letting the contract; that bids were there received, the commissioners requiring each bidder to furnish his own plans and specifications, they assuming to adopt such plans as they saw fit and to accept the bid accompanying the same. It also appears from the evidence that they met at the county seat for a short time on the day on which the contract was to be let, and accepted the highest bid made, that a bond was accepted by the commissioners for the completion of the contract, which is now claimed to be no security whatever, and thirty thousand

dollars of the bonds of the precinct delivered to the contractor, without authority and before any part of the bridge had been erected; and that is now urged as a reason, in this court, why the King Company should be permitted to build the bridge in question, otherwise, it is claimed, the bonds will be lost to the precinct. No equities can be founded on the wrongful delivery of the bonds, even if they have passed into the hands of innocent purchasers, and the commissioners are individually liable for any wrongful application of the funds in their hands. But a contract made in defiance of law cannot be made valid by an attempted payment of the consideration in advance.

There is no doubt of the right of the lowest responsible bidder, or of a taxpayer of the proper county in a proper case, to maintain an action of this kind, and in no other way can the rights of bidders, and the public, be fully secured and enforced. In the case of *Boren & Guckes v. Comr's of Darke Co.*, 21 *Ohio State*, 323, the court held: "The power conferred by the statute was to award the contract to the lowest bidder; this they have not done, and the power to do this remains to be exercised by them. To hold that an unauthorized award of the contract exhausted their power to make the only award and contract they were authorized to make, would afford another easy mode by which the commissioners might nullify the statute." To permit commissioners to accept plans and bids thereon at the same time, they accepting such as they approve, prevents all competition and opens the door to corruption, favoritism and fraud, and is against the policy of the law. *Boren v. Comr's*, 21 *Ohio State*, 323. The estimated cost of this bridge is at least fifty thousand dollars. Is it not remarkable that plans and specifications were not prepared in advance, and bids invited thereon? There being no basis on which bids could be received no valid

contract can be founded thereon; therefore the contract made by the county commissioners with the King Bridge Company is void, and there being no valid contract with the King Company, none can be awarded to Clark.

Mr. Justice Gantt concurred in the foregoing opinion. Chief Justice Lake concurred in the judgment denying the writ, but dissented from the views taken by the majority of the court upon the construction of the statute, and filed the following opinion.

Lake, Ch. J.

While I am clearly of the opinion that the prayer of the relators must be denied, it is impossible for me to give my assent to several of the propositions advanced by a majority of the court. I will therefore, very briefly, give the reasons why, in my opinion, this writ should be withheld.

From the pleadings and testimony, it appears that the commissioners of Buffalo county, being desirous to construct a wagon bridge across the Platte river, invited proposals therefor without having previously determined the precise kind or description of bridge they would have, leaving it to the respective bidders to furnish, together with their bids, plans and specifications of their own, from which the commissioners would select the one, which under all the circumstances they should consider the best. On the 29th day of July, 1873, bids were made by the King Wrought Iron Bridge Company and by Henry T. Clarke, respectively, upon substantially the same general plan, but differing in the details so widely as to leave it quite doubtful, and difficult to determine, which one would, in fact, prove to be the more desirable, or valuable to the county, in case it were adopted.

The bid of the King Wrought Iron Bridge Company was for thirteen dollars per lineal foot, payable in the

bonds of Kearney precinct, which it seems had been voted for this purpose, while that of Clarke was for eight dollars and seventy-five cents per lineal foot, but payable in money. Subsequently, however, on the same day, Clarke offered to take the bonds in payment at eighty cents on the dollar, which made his bid the lowest, provided his bridge were equally as good as that of his competitor. Without very much reflection, apparently, and in exceeding great haste, the bid and plans of the King Wrought Iron Bridge Company were accepted by the commissioners, the contract in question entered into, and the bonds of said precinct actually delivered in payment before a single blow towards the construction of the bridge had been struck. But, notwithstanding the fact that the testimony shows, very satisfactorily to my mind, that the course pursued in this instance by the commissioners was not at all calculated to promote the best interests of the people, yet I do not think such a case is made out as calls for, or would at all justify, the application of the corrective which is here sought.

In my opinion, the radical difficulty in respect of the control of county commissioners in the erection of bridges lies in the almost unlimited discretion with which our statutes vest them in dealing with this subject. And it is in this particular, that I find myself wholly unable to agree with my associates. In many of the states we find ample provision made by statute for the guidance and control of officers intrusted with the erection of public buildings, bridges, and the like, by which they must advertise for a certain time, and in a certain manner, for bids to do the work according to plans and specifications previously agreed upon. But, in respect of bridges, especially, we have no similar statute in this state; the whole matter is left to the wisdom and sound discretion of the commissioners of the several counties, which discretion, so long as exercised in good faith, is

entirely beyond the reach or control of any authority whatsoever. But, while this is true, it by no means follows, if it be clearly shown that the commissioners are proceeding corruptly in the exercise of such discretion, to the prejudice of the public interests, or of individual rights, that they may not be enjoined by the courts, or compelled to answer in damages for their malfeasance.

In the opinion of my associates, section 16, chap. 67, General Statutes, requires that contracts for the erection of permanent bridges within a county, shall be let to "the lowest competent bidder" and that this necessitates the previous procurement of plans and specifications to which all bids must conform. I do not so understand this provision. It is clear to my mind that this section has reference solely to such work, grading, turnpiking, and the like, which may be paid for out of the county road fund proper, and not to those expensive, permanent bridges, referred to in the last proviso of the preceding section, which are to be built "under the direction of the county commissioners," and paid for out of a fund raised especially for that purpose, as in said section provided.

There is another consideration that, in my opinion, ought to have much weight in the determination of this particular question, and lead this court to hesitate long before announcing the conclusion that all contracts for permanent bridges must be let to the lowest bidder. It is a fact of common notoriety that most, if not all, of the very best bridges are patented, and can only be built by the respective patentees, or the person who has purchased the right for the particular state or territory. In such case it is clear that there can be no competition as to the building of a bridge of any one particular patent; and it would be an act of folly for the commissioners to announce that they had settled upon a structure which only a single individual, or company had the right to build, and

then to advertise for proposals, in the expectation of competition, for its erection. The only sensible course to pursue in such case would be the one ostensibly taken by these commissioners, to invite competition between the owners of the most valuable patents, leaving the selection to be made after due consideration of their respective merits, as well as the cost of each. This I believe to be the course that a prudent, careful man would take, in such case, if the matter concerned him alone, and I can see nothing in our statutes which ought to prevent the commissioners of a county from acting in like manner, in behalf of the public.

On the argument of the case, no question was raised, either as to the legality of the fund out of which payment was to be made for the bridge, or as to the right of the commissioners to deal with it. But, notwithstanding this fact, I cannot forbear the suggestion that the authority of Kearney precinct to issue these bonds, to my mind is not altogether clear, and may admit of very serious doubt. Should it be here adjudged that these bonds were issued without authority, it would of course be fatal to the claim of the relators. Inasmuch, however, as I am satisfied, that for other reasons, already stated, the writ must be denied, and for the further reason that no argument has been heard thereon, I forbear the expression of an opinion on this point, at this time.

For the reason therefore, that under our statutes the duties of county commissioners in the building of permanent bridges, are chiefly of a judicial, or discretionary character, especially so of the particular kind of structure they will have, I do not think this court has any authority to compel them to adopt Clarke's plan, or any other definite description of bridge, but that in this matter they should be left to the exercise of their own judgment entirely.

For these reasons, I concur in the opinion, that the

peremptory writ must be withheld, and the case dismissed at the cost of the relators.

WRIT DENIED.

JOHN MONTEITH, DAVID MAY, F. A. LEONARD AND E. JULIUS SCHMIDT, PLAINTIFFS IN ERROR, v. LOUISA E. BAX, DEFENDANT IN ERROR.

Fraudulent Conveyance: EVIDENCE. The question of intent, in case of an alleged fraudulent conveyance of property by a husband to a wife, is one of fact for submission to a jury.

LEONARD and Schmidt brought an action in the district court of Lancaster county, against Adam Bax, husband of Louisa E. Bax, the defendant in error, in which an order of attachment was issued and levied on a promissory note, executed by one George Douglas to the said Louisa E. Bax, Douglas being served as garnishee. A trial of the right of property was had under the provisions of Sec. 996–998 of the civil code, which resulting in favor of the defendant in error, a bond for the payment to her of all damages she should sustain by reason of the detention and sale of said note, was given with John Monteith and David May as sureties. At the April term, A. D. 1872, of the district court, judgment was obtained by Leonard and Schmidt against Adam Bax for $832.69 and costs, and it was ordered by the court that Douglas pay in to the clerk the amount then due by him on the note attached, to abide the further order of the court. It does not appear, from the record brought here, that anything further was done in the cause. Louisa E. Bax, the defendant in error, then brought suit on the bond, given as above stated, against

the sureties, Monteith and May. Leonard and Schmidt were brought in as defendants upon their own motion. The petition of Louisa E., alleged that she had sustained damages to the full amount due and unpaid on the Douglas note, and also that said note was her own separate property. These allegations were denied by the answer, which alleged, *inter alia*, that in law the said note was the property of her husband, Adam Bax; that the note was given for personal property sold to George Douglas, which, together with other personal property and book accounts, altogether of the cash value of two thousand and three hundred dollars, were on the 30th day of May, 1871, by deed of conveyance, assigned and transferred by said Adam Bax to his wife Louisa E., to hinder, delay and defraud his creditors, and especially the said Leonard and Schmidt.

There was a trial, and upon the evidence adduced, the court below refused to submit the question of fraud to the jury, but directed them to find a verdict for Louisa E. The defendants, Monteith, May, and Leonard & Schmidt, then brought the cause here by petition in error.

Seth Robinson, for plaintiffs in error.

Our statute expressly provides that fraudulent intent shall, in all cases of this kind, be a question of fact and not of law. This provision, of itself, is sufficient to dispose of the case. *Sec.* 20, *Genl. Stat.*, 395. Whatever the opinion of this court or the court below may be, if the question of fact were submitted to them, it is plain upon principle and authority, that the whole question of fraud or no fraud is for the jury upon all the facts of the case. *Bump on Fraud, Con.*, 69, 115, 137, 148. *Allen v. Cowan*, 23 *New York*, 502. *Babcock v. Eckler*, 24 *Id.*, 623. *Cole v. White*, 23 *Wend.*,

511. *Seward v. Jackson*, 8 *Cow.*, 416. *Smith v. Acker*, 23 *Wend.*, 653. *Hanford v. Archer*, 4 *Hill.*, 271. *Kerr on Fraud and Mistake*, 204.

Philpott & Cantlon (with whom was also *T. M. Marquette*), for defendant in error.

It is not the province of a jury, under Sec. 20, Chap. 25, Gen. Stat., page 395, to determine or find whether a certain transaction is, or is not, fraudulent. It is a question of fact for the jury to determine if there be the existence of a certain intent, and for the court to declare whether such intent be fraudulent or otherwise. *Gere v. Murray*, 9 *Minn.*, 305.

The question of error assigned is not, whether the court erred in not leaving it to the jury to say if there be the existence of a certain intent, or for it to find the facts that constitute the fraud, but to say whether the transaction be fraudulent—the very matter which, if it had been submitted, would have been error itself; therefore the court did not err in not leaving it to the jury to say that the said transaction was fraudulent.

Fraud is a question of law. It is the judgment of the law on facts and intents. *Sturtevant v. Ballard*, 9 *Johns.*, 337.

GANTT, J.

On the trial of this cause, it was admitted that the personal property conveyed by Adam Bax to his wife was of the reasonable cash value of two thousand dollars, besides the book accounts of about three hundred dollars; that when Adam and his wife settled at Lincoln, in the fall of 1868, they were both destitute of any means, and were dependent on his daily labor for a livelihood; that he commenced the business of a shoemaker, and at different times purchased of various firms and persons

merchandise, consisting of boots, shoes, leather, and material to be used in his business, being all the time largely indebted on such purchases until April, 1871, when his whole indebtedness amounted to the sum of $2,546.21; and that all the property which the said Adam and his wife possessed or owned, other than that transferred by him, under the deed of conveyance to his wife, did not exceed $1,450, in value. Adam and his wife each testified, that before their marriage she was possessed of some money in her own right, which she received from the estate of her former deceased husband; that after their marriage, and during the year 1865, she loaned to her husband at two different times, five hundred dollars of this money, taking his due-bills for the same; that afterwards she loaned to him other sums, making in all the sum of $827; and that while residing in Tennessee in 1866, these due-bills, and the house in which they resided, were burned and wholly destroyed.

The court instructed the jury to "bring in a verdict for the plaintiff" (now defendant in error) "for the amount due on the note." It is urged, that in thus directing the jury to find a verdict for the defendant in error, the court erred.

When we consider that Adam Bax and wife settled at Lincoln without any pecuniary means whatever; that he purchased the goods to carry on his business mainly on credit, and became largely indebted therefor; that he conveyed to his wife property in value greatly disproportioned to the amount claimed to have been loaned to him by her; that she was acquainted with all his circumstances during the time he was carrying on business; and also consider all the transactions between them both at the time of the transfer of the property to her and preceding that time, as is shown by the evidence, it seems very clear that the real question raised and to be determined in the case was, whether the transfer of the property

by Adam to his wife was fraudulent as to his creditors, Leonard and Schmidt. And the question now presented for consideration is, should the court below have submitted the question of fraud to the jury, as one of fact to be by them determined from all the evidence and circumstances of the case?

In answering this question it may first be observed, as is said in *Nolan's Appeal*, 23 *Penn. State*, 38-9, that although "the possession and use by a husband of his wife's money is very strong evidence of the conversion of it to his own use, and with intent that her right to it shall be divested, yet, this presumption may be repelled by sufficient proof of a different intention. It may be shown by parol proof, that the husband has the use of the wife's money for a limited or special purpose and with intent to hold it in trust for her, but the evidence of such intent and purpose must be clear and unquestionable." This, undoubtedly, is the correct rule under the statutory provisions which exempt the separate property of the wife from liability for debts of her husband; and, according to this rule, it will hardly be questioned, under clear and unquestionable proofs of a *bona fide* transaction by which the husband has the use of the wife's money in trust for her, that she may become his creditor, and be entitled to the rights of any other creditor of the husband.

It may, *en passim*, be observed, that the general act relating to the rights of married women, took effect subsequent to the time of the transaction between Adam Bax and his wife, and it is not therefore necessary to now express any opinion as to the proper construction of this latter act.

Now under the above rule, requiring proof to repel the presumption of the conversion of the wife's money by the husband to his own use, with intent to divest her right to it, it seems that the determination of such ques-

tion must necessarily become one of fact, which in actions at law, are to be tried by a jury; but when, as in this case, the question raised is one of fraudulent conveyance of property by the husband to his wife to hinder, delay, and defraud his creditors, it seems clear, both upon principle and authority, that the fraudulent intent is a question of fact which must be submitted to a jury, to be tried by them upon the proofs.

It is said that fraud implies a fraudulent intent, and that intent or intention is an emotion or operation of the mind, and can usually be shown only by acts or declarations; a man is presumed to intend the consequences resulting from his own acts; hence, the fraudulent intent is the inference or conclusion of fact drawn from the facts or circumstances of the transaction, and if it is a presumption, it is a presumption of fact and not of law. 1 *Greenleaf Ev.*, *Sec.* 44, 48. Certainly it is the province of the jury, who are to try the facts, to find the actual intent, and this doctrine is in perfect accord with our statute of frauds which declares that the question of fraudulent intent shall be deemed a question of fact, and not of law. *General Statutes*, 395. And in *Oliver v. Eaton*, 7 *Mich.*, 113, in respect to the statute it is said, that "it certainly does not strike one as an obvious conclusion from this language, that the fraudulent intent to be derived from any given or found state of facts, was intended to be made an inference of law. The question of *intent*, and not merely the facts from which it may be inferred, is declared to be a question for the jury. The statute must have some meaning, and it was undoubtedly introduced to create or settle a rule of law." *Smith v. Acker*, 23 *Wend.*, 657–8. But "when the instrument, on its face, is one the law will not sanction against creditors, it is the duty of the court to pronounce fraudulent as to them, but the court

cannot look at matters *dehors* the instrument for that purpose." *Bagg v. Jerome*, 7 *Mich.*, 157–8. *Cunningham v. Freeborn*, 11 *Wend.*, 261. So, it is said, that when the existence of the fraudulent intent is a question of fact, it must, in actions at law, be expressly found by the jury, for the court cannot infer it. *Allen v. Wheeler*, 4 *Gray*, 123. *Ewing v. Gray*, 11 *Ind.*, 64. *Maples v. Burnside*, 22 *Ind.*, 139. *Banfield v. Whipple*, 14 *Allen*, 13. *Green v. Tanner*, 8 *Met.*, 411. *Bagg v. Jerome*, 7 *Mich.*, 145.

In *Babcock v. Eckler*, 24 *New York*, 628, it is held that to make a deed voluntary, "it must be without any the least valuable consideration," and, that "when a conveyance of land is upon any the least valuable consideration, the question whether it be fraudulent as to creditors belongs exclusively to the jury, as a question of fact;" and, where the debtor had conveyed property to a creditor, it was held, that "the defendant clearly had a right to show upon the question of fraud, that the value of the goods mortgaged to plaintiffs was disproportioned to the amount of their debt. It might tend, with other circumstances, to show an intention to hinder and embarrass the creditors by covering up his property." *Ford v. Williams*, 13 *New York*, 583. And in *Seward v. Jackson*, 8 *Cow.*, 433, Spencer says, that "where there was some valuable consideration, whether sufficient or not, whether the whole was not to avoid the payment of creditors, are distinct questions depending upon a variety of facts and circumstances, and which it is considered on all hands, must be decided by a jury."

We think, that under the evidence and all the circumstances of this case, the question of fraud should have been submitted to the jury as a question of fact, to be determined by them, and therefore the judgment of the

court below should be reversed and cause remanded for a trial *de novo*.

REVERSED AND REMANDED.

MR. JUSTICE MAXWELL, concurred. CHIEF JUSTICE LAKE, having tried the cause below, did not sit.

O. J. MARTIN, PLAINTIFF IN ERROR, V. ISAIAH COPPOCK, DEFENDANT IN ERROR.

1. **Practice**: AUTHENTICATION OF DEPOSITIONS. Depositions taken in Illinois by a notary public, certified to under his hand and official seal, may be read in evidence here without further authentication.
2. ——: AMENDMENT OF SUMMONS. The amendment of a summons, made after notice to the defendant by the correction of a mistake in the name of the plaintiff, relates back to the time of service.

ERROR to the district court for Lancaster county. The opinion states the case.

Philpot & Cantlon, for plaintiff in error.

I. THE issuance of the summons in this case was not the issuance of a summons in the case of Isaiah Coppock against O. J. Martin. *Gen'l Stat.*, *Sec.* 64, 533. The summons did not give the name of Isaiah Coppock either in the body of it nor in the indorsements thereon, the name *Isaiah* being omitted, and the name *Isaac* being used. A person cannot have two christain names at one and the same time. *Bacon's Abr.*, *vol.* 7, *p.* 7 (*B.*), 1. *Coke Litt.*, 3. 2 *Roll. Abr.*, 135. Isaiah and Isaac cannot be taken to be the same name, for there is a substantial variance in sound, original, *and common*

use. 7 *Bac., Abr.*, 5, 6. *Robinson v. Neal*, 5 *Monroe*, 213.

II. The service of said summons on Martin is not service by virtue of which Isaiah Coppock was authorized to commence the taking of testimony in his said action, under Sec. 373 of the code.

III. At the time of the taking of depositions by notaries in this case, they were not authorized by the statutes of the state of Illinois to have an official seal. *Statutes of Illinois, Chap.* 75. *An Act to provide for the appointment, etc., of notaries public, Approved April* 5, 1872, *Sec.* 7. Therefore having no seal, depositions taken by them must be further authenticated, before they can be read in evidence here.

Lamb & Billingsley, for defendant in error.

I. The depositions could be taken before a notary public, out of the state, by the express terms of our statute, without any regard to the particular authority conferred on notaries by the laws of Illinois. *Civil Code, Sec.* 375.

II. When a statute authorizes an act to be performed in another state, by an officer of that state, deriving his authority under its laws, our courts will take judicial notice of the laws of that state in passing upon the validity of his acts, without further proof. *Vance v. Schuyler*, 1 *Gilman*, 163. *Secrist v. Green*, 3 *Wallace*, 744. *Carpenter v. Dexter*, 8 *Id.*, 513. His own authentication is sufficient unless a contrary rule is prescribed by statute, and this by force of our own statute. *City Bank v. Lumley*, 28 *How. Prac.*, 397. *Earl v. Hurd*, 5 *Blackf.*, 248.

III. By the law of Illinois, notaries could and did administer oaths, and did have official seals, and were required to use them in some cases, but whether this was by common law or by statute may not be altogether clear. *Stout v. Slattery*, 12 *Ill.*, 162. *Rowley v. Berrian*, *Id.*, 198. *Dyer v. Flint*, 21 *Id.*, 80.

MAXWELL, J.

On the tenth day of February, 1872, the defendant in error filed his petition in the district court of Lancaster county against the plaintiff in error, alleging that he was indebted to him in the sum of four hundred and fifty-six dollars and fifty-one cents, with interest from October 1, 1868, for money fraudulently received and appropriated to his own use. A summons was issued in the name of *Isaac* Coppock and served on Martin, on the 13th day of February, 1872. On the 26th day of March, after notice to Martin, a motion was made to amend the summons heretofore issued in the action by changing the name *Isaac*, as written in the summons, to *Isaiah*, to correspond with the petition and precipe, which motion was sustained. On the 29th day of April, 1872, the plaintiff in error filed a motion to strike certain redundant matter from the petition. No action appears to have been had on the motion, and on the 2d day of May, 1872, Martin filed his answer denying the allegations of the petition. The case was tried at the October term, 1872, for Lancaster county, and Coppock recovered the amount claimed in his petition. The cause is now brought to this court by petition in error. The errors assigned are as follows:

First. That the court erred in admitting the depositions of Isaiah Coppock, William Coppock, A. B. Powell, Josiah Hurty, and James A. Eads.

Second. That the court erred in not sustaining the exceptions to said depositions.

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

On the 28th day of October, 1872, Martin filed exceptions to the depositions of Isaiah Coppock and William Coppock.

First. Because the official character of the notary before whom they were taken was not properly proved.

Second. Because the plaintiff in the court below commenced taking the same before service of summons was had on the defendant.

The same exceptions were filed to the depositions of Josiah Hurty and James Eads.

The notice to take depositions was served on Martin on the 23d day of March, 1872, and the depositions appear to have been taken on the second day of April, 1872. To sustain his exceptions, the plaintiff in error read in evidence, chapter 75 of the Statutes of Illinois, in relation to the powers and duties of notaries public. Also an act of the legislature of Illinois, approved April 5, 1872, in which it is provided that "each notary public hereafter appointed shall, upon entering upon the duties of his office, provide himself with a proper official seal, with which he shall authenticate his official acts, upon which shall be engraved the words "Notarial Seal" and the name of the county in which he resides."

Section 384 of the code of civil procedure provides that "depositions taken pursuant to this title by any judicial or other officer herein authorized to take depositions having a seal, whether resident in this state or elsewhere, shall be admitted in evidence upon the certificate and signature of such officer under the seal of the court of which he is an officer, or his official seal, and no other or further act of authentication shall be required."

The certificate to the deposition of William Coppock

and Isaiah Coppock, concludes as follows: "In testimony whereof I have hereunto set my hand and official seal this third day of April, 1872.

GEORGE A. DICE,
N. P."

George A. Dice, Notary, Vermillion Co, Illinois.

The certificate to the depositions of Alexander B. Powell, Josiah Hurty and James A. Eads concludes as follows:

"In testimony whereof I have hereunto set my hand and notarial seal this 8th day of April, 1872.

JOSEPH E. DYERS,
Notary Public."

J. E. Dyers, Notary Public, Paris, Ill

It is every where held that it is a sufficient authentication of a protest made in a foreign country or state that it purports to be and apparently is under the seal of a notary. 1 *Parson Bills*, 634, *note p. and cases cited.* 1 *Bouvier Dic.*, 503.

We cannot presume from the evidence offered that the law of Illinois did not require the use of a seal at the time these depositions were taken. The authentication was clearly sufficient and the exceptions thereto properly overruled.

As to the point that notice to take depositions was given before the service of summons, it is sufficient to say that service of summons was made upon Martin on the thirteenth day of February, 1872, and notice to take depositions was served on him March 23, 1872, that depositions would be taken on the second day of April. The mistake in the name of Coppock could not have misled Martin, but when the amendment to the summons

was made it related back to the time of service. The defense in this case is purely technical. The case as presented by the bill of exceptions shows the defendant in the court below to be indebted to Coppock for the full amount claimed in the petition, and we see no error of which he has any cause to complain. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

MR. JUSTICE GANTT, concurred. LAKE, Ch. J., having tried the cause in the court below did not sit.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1875.

PRESENT:

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

J. H. LACEY, PLAINTIFF IN ERROR, v. CENTRAL NATIONAL BANK OF OMAHA, DEFENDANT IN ERROR.

1. **Witnesses:** STATING OPINIONS OR FACTS. A witness testifying must state facts. His understanding of the purpose and object of a transaction is not evidence.

2. **Promissory note:** DEFENSE: EVIDENCE. The defense to an action upon a promissory note being that the note had been given to cover an overdraft by a depositor in a National Bank, *it was held:* 1. That testimony of one of the makers, as to his understanding of the purpose and object of giving the note, was inadmissible. 2. That demand for security for the overdraft of such depositor, made long after the note was given and when there was an overdraft to a large amount still due, constituted no part of the *res gestae.*

3. ———: ACTION UPON. The right to sue upon a note executed exclusively for the benefit of a banking corporation, vests in the bank, and the indorsement of its cashier, to whom as cashier, such note is made payable, is not necessary.

ERROR to the district court of Douglas County.

THE defendant in error brought action upon a promissory note, made by J. C. Mackoy & Co., J. H. Lacey, and J. M. Mackoy, to James W. Watson cashier, and alleged that the note was executed and delivered to and for the use and benefit of the bank. The answer admitted the execution of the note, but alleged that the note was given merely to cover an overdraft of Mackoy & Co. of their deposit in the bank, during an examination of the bank by a United States examiner, and not for the purpose of securing such overdraft, or for payment; and also that other persons were to sign the note with Lacey. Upon the trial, the deposition of J. C. Mackoy was offered in evidence, on behalf of Lacey, and objection being made to the admission of the following questions and answers, the court sustained the objection, and refused to permit said questions and answers to be read to the jury:

"*Ques.* 6. Was anything said about the note being security at that time?

Ans. No, nothing was said about the note being security for the overdraft. It was understood between the cashier and myself that the note was given for the purpose of satisfying the bank examiner, and that the note was not to be enforced against the signers of said note.

Ques. 7. State whether or not you made the understanding known to the defendant Lacey, at the time you applied to him for his signature?

Ans. I did.

Ques 8. At the time of your application to defend-

ant Lacey did you mention to him the name of any other person or persons who were to sign the note with him, and if so, whose?

Ans. I did. I mentioned to him James M. Mackoy.

Ques. 9. State whether or not there was any understanding or agreement that the note in suit was to be collected against either or any of the makers?

Ans. It was the understanding between us and the plaintiff that it was not to be collected of the makers of said note. The understanding was that it was to be left there merely for the inspection of said bank examiner, and that was the only reason that the note was given.

Ques. 10. At what time if ever did plaintiff ask or demand security for the overdraft of your firm?

Ans. I think it was sometime during the Christmas of 1868, and subsequent to the time of giving the note."

The jury returned a verdict for the bank upon which judgment being rendered, Lacey brought the cause here by petition in error, and it was submitted to this court upon printed briefs.

E. Wakeley, for plaintiff in error.

I. The promise was to pay to the cashier. If this was for the use and benefit of the bank, as alleged, the cashier was the trustee, and should have brought the action. No facts are alleged showing that the bank was the owner. *Raymond v. Pritchard*, 24 *Ind.*, 318. *Hereth v. Smith*, 33 *Ind.*, 514.

II. The defense was, a want of consideration. The answer averred that the note was given for the accommodation of the bank; that the bank examiner was about to visit the institution, and the officers wanted the note to exhibit to him; that it was expressly understood that the note was to be used only for that purpose, and was not to be paid. If the testimony, which was excluded,

tended to establish the defense, it should have been received and submitted to the jury. The note was given for a particular purpose. The bank had no right to use it for any other. Having obtained it upon the representation that it was to be used only to show to the examiner, it was a fraud on Lacey (as well as Mackoy) to undertake to hold it as security for the overdraft. The proposition rests upon general principles. *Dennistan v. Bacon*, 10 *Johns.*, 198. *Shelding v. Haight*, 15 *Id.*, 270. *Vallet v. Parker*, 6 *Wend.*, 615. *Kesson v. Smith*, 8 *Id.*, 437. *Stevens v. Parker*, 5 *Allen*, 333. *Shade v. Hood*, 13 *Gray*, 97. *Small v. Smith*, 1 *Den.*, 583. *Hill v. Ely*, 5 *Sergt. & R.*, 363. *Miller v. Henderson*, 10 *Id.*, 290. *Armstrong v. Cook*, 30 *Ind.*, 22.

Carrigan & Osborn, and *John D. Howe*, for defendant in error.

I. The rule that parol contemporaneous agreements are wholly inadmissible to alter, vary, or add to a written contract, admits of no exception, and it is equally well established, that it is wholly inadmissible to show that it was agreed that there should be no liability upon the note. 2 *Parson Notes and Bills*, 501. 1 *Greenleaf Evidence*, § 275–383. *Gridley v. Dole*, 4 *New York*, 486. *Thompson v. Ketchum*, 8 *Johns.*, 190. *Bank of the United States v. Dana*, 6 *Pet.*, 59. *More v. Willis*, 13 *Ohio*, 26. *Ely v. Kilbourn*, 5 *Denio*, 514. *Ervin v. Saunders*, 1 *Cow.*, 549. *Hanson v. Stetson*, 5 *Pick.*, 506. *Bentley v. Bradley*, 8 *Vermont*, 243. *Isaacs v. Elkins*, 11 *Id.*, 679. *Molls v. Bird*, 11 *Mass.*, 501.

II. As to the questions and answers, the answer wherein Mackoy states what was "understood" between him and the cashier, is a conclusion of fact, Lacey was not present, and there was no defense in the answer to which the fact could be relevant.

GANTT, J.

As is clearly shown by the record the only exceptions taken by the plaintiff on the trial of the cause in the court below, was to the ruling of the court upon refusing to allow portions of the deposition of J. C. Mackoy to be read in evidence.

In answer to the sixth question, the witness states what was "understood" as the purpose and object of giving the note, and in answer to the ninth question he again states the "understanding" in respect to the giving of the note, and the seventh question was an inquiry as to whether or not this "understanding was known to Lacey." Hence, in answer to all these questions, the witness does not state what was said by himself or the cashier of the bank; he does not state the terms or conditions of any agreement or contract between the cashier and himself in regard to the purpose for which the note was given, or whether there was such contract—he does not state a single fact in regard to the matter; he simply and only speaks of his understanding of the matter, and this is no more than his mental conclusion, deduced from his interview with the cashier of the bank. In legal parlance, this understanding of the witness may be defined to be the faculty of the human mind, by which it receives or comprehends the ideas which others express and intend to communicate. And the expression of ideas of one person may and most usually will, in some material points, impress the minds of others with different conclusions. Therefore, such deduction, however logical in order and truthful in substance the witness may consider the same to be, yet, I think it would be very unsafe to permit a jury to predicate a verdict on such testimony. It is a principle well founded in reason, and the philosophy of moral evidence, that the witness testifying must state facts, and not deductions or con-

clusions. Would not the admission of such testimony be an unsafe departure from the fundamental principles of the laws of evidence, dangerous in its consequences? And might it not be productive of great injustice in the legal adjustment of controversies between individuals? It surely would establish a rule which does not seek after facts, but simply the understanding of the witness. I think the testimony was inadmissible, and therefore properly rejected.

The eighth question was an inquiry as to whether the witness mentioned to Lacey the names of any other persons who were to sign the note with him, and if so, who. The answer is that he mentioned the name of J. M. Mackoy, who did sign the note, and hence the question and answer were wholly immaterial; but at any rate, the answer could not be used as evidence against the bank, for the reason that the bank was not present at the time, and had no knowledge in regard to the matter.

The answer to the tenth question is irrelevant and was properly rejected, because it was a demand for security for an overdraft of the firm of Mackoy & Co., made long after the note was given, and when there was an overdraft of this firm to a large amount still due to the defendant in error.

But it is contended by the counsel for plaintiff in error, that the note was made to James W. Watson, cashier, and not to the bank corporation, and, therefore, the action cannot be maintained by the defendant in error, without the indorsement of the note by James W. Watson. In answer to this argument it might be sufficient to state that the record shows no exception taken by the plaintiff in error to the introduction of the note in evidence on the trial. Hence, any objection which might have been made to the note was waived

But suppose the exception had been properly taken, then, it need only be observed that upon a careful reading of the answer, and the evidence admitted, as well as the petition, it clearly appears that the note was given exclusively for the benefit of the defendant in error; and this fact was well known at the time the note was given, for J. C. Mackoy, who attended to the matter says in his deposition that "James W. Watson, the cashier, asked him to give a note for five thousand dollars, with two other names besides the firm name of J. C. Mackoy & Co.; he stated a bank examiner was expected very soon, and he wanted the note to account for any overdraft." Therefore, under the nature and circumstances of the transaction I think in contemplation of law as well as in fact, the note was the property of the defendant in error, and under our practice act, which requires the action to be prosecuted in the name of the real party in interest, the right of action to sue on the note vested only in the defendant in error. In the case of *Babcock v. Beman*, 1 *New York*, 200, the action was on a note payable to the order of "R. B. Treas." executed by "A. S. & Co., and indorsed "R. B. Treasurer." The complaint set forth facts necessary to charge the defendant personally as indorsee; the answer alleged that the defendant was the treasurer of an incorporated manufacturing company, etc. The court says that "it has been held that the indorsement of a note to the cashier of a monied corporation, by adding the word cashier to his name in the indorsement, is a transfer to the corporation, where that was the design of the corporation. *Watervliet v. White*, 1 *Denio*, 608. So the note before the indorsement may be considered as having been the property of the manufacturing corporation, it being substantially averred that such was the nature of the transaction upon which it was given." It was therefore held that "R. B. Treas." was not personally liable as indorsee.

Brockaway v. Allen, 17 *Wend.*, 41. *Hick v. Hinde*, 9 *Barb.*, 528.

JUDGMENT AFFIRMED.

MAXWELL, J, concurred. LAKE, Ch. J, did not sit..

A. L. RICH AND D. W. HANLIN, PLAINTIFFS IN ERROR V. W. S. STRETCH, DEFENDANT IN ERROR.

1. **Practice**: DEFAULT. A defendant appealing from a judgment of the probate court is not in default, in the district court, until after the rule day for filing his answer has elapsed.

2. ———: JUDGMENT: ATTORNEY'S FEES. Where an allowance is made for an attorney's fee, as provided by Sec. [23], p. 98, Gen. Stat., the amount thereof should be specifically stated and kept distinct from the amount of the judgment proper. PER LAKE, CH. J.

ERROR to the district court of Richardson County.

THE case was brought into that court by appeal on behalf of Rich and Hanlin, against whom judgment had been rendered by default in the probate court, in favor of W. S. Stretch. The statute concerning appeals from judgments of Justices of the peace, is as follows:

"(900.) SEC. 1008. The said justice shall make out a certified transcript of his proceedings, including the undertaking taken for such appeal, and shall, on demand, deliver the same to the appellant, or his agent, who shall deliver the same to the clerk of the court, to which such appeal may be taken, on or before the second day of the term thereof next following such appeal," *General Statutes*, 686. The act regulating practice in the probate court provides that appeals from judgments of that court may be taken "in the same manner as provided by law

in cases tried and determined by justices of the peace." *General Statutes*, 268.

These statutes being in force this action was brought as above stated, and judgment being entered against Rich and Hanlin, defendants in the district court, they brought the cause here by petition in error. The facts presented by the record are fully set forth in the opinion of the court.

Schoenheit & Towle, for plaintiffs in error, insisted that the rules of court, relating to appeals from justices of the peace, should be followed and enforced respecting appeals from probate courts, and no default could be entered until after the rule day for answering had elapsed; and that no default could be taken and judgment rendered upon it for the attorney's fee without the amount or sum being fixed by the court. *General Statutes*, 98.

W. W. Wardell, for defendant in error, made the fol lowing points:

I. After default against him, a defendant can take no steps, not even to except, till default has been set aside on his motion.

1. The plaintiffs in error, in this case, were in default in the district court by law.

2. No motion was made in either court to set aside the default.

II. Error, when there has been default, raises only the question of the sufficiency of the petition, and will not lie on what is a matter of discretion in the lower court. *Chase v. Davis*, 7 *Vermont*, 476. *Chaffee v. Soldan*, 5 *Mich.*, 242.

III. When defendant suffers default and fails to take advantage of points open to him, he will be held to have waived them unless he can make a satisfactory excuse for

his previous omission. *Hollinshead v. Von Glahn*, 4 *Minn.*, 190. *Weston v. Palmer*, 51 *Maine*, 73.

LAKE, CH. J.

In the assignment of errors, in this case, but a single question is presented for our consideration, and that is, whether the judgment, which was by default, was entered before it could legally be done. It appears from the record, that on the eighteenth day of December, 1874, the defendant in error, who was plaintiff in the court below, recovered a judgment against the plaintiff in error, in the probate court, from which judgment, on the eighteenth of the same month, they took an appeal to the district court.

The next regular term of the district court, for said county, succeeding the taking of the appeal, was fixed for the fifteenth day of March, and the appellants had until the second day of that term to perfect their appeal by filing a transcript, and having the case docketed in the appellate court. The appellants, however, did not take the full statutory time to perfect their appeal, but actually filed the transcript on the sixth day of March, some ten days before they were required to do so.

By the rule of said district court, regulating the making up of issues in cases entered therein by appeal, the petition should be filed on or before the *third* Monday, after the time fixed for filing the transcript, and the answer on or before the second Monday thereafter. By this regulation, the rule day for filing the petition, in this case, was the sixth of April, and that for the answer, the twentieth of the same month, and the defendants would not be in default until after the last mentioned date, nor could any judgment be legally entered against them before that time. But the transcript shows that the default was actually taken on the twenty-second day of

March, nearly a month before it should have been done, and a judgment thereupon at once entered for the full amount claimed in the petition, to all of which the plaintiff in error duly excepted. In this there was manifest error, for which the judgment of the district court must be reversed.

In their brief, the counsel for plaintiffs in error call attention to the fact that the judgment is for considerably more than is called for by the terms of the note upon which the action is brought. It is suggested, and is no doubt true, that this excess is made up of a sum allowed as attorney's fee, which is provided for in this note. But in the finding of the court, no allusion is made to this subject, nor is any allowance made in terms therefor. The whole amount of the judgment is, ostensibly, found to be due, by the terms of the note, without reference to an attorney's fee. In cases like this, the court is authorized, in its discretion, to allow such fee, not exceeding ten per cent. on the amount of the recovery, but if such an allowance is made, the record should show the fact, and it should be kept entirely distinct from the judgment proper. It is considered in the nature of costs, and should be treated as such. This judgment is objectionable in this particular, but inasmuch as the point is not made in the assignment of errors it furnishes no ground for the reversal of the judgment.

For the reason, therefore, that the judgment was rendered on a default taken before the rule day for filing the answer had elapsed, the judgment of the district court is reversed, the default set aside, and cause remanded for further proceedings.

REVERSED AND REMANDED.

MAXWELL, J., concurred. GANTT, J., did not sit.

GEORGE M. MILLS, PLAINTIFF IN ERROR, v. ALVIN SAUNDERS AND ALFRED BURLEY, DEFENDANTS IN ERROR.

1. **Conveyance:** MORTGAGE: REDEMPTION. Mortgage premises were conveyed by deed to M., with covenant against incumbrances, M. giving a note in part payment thereof. The premises were sold under the mortgage, and M., afterwards paid the purchaser the full amount of the mortgage debt, with interest and costs taking a deed of quit-claim therefor. *Held*, in a suit upon the note, that the amount paid to discharge the incumbrance was for the redemption of the premises, to be applied as a credit upon the note.
2. **Interest.** Partial payments made upon a debt drawing interest should be first applied in payment of the interest, and afterwards to the reduction of the principal.
3. **Evidence:** ADMISSIONS AND DECLARATIONS. In an action upon a promissory note, where the defense was that the note had been given in part payment of real estate, upon which an incumbrance existed, proof that one of the payees had said that "if the defendant would pay off the incumbrance plaintiffs would owe the defendant $5000," *held*, inadmissible.
4. **Conveyance:** COVENANT AGAINST INCUMBRANCES: SET-OFF. An incumbrance by way of taxes upon land must be first paid, before the vendee can plead the same, as a set-off, in an action for the recovery of the purchase money.

ERROR from the district court of Douglas county.

The action was upon a promissory note executed December 7th, 1867, by George M. Mills and others, who were sureties, to Alvin Saunders and Alfred Burley. It was given as part consideration for the west thirty-four feet of lot seven, in block one hundred and twenty, in the city of Omaha, sold by Saunders and Burley to Mills by deed with covenants of warranty and against incumbrances. A mortgage existed upon said lot of land, held by one Merrit, which was afterwards foreclosed and at the sale thereof by the sheriff, Merrit became the purchaser. Afterwards, and on the thirtieth day of December, 1868, Mills paid Merrit the sum of $4684.46, said sum being

the amount due to Merrit under the mortgage, including the costs of foreclosure and the attorneys fees and expenses of said Merrit therein, and being $1315.54 less than the amount for which the premises sold under the foreclosure proceedings. The court below entered a finding in accordance with these facts, and also found that Mills agreed to protect Merrit against the payment of the above excess, and received from the said Merrit a quit-claim deed running to himself and George L. Miller. The court also found that the amount paid by Mills was for the redemption of the premises, and that Mills was entitled to have the credit of said sum of $4684.46 upon the note at the time of the payment, December 30, 1868. Interest was computed upon the note up to that date, the payment deducted, interest computed on the balance up to the first day of the term of court at which the cause was tried, and judgment entered accordingly. Upon the trial, the defendant, Mills, offered to prove by himself and defendant, McCormick, that at a time prior to the commencement of the action they called upon plaintiff Burley, who said that if Mills paid the Merrit claim the plaintiffs would owe Mills the sum of $5000. This the defendants were not permitted to prove, and they took their exceptions accordingly. The cause was brought here by Mills, defendant in the court below, by petition in error.

G. M. Mills, pro se., cited Bemis v. Smith, 10 *Met.*, 194. *Brown v. Dickerson*, 12 *Penn. State*, 372. *Stewart v. Drake*, 4 *Halstead*, 139. *McGary v. Hastings*, 39 *Cal.*, 360.

George W. Doane, for defendant in error.

I. The mode of computing interest, which was adopted in this case, is that which is supported by the best author-

ity. *Parson on Mer. Law*, 269. 1 *Bouvier Inst.*, 448. *Connecticut v. Johnson*, 1 *Johns. Ch.*, 13. *Dean v. Williams*, 17 *Mass.*, 417. *Fay v. Bradley*, 1 *Pick.*, 194. *Penrose v. Hart*, 1 *Dall.*, 378. *Spires v. Hamet*, 8 *Watts & S.*, 18. *Story v. Livingstone*, 13 *Pet.*, 371. *Jones v. Ward*, 10 *Yerg.*, 170. *Hammer v. Neville*, *Wright's Rep.*, 164.

II. Until an incumbrance is discharged by payment, the plaintiff in error has not been damnified, and is not entitled to recover the amount due from the covenantor. *Rawle on Covenants*, 134.

III. The offer to prove upon the trial the opinion of one of the defendants in error, as to the legal liabilities of the parties to each other, was clearly incompetent.

GANTT, J.

It is claimed that the court erred in finding that the sum of money paid by plaintiff to Merritt was for the redemption of the premises bought by Mills of Saunders and Burley; and also in the method of computing interest. We think there is no error in these findings of the court. The plaintiff in error could at any time have paid off this incumbrance, and having done so, would have been entitled to a credit on the note for the amount so paid; or if the purchase money had all been paid, he could have recovered the amount so paid, by suit, if the defendants in error had refused to pay the same; or he might have brought his action upon the covenants of warranty against the incumbrance; but he saw proper to permit the mortgage to be foreclosed and the premises to be sold, and then redeemed the same by paying to the mortgagee his debt, costs and attorney's fees. For the whole sum of money so paid to the mortgagee, by the plaintiff in error, the court allowed him a credit upon

the note. This he was entitled to and it was all he could in equity demand.

But it is insisted that the court erred in its method of computation of interest in rendering its judgment against plaintiff in error. In respect to this question, the rule seems not only to be well established but to be just in principle, that interest on a judgment or debt due, is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterwards, if there be a surplus, such surplus is applied to sink the principal, and so *toties quoties*—taking care that the principal thus reduced shall not at any time be suffered to accumulate by the accruing interest. *Penrose v. Hart*, 1 *Dall.*, 379. *Spires v. Hammet*, 8 *Watts & S.*, 18. *Story v. Livingstone*, 13 *Peters*, 371. *Smith v. Shaw*, 2 *Wash.*, *C. C.*, 167. *Hammer v. Neville*, *Wright's Rep.*, 169.

In respect to the sixth assignment of error it may be observed, that it seems impossible to discover in what way the evidence offered by plaintiff in error, in regard to the opinion or declaration of one of the defendants in error as to the legal liabilities of the parties to each other, could affect or change the final result of the case. The execution of the note and the price to be paid for the premises are not controverted, and the record clearly shows that Mills was credited with the full amount paid by him on the mortgage incumbrance. It is upon the facts, and the law fairly applied to these facts, that the matters in controversy between the parties must be adjusted, whatever may have been the opinion of any one of the parties as to their legal liabilities; and upon an examination of the entire record it appears clear that the evidence offered was immaterial, and therefore properly rejected.

It is also insisted that the court erred in sustaining the demurrer to the third defense of the answer, which

alleges that there were delinquent and unpaid taxes upon the premises, which were an incumbrance thereon, and it is asked that such taxes be set off against the sum found due upon the note. It is not alleged that these taxes have been paid by Mills, or that he had ever been called on to pay any portion of them. This defense is specifically one of set-off, and is not a count in the nature of an action upon a covenant of warranty against an incumbrance. It is a plain elementary principle of law, that until such incumbrance is discharged by the vendee of land, he is not damnified in such manner as to entitle him to plead such incumbrance, by way of set-off to an action for the recovery of any portion of the purchase money. *Rawle on Covenants*, 288–9. The demurrer was properly sustained.

The judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

MR. JUSTICE MAXWELL, concurred. CHIEF JUSTICE LAKE did not sit.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1876.

PRESENT:

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

JAMES D. BROWN, APPELLANT, v. SAMUEL O'BRIEN, APPELLEE.

1. **Practice**: REPORT OF REFEREE. The report of a referee upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence.

2. **Partnership.** A. and B. entered into a written partnership agreement concerning a herd of cattle furnished by A., and to be cared for by B.. A. also advanced money for further investment in the enterprise, a portion only of which B. used for that purpose. A. told B. to invest the remainder in "something that would pay, and not let it be idle." B. afterwards rented land in his own name, raising crops of wheat and barley, upon which a judgment creditor of B. levied. A. brought an action to enjoin a sale under the levy, setting forth his partnership with B. in the

cattle venture, and claimed that the crops levied on were part of the assets raised for and on account of the partnership: *held*, that the partnership did not extend to the crops raised by B.

APPEAL from Dodge county. The facts are as follows:

On the fifth day of April, 1871. James D. Brown, plaintiff, and Thomas M. Boyer, one of the defendants, entered into a written contract, under which the former furnished the latter a herd of cattle consisting of cows and young stock, estimated at an agreed price of thirteen hundred and sixty-five dollars. Boyer agreed to take good care of the herd for three years from the first day of April, 1871. Boyer also agreed to make what butter he could by good management, to raise all the calves and to increase the herd as fast as possible. Boyer was to have the privilege of trading any of said cattle for others, and the privilege of selling the same for cash. Other cattle were afterwards to be furnished by the plaintiff, the same to be treated and regarded as part of the increase. It was further agreed between the parties, that at the expiration of the said three years, Boyer was to return to the plaintiff stock out of said herd to the value of thirteen hundred and sixty-five dollars, together with the additional value of any stock he might thereafter furnish Boyer, which were to be kept by Boyer on same terms. After plaintiff had received of Boyer in stock the amount that he had furnished, the balance of the herd was to be divided equally between them, and a basis was fixed for the price of cattle to be returned to Brown at the end of three years, or whenever they were returned. During the time of this arrangement between the plaintiff and Boyer, the latter traded a portion of the herd for sheep, sold the sheep and paid the plaintiff the amount to which he was entitled under the contract. The plaintiff afterwards returned to Boyer $500 for further investment in cattle. Of this amount he paid for stock $226. In a

conversation had between the parties in reference to the balance of the money on hand in Boyer's possession not invested, the plaintiff told Boyer to invest the money in something that would pay and not let it be idle. After this conversation Boyer rented of one Wilcox a piece of land in his own name, agreeing to build a small house thereon for the rent, and to pay taxes. On this land Boyer raised crops of wheat and barley. In the cultivation of the land, Boyer used his own farm implements, and the machinery used in harvesting. In procuring seed wheat he traded one of the cows of the herd belonging to him and plaintiff. Upon the wheat and barley thus raised, defendant Samuel O'Brien, who had before procured judgment against the defendant Boyer, levied under and by virtue of an execution issuing from the district court of Dodge county. At a sale under the execution, the defendant O'Brien became the purchaser of said wheat, and threshed a portion, when he was stopped from further work by a temporary order of injunction issued in this cause, the plaintiff seeking by this action to have a final accounting between himself and defendant Boyer, and for a decree declaring that the crops so raised by defendant Boyer were part of the partnership assets.

The referee made a report in accordance with these facts, and from the evidence introduced further found that the plaintiff did not know, until after the sale of the grain under the execution issued by defendant O'Brien, that Boyer was engaged in raising wheat; that he had not seen Boyer for six or seven months; that there was nothing said between plaintiff and Boyer before the latter engaged in the wheat enterprise; that there was no fraud on the part of Boyer, or breach of trust in investing in the wheat enterprise a small amount of money received from the sale of stock furnished by the plaintiff, or in trading one of the cows for seed wheat;

and that there was no agreement between the plaintiff and defendant Boyer in reference to renting the land, which Boyer did rent, or any other land for the purpose of raising a crop on the joint interest or otherwise of the plaintiff and Boyer.

Savage & Manderson, for appellants.

The written contract in evidence, and its subsequent oral modification, as found by the testimony, created a partnership in the wheat and barley, between the two last named parties. *Gow on Partnership*, 1. *Parson's on Part.*, 8, 47. *Reid v. Hollinshead*, 4 *Barn. & Cress.*, 867. *Miller v. Price*, 20 *Wis.*, 117. *Cashman v. Bailey*, 1 *Hill*, 526. *Story on Partnership*, § 15. 1 *Parsons on Contracts*, 157. *Briggs v. Vanderbilt & Drew*, 19 *Barb.*, 222. Community of profit in a joint adventure is the test of partnership. *Loomis v. Marshall*, 12 *Conn.*, 79.

Gray & Briggs, for appellee O'Brien.

I. The referee who finds there is no partnership between Brown and Boyer in the grain in controversy, has heard the witnesses and is the best judge as to what the truth of the matter really is. The report is only to be set aside when the finding is clearly against the weight of the evidence. *Green v. Brown*, 3 *Barb.*, 119. *Mersereau v. Lewis*, 25 *Wend.*, 243. *Bearss v. Copley*, 10 *New York*, 93.

II. The error, to require the court to set aside a report, must be a clear and decisive error, by which the party objecting has been injured. *Ludington v. Taft*, 10 *Barb.*, 448. *Woodruff v. McGrath*, 32 *New York*, 255. *Douglass v. Tousey*, 2 *Wend.*, 353.

LAKE, CH. J.

In the court below, all the issues in this case, both of fact and law, were referred to and tried before a referee, whose report was confirmed and the case dismissed. Several exceptions having been taken by the plaintiff to the referee's report, and overruled by the court, the main question for our determination is, were these exceptions well taken?

As to all the questions of fact, submitted to the referee, his report thereupon must have the same effect and be treated in all respects as the verdict of a jury. *Civil Code, Sec.* 300. The court has no right to set it aside unless it be manifestly against the weight of the evidence. *Green v. Brown*, 3 *Barb.*, 119. *Bearss v. Copley*, 10 *New York*, 93.

We have looked very carefully into this record, and weighed the testimony, especially that of the plaintiff, but can see nothing which calls for a reversal of the judgment. It is unnecessary for us to recapitulate the evidence, or to incorporate any portion of it into this opinion, for the reason that all the several objections to this report, urged upon our attention either in the printed brief or oral argument of counsel, go to the conclusion of law which the referee drew from a consideration of the entire testimony, as to the alleged partnership between the plaintiff and the defendant Boyer, in the cultivation of the farm which the latter had rented and conducted in his own name.

We are of the opinion that there was a signal failure to establish the alleged partnership. The alleged interview between these parties in the winter or spring of 1872, at Omaha, in respect to the investment of the residue of the five hundred dollars, then remaining in Boyer's hands, fell far short of doing so. It was alto-

gether too indefinite, and uncertain, to have that effect. Neither did the management of the farm by Boyer tend, in the slightest degree, to show that he considered Brown as a co-partner with him in that business, or as entitled to any definite share in the crops raised.

We think that Boyer was simply liable for the money advanced to him by Brown, and not invested in cattle. We do not think that, under the testimony, Brown could have been held liable as a partner, for either the rent of the farm, or for any debt which Boyer contracted in its cultivation. Neither do we think, that, as against the creditors of Boyer, he should be permitted to hold the products of the farm, under a claim of partnership, based upon so fragile a case.

For these reasons we are of the opinion that the report of the referee should be affirmed, and a judgment rendered in conformity thereto. The other judges concur.

JUDGMENT ACCORDINGLY.

T. W. T. RICHARDS, PLAINTIFF IN ERROR, v. HERMAN KOUNTZE, DEFENDANT IN ERROR.

1. **Usury.** A note drawing legal interest is not affected with usury, by an indorsement of the maker, made after maturity, wherein he promises to pay a greater rate of interest than that allowed by law. In such case, money paid in excess of lawful interest constitutes a payment, *pro tanto*, of the principal.

2. **National Bank**: MORTGAGE. Notes secured by mortgages were assigned to a National Bank, and by it to plaintiff. *Held*, in an action of foreclosure, that the mortgages were not extinguished by the assignment to the bank, and were valid in the hands of the plaintiff, he being a bona fide purchaser.

3. ——: EVIDENCE: PRESUMPTIONS. In the absence of evidence showing the purpose and object of the assignment to the bank, it cannot be presumed that it was for a debt created *in presenti*, in violation of the National Banking Act.

4. ———. *Semble*, that the limitations of the act apply to transactions in real property, independent of legitimate banking operations, and not to mortgage securities.

ERROR to the district court of Douglas county.

THE action was upon four promissory notes, executed by Richards, the plaintiff in error, dated April 6, 1870, payable one year after date with interest at the rate of ten per cent per annum, secured by mortgages upon real estate situated in Omaha, and made payable to the order of John A. Parker. The notes and mortgage securities were assigned by Parker to Augustus and Herman Kountze, who afterwards assigned them to the First National Bank, by whom they were assigned to Herman Kountze, the defendant in error, who brought this suit to foreclose the mortgages and recover the debt secured by them.

After the maturity of the notes, and while they remained in the hands of the bank, Richards indorsed the following upon each note:

"For value received I promise to pay interest at rate of 12 per cent. per annum from maturity until paid. T. W. T. Richards, Omaha, Nov. 29, 1871."

In pursuance to this agreement, Richards paid interest from maturity to date of agreement, being $2.24 interest additional to the 10 per cent mentioned in the notes. The statute then in force concerning interest was as follows:

"Sec. 2. Interest upon the loan or forbearance of money, goods or things in action, shall be at the rate of ten dollars per year upon one hundred dollars, unless a greater rate, not exceeding twelve per cent. per annum, be contracted for by the parties." *Laws* 12 *Sess.*, 1867, *page* 8. *Genl. Stat.*, 446.

Section 28, of the National Banking act, provides as follows:

"It shall be lawful for any such association to purchase, hold, and convey, real estate as follows:

1. Such as shall be necessary for its immediate accommodation in the transaction of its business.

2. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

4. Such as it shall purchase at sales, under judgments, decrees or mortgages, held by such association, or shall purchase to secure debts due to said association.

Such association shall not purchase or hold real estate in any other case or for any other purpose than is specified in this section." 13 *U. S. Statutes at Large*, 107.

The court below rendered a decree in favor of Herman Kountze for the principal of the notes with interest at 10 per cent, and for a sale of the mortgaged premises. Richards brought the case here by petition in error.

T. W. T. Richards, pro se.

I. The contract entered into Nov. 29, 1871, and indorsed upon the back of the notes, was usurious. It took the place of the original provision as to interest contained in the notes, and when the defendant in error took the notes from the bank he took them with this new contract incorporated into them, and in his original petition he claims interest under this new contract. In his amended petition, however, he discards the usurious contract, and swears that he never claimed interest under it. It is insisted, however, that as the usurious agreement was a part of the notes, and specially made so by the bank and the maker of the notes, when he received them from the bank, and he had a full knowledge of the contract, and afterwards demanded and sued for interest under it, and thereby ratified it, that he cannot after-

wards be heard to discard it, and claim under the original contract only, which was in fact never transferred to him. It was the modified contract only which was transferred to him. The original contract, as to rate of interest, had been superceded by the contract of Nov. 29, 1871. It is therefore insisted that all interest paid in pursuance of said agreement ($144.00) should be credited upon the principal ($800.00), and that no interest should have been allowed, and that the defendant in error should have had a decree for only $656.00. It is not contended that the original contract was usurious, but that the subsequent agreement ingrafted upon it is clearly usurious—and upon this point plaintiff in error refers to the following authorities: *Rock County Bank v. Woolliscroft*, 16 *Wis.*, 22. *Hunt v. Bloomer*, 5 *Duer*, 202. *Ferrier v. Scott's Admr's*, 17 *Iowa*, 578. *Hopkins v. Koonce*, 6 *Gratt.*, 387. *Mattock v. Mallory*, 19 *Ala.*, 694. *Meiswinkle v. Jung*, 30 *Wis.*, 363. *Barnes v. Pilgrim*, 24 *Texas*, 385. *M'Allister v. Jerman*, 32 *Miss.*, 142. *Shirley v. Welty*, 19 *Ill.*, 623.

II. But plaintiff in error insists that under the provisions of the National Banking Act, the bank could not purchase either from Parker or the Kountzes the mortgages in question, and any sale to them would be absolutely prohibited by the statute, and void. The only title the bank could take would be the notes. If Parker sold to the bank, the bank took no title to the mortgages, and could transfer none to Herman Kountze; and *a fortiori* the latter could not foreclose the mortgages and cannot maintain this action. The bank taking no title to the mortgages it follows as a necessary sequence, that the notes and mortgages became separated, and the mortgages became *ipso facto* extinguished, and ceased to be a subsisting demand. See especially the case of *Fowler v. Scully*, 72 *Penn. State*, 456, and the following: *Langdon v. Buel*, 9 *Wend.*, 84. *Merrick v. Bartholick*

36 *New York*, 44. *Aymar v. Bill*, 5 *John's Ch.*, 570. *Jackson v. Blodgett*, 5 *Cow.*, 296. *Huntington v. Smith*, 4 *Conn.*, 237. *Southerin v. Mendum*, 5 *New Hampshire*, 432. *Green v. Hart*, 1 *Johns.*, 580.

George I. Gilbert, for defendant in error.

The contract was not for the "loan or forbearance of money." No money was loaned, and no agreement was made to extend the time or forbear the payment of the money due or to become due. Richards had been in default for several months, and had already received all the consideration for the contract. The indorsement on the notes was a simple promise on the part of Richards. The day after or even on the very day the promise or contract was made, suit might have been commenced by the bank on the notes and mortgages, and the promise would not have afforded any defense or bar to the action. So far as the question of usury is involved in the case, it is the same as though Richards had paid the $2.24 on the 29th day of November, 1871, and made no agreement at all as to the rate of interest after that time. Could such a payment vitiate the note? I think not. But admitting that the contract with the bank was usurious, it was made subsequent to the time of the loan, and cannot avoid or affect the notes. When a security which is given on a loan of money is valid at its creation, no subsequent agreement of the borrower to pay an usurious premium for a further forbearance of the loan will invalidate the original security or prevent the collection of the money lent, with legal interest thereon. *Crane v. Hubbell*, 7 *Paige, Ch.*, 413. *Merrills v. Law*, 9 *Cow.*, 65. *Wells v. Chapman*, 13 *Barb.*, 561. *Hammond v. Hopping*, 13 *Wend.*, 505. *Rice v. Welling*, 5 *Wend.*, 597. Even had the bank agreed to extend the time of payment of the notes to some fixed day, in consideration of the

increased rate of interest, such an agreement would not only fail to sustain the defense of usury in an action on the notes by the bank, and much less in this action by the indorsee of the bank, but the agreement itself to pay the excess of interest would not be usurious. *Stewart v. Petree*, 55 *New York*, 621.

GANTT, J.

It is contended that the indorsement of the agreement on the notes by Richards, the plaintiff in error, affected the original contract of debt with the vice of usury; and therefore, it is insisted that the decree was rendered for too large an amount, and is contrary to law and ought to be reversed. The question thus presented for consideration is, does the promise indorsed on the notes taint the original contract with the vice of usury? In the determination of this question, I think it is sufficient to observe that the rules of law in respect to usury seem to be well settled, and that they may be stated in the following propositions, deduced from the authorities, without reproducing the reasons upon which they are founded.

1. It is a cardinal principle in the doctrine of usury, which must be regarded as the common place to which all reasoning and adjudication upon the subject should be referred, that 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. *Nicholas v. Fearson*, 7 *Peters*, 413. *McGill v. Ware*, 4 *Scam.*, 24.

2. Where by the terms of the contract between the lender and the borrower, the lender receives or reserves a greater rate of interest than the maximum allowed by law, such contract is affected with the vice of usury; and it makes no difference whether the usurious interest

is expressed in terms in the instrument given for the payment of the debt created by the loan, or whether it is taken as a bonus, or is secured by any other corrupt agreement, device, or shift, at the time of the contract. The whole transaction constitutes only one contract. *Gillman v. Woolcock*, 13 *Wis.*, 589. *Lear v. Yarnell*, 3 *A. K. Marsh.*, 419. *Merrils v. Law*, 9 *Cow.*, 65. *Bank of the United States v. Waggoner*, 9 *Peters.*, 399.

3. If the original contract is *bona fide*, and wholly free from the taint of usury, then no subsequent agreement to pay usury, or an usurious premium upon the debt, will invalidate the instrument given for the payment of the debt, or affect the original contract with the vice of usury, or prevent the collection of the debt with its legal interest. And this proposition, I think, is well founded in principle and just in equity, for, if there was once a valid subsisting debt, bearing interest, the contract creating such debt cannot be impaired or destroyed by a subsequent void agreement. Such agreement would be a mere nullity, and could not impair or destroy rights acquired under a valid subsisting contract. *Stewart v. Petree*, 55 *New York*, 623. *Rice v. Welling*, 5 *Wend.*, 597. *Rogers v. Rathbun*, 1 *Johns. Ch.*, 367. *Early v. Mahon*, 19 *Johns.*, 150.

4. If money should be paid as a premium upon a loan, or as usurious interest on a debt, the money so paid would in equity be considered as a payment *pro tanto* upon the original debt; and under the statutory provisions of our state, if such usurious interest has been directly or indirectly contracted for, taken or reserved in the original contract for the loan, the lender shall only receive the principal without any interest or costs, and if such interest be paid, it shall be deducted from the principal. *Crane v. Hubbel*, 7 *Paige*, 417. *Merrills v. Law*, *supra*, and see generally: 1 *H. Black.*, 462. 7 *Mod.*, 119.

Murray v. Hardwicke, 2 *W. Black.*, 859. *Floyd v. Edwards*, *Cowp.*, 112. 3 *Campbell*, 119.

In the case under consideration there was a valid subsisting debt, bearing the legal rate of interest. The contract by which this debt was created was unaffected by usury, and therefore as is said in *Nicholas v. Fearson*, it "can never be invalidated by any subsequent usurious contract." Hence, it follows as a legal sequence that the promise indorsed on the notes, by the plaintiff in error, is utterly void and cannot modify or impair the original contract. This subsequent promise could pass nothing by the transfer of the notes and mortgage securities to the defendant in error. Whatever rights he acquired by the assignment to him of the notes and mortgage securities, he acquired them under the original contract creating the debt. Therefore this case clearly comes within the rule enunciated in the third proposition.

Again as a defense, it is contended that when the notes passed into the hands of the bank, the mortgage securities became extinguished, on the ground, as alleged, that under the act of Congress in relation to National Banking Associations, the bank could not hold and convey real estate under the purchase of the mortgage securities in this case; hence, the mortgage securities became separated from the debt.

Many authorities were cited to show that the mortgage security is an accessory or incident to the debt, or the instrument given as the evidence of the debt; and that the mortgage security cannot be separated from the debt; or as is said in the case of *Jackson v. Blodgett*, 5 *Cow.*, 296, the mortgage "cannot exist as an independent security in the hands of one person while the bond belongs to another." This proposition is true, and a simple transfer of the mortgage without the debt, or note which is the evidence of the debt, is a nullity, for distinct from the debt, the mortgage has no determinate value; and

also the transfer of the debt only, reserving the pledge as an independent security, renders the mortgage a nullity. In legal parlance, the pledge being an incident to the debt, so far as regards its determinate value, it cannot be detached from the debt. It seems, therefore, that in order to work an extinguishment of the mortgage security, the transfer must be with intent to separate the one from the other; that is to detach the debt so as to leave the mortgage a separate and independent security.

The mere fact, however, that after the assignment of the debt, the mortgage remains in the hands of the mortgagee, or in the hands of any person other than the assignee of the debt, will not of itself work an extinguishment of the mortgage security. To do so, the mortgage must be held to operate as a separate independent security. It is said by a very able jurist that "if a mortgage is made to one person to secure several notes or bonds made to him, and the mortgagee assign the notes or bonds to different persons, but continues to hold the mortgage security in his own name, he will hold it in trust for the several persons to whom he has assigned the mortgage notes, bonds, or other evidences of the debt due him." *Perry on Trusts, Sec.* 593. This is upon the principle that the mortgage security is an incident to the debt, and follows or passes with the assignment of the debt, unless by the intent of parties it is detached from the debt.

In the case at bar, the evidence will not at all justify the conclusion that it was the intention of any one of the parties concerned, to separate or detach the mortgage securities from the debt, and therefore the point so strongly urged by the counsel for plaintiff in error, will not, as an abstract principle of law, apply to this case.

But did the assignment to the bank of itself extinguish the mortgage securities? Under the act of Congress, the bank is permitted to hold and convey such real

estate as shall be mortgaged to it in good faith by way of security for debts previously contracted, or such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Now whether the sale and assignment of the notes to the bank were not made in satisfaction of or security for a debt previously contracted is not at all clear from the evidence reported in this case. It is not shown by the evidence for what purpose the sale and assignment were made to the bank; and to say that the notes and mortgages were assigned to the bank for a debt created *in presenti* would be the assumption of a fact not proved in the case. And it will hardly be urged that the court shall presume a person or a corporation to have been guilty of the violation of law; and hence, it will not be presumed that the bank received the notes and mortgages for a debt created *in presenti*. It has an undoubted right to take and hold such securities for a debt previously contracted. Was it not the intention of Congress to prohibit banking associations, organized under the law, from dealing in real property as a business independent of their legitimate banking operations? This would seem to be the purpose of the limitations in the act; and from all that appears in the record, there is nothing to justify the conclusion that these limitations have been transgressed in this case.

But the notes and mortgages passed into the hands of a person in no way incapacitated to take and receive them. Herman Kountze, the plaintiff in the court below, and defendant in error here, became the owner of them in good faith for value, and in *Willmouth v. Crawford*, 10 *Wend.*, 343, it was contended that the note was given to a corporation for a purpose or consideration for which the law forbid the corporation to receive "any note or other evidence of debt in payment." The court held that "conceding the note to be taken without

authority, it is valid in the hands of a *bona fide* holder."

It, however, appears that while the notes remained in the hands of the bank, Richards the plaintiff in error paid to it, in excess of the interest stipulated in the original contract, the amount of $8.96. This sum according to the rule stated in the fourth proposition, should have been deducted from the debt as of the time when it was paid, and the finding and decree should have been for $949.28. Therefore the finding must be made, and decree now rendered in this court, in favor of Herman Kountze and against T. W. T. Richards in accordance with the views expressed in this opinion.

DECREE ACCORDINGLY.

MAXWELL, J, concurred. LAKE, Ch. J, did not sit, having tried the cause in the court below.

NICHOLS, SHEPARD AND CO., PLAINTIFFS IN ERROR, v. JOHN HAIL, DEFENDANT IN ERROR.

1. **Sale**: WARRANTY. In an action upon a promissory note, given in part consideration for a threshing machine, the defense was warranty of the machine and a breach of its conditions. It appeared in evidence that the defendants gave one M. an order for a certain kind of thresher, on the back of which was a printed warranty. The order was sent to the agent of plaintiffs, but it was not accepted nor the machine mentioned therein furnished, and M., acting for the agent, sold defendants an old machine, they knowing it to be such, giving their note therefor, and using the machine during the following season without objection. *Held*, that the warranty did not extend to the machine purchased, and parol evidence of its contents was inadmissible.

2. ———: ———: CONDITIONS PRECEDENT. A reasonable compliance with conditions precedent, in a contract of warranty, is essential, before it can be enforced against the warrantor.

3. **Principal and Agent.** The mere fact that the agent of plaintiffs suing upon a note payable to them, received it from a person selling a machine, in consideration of which the note was given, will not of itself estop the plaintiff from denying that such person was their agent in the sale; but it should be left to the jury to say that if the machine was the property of plaintiffs at the time of its sale, they would be justified in finding agency from the fact that the note was made payable to them.

ERROR from the district court of Cuming county.

THE case was brought into that court, by appeal from the probate court, and tried *de novo*. The jury returned a verdict in favor of the defendant in error for five hundred dollars. This verdict was set aside, and at the second trial the verdict was again for defendant in error, but without damages. Motion for a new trial overruled. Judgment against plaintiff, who brought the case here by petition in error. The facts necessary to its proper understanding appear in the opinion.

Uriah Bruner, for plaintiff in error, contended *inter alia*, as follows:

There has been no evidence offered by the defendant to show that Malchow was the agent of the plaintiff; that the conditions of the warranty have been complied with on the part of the defendant; that demand has been made for repairs, that the machine has been offered to be returned on the defendant discovering the defects complained of; nor that the alleged warranty was given by the plaintiff or his agent; that the warranty applied to the said machine purchased; nor that the said alleged warranty was not in the hands of the plaintiff or under his control, or beyond the control of the defendant, or that it was lost.

If a warranty contain conditions to be observed by the vendee, the defendant must show that the said conditions have been substantially complied with. 2 *Hilliard on Contracts*, 192. *Dewey v. Erie*, 14 *Penn. State*, 211.

Bristol v. Tracey, 21 *Barb.*, 236. *Johnson v. Barney*, 1 *Iowa*, 531. The defendant, having been fully advised of the condition of the threshing machine purchased, and bought the same with full knowledge of the condition thereof, was not deceived.

LAKE, CH. J.

This action was brought in the district court upon a promissory note given by the defendant, and one Joseph Hoffman, in part payment for a threshing machine.

This machine was purchased by them, at West Point, from one William Malchow, who was the agent of John T. Edgar in its sale. The note was made payable directly to the plaintiffs, who were the manufacturers of the machine.

The defense seems to have been conducted on the theory that Edgar was the general agent of the plaintiffs, and that Malchow was a sub agent, although there was no such allegation in the pleadings. The answer alleges that there was a warranty of the machine by the plaintiffs, in these words, "We hereby warrant this machine to be made of good material, well put together, strong and durable, and capable of threshing and cleaning, as much wheat, oats, barley, or other small grains, as any other machine, and better than any endless apron machine." As a breach of said warranty it is alleged, "that said machine was not of good material, nor was the same well made, nor was the same strong and durable as the plaintiff well knew. That said machine had been exposed to the weather about two years, while owned by said plaintiffs, who are manufacturers of these threshing machines. That the action of the weather on the joints of said machine caused the tenants in the mortices to rot, so as to render the said machine for the purposes of threshing almost valueless." The alleged warranty, and breach, are all put in issue by the reply.

On the trial, the defendant offered to prove said warranty, which was alleged to have been a printed one, by parol testimony. This was objected to by the plaintiff, for the reason among others, that it had not yet been shown that any warranty had been given. The objection was, however, overruled; the testimony admitted, and exception duly taken.

The testimony introduced by both parties shows very conclusively that no warranty was, in fact, given on the sale of this machine, either by the plaintiffs, or by Malchow who made the sale. Indeed, the defendant himself swears that none was given.

The record does show that sometime before the purchase of this machine, the defendant and said Hoffman, gave to Malchow an order for a "Nichols & Shepherd, Vibrator Thresher, and Power of the latest patent, and most modern improvements," which order the latter sent to Edgar, at Omaha, to be filled. On the back of this order there was a printed warranty of that particular description of machine. It is possible that these orders in blank, with the printed warranty thereon, were in fact furnished by the manufacturers to their agents, to be filled up and used by a purchaser in making his order for a machine. It is also shown, by the evidence of the defendant, that this order was not accepted, nor the machine mentioned therein furnished; and that when Hoffman, who was acting for himself and Hail, went for the machine, so ordered, and was told by Malchow that it could not be obtained, he made a purchase of the one in controversy. Hoffman knew it was not the machine they had ordered, and was told by Malchow that it was an old one, that had been brought up from Kansas, where it "had been exposed to the weather for several years, and that Edgar had repainted it." This is all there was of the pretended warranty, as disclosed by the record, and fell very far short of showing that one was given on the

sale of this machine. We are of the opinion, therefore, that the plaintiff's said objection was well taken, and ought to have been sustained.

But the warranty, as finally proved by the defendant, even if it had applied to this particular machine, would be fatal to his defense. It is not the absolute, unconditional contract set out in the answer, but one with numerous important conditions attached. Among these conditions were the following, viz: "If they were not able to make it operate well, and the fault is in the machine, it is to be taken back, and the payments refunded or the defective parts remedied." And if "they were unable to make it operate well, a written notice, stating wherein it failed to satisfy the warranty, is to be given by the purchasers to the dealer, through whom they purchased, and to Nichols, Shepard & Co., and a reasonable time allowed to get to it, and remedy the defect if any."

Now the testimony shows there was a total failure on the part of the defendant to observe a single one of these, and numerous other conditions upon which the plaintiffs' liability, under the warranty, even if it were given, depended. When 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.

The uncontradicted testimony shows, that the defendant and his associate took this machine, knowing that it was an old one, and used it throughout the entire season without any objection whatever. No fault was found with it, nor any complaint made either to the plaintiff, or any agent of theirs, of any defect in the construction or working of this machine. The defendant is, therefore, in no attitude to demand a reduction in the contract price, nor to offset any damages which he may have

sustained in consequence of the alleged defects, in an action brought upon the note given therefor.

Again, I am of the opinion that the instruction given to the jury, that, "the plaintiffs, having accepted the note sued on in this action from Malchow, are estopped from denying that he was their agent," was clearly erroneous. It assumes that the plaintiffs received the note directly from Malchow, of which there is no proof whatever. Malchow, who was called as a witness for both parties, swears, that he "sold the machine as agent for Edgar," to whom he sent the note. He further testified, "what was done with these notes, I don't know. I paid them to Edgar for the machine sold to Hoffman and Hail. I did not have any business with Nichols, Shepard & Co."

But, even if it had been clearly shown, that the plaintiffs received the note directly from Malchow, that, of itself, would not have had the effect to estop them from denying that he was their agent.

It would, however, have been a proper instruction, to have told the jury, that, if they found from the evidence that at the time of the sale of the machine to Hoffman and Hail, it was the property of the plaintiffs, then they would be justified in also finding that Malchow was their agent, from the additional fact, that the note was made payable to them.

After a very careful examination of the entire record, I fail to find any evidence to support the defendant's claim. I think the court would have been justified even, in directing a verdict in favor of the plaintiffs, for the full amount of the note. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

The other judges concurred.

STATE OF NEBRASKA, EX REL., GEORGE H. ROBERTS v. JEFFERSON B. WESTON, AUDITOR.

Constitutional Law: SALARY OF OFFICERS. The constitution fixing the salary of an officer, and providing that "the auditor shall draw warrants of the state quarterly" therefor, "which shall be paid out of any funds not otherwise appropriated," appropriates by law the amount necessary to pay such salary, and no legislative act is necessary.

THIS was an application for a mandamus against the respondent, to compel him to draw his warrant for $166.66, salary alleged to be due the relator on the first of January, 1876, for the months of November and December, 1875, and representing the increased compensation due the relator under the provisions of the constitution taking effect November 1, 1875. The answer of the respondent alleged that by Sec. 22, Art. III, of said constitution, no money could be drawn from the treasury except in pursuance of a specific appropriation made by law; that there had been no session of the legislature, the law-making power, since the adoption of the constitution, and no specific appropriation made to cover said salary.

George H. Roberts, *Attorney General*, *pro se*, cited *Reynolds*, *Auditor*, *v. Taylor*, 43 *Alabama*, 420. *Thomas v. Owens*, 4 *Maryland*, 189.

Nathan S. Harwood, for the respondent, cited sections 19 and 22, Art. III, of the Constitution.

LAKE, CH. J.

This case raises the question of the authority of the state auditor to draw warrants upon the state treasurer for the payment of the salaries of the state officers, when

no appropriation therefor has been made by the legislature.

I. On the part of the relator it is contended that such authority is clearly given by section twenty-five of the schedule of the new constitution, while on the other hand, the auditor insists that it furnishes no authority whatever for him to do so. This section is as follows:

"Sec. 25. The auditor shall draw the warrants of the state quarterly for the payment of the salaries of all officers under this constitution, whose compensation is not otherwise provided for, which shall be paid out of any funds not otherwise appropriated."

If this section is given the effect which the language, by its ordinary meaning plainly imports, there would seem to be no doubt that it was intended thereby to dispense with the necessity of a legislative appropriation in all those cases to which it applies, viz: in the payment of the salaries of those officers created by the constitution, and whose salaries it directs to be paid from the state treasury.

It will be observed that all the words here employed are of common use, and therefore are to be taken in their plain and ordinary sense. The rule is the same in the construction of a constitutional provision, in this respect, as in the construction of an act of the legislature.

It was suggested, however, by the defendant's counsel, that there is a conflict between this section, and the second clause of section twenty-two, article three of the constitution, which provides that, "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law," and therefore both cannot stand. But we do not think there is any conflict whatever between them. The constitution is the "*supreme law*" in the state, emanating directly from the body of the people; and section twenty-five of the

schedule, in plain, simple language, appropriates from the treasury sufficient funds, not otherwise appropriated, to pay the salaries of all officers within its operation, whenever it shall happen that no legislative appropriation exists. This is, therefore, an appropriation "*made by law*," and applicable to a specific object.

This section was undoubtedly framed for the express purpose of meeting, and providing for, the very contingency which now exists, and which may hereafter happen, of various officers being in the employ of the state, with no legislative appropriation authorizing their payment. This must have been the purpose of the convention in framing, and the people in the adoption of this section, otherwise it would be entirely meaningless. If the clause of section twenty-two, before referred to, had limited the appropriation which it requires, to an act of the legislature, there might be some force in the objection urged. But, it only requires a specific appropriation "*made by law*," and we are clearly of the opinion, that this may be accomplished just as effectually by the constitution as by legislative enactment.

Again, section twenty-five, of the schedule, not only requires the payment to be made, but, it also directs that it should be done quarterly, which renders it just as specific, in all essential particulars, as it was possible to make it.

In the case of *Reynolds, Auditor, v. Taylor*, 43 *Alabama*, 420, it was held, that if the salary of a public officer is fixed, and the times of payment prescribed by law, no special annual appropriation is necessary to authorize the auditor to draw his warrant for its payment. But the case of *Thomas, Comptroller, v. Owens*, 4 *Maryland*, 189, seems to be more directly in point. It was there held, that when the constitution declared the amount to be paid an officer, that it was an appropriation made *by law*, and no legislative act was necessary.

II. Is the relator within the operation of this section of the schedule, and does he show himself to be entitled to the benefit of its provisions?

He is holding the office of attorney general of the state, which, at the time of his election, and until the taking effect of the new constitution, was a purely statutory office, depending for its existence, and continuation, upon the will or caprice of the legislature. But, on the first day of November it became a constitutional office, and the tenure of the incumbent, as well as his compensation, were made independent of, and placed beyond the reach of the legislature, and now rest on the solid foundation, and are under the protection, of the paramount law. Up to the time the change was made, his salary was $1,000.00 per annum. By section twenty-four, article five, of our present constitution, the salary of the attorney general is fixed at $2,000.00 per annum; and by section twenty-three of the schedule, the relator was continued in, and now holds his office.

The legislative appropriation of the twenty-third of February last, sets apart only the sum of $1,000.00 per annum from which to pay the relator's salary, thereby leaving a deficiency of $250.00 per quarter, since the first day of November, in meeting this increased compensation, if we look alone to this source of payment; this deficiency amounting, at the close of the last quarter, to $166.66, he is entitled to have made up to him, as provided in section twenty-five of said schedule, by a warrant in due form, drawn by the defendant on the state treasurer, and to be paid out of any funds not otherwise appropriated; in other words, out of the general fund.

The peremptory writ is therefore awarded as prayed, to carry this judgment into effect.

JUDGMENT ACCORDINGLY.

ALL of the Judges concurred.

W. H. DODGE, PLAINTIFF IN ERROR, v. THE PEOPLE OF THE STATE OF NEBRASKA, DEFENDANTS IN ERROR.

1. **Constitutional Law**: JURISDICTION. The act of February 25, 1875 (Laws 1875, 31), authorizing any judge of the district court to designate the county in his district where an indictment may be found, and persons tried for felony committed in any unorganized county attached to such district, or in any county where no district courts are held, so far as it applies to such unorganized counties, is not unconstitutional; and the court of any county so designated has jurisdiction of the offense.

2. **Practice in Criminal Cases**: JURISDICTION. If the indictment contain an averment of designation under the above act, sufficient appears of record to show that the court had jurisdiction, though no distinct copy of the order of the judge be set forth therein.

3. ———: MOTION FOR A NEW TRIAL. In criminal, as well as in civil cases, all the reasons known to exist for setting aside the verdict, and granting a new trial, should be set forth in the motion therefor.

4. ———: INTENDMENTS OF THE RECORD. Where the record in a capital case shows the arraignment and plea of the prisoner, his presence during the impaneling of the jury, his filing of instructions with the clerk, and his exceptions to the charge given to the jury, the presumption is that he was present during the trial, and at the return of the verdict, there being no allegation or complaint to the contrary in the motion for a new trial.

5. ———: EXCUSING JURORS. Where there is no abuse of the discretion vested in the district court, in excusing persons from serving on juries, its action in that regard will not be reviewed in the Supreme Court.

6. ———: SUMMONING JURIES. The summoning of juries for the trial of criminal cases is regulated by Sec. 660, 664 of the civil code, but the number of jurors is not limited to those summoned on the regular panel. The court may direct the sheriff to summon talesmen, and no special venire therefor is necessary.

7. ———: ARREST OF JUDGMENT. Want of jurisdiction and insufficiency of the indictment, are the only grounds for arrest of judgment, under the criminal code.

8. **Evidence**: CONFESSIONS. The degree of credit, ordinarily to be given to the confession of a prisoner, should be left to the jury, under proper instructions, with reference to the evidence in each particular case. But a confession alone is not sufficient evidence of the *corpus delicti*. There should be other proof that a crime has been committed and the confession admitted only for the purpose of connecting the defendant with the offense.

9. ———: ———: Instructions asked for by a prisoner with reference to an alleged confession, made by him and admitted in evidence, *held* properly refused, there being nothing in the record showing the nature of the confession, to whom made, its extent, or whether corroborated or not.

10. **Practice in Criminal Cases**: EXCEPTIONS TO CHARGE. Each specific portion of a charge, deemed erroneous, must be pointed out and excepted to. A general exception is unavailing, although the rule will not be as rigidly adhered to in criminal, as in civil cases, where it is apparent that the charge given was not applicable, and tended to mislead the jury.

11. ———: SENTENCE. At common law courts had no power to grant new trials in cases of felony, and it was held that they had no power to revise or correct their judgments in such cases. Consequently if the sentence of a prisoner was so defective as to invalidate the judgment, he was discharged. But this doctrine is now overruled. *King v. Kenworthy*, 1 *Barn. and Cress.*, 711. *Regina v. Holloway*, 5 *Eng. Law and Equity*, 360.

12. ———: ———. Where a prisoner has been found guilty of murder in the first degree, and the only error that appears on the record is the failure of the court, before pronouncing sentence, to inform the prisoner of the verdict, and ask him whether he had anything to say why judgment should not be pronounced against him, the judgment will be set aside and the cause remanded to the court below, with instructions to render judgment on the verdict in the manner prescribed by law.

ERROR to the district court of Otoe county.

THE plaintiff in error was indicted at the March term, A. D., 1875, of the district court for the murder of James McGuire, on the twenty-seventh day of September, A. D., 1874, in the county of Chase. This latter county is unorganized, and the indictment was found, and plaintiff in error tried in Otoe county, under authority of the act of 1875. *Laws of* 1875, 31. A verdict of guilty was returned by the jury, and the plaintiff in error sentenced to be executed on the fourteenth day of January, 1876. A writ of error to this court was allowed, and execution of the sentence suspended until its determination. The statute concerning proceedings in error, in capital cases, is as follows:

"Sec. 509. In all cases of conviction where the punishment shall be capital, the judges or court allowing such writ of error, shall order a suspension of the execu-

tion until such writ of error shall be heard and determined; upon hearing such writ of error, they shall order the prisoner to be discharged, a new trial to be granted, or appoint a day certain for the execution of the sentence as the nature of the case may require." *General Statutes*, 834. All other facts necessary to an understanding of the case appear in the opinion.

John C. Watson and Frank P. Ireland, for plaintiff in error.

I. The first question is as to the jurisdiction of the court.

Can the grand jury of one county indict a person for a crime alleged to have been committed in another county? Has the legislature power to direct offenses committed in any unorganized county to be tried in any other county and allow the judge to designate the county wherein the offense may be inquired into by a grand jury, and in case an indictment found, the person or persons tried, no matter how remote it may be from the county where the crime was committed? Most assuredly not. 4 *Bl. Com.*, 303. *Hughes v. The State*, 35 *Ala.*, 351.

II. The constitution of our state gives the right of trial by jury, and the legislature has prescribed how the jury shall be summoned and selected. *Const. Neb.*, 1867, *Art.* 1, *Sec.* 5. *Gen. Stat.*, 642, 643. If it were permitted to disregard one of these formalities, without the consent of the accused, all might be set at naught. *Baggs v. The State*, 45 *Ala.*, 30.

III. There was error in refusing to give the instructions, asked for by the prisoner, and in giving the following instructions:

"Now in your deliberations you will take into consideration the position of the body when, and the place

where it was found as shown by the facts proved, together with all the evidence and circumstances, *and in this review you must receive the declarations and confessions of the accused* with great care and caution, and you will carefully consider and weigh them in the light of the surrounding circumstances of the case as developed on the trial."

IV. Errors appearing on the record.

1. It does not appear upon the record that the prisoner was in court when he was sentenced to be executed.

2. It does not appear upon the record that the defendant was informed by the court of the verdict of the jury.

3. It does not appear upon the record that the defendant was asked by the court if he had anything to say why sentence should not be pronounced against him. The record is conclusive of the fact. And in all felonies the record must show that the prisoner was present in the court when he was sentenced, that he was informed by the court of the verdict of the jury, and that he was asked before sentence, if he has anything to say why judgment should not be pronounced upon him. *Chit. Crim. Law*, 700, 720. *West v. The State*, 2 *Zab.*, 212. *The State v. Ball*, 27 *Mo.*, 324. *Dunn v. Com.*, 5 *Barr*, 384.

V. Under Sec. 509, Crim. Code, we insist that this court must send the case back to the district court for a new trial. *Kuckler v. People*, 5 *Park.*, (*N. Y.*), *Cr.*, 212.

George H. Roberts, Attorney General, and M. H. Sessions, for the People.

I. The act of 1875 is constitutional. Unless there is an inhibition in the constitution prohibiting the same, there can be no question about the power to pass the act.

It is contended that not only is there no such inhibition in the constitution, but on the contrary, that by Sec. 2, Art. 4 and Sec. 4, of Art. 4 of the constitution, the power is expressly conferred.

II. The record shows, that the only exception taken to the charge of the court to the jury was the following: "To this charge and every part thereof the defendant then and there excepted." The charge of the court in this case involving more than one proposition, and a portion of it being admittedly correct, in the expressive language of Justice Crounse—"This firing at the flock will not do." *McReady v. Rogers*, 1 *Neb.*, 129. *Strader v. White.*, 2 *Neb.*, 360. *Graves v. The State*, 12 *Wis.*, 591. *The State of Kansas v. Cassady*, 12 *Ka.*, 550.

III. In the hearing of a case in this court, no errors in the court below can be considered, unless embraced and specified in the motion for a new trial, and the rule is the same in criminal cases as well as in civil. *Midland Pacific R. R. Co. v. McCartney*, 1 *Neb.*, 398. *Cropsey v. Wiggenhorn*, 3 *Neb.*, 117. *The State v. Swartz*, 9 *Ind.*, 221. *Wright v. Potter*, 38 *Ind.*, 61. *Streight v. Bell*, 37 *Ind.*, 550–54.

IV. The record shows that the defendant was in court at the impaneling of the jury and during the trial, and it does not show that the court even took a recess, or that the prisoner left the court room until after the jury brought in their verdict. From this it is claimed that he was in court at the rendition of the verdict. The presumption is in favor of the regularity and legality ot the proceedings in the court below. *State v. Schlagel*, 19 *Iowa*, 169. *State v. Pitts*, 11 *Id.*, 343.

Where the defendant was regularly tried and convicted of misdemeanor, and judgment rendered thereon, *held*, that it was not necessary that the record should

show that the defendant was asked if he had any legal cause why judgment should not be pronounced against him. *State v. Stiefle*, 13 *Iowa*, 603. Statutes of Nebraska similar to that of Iowa. *Gen. Stat.*, 832, *Sec.* 495. *Iowa Statutes*, *Sec.* 3065.

V. If the trial has been regular, and no error intervened prior to the rendition of the verdict, but has subsequent thereto, the case should be remanded for sentence. *Gen. Stat.*, *Sec.* 449, *Crim. Code. Regina v. Holloway*, 5 *Eng. Law & Eq.*, 310. *King v. Kenworthy*, 8 *Com. Law*, 300. *Benedict v. State*, 12 *Wis.*, 313.

MAXWELL, J.

The first error assigned is that the court had no jurisdiction.

The plaintiff in error was indicted and tried in Otoe County, for the murder of James McGuire in the unorganized county of Chase. The act approved Feb. 25, 1875, provides that "it shall be lawful for the judge of any judicial district court within the state of Nebraska, when it is made to appear to him that a crime has been committed, amounting to a felony, within any unorganized county or territory, or in any county where no terms of the district court are held, attached to or in his said district for judicial or other purposes, to designate the county in his district wherein the alleged offense may be inquired into by the grand jury, and in case an indictment is found, the person or persons so indicted tried; provided, nothing herein contained shall prevent the person or persons so indicted, upon a legal and proper application, removing the trial thereof to some other county in the same judicial district."

At common law in general, offenses could be inquired into as well as tried, only in the county where they were

committed. 4 *Blackstone Com.*, 305. Yet there were many exceptions to the rule. *Id.*, 304. Section four hundred and fifty-five of the criminal code provides, that all offenses shall be tried in the county in which they are committed, unless for cause the venue is changed. The act above quoted, so far at least as it applies to unorganized counties, is clearly within the power of the legislature. Such counties having but few inhabitants, and being entirely without organization, must from the necessity of the case be attached to some other county in the same judicial district for judicial purposes. The right to designate the county is properly left with the judge of the district court, who being supposed to be entirely free from bias, may reasonably be expected to designate a county in his district where a fair and impartial trial can be had. If the county designated is too remote from the place where the offense is alleged to have been committed, so that material witnesses cannot be procured to attend the trial, or if from any cause a fair and impartial trial cannot be had in the county designated, the defendant has a right, on a sufficient showing being made to the court, to have the cause removed to some other county in the same district for trial. In the case at bar, no distinct copy of the order of the court designating Otoe County is found in the bill of exceptions, but the indictment contains an averment that Otoe County was so designated by the judge of the district court. It also appears from the bill of exceptions, that defendant's counsel moved to quash the indictment, alleging among other grounds that the court had no jurisdiction of the cause, which motion was overruled by the court. We think, therefore, that sufficient appears on the record to show that the court had jurisdiction of the case.

It is claimed that the record does not show that the prisoner was present in court during the trial, nor at the

time sentence was pronounced. It appears from the record, that the prisoner was duly arraigned and plead not guilty, that he was present during the time the jury were being impaneled, that after the evidence was closed he filed instructions with the clerk and excepted to the instructions given by the court on its own motion, but the record is silent as to whether the prisoner was present in court or not, at the time the jury returned their verdict. The rule is well established, that in all cases of felony the prisoner must be present in court during the trial, and at the time the verdict is received, and no valid judgment can be predicated on a verdict received in the absence of the prisoner. At common law, the finding of the jury of the guilt of the accused, was conclusive of that fact, and the court possessed no power to set the verdict aside and grant a new trial on the merits, on the motion of the accused, even where the verdict was clearly against the weight of the evidence. *Hilliard on New Trials*, 114. *Queen v. Bertrand*, 1 *P. C.*, 520. *The King v. Fowler*, 4 *Barn. & Ald.*, 275. 1 *Ch., C. L.*, 653. Neither was counsel allowed a prisoner upon his trial on the general issue, in any capital crime, unless some point of law arose proper to be discussed. 4 *Blackstone Com.*, 355. To guard against this provision of the common law, the constitution of the United States provides, that in all criminal prosecutions the accused shall have the assistance of counsel for his defense. Nor must it be forgotten, that among the variety of actions that men are liable to commit, one hundred and sixty were declared to be felonies without benefit of clergy, the punishment of which was death. 4 *Blackstone*, 19. Therefore the utmost caution was required in capital trials, in favor of life, and if an irregularity materially affecting the trial occurred to the injury of the accused, the court usually represented such matter to the crown, and a pardon was granted. *Com-*

monwealth v. Green, 17 *Mass.*, 534. Now, however, in the court of Queen's Bench, when the record is before that court and it appears that evidence has been improperly admitted, or the jury have been misdirected, a new trial may be granted in cases of felony. *Rex v. Scaife*, 2 *Den., C. C.*, 281. 17 *Q. B.*, 238; and a person accused of crime is allowed the assistance of counsel to conduct his defense. In this country the almost uniform practice has been to extend to criminal cases, so far as the revision of verdicts is concerned, substantially the same principles which have been established in civil cases; and by statute in this state, after a verdict of guilty, a defendant may move for a new trial, on any or all of the grounds therein set forth. And it is his duty, in such a case, to bring before the court, by his motion, all the reasons which are known to exist for setting aside the verdict and granting a new trial. There is no reason why the same rule in that respect should not apply in criminal as in civil cases. In this case, in the twenty-three grounds assigned in the motion for a new trial, there is no allegation that the prisoner was not present in court; the only irregularity complained of in the proceedings of the court is in overruling the motion of the prisoner to quash the indictment. The presumption is that the court performed its duty and that the prisoner was in court at the time the verdict of the jury was received. In the case of *Beale v. The Commonwealth*, 25 *Penn. State*, 18, the court held "we are not to expect too much from the records of judicial proceedings. They are memorials of the judgments and decrees of the judges, and contain a general but not a particular detail of all that occurs before them. If we must insist on finding every fact fully recorded before a citizen can be punished for an offense against the laws, we should destroy public justice, and give unbridled license to crime. Much must be left to intendment and presumption, for it is often less

difficult to do things correctly than to describe them correctly." And in *Rhodes v. The State*, 33 *Ind.*, 24, the court held: "In this case the prisoner is shown by the record to have been present in court at the commencement of the trial. The record is silent as to where he was at the return of the verdict. We presume he was in court." *See also*, *Brown v. The State*, 13 *Ark.*, 100.

It is alleged that there was error in impaneling the jury in the case, and in summoning talesmen. It appears that eleven of the regular panel of petit jurors were absent or excused, and that the court ordered the sheriff to summon eleven good and lawful men from the body of the county to fill up the panel, which appears to have been immediately complied with. The counsel for the prisoner challenged each of these talesmen, because their names did not appear on the "venire of the original panel of jurors summoned," which challenge was overruled by the court, and the prisoner thereupon excepted. Section four hundred and sixty-six of the criminal code provides that "in all criminal cases, except as otherwise provided, the jury summoned and impaneled according to the provisions of the laws in force relating to the summoning and impaneling of juries in other cases, shall try the accused." *Genl. Stat.*, 825. It is further provided that a person arraigned for a crime punishable with death, shall be admitted on his trial to a peremptory challenge of sixteen jurors, and the state to a peremptory challenge of six jurors. Section six hundred and sixty of the civil code provides that "twenty-four names shall be drawn, and the persons whose names are so drawn shall be the petit jurors." Section six hundred and sixty-four 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 court, or whenever at any general or special term, or at any period

of a term, for any cause, there is no panel of grand or petit jurors, or the panel is not complete, said court may order the sheriff, deputy sheriff, or coroner, to summon without delay, men having the qualifications of jurors." *Genl. Stat.*, 643.

The district court certainly has authority, on sufficient cause being shown, to excuse a grand or petit juror, and unless there is a clear abuse of that authority to the prejudice of the accused, the matter will not be reviewed in this court. It is apparent that it was not the intention of the legislature to limit the number of jurors to those drawn on the regular panel. If that were so, it would be in the power of the accused, in a case like this, to prevent a trial altogether. It is the duty of the court to see that a party accused of crime, has a fair trial before a fair and impartial jury, and to secure this the court has full power and authority to direct the sheriff to summon as many talesmen as may be deemed necessary to secure an unbiased jury, and no special venire is necessary for that purpose. There is nothing in this case from which it can be inferred that there was any bias or prejudice in the minds of the jurors, so summoned, against the accused, nor does it appear that he was prejudiced in the least.

A motion in arrest of judgment, under our statute, applies only to the jurisdiction of the court and the sufficiency of the indictment, and was properly overruled.

It is alleged that the court erred in refusing to give certain instructions in regard to the confession of the accused. The rule is well settled that to make a confession admissible in any case, it ought to appear that it was made voluntarily and without inducement of any kind, and the evidence of verbal confessions of guilt is to be received with great caution. A confession alone ought not to be sufficient evidence of the *corpus delicti.*

There should be other proof that a crime has actually been committed, and the confession should only be allowed for the purpose of connecting the defendant with the offense. *Cooley's Con., Lim.*, 315. *Stringfellow v. The State*, 26 *Miss.*, 157. *The People v. Henessy*, 15 *Wend.*, 147. 1 *Greenleaf Ev.*, 217.

None of the testimony in the case is before us. We know nothing of the nature of the alleged confession, to whom made, its extent, or whether corroborated or not. Instructions should be given with reference to the evidence in each particular case, and questions of fact should be fairly submitted to the jury. Ordinarily, the degree of credit, to be given to a confession, is to be left to the jury under the circumstances of each case. From the record before us there is nothing to show that the court erred in refusing the instructions asked by the prisoner.

The prisoner excepted to the instructions given by the court on its own motion, in these words: "To this charge and every part thereof the defendant then and there excepted." This is a general exception. The rule is well settled in this court that each specific portion of instructions which is claimed to be erroneous, must be distinctly pointed out and specifically excepted to. *McReady v. Rogers*, 1 *Neb.*, 124. *Strader v. White*, 2 *Neb.*, 360. *Schryver v. Hawks*, 22 *Ohio State*, 308. Although this rule will not be as rigidly adhered to in criminal as in civil cases, where it is clear the instructions could not be applicable in any possible view of the case, and that they were calculated to mislead the jury. But the instructions given in this case are substantially correct in principle.

It is unnecessary to take up the numerous assignments of error in detail. We have carefully examined the record and can find no error, up to the return of the verdict, of which the prisoner can complain. The verdict

of guilty will therefore be permitted to remain undisturbed.

Section four hundred and ninety-five of the criminal code provides that "before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be pronounced against him." *Genl. Stat.*, 832.

It does not appear from the record that this requirement of the statute was complied with, or that the prisoner was present in court at the time sentence was pronounced, and counsel for the prisoner insist that there being error in this, we have no authority to either pass sentence, or remand the cause to the district court with instructions to pronounce sentence in conformity to law, and therefore the prisoner must be discharged.

We are aware that cases can be found, holding under a statute similar to ours, that there is no authority in this court either to resentence the prisoner, or remand the case to the court below for that purpose. We may correct errors in any other respect, review the proceedings of the district court, see that the accused has had a fair trial, and that his rights have been properly guarded and secured, but the moment it appears that the court has not fully complied with the law in pronouncing sentence, it is at once ousted of jurisdiction and the accused must go aquit. This doctrine, originating in England at a time when the courts of that country held that they had no authority to revise proceedings and judgments in cases of felony, and grant new trials, partakes of the reasoning of that period, that the judgment in a criminal case was absolute, unless a pardon was granted, that if the judgment did not conform to the law there was no power of revision or amendment, and as the prisoner could not be held on an invalid judgment he must therefore be discharged. This doctrine was expressly over-

ruled in *King v. Kenworthy*, 1 *Barn. & Cress.*, 711, and in *Regina v. Halloway*, 5 *Enq. Law and Equity*, 310; and the English courts now hold that they have full authority in such cases to impose the sentence required by law. In the case of *Beale v. The Commonwealth*, 25 *Penn. State*, 22, the court held: "the common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed error in passing sentence If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established. Our duty is to correct errors and 'minister justice,' but such a course would perpetuate error, and produce the most intolerable injustice." And to the same effect see *Benedict v. The State*, 12 *Wis.*, 313. *Williams v. The State*, 18 *Ohio State*, 46. *Richett v. The State*. 22 *Ohio State*, 405.

A person convicted of felony cannot waive his right to be present in court, at the time sentence is pronounced, and he must be "informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be pronounced against him." As it does not appear that these requirements of the statute have been complied with, the judgment must be reversed, and an order directed to the court below, to proceed to render judgment on the verdict in the manner prescribed by law. In the language of Judge Dixon in *Benedict v. The State*, 12 *Wis.*, 313, "this course appears to us not only rational and correct, but the only one which in many cases will save the justice of the state, in criminal proceedings, from being entirely defeated through the mistakes or oversights of clerks and other officers, in matters not reached or at all affecting the merits of the controversy or the legal rights of the accused."

This case is therefore remitted to the court below with

directions to proceed to pronounce judgment on the verdict in the manner prescribed by the statute.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

THE STATE OF NEBRASKA, EX REL., BRUNO TZSCHUCK V. JEFFERSON B. WESTON, AUDITOR.

1. **Constitutional Law**: EXECUTIVE OFFICERS: ADJUTANT GENERAL. The office of adjutant general exists in this state by virtue of an appointment from the Governor as commander-in-chief of the military forces, acting under authority given him by Congress (1 Statutes at Large, 273), and the act of March 4, 1870. *Gen. Stat.*, 470.

2. ——: ——: ——. Such an office is not executive within the meaning of the constitution which provides that "no other executive state office (aside from those mentioned), shall be continued or created."

3. ——: ——: SECRETARY OF STATE: SALARY. One holding the office of secretary of state is eligible to that of adjutant general, and the allowance to him of a salary therefor, does not conflict with that section of the constitution, fixing the salary of the secretary of state, and providing that he shall not receive to his own use "any fees, costs, perquisites of office, or other compensation."

ORIGINAL application for Mandamus. It set forth that the relator had, on the first day of February, 1875, been duly appointed, commissioned and qualified as adjutant general of the state, by his excellency Silas Garber, Governor, and that he had ever since performed the duties of that office and was fully entitled to the emoluments thereof; that the legislature at its session in 1873, appropriated the sum of four hundred and fifty dollars per annum as the salary of the adjutant general; that he had drawn such salary up to the first day of November, 1875, but since that date the auditor of state had refused to draw his warrants for the further payment of such salary. The answer of the respondent, denied that there

was any such office as adjutant general in this state since the first day of November, 1875; and that anything was due the relator as adjutant general since that date. It alleged that the present constitution taking effect November 1, 1875, abolished and discontinued that office, if any such office before existed; that the relator was secretary of state receiving a fixed salary, and as such officer prohibited from receiving any salary or emoluments for or on account of any other office.

N. S. Harwood, for the relator.

I. Does the office of adjutant general exist in this state? That point being established, the only remaining question will be, can the relator, under our new constitution, hold the office and draw the pay? We contend that the office is in existence in this state from the following facts, viz: The act of Congress of 1792, and acts supplementary thereto, requires each state to have an adjutant general.

1. These acts are in full force, constitutional, and mandatory on the states. Nor do we find them to have been questioned by the courts. This is necessary to enforce the war power of the general government.

2. The state has recognized the force of this law by its militia act, which requires its independent companies to report to the adjutant general, and gives the governor power to make all necessary appointments to carry out the provisions of such act. *Gen. Stat.*, 470. The adjutant general is one of the officers required under this act. It is impossible to draw the state quota of arms without such officer or organize the militia. Therefore in pursuance of said act, and the acts of Congress, the governor appointed the relator to this office, and the legislature thereafter ratified the appointment by making an appropriation to cover his salary $450 per annum. Can it need

any stronger proof of the existence of the office than this?

II. The existence of the office under the permanent authority of congress, and acquiescence of this state, being established, can the relator hold the office?

1. The relator is secretary of state. Sec. 24, article V, of the new constitution, provides the salaries of the various state officers, and that "they shall receive no other fees or perquisites of office, and that all fees shall be paid in advance into the state treasury." This relates to the fees of the officer, and no more relates to his salary as adjutant general, than it would to fees he might receive as a notary public or commissioner of deeds, if he should chance to hold those offices. As well might it be contended that the profits of his farm should be converted into the state treasury, as that his salary should be.

2. The office is not an *executive* office, within the meaning of the constitution. It is in the nature of a staff office. An adjutant never holds a command; he simply acts as the clerk or agent of an executive officer.

3. The relator doubtless could not be compelled to perform the duties of this office, but having done so he is entitled to the pay. *Love v. Baehr*, 47 *Cal.*, 364. *Crosman v. Nightingill*, 1 *Nev.*, 326. *Converse v. United States*, 21 *How.*, 463.

George H. Roberts, *Attorney General*, for the respondent.

I. It is not denied that his excellency, the governor, has duly appointed the relator to the office, so-called, of adjutant general, but it is contended that under the act of March 17, 1871, *General Statutes*, 1020, said office was abolished, and since that time no authority has existed to fill the office. And by this same act abolishing the office, the books and papers are to be kept and

preserved by the secretary of state. So then, under this act, the taking care of these records was made part of the duties of the secretary, as secretary, and was so designated by law; and under this act, as well as under the general law prescribing the duties of secretary of state, it became, was, and still is the duty of the relator, as such secretary, to take charge of and care for these records, and without additional compensation.

II. Can it be claimed, that the appropriation for salary as adjutant general re-created that office? Can it be claimed that it exists under an old and musty act of Congress, without any assisting legislation of the state? This appropriation, when made, was only the result of an effort in behalf of the people, to make other and further provisions for their then niggardly paid public servants, if not over, then around the provisions of the old constitution, which fixed the salary of the secretary at the paltry sum of six hundred dollars per annum. But the reason of this appropriation is now happily remedied, by the adoption of the present constitution, to some of the provisions of which we invite the attention of the court.

III. It certainly seems as if we might pause by merely citing Sec. 24, article V, which provides that the officers mentioned shall receive "no other compensation," satisfied that if the court could not agree with us in the propositions above laid down, it would do so in our construction of this section, the salary of the secretary, in which, as we claim is in full compensation for the performance of all the duties devolved upon him, including the care and custody of the records of the former adjutant general. But by section twenty-six of the same article, there is an express inhibition that no other executive state office shall be continued or created,

except those named in the constitution, among which is not to be found the name of the adjutant general.

IV. We contend then: *First.* We had no such office under the old constitution. *Second.* If we had, it was discontinued because not provided for by the new. *Third.* The books and records are in charge of the secretary of state. *Fourth.* We find the provision that duties devolving upon officers not provided for by this constitution shall be performed by the officers herein created. *Fifth.* We find the secretary of state performing the duties of an adjutant general. *Sixth.* The constitution fixes the salary of secretary of state at $2,000, and denies him any other compensation whatsoever.

V. But the relator who, as is admitted, fills the office of secretary of state, is ineligible to "any other state office," under the provisions of section two of the Executive Article. And if the office of adjutant general does exist, which any other person might fill, and draw the salary appropriated, still the relator is ineligible under the last named section of the constitution, which clearly provides that "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." The relator is not then entitled to the relief prayed for, and the writ should be denied.

N. S. Harwood, in reply.

I. We have proved the existence of the office independent of the act of 1869, creating it and the act of 1871, abolishing it. Therefore the act of the legislature did not create a thing already in existence, consequently it could not abolish it. It did, however, by the first named act fix the salary, and make it the duty of the governor to appoint. The last did, and only could abol-

ish the salary and leave it to the governor to appoint or not, as he saw fit. But this act in no wise repealed the militia act of 1870.

II. Section two of Article V, which provides that "none of the executive officers shall be eligible to any other state office, during the period for which they have been elected," if it applies at all to this office, is held in check until the expiration of the present term by section five of the schedule, which provides that "all persons now filling any office or appointment, shall continue in the exercise of the duties thereof according to their respective commissions, elections or appointments," unless otherwise directed by the constitution, which in this case it is not. The relator's commission does not expire until January, 1877.

LAKE, CH. J.

This is a proceeding by mandamus to compel the defendant who is auditor of state, to draw his warrant upon the state treasurer, in favor of the relator in payment of his salary as adjutant general of the state. The answer to the alternative writ raises several questions for our consideration which we will briefly notice.

I. Is the relator the officer which he claims to be? That he was, at least formally appointed to said office on the 1st day of February, 1875, is not disputed. But it is contended on behalf of the defendant, first: That the governor had no authority to make the appointment; and second: That even if the authority to make it be conceded, yet the new constitution, of its own force, terminated the office on the first day of November last, and third: If this last proposition be untrue, then it is insisted, that the relator, who was duly elected to, and holds the office of secretary of state, with a fixed salary of $2,000 per annum, is, by the constitution, debarred the privilege of receiving any other or further compensation whatever

from the state, although he may have performed all the duties of the office of adjutant general also. We will notice these objections in the above order.

By an act of the legislature, approved February 15, 1869, the governor was required to appoint and commission an adjutant general for the state, who was required by said act to reside at the seat of government, keep his office open for the transaction of business every day, Sundays excepted, and was to receive for his services a salary of $1,000 per annum. This act was repealed on the seventeenth day of March, 1871. By the second section of this repealing act it was provided, that "the books, papers, and property of the state, in the hands of the adjutant general, shall be taken possession of by the secretary of state, and by him preserved."

By this act it will be observed that the secretary of state was simply made the custodian of the books, papers, and property of the state then in the hands of the adjutant general. He was invested with none of the powers, nor required to perform any of the numerous duties, usually devolving upon an adjutant general.

But at the time of the repeal of the act of February 15, 1869, the act of March 4, 1870, providing for the organization of state troops, and for other purposes, was in full force. Following the provision of the constitution, in this particular, section five of this act provides, that "the governor shall be commander-in-chief of the militia, and volunteer troops of the state, and he shall arm and equip the same when in his judgment he shall deem it necessary for the protection of the citizens thereof, *so as to conform to the laws and regulations of the United States army*," etc.

Now to do all this it is absolutely necessary that there should be certain officers to perform the various duties contemplated by this act, one of the most important of which, in view of the relation which the military organi-

zation of the state holds to the general government, is the adjutant general.

By section six of the Act of Congress entitled, "An Act more effectually to provide for the National Defense by establishing an uniform militia throughout the United States," approved May 8, 1792, it is provided, "That there shall be an adjutant general appointed in each state, whose duty it shall be to distribute all orders from the commander-in-chief of the state to the several corps; to attend all public reviews when the commander-in-chief of the state shall review the militia, or any part thereof; to obey all orders from him relative to carrying into execution and perfecting the system of military discipline established by this act; to furnish blank forms of different returns that may be required, and to explain the principles on which they should be made; to receive from the several officers of the different corps throughout the state, returns of the militia under their command, reporting the actual situation of their arms, accoutrements and ammunition, their delinquencies, and every other thing which relates to the general advancement of good order and discipline; all of which the several officers of the divisions, brigades, regiments, and battalions, are hereby required to make in the usual manner, so that the said adjutant general may be duly furnished therewith; from all which returns he shall make proper abstracts, and lay the same annually before the commander-in-chief of the state." 1 *U. S. Statutes at Large*, 273.

Now it is quite clear that this act of Congress contemplates, nay requires, affirmative action at the hands of the proper authorities. Indeed, it directs the performance of a plain duty, which a due regard for the public safety requires should not be omitted.

And it would seem that the legislature must have had this duty in view, in the passage of the act of the fourth

of March, 1870, before referred to, by which at least the skeleton of a state military organization is provided for.

As to the office of adjutant general, it was undoubtedly intended by the legislature that it, as well as all other usual and necessary staff offices, required for the efficient organization of the militia, should be left just where they usually are, viz: in the hands of the commander-in-chief, for, by section six of said last named act, it is provided that "the governor shall appoint, except where elected as hereinbefore provided, and commission all officers."

Giving, therefore, to this act of Congress, and to that of our own legislature on this subject, the effect which it was evidently intended they should have, it seems very clear to us, that the governor had full authority to make the appointment in question, and that the relator was entitled, under the law, to the compensation which the legislature had provided.

II. But, it being established that the relator was rightfully in the possession of the office, and well entitled to the emoluments thereof, at the time our present constitution took effect, how stands the matter now? Is there anything in the instrument from which it can reasonably be inferred, either, that the office is destroyed, the relator rendered ineligible, or the legislative appropriation for his salary changed, or modified, in any respect?

It was claimed on behalf of the defendant that the office ceased to exist on the first day of November last, when the new constitution took effect. This claim is based upon sections one and twenty-six, article V, of the constitution. Section one, among other things, provides that "the executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public

instruction, attorney general, and commissioner of public lands and buildings." And section twenty-six, "that no other executive state office shall be continued or created, and the duties devolving upon officers, not provided for, by this constitution, shall be performed by the officers herein created." This last section doubtless refers solely to executive state officers, and to civil duties, strictly executive. We do not think it has any reference whatever to the officers necessary to the perfection of a military organization under our National and State laws. Nor do we see any reason why the person who happens to hold the office of secretary of state, may not, at the same time, hold that of adjutant general. It is true, that the duties of the two offices are entirely dissimilar, but they are in no respect antagonistic, and, so long as the incumbent is willing to undertake the performance of both, in the absence of a law prohibiting it, we are of the opinion he may do so. We do not think that the office of adjutant general is an executive office within the meaning, nor does it fall within the operation of the sections of the constitution before cited.

III. But, conceding that he may hold the office, and perform the duties thereof, can he receive the compensation which the legislature has provided? The defendant insists that he is restricted by the constitution solely to his salary as secretary of state.

It is doubtless true, that, as to all duties, which, as secretary of state, he is now, or may hereafter be required to perform, he is absolutely restricted to the salary provided in the constitution. But we do not think this restriction goes to the extent claimed for it. It is found in section twenty-four, article V, which fixes the salaries of the several executive state officers, and, among other things provides, that the officers therein mentioned, "shall not receive to their own use, any fees, costs, inter-

est upon public moneys in their hands, or under their control, perquisites of office, *or other compensation*," *etc.*

As before stated, this would undoubtedly apply to all acts or duties, required of the relator as secretary of state, and as to such acts and duties, he is confined to his salary of $2000 per annum, for his compensation. But the duties imposed upon him as adjutant general are in no sense of a civil character, but purely military. Under the act of Congress before referred to, it is made his duty "to distribute all orders from the commander-in-chief of the state to the several corps; to attend all public reviews, when the commander-in-chief shall review the militia, or any part thereof; to obey all orders from him relative to carrying into execution and perfecting the system of military discipline established by this act," duties in no sense pertaining or relating to the office of secretary of state, and not imposed upon him as such officer.

Such being the case, we see no reason why the relator is not entitled to whatever compensation, as adjutant general, the legislature may see fit to bestow upon him, in addition to his salary as secretary of state. *Love v. Baehr*, 47 *California*, 364.

THE PEREMPTORY WRIT IS AWARDED.

All the judges concurred.

JOHN LAMMERS, APPELLANT, v. P. C. NISSEN AND OTHERS, APPELLEES.

1. **Riparian Rights**: ACCRETIONS. An accretion to land is the imperceptible increase thereto on the bank of a river by alluvion, occasioned by the washing up of sand or earth, or by direliction as when the river shrinks back below the usual water mark; and land so formed by addition belongs to the owner of the land immediately behind it.

2. ———: PUBLIC LANDS: MEANDER LINES. Although, as to public lands of the United States, a meandered line is generally considered as following the windings of a stream, yet the question whether it does so or not may be determined by evidence *aliunde*. The mere fact that it is run and designated upon the plats as a meandered line is not conclusive against the government.

3. ———: ———: ———. An entry of government land, bounded by a meandered line, does not include land lying at the time between such meandered line and the bank of the river.

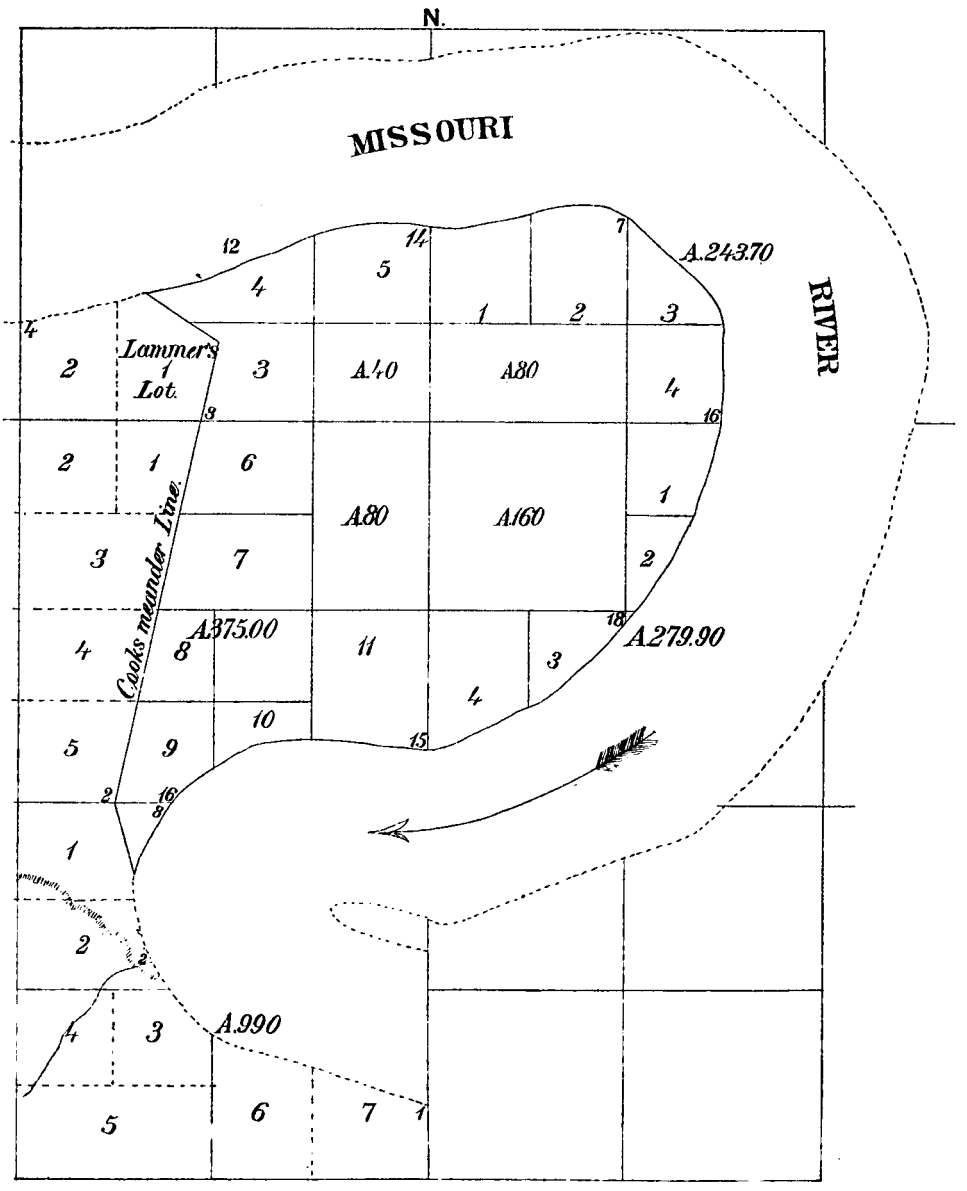
THIS was an appeal from a decree dismissing plaintiff's petition rendered by Hon Samuel Maxwell, sitting in the district court of Cedar county.

It was a petition in equity, filed by the appellant, against P. C. Nissen, Henry Filber, Peter Johnson, and Mrs. Christina Meng, widow of Jesse P. Meng, deceased. The plaintiff alleges, that on the 17th day of July, 1861, he entered at the United States Land Office, among other property, lot one in section twelve, in township thirty-three, range one east, situated in said county of Cedar, and on the 5th day of December, 1861, received a patent therefor; that the lot bordered on the Missouri river, and since the date of his entry a large body of land has formed thereon by accretion, which has been covered by timber, and is valuable; that the defendants for the purpose of defrauding him out of said property, acquired by these accretions, by fraudulent misrepresentations procured a fragmentary survey thereof to be made by the United States; that the defendants have entered the

same at the United States Land Office, and received patents therefor; that plaintiff is still the owner of most of this land, but a part thereof he has conveyed with full covenants of warranty; that the defendants have cut and removed, and still threaten to cut and remove timber therefrom. The prayer is for an injunction restraining the defendants from cutting and removing this timber, and that the titles claimed by them to parts of said land, may be cancelled in order to remove the cloud cast upon the plaintiff's title.

Separate answers were filed by the defendants, but on the 20th of November, 1874, they joined in an amended answer, in which they deny that the lot one bordered on the river; and that since the purchase, large accumulations of land have formed thereon by accretion, and they say that at the time of plaintiff's purchase, there was land between the boundary thereof and the river; that in the original survey, the meander line was run along the bank of an ancient slough and not the bank of the river, leaving a tract of one thousand acres between the line and the river, not subject to overflow above high water mark, and covered with a dense growth of cottonwood and other timber, which land belonged to the United States, and formed no part of lot one; and from the original survey to the fragmentary survey, in 1869, it was recognized by the plaintiff, and adjoining settlers, as the boundary line of the lot, and the plaintiff never claimed it until the survey in 1869. This survey was made by the proper officers in June, 1869, and plats thereof made and filed in the United States Land Office, and the defendants have become the owners of the several parts of the land in controversy by pre-emption purchases from the United States.

On the trial, the plaintiff introduced his patent, with maps and field notes of the surveys, and a large amount of testimony was taken orally and by deposition, and


N.
MISSOURI
RIVER
A.243.70
Lammer's Lot.
Cooks meander Line.
A.40
A80
A160
A375.00
A279.90
A.990

embodied in the transcript brought here. It is too voluminous for publication, nor is it necessary to make any statement of it in detail, beyond what is alluded to in the opinion.

It appeared, however, from the maps filed that the original survey, made by Cook in November, 1858, showed the meander line as running along the bank of the Missouri river, and no reference is made to any land lying *outside* of the meander, but the parcel of land entered by the plaintiff, as lot one, of section twelve, is represented as immediately adjacent and bounded by this line. It was also shown that the government made a special survey of this fractional township in 1869, and from the maps and field notes thereof, it appears to include a large tract of land, lying east of the "meander line" of the original survey. The situation of this land will better appear by a reference to the adjoining map of the special survey, which also shows the original meander line run by Cook in 1858.

In the court below the finding was in favor of the defendants, and a decree was rendered dismissing plaintiff's petition. He appeals.

J. M. Woolworth, for appellant.

The questions raised upon the record are, whether the entry by the appellant of lot one, gave him the land beyond the meander line on the river side? Whether, if it did, it also gave him all land to the river which was surveyed, and whether the accretions made after the entry also belonged to him.

First.—I insist as a matter of law, that in the survey of the public lands, the meander line upon rivers, whether navigable or non-navigable, is not the boundary of the land included within the lines marking a tract, but the tract extends to the bank of the river, without regard to the meander line. There are diverse

decisions on this question, but as it is one of federal law the decisions of the United States supreme court are conclusive upon it. That court held the law as we claim it, in the *Railroad Co. v. Schurmeir*, 7 *Wall.*, 272, affirming the judgment of the supreme court of Minnesota, in the same case, 10 *Min.*, 82. This case is on all fours with this. This view was also taken in *Kraut v. Crawford*, 18 *Iowa*, 549. *Lorman v. Benson* 8 *Mich.*, 18. *Rice v. Ruddiman*, 10 *Ib.*, 125. *Gavit v. Chambers*, 3 *Ohio*, 496. *Walker v. Board of Public Instruction*, 16 *Ib.*, 545.

And still further, the field notes and plat, showing the survey, having been duly approved, are binding on the government as to where the bank was, and as to the character of the land on the river-side of the meander line. *Bates v. The Illinois Central Railroad Co.*, 1 *Black.*, 204.

Second.—From what has been said, it clearly appears that had the entry of the appellant been made at the time of the survey, or while the nature of the land remained as at the time of the survey, he would have taken whatever there was on the river-side of the meander line. Now we submit, the testimony does not show that any change had taken place at that time. That question of fact we submit upon the record. But as matter of law, we insist that had such change taken place, his rights would be unaffected by it. And this appears from a very simple view of the matter. The government had made a survey by which it was bound. It sold the land according to that survey, expressly referring to the plat for description. It must then be held to its grant.

Suppose a private party owned a tract of land which he had platted, and sold a lot therein "according to the plat." Undoubtedly the purchaser would take whatever the plat indicated. A government grant is governed by the same rules.

Third.—Whatever land was formed by accretion, subsequent to the appellant's entry, became his upon common law principles, and upon the decisions of the federal courts, as applied to public lands lying upon the banks of the great rivers. The doctrine of the common law is plainly stated in 2 *Black. Comm.*, 261–2. And it has been applied to the public lands in many cases. *Railroad Co. v. Schurmeir, supra. Bates v. Illinois Central Railroad Co., supra. Banks v. Ogden*, 2 *Wall.*, 58.

W. H. Powell, and Bartlett & Tripp, for Appellees.

I. The government holds right of ownership of all lands unsurveyed, as well as those left out in the course of an original survey, from any cause, as those not yet reached in the course of its work. See the several acts of Congress donating swamp lands to the states. *Lester Land Laws.*

II. The returns and field notes of a survey are *prima facie* the best guides for the sale of lands. They are only *prima facie*, and do not overthrow the fact of mistakes, errors, or omissions, as to lands outside of lines actually run. If the mistake within the survey be greater than instructions permit, the work is rejected. If mistakes or omissions made are corrected in the field notes, so as to come within instructions, then the act of May 30, 1862, is expressly provided. Meander lines bounding land and locating river or swamp, may be correct as to the former, and incorrect as to the latter.

III. The United States patent calls for a definite piece or parcel of land according to the survey and plat. If it calls for a section, it is a mile square; if a lot or fraction, it calls for a parcel bounded by lines, the terminations of which are monuments fixed by the surveyor, and the contents calculated even to hundredths of an

acre. By what then is the grantee bound, except by the lines established? *Kent's Comms., Riparian Rights. Canal Com'rs v. The People*, 5 *Wend.*, 423. *McClintock v. Rogers*, 11 *Ill.*, 279. *Jones v. Johnson*, 18 *How.*, 150. *Walker v. Smith*, 2 *Penn. State*, 43. *Martin v. Carlin*, 19 *Wis.*, 454. *Bates v. Illinois Railroad*, 1 *Black.*, 204. *Parker v. Kane*, 22 *How.*, 1. But the case of *Granger v. Swartz*, 1 *Woolworth Cir. Court Reports*, 88, is almost precisely similar to the one before us, and contains a correct statement of the law, which when applied to this case, must affirm the decree of the court below.

GANTT, J.

The plaintiff in this case claims the land in controversy, as accretions formed on the bank of the river, by which he alleges his land was bounded. The first question suggested to the mind by the issues raised between the parties is: What is an accretion to land? It seems to be a settled doctrine at common law, that an accretion to land is the imperceptible increase thereto on the bank of a river by alluvial formations, occasioned by the washing up of the sand or earth, or by direliction as when the river shrinks back below the usual water mark; and when it is by addition, "it should be so gradual that no one can judge how much is added each moment of time." And when the formation of land is thus imperceptibly made on the shore of a stream, by the force of the water, "it belongs to the owner of the land immediately behind it, in accordance with the maxim, *de minimis non curat lex.*" It is said that "no other rule can be applied on just principles," for the reason that "every proprietor whose land is thus bounded, is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way, he can-

not be held accountable for his gain." In *Granger v. Swartz*, 1 *Woolworth, C. C. R.*, 91, it is held that, if when the entry of public land is made, the banks of the river, at any ordinary stage of water, was in fact where the meander line was represented by the survey, and land has since been formed by accretion, it will become the land of the person who has title to the land immediately behind it. *New Orleans v. United States*, 10 *Peters*, 717.

Again, another inquiry involved in the consideration of the case is as to what is the effect which a meandered line, purporting to have been run along the bank of a stream, may have in regard to land at the time lying between it and the bank of the stream, and remaining unsurveyed. And in respect to this inquiry, I think it sufficient to observe that as to public lands of the United States, conceding the rule to be well settled that a meandered line bordering on the bank of a stream, is not to be considered as the boundary of the tract, but simply as defining the sinuosities of the banks of the stream, and as a means of ascertaining the quantity of the land in the fraction subject to sale, yet the question whether such line does in fact define the sinuosities of the bank of the stream or not, is one which may be determined by evidence *aliunde*. The mere fact that it is run and is designated upon the plats as a meandered line, certainly cannot be conclusive in the matter. To establish the doctrine that such meander line is conclusive, would estop the government from disposing of lands left unsurveyed between such line and the bank of the stream; it would prevent the correction of mistakes made by surveyors in such case, and would be in direct conflict with the well settled rule of law defining what is an accretion to land. In *Granger v. Swartz, supra*, the principle is enunciated that if between the meander line, by which the government survey was made, and the

bank of the river, there is, at the time, a body of swamp or waste lands, or flats, on which timber and grass grew, and horses and cattle fed, then the patents for the lands surveyed would not cover this land, but must be confined to the actual limits of the meander line, and include no more.

The remaining question is one of fact, in the consideration of which the law as stated in respect to accretions and meandered lines must apply. It is this: Has the land in controversy been formed by gradual alluvial formations on the bank of the river, since the original survey of the meander line was made in November, 1858? All the proof taken in respect to the nature and character of this land, at the time the original survey was made, and since that time, is found in the testimony of five witnesses examined on the part of the plaintiff and twelve on the part of the defendants. There is some conflict in the testimony of some of these witnesses; it, however, appears very clear that the weight of the evidence establishes the fact that the land in controversy was not formed by accretions since the original survey was made. One witness, examined on the part of plaintiff, says that in 1857–1858, this land was covered with vegetation and a growth of very young trees; and P. Clark, whose deposition was taken on the part of defendants, says that he resided in the county in which the land is situate, from 1858 till 1865; that he was present when a portion of the original line was run, being interested at the time in relation to a claim which was bounded by the meandered line; that at this time he estimated there were from eight hundred to one thousand acres of land between this line and the bank of the river, of a similar character to that inside the meander line, and covered with a growth of cottonwood and willows, and that there were cottonwood trees from six to eight inches in diameter; he also says that, at the

time, he called the attention of the surveyor to these facts, who replied that he supposed that the slough (on the west side of which he was running the line), was a portion of the river as it had some water in it, but that it made no difference, as the land lying outside the meandered line would go to the state as swamp lands. The testimony of this witness is corroborated by that of ten others. The slough mentioned by the witness extended only a part of the distance along the meandered line.

Upon a close examination of the evidence, we think it clearly establishes the fact, that at the time the meandered line was made in 1858, the nature and character of the land, on both the west and east side of that line, in respect to both soil and topography, were similar, except that some portions on the east side were somewhat lower than on the west side; that at least a very considerable portion of that part now in controversy was covered with vegetation and a growth of cottonwood and willow timber, and that its surface was above the ordinary stage of water in the river.

We are of opinion, that upon both the law and the facts of the case, the finding and decree of the court below are right, and should be affirmed.

DECREE AFFIRMED.

CHIEF JUSTICE LAKE, concurred. MAXWELL, J., did not sit.

THE PEOPLE OF THE STATE OF NEBRASKA, EX REL., JAMES P. HUNTER V. PAUL PETERS.

1. **Contract:** LIABILITY OF SCHOOL DISTRICT. A contract entered into and signed by persons styling themselves as director and moderator of a school district, is their individual contract, and not binding upon the district.

2. **School Districts:** MEETINGS. The action of a majority of a school district board will not bind the district, without notice to or participation therein of the other members.

THIS was an application for Mandamus to compel the defendant, as treasurer of a school district, to pay an order drawn upon him by the director and moderator. The order was in payment of material furnished by the relator to the school district, under an alleged contract entered into by the relator and certain officers of the district for the erection of a school house.

H. H. Blodgett, for the relator.

C. C. Burr, for the respondent.

LAKE, CH. J.

I. To entitle the relator to the peremptory writ, he must establish the validity of the alleged contract for the erection of the school house. In other words he must show that school district number eighty-four was a party to and bound by said contract. Has he done so?

From the testimony reported by the referee it is clearly shown, that the alleged contract was entered into by the relator of one part, and William Axe, director, and Henry Diffenbaugh, moderator, of said school district, of the other part. It does not purport to be the contract of the district in any respect, but simply that of two individuals who style themselves respectively, the director and mod-

erator of the district board. Nor do they by the terms of the contract undertake to bind the district, but in the language thereof, in addition to themselves, their "executors, administrators, and assigns."

In the construction of this instrument, we must hold it to be the contract, not of the school district, but that of Axe and Diffenbaugh; and that, by its terms, it imposes no liability whatever upon said district.

II. But another and quite as serious a difficulty is presented in the fact that this contract was entered into by the director and moderator alone, without any notice to, or participation therein by the treasurer of the board.

Section fifty-four of our school law provides that "the moderator, director, and treasurer, shall constitute the district board." *Gen. Stat.*, 970. Now while we cannot go so far as to hold, as insisted by counsel for the defendant, that all three of these officers must coincide and unite in a contract, to make it binding upon the district, yet we are of the opinion that all of them should be duly notified, and afforded an opportunity at least, to be present at all meetings, at which any business is transacted for the district; otherwise the action of the majority would not be legal, nor the district be bound, if the absent member should refuse his assent to what was done in his absence.

It was evidently contemplated by the legislature, that a school district should have the benefit to be derived from the united experience and wisdom of all the members of the board. This would appear to be so from the fact that special pains seem to have been taken to secure, at all times, a full board. By section sixty-two of said school law, it is provided, not only that the board shall have power to fill by appointment any vacancy that may happen to occur in their number, but it is imperatively required that they "shall" do so. To hold that two members of the board have the authority to appoint pri-

vate meetings, and there transact the important business of the district without notice to their fellow member, is in our opinion, not only wholly unwarranted, but would be fraught with infinite mischief to the public.

For these reasons we must hold that the relator is in no situation to enforce the payment of this order by mandamus, and the peremptory writ is denied.

WRIT DENIED.

THE other judges concurred.

DWIGHT J. MCCANN, PLAINTIFF IN ERROR, V. AMERICAN CENTRAL INSURANCE COMPANY OF ST. LOUIS, MISSOURI, DEFENDANT IN ERROR. JOSEPH P METCALF V. THE SAME.

Contract: SUBSCRIPTION: CONDITIONS PRECEDENT. Where a subscription is made to the capital stock of an insurance company, upon the condition that the same is not payable until a certain specified amount has been subscribed, such condition is a condition precedent, performance of which is essential before the company can enforce the payment of a note given for such subscription; nor will it avail the company that the condition is complied with after suit brought, but before the trial; the right to recover must exist at the time the action is commenced.

ERROR to the district court of Otoe County. The facts are fully set forth in the opinion. The two cases involved the same question and were argued together.

E. F. Warren, for plaintiffs in error.

A subscription to the stock of a railroad company, conditioned to be paid when $5,000 was raised for a certain purpose, is a conditional contract. *Chase v. Sycamore & Courtland R. R.*, 38 *Ill.*, 215. A conditional

subscription need not be paid before condition performed. *Id.* When a party signs a paper to pay any amount towards raising a larger sum, and no further sums are paid, the contract does not become operative unless the contemplated fund is raised. *Dodge v. Gardiner*, 31 *New York*, 239. *Trustees v. Stewart*, 1 *Id.*, 581. Any condition a subscriber sees fit to make must be complied with before he is liable to assessment. *Penobscot & Kennebec R. R., v. Dunn*, 39 *Maine*, 587. *Great Falls and Conway Railroad, v. Copp*, 38 *New Hamp.*, 124. Giving a note is no waiver of condition. *Parker v. Thomas*, 19 *Ind.*, 213.

S. H. Calhoun and *M. L. Hayward*, for defendants in error.

The answer sets up certain fraudulent representations on the part of the plaintiff below, and also sets up a parol agreement between the parties, said to have been made prior to the making of the note. There was no proof of fraud (which cannot be presumed in a law case), and no such parol agreement, changing the contract made in the note can be set up or proven. *Specht v. Howard*, 16 *Wall.*, 564. *Wemple v. Knoff*, 15 *Minn.*, 440. *Wright v. Smyth*, 16 *Gray*, 499. *Campbell v. Tate*, 7 *Lansing*, 370. *Hill v. Payton*, 22 *Gratt.*, 550. The answer of McCann says his subscription was not to be binding unless two hundred and fifty shares were taken; but the answer shows that when sixty-five shares were taken he paid his twenty per cent., and took from the agent a due bill for thirty-five dollars, to be credited not on his subscription to the stock, but on the note sued on; showing clearly that McCann considered his note a complete payment of twenty per cent. on his stock, and that both parties accepted the condition of affairs as they then stood, and settled upon that basis; for, if obtaining

future additions to the subscriptions for stock was a condition precedent to the payment of the note, why did McCann accept a due bill for thirty-five dollars only? The plaintiff in error seems to be laboring under the hallucination that the subscription list is the contract sued on. This is not the case. We sue on the note, *which is the last written contract*, and if it was true (which is not the case) that there were any terms or conditions to the payment of said note, such terms and conditions should have been clearly expressed therein. *Evansville R. R. Co. v. Dunn*, 17 *Ind.*, 603.

LAKE, CH. J.

The action in the court below was upon a promissory note, given by McCann to the defendant in error, for twenty per cent. of his subscription of one thousand dollars to its capital stock. The case was tried to the court without the aid of a jury, and the entire testimony is preserved by a proper bill of exceptions. The only question of importance presented in the record, is whether the finding and judgment of the court are warranted by the evidence. As to all of the material facts of the case there is no dispute. It is shown that McCann's subscription to said capital stock, and his giving of the note were contemporaneous acts, respecting one and the same transaction, and they must therefore be considered together.

The contract of subscription, which was in writing, contains among numerous other provisions, the following important condition, viz: "The terms of subscription are as follows: $20 per share of $100 each, is to be paid when the list is completed, as per apportionment above, and the remaining 80 per cent., unpaid on stock account, is to be assessed only in the event of the 20 per cent. cash fund becoming impaired by losses." The "apportionment" here referred to was in these words, viz:

"American Central Insurance Company. The amount of stock apportioned to Nebraska City is $10,000."

It is very clear that if we give to this condition the effect which its language plainly imports, it must be held to be a precedent condition to the payment of the twenty per cent. for which the note was given, and that, at least as between the maker and the payee, payment could not be enforced until the whole amount of the $10,000 had been subscribed. That a conditional subscription need not be paid until the condition is performed, is a proposition which needs the citation of no authorities in its support.

It is true that the subscription list shows at least a nominal compliance with this condition. That is, there appears to have been subscribed the sum of $10,300, but it was very clearly shown that as to $2,800 thereof, taken by Gerhard, Crook, and McLennan, the subscriptions were not made until long after the action was commenced; indeed as to the subscriptions of Crook and McLennan, amounting to $2,000, not until a very few days before the trial, and quite evidently with the intention of avoiding the objection urged in the answer, that the whole amount of capital stock, which the condition called for, had not been taken.

The question of the good faith with which these three subscriptions were made, does not properly arise at this time. Conceding that they were genuine, which from the testimony may well be doubted, still they cannot avail the defendant here. A right of recovery must exist when the action is commenced, or it cannot be maintained.

Judging from the testimony, the most favorable view for the company is, that the action was prematurely brought. The evidence is far from sufficient to sustain the judgment. It must therefore be reversed and a new trial awarded.

REVERSED AND REMANDED.

The other judges concurred.

THE STATE OF NEBRASKA, EX REL., ARTEMAS ROBERTS v. THE MAYOR AND CITY COUNCIL OF LINCOLN.

1. **Practice**: MANDAMUS. Application for the writ should be made by motion, accompanied by an affidavit setting forth the facts upon which it is based. A petition, verified in the same manner as a pleading in an ordinary civil action, is insufficient.

2. **Officers**: RESIGNATION. The acceptance of a resignation of a municipal office, by the authorities to whom it is tendered, is not necessary to make the same effective.

Tuttle, Harwood & Ames, for the relator.

T. M. Marquette, for the respondents.

LAKE, CH. J.

THIS is an original application to this court for a peremptory writ of mandamus against the mayor, council and clerk, of the city of Lincoln. The object of the writ is to compel the mayor and council to audit and allow a claim against said city in favor of the relator for services rendered by him as city engineer, amounting to two thousand nine hundred and twenty dollars; and when so allowed to require the clerk to draw a warrant in his favor, for that amount, upon the city treasury.

Our statute regulating the issuance of this writ, requires the motion therefor to be made upon an affidavit setting forth the facts upon which it is based. *Genl. Stat.*, 640, *Sec.* 649. This application is by petition, verified in the usual mode of verifying a pleading under the code, that the facts stated therein are true as affiant "verily believes." This is a fatal defect, and a sufficient reason for denying the motion.

But there are other reasons why we feel called upon to withhold the writ. The office of city engineer is an elective office. The relator claims he was elected thereto

on the first Tuesday in April, 1875. That after this, his second election, he continued to hold the office until the 28th day of May, when he delivered to the mayor and council his written resignation. This he says was not formally accepted, at least not until after the 27th of December, at which time he made a written request to withdraw it.

In the absence of some statutory provision, we know of no rule which requires such resignation to be accepted by the municipal authorities, to make it effective. Their refusal even, to accept it, would not have the effect to compel him to retain the office against his will. We must hold, therefore, that by his written resignation of the office to the mayor and council, on the 28th of May, the relator ceased to be such city engineer. *The United States v. Wright*, 1 *McLean*, 509. *The People v. Porter*, 6 *Cal.*, 26.

Again, the relator has a plain and adequate remedy, by an ordinary civil action against the city to recover a money judgment for any sum that may be justly due him for his services. Where this is the case, resort should not be had to this extraordinary remedy. The other judges concur, and the writ is denied.

WRIT DENIED.

JOSEPH W. LASH, PLAINTIFF IN ERROR, v. JOHN C. CHRISTIE, DEFENDANT IN ERROR.

1. **Practice**: WAIVER OF ERROR. Error alleged to have been committed by the district court, in the reversal of a judgment rendered in favor of the plaintiff before a justice of the peace, *held* to be waived, no exception being taken, and plaintiff filing a petition as provided by the code. Gen. Stat., 632, 687.

2. ———: DEFECTS IN PETITION. Alleged defects in a petition that "a copy of the note sued on is not attached to or filed with" it, and that "the names of parties are not properly entitled," can only be reached by motion. They are not grounds for demurrer.

3. ———; MISJOINDER OF CAUSES OF ACTION. A petition in an action upon a promissory note reciting the consideration of the note, and disposition of property for which it was given, but not alleging that there was a "wrongful conversion" of the property, is not subject to objection by demurrer, on the ground that "an action on a promissory note and an action of trover are improperly joined."

ERROR to the district court for Nemeha county. The opinion states the facts of the case.

E. W. Thomas and J. W. Newman, for plaintiff in error, to the point that the plaintiff did not, by filing his petition in the district court, waive the error committed by that court in the reversal of the judgment of the justice of the peace, cited, *Shoff v. Wells*, 1 *Neb.*, 168. *Minor v. Smith*, 13 *Ohio State*, 78. *Powell's Appellate Proceedings*, 207. Nor was it necessary for Lash to except to the ruling of the district court in reversing the judgment of the justice. *Powell's Appellate Proceedings*, 215.

W. T. Rogers, for defendant in error.

LAKE, CH. J.

Several errors are assigned in this case, but the condition of the record makes it unnecessary for us to notice but two of them at any length.

The plaintiff commenced his action originally before a justice of the peace, on a promissory note given him by the defendant, and recovered a judgment for the amount of his demand. The defendant, thereupon, took the case to the district court by proceedings in error, and obtained a reversal of the judgment, whereupon the cause was set down for trial in that court, as the statute provides shall be done in such cases. It is urged that this judgment of reversal was erroneous; but inasmuch as no exception was taken thereto, and a petition having been filed in the district court, the error, if any were committed was waived by the plaintiff.

The petition so filed was adjudged defective, and the plaintiff took leave to amend, which he did. To the amended petition a demurrer was interposed and sustained, and exceptions duly taken. Having elected to stand this second petition, final judgment was rendered against the plaintiff, and this brings us to the first practical question which the record presents, viz: was this demurrer properly sustained? Several of the alleged defects in this pleading, for instance, "that no copy of the note is attached to and filed with said amended petition," and "that the names of the parties plaintiff and defendant, are not properly entitled in said amended petition," cannot be reached by demurrer. The grounds of demurrer are all set out in the code, and these are not of them. They are defects which can be reached only by motion.

The chief objection to this petition, and the one probably on which the demurrer was sustained is "that it appears on the face of the petition, that an action on a promissory note, and an action of trover are improperly joined."

We find in this petition all the essential allegations, although not very symmetrically arranged, of an action

upon a promissory note. In addition to these there is given a brief history of the transaction out of which the note grew. It is alleged that "on or about May 1, 1873, at the request of said John C. Christie, he sold and delivered him a certain horse * * * for the price of seventy-five dollars, and said Christie, in consideration of said sale, afterwards on the 15th day of July, 1873, executed and delivered to said Lash, a promissory note in writing of that date, and did thereby promise to pay said Lash the sum of $75, one day after date." After a further description of the note, it is stated that "at the time of the selling of said horse, as aforesaid, the said Christie represented himself to be capable of buying and agreeing to pay for said horse, and induced said Lash to believe he could do so. * * * The said Christie having obtained the possession of said horse, in the manner aforesaid, converted and appropriated the same to his own use, and some time afterward, sold the same, and used the money arising from said sale for his own use and benefit." Now all this recital of the consideration of the note, and the disposition made of the horse, by Christie, after his purchase, are immaterial, and had a motion to that end been made, should have been stricken out for that reason. All that Christie is alleged to have done he had a perfect right to do, for aught that appears in the petition, for he was the true owner of the horse. It is not alleged, nor is there a single fact set forth from which the inference can be drawn, that there was a wrongful conversion of the horse by the defendant. We are of the opinion, that on the hearing of this demurrer, these immaterial facts should have been disregarded, and the petition sustained. The judgment of the court below, therefore, is reversed, and the cause remanded for further proceedings.

The record also shows that an attachment was sued out in the district court, which, on motion supported by

affidavits, was dissolved. In this there was no error, and the ruling of the court on this motion is sustained.

REVERSED AND REMANDED.

The other judges concurred.

THE PEOPLE OF THE STATE OF NEBRASKA, EX REL., ROBERT McMILLAN v. ISAAC T. HODGE.

1. **Schools**: DIVISION OF SCHOOL DISTRICT: DISPOSITION OF FUNDS: MANDAMUS. Upon the division of a school district, the old district has no authority to use property or funds to which the new one is entitled. But mandamus will not lie against the treasurer of the old district, if such funds are placed beyond his control by the action of its officers.

2. ——: SCHOOL DISTRICT. Demands upon the treasurer of a school district, should be accompanied by an order of the director, countersigned by the moderator.

ORIGINAL application for Mandamus to compel the defendant to pay over money belonging to a school district, of which the relator was treasurer. An alternative writ was allowed, and upon the coming in of the answer, the cause was sent to a referee to take the testimony. The facts are fully set forth in the opinion of the court.

E. F. Warren, for the relator.

Stevenson & Hayward, for the respondent.

LAKE, CH. J.

THE relator is the treasurer of school district number eighty-two, and the defendant of district number twenty-eight, in Otoe county. District eighty-two is a new one created by a division of number twenty-eight, by order

of the county superintendent of public instruction, on the 24th of March, 1875.

A division was also ordered by the superintendent, as the statute requires, of certain monies which had been raised in the old district, and was on hand at the time the new district was formed. It is not disputed that this division of funds was in strict compliance with the statute on this subject, nor that the relator as treasurer of the new district, was entitled to the proportion set apart to it. But the defendant in his answer to the alternative writ alleges: *First.* That no legal demand for the money was made upon him, no order therefor from the proper district officers having been presented to him. *Second.* That on the 18th of June an arrangement was entered into between the officers of the two districts, respecting said funds, whereby district twenty-eight was to pay, at once, the whole amount due from the teacher's fund (which has been done) and $100 of the amount due from the special fund; in consideration of which district eighty-two was to wait for the balance until it could be raised by a tax to be levied for that purpose. *Third.* That prior to the service of the alternative writ, arrangements had been perfected in his district for the erection of a school house, and the money in controversy drawn from his hands, by an order of the director and moderator, and placed in the hands of a committee appointed to take charge of the work. That the funds were wholly beyond his control.

We have examined the testimony, reported by the referee, and think it proves all the material averments of the answer. As to the agreement, however, all that need be said is, that it was entirely unauthorized and void, and would furnish no excuse whatever for not paying over the money, were it still in the defendant's hands. The statute points out very clearly what disposition shall be made of property and money owned by a school district when it is divided, and this direction should be

carefully followed. After the superintendent had divided these funds, the old district had no right whatever to use, in any manner, nor for any purpose, the proportion set apart to the new one. But however wrongful may have been the action of the officers of district twenty-eight, in this respect, the fact that the money was not within the control of the defendant, at the time the writ was served upon him, is a sufficient excuse for not pay-it over to the relator.

It is suggested that this building fund was drawn from the defendant, and paid over to the building committee, for the express purpose of placing it beyond the reach of the relator. This may be true. Indeed we think the evidence very clearly justifies such an inference. But whatever may have been the motive which prompted this extraordinary action, whereby the money was drawn from the treasurer and placed in the hands of a committee to be expended, the fact that it was done, and thereby placed beyond the defendant's reach, is a sufficient reason why the peremptory writ should be withheld. It should not be issued when it is ascertained that the desired action is not possible on the part of the defendant.

It only remains now to notice the first point raised by the answer, viz: that no order had been presented for the money from the director and moderator. Section forty-one of the school law provides that "it shall be the duty of the treasurer of each district to apply for, and receive from the county treasurer, all school monies apportioned to the district, or collected for the same by the county treasurer, and to pay over on the order of the director, countersigned by the moderator of such district, all monies received by him." *Gen. Stat.*, 968. This being the law, the defendant could not be required to respond to a demand made upon him for such money, unless accompanied by an order of the director of his district, countersigned by the moderator, directing him to do so. Before making his demand on the defendant for this money, the relator should have

provided himself with the proper order, but not having done so his demand was unauthorized and is of no avail. A point was made by the relator's counsel, on the argument, that it appears from the evidence, that a proper order for $100, had been presented to the defendant, and payment refused by him, notwithstanding he had funds sufficient at the time to have done so. The testimony shows, however, that this order was given in pursuance of said illegal agreement, for a delay of payment of the greater part of the money belonging to the special fund, and that the relator, acting probably under advice of counsel, told defendant that he did not want the money which this order called for.

For these reasons, the peremptory writ must be denied, and the relator left to his remedy by an ordinary civil action.

WRIT DENIED.

The other judges concurred.

BURLINGTON AND MISSOURI R. R. IN NEBRASKA, PLAINTIFF IN ERROR, V. AMASA WESTOVER, DEFENDANT IN ERROR.

1. **Railroads**: NEGLIGENCE: BURDEN OF PROOF. Where damage is caused by the escape of fire from a railway engine, the burden is upon the company to show that their engine was properly constructed, equipped and operated. And the question of the sufficiency of such construction and equipment is one of fact for the jury.

2. ————: ————. It is not negligence *per se*, for a railway company to permit dry grass and herbage to remain on its right of way. The fact, however, is evidence for the jury, who may find negligence from it.

3. ————: REMOTE DAMAGES. Where grass and herbage on the right of way of a railroad was set burning by fire from an engine, the fire spreading rapidly and burning continuously until it reached the farm of plaintiff, situated a half-mile from the railroad track, destroying straw, timber, etc.; *held*, that the damage was not too remote to be recovered.

4. ————: ————: CONTRIBUTORY NEGLIGENCE. Nor is the plaintiff in such case guilty of contributory negligence in not having fire breaks plowed around his premises.

5. ————: ————. Property owners along the line of a railroad, take the risk of injuries unavoidably produced by the use of fire for the purpose of generating steam; but the company cannot impose conditions on others, in order to shield themselves from their own negligence in the use of such fire.

THIS was an action, brought in the Lancaster district court, to recover damages for the destruction by fire, of plaintiff's trees, straw, etc., on his premises. The fire was communicated by sparks or coals from a railway engine to dry grass and weeds, on its right of way, and passed thence over intervening lands to plaintiff's farm, situated a half-mile from the track. The season was a dry one, and at the time of the fire a heavy wind prevailed. The jury returning a verdict against the railroad company, motion for new trial was overruled, judgment entered, to reverse which the case came here by petition in error.

T. M. Marquette, for plaintiff in error, insisted that the court erred in refusing the instructions asked for on behalf of the company; that the mere fact that the fire was communicated from the engine, as proof of negligence, is a mere presumption of law; that there was no evidence as to carelessness in operating the engine; that the presumption of negligence from the fact that the engine was seen to puff by a person standing some distance from it, or even standing near it, is but a weak presumption of negligence in the person operating the same, and is entirely overcome by evidence showing that the engine was properly constructed, and that it was carefully operated, and had attached to it all the most approved appliances in use to prevent the spread of fire; that there was no negligence from the fact that the fire caught within the right of way of the company, from the

natural growth of grass and herbage. *Spaulding v. C. & N. W. R. R. Co.*, 33 *Wis.*, 590. *Butt v. Clark*, 23 *Ind.*, 548. *Meyer v. Midland Pacific*, 2 *Neb.*, 346. *O. & M. R. R. v. Shanfelt*, 47 *Ill.*, 497. *Kansas Pacific v. Butts*, 7 *Kan.*, 315.

Lamb, Billingsley & Lambertson and *M. H. Sessions*, for defendant in error, cited *Salmon v. Delaware R. R. Co.*, *Am. Law Register*, *September*, 1875. *Cook v. Champlain*, 1 *Denio.*, 91. *Field v. New York Central*, 32 *N. Y.*, 339. *Bedell v. The Long Island R. R. Co.*, 44 *N. Y.*, 367. *Lackawanna v. Doak*, 52 *Penn. State*, 380. *Flynn v. S. F. R. R.*, 40 *Cal.*, 14. *Meyer v. Chicago R. R.*, 59 *Mo.*, 223. *A. T. & Santa Fe R. R. v. Stanford*, 12 *Kan.*, 354. *Fero v. Buffalo*, 22 *New York*, 209. *Annapolis R. R. v. Gantt*, 39 *Md.*, 115. *Higgins v. Dewey*, 107 *Mass.*, 394. *Page v. N. C. Railroad Co.*, 71 *North Car.*, 222. *Perley v. Eastern Railroad*, 98 *Mass.*, 415.

MAXWELL, J.

On the trial of this cause in the court below, the plaintiff in error introduced testimony showing that its locomotives were properly constructed and were equipped with all the most approved appliances for the prevention of the escape of fire.

The court on its own motion instructed the jury that, "In operating its road the railroad company is expected and required to use the most approved machinery in use by railroad companies generally, to prevent the communication of fire to combustible materials along or in the vicinity of its track, and it is also required to employ competent and careful servants in the management of its engines to the same end. And if they fail to do so, and in consequence thereof a fire is kindled and property thereby burned, without any fault or negligence on the

part of the owner of such property, the company would be liable therefor. But on the other hand if the appliances on said engines are found by the jury to have been of the most approved kinds for the prevention of the escape of fire, and were operated in the usual and ordinary way by skillful hands, then, even although fire did escape and occasion damage to the plaintiff, he cannot recover on this ground alone. The presumption of negligence or want of proper equipments, arising from the fact that the fire escaped from the defendant's engine, is not a very strong presumption, and is indulged in for the purpose of putting the defendant upon proof and compelling it to explain to a reasonable and fair degree of certainty, that it had performed its duty in this particular; and if you find that the engines from which the fire escaped were properly constructed and equipped, and were subjected to the careful inspection of a competent and skillful person as often as once in two days, and all defects discovered properly remedied, this would be all that in reason would seem to be required, so far as relates to the care which should be bestowed on the spark arrester."

The defendant in the court below asked the court to instruct the jury that, "the evidence in this case shows that the engines of the defendant were in good order, properly constructed, and provided with all the usual appliances in use at the time of the occurence of the fire to prevent the escape of fire from their engines and injuring adjacent property," which the court refused to give, to which defendant excepted.

A railroad company has the right to use fire on its engines for the purpose of generating steam, and is not responsible for damages sustained by its proper use for that purpose, the law regarding such injuries as unavoidable; yet fire being an element of an exceedingly dangerous character, the law requires the company so using it,

to adopt such precautions as may reasonably be expected to prevent damage to the property of persons along its line. *Piggott v. The East. Co. Railway*, 3 *C. B.*, 229.

As to what are reasonable precautions against the escape of fire, the courts almost without exception hold, that where engines are properly constructed and have all the appliances in general use for preventing the escape of fire, and there is no negligence in their management, the company will not be liable, as experience has shown that it is impossible at all times and under all circumstances to prevent the escape of fire from locomotives in such quantities as to occasion injury; but it has also been fully demonstrated that where engines are properly constructed and have the proper appliances for preventing the escape of fire, and are managed with care, they rarely occasion damage by setting out fire. This seems to have led the courts of England to adopt the rule, that when fire is set out by sparks emitted from an engine, it is *prima facie* evidence of negligence.

There is a direct conflict of authorities in this country on this question, in many of the cases, particularly the early ones, it being held that it devolved on the plaintiff to prove negligence on the part of the defendant. The better rule appears to be, where it is shown that a fire has originated from sparks thrown out by an engine, to require the company to show that their engine was properly constructed, equipped, and operated. The reason for the rule as stated in a late case in Wisconsin, being "that the agents and employes of the road know, or are at least bound to know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that purpose, and if so, what was their character. Whilst on the other hand persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information." *Spaulding v. C. & N. W R. R.*, 30 *Wis.*, 122.

"The presumption of negligence arising from the fact that fire has been set out by sparks emitted from an engine, is not ordinarily a strong presumption. It is indulged in merely for the purpose of putting the company to proof, and compelling it to explain and show, with a reasonable degree of certainty, not by the highest and most clear and unmistakable kind of evidence, that it had performed its duty in that particular." *Id.*, 30 *Wis.*, 123.

The rule is well established, that when there is no conflict of testimony, and the existence of a fact is clearly proved by undisputed testimony, that it would be error to submit the question to a jury, as to whether that fact existed or not. It is therefore insisted that the court erred in refusing to give the instruction in question, asked by the plaintiff in error, there being it is claimed no conflict of testimony on that point. It is true, there is no direct testimony in regard to the character of the construction and appliances of the engines of the defendant in the court below, except that offered by the company. But a case of this kind differs, in many respects, from a case where the facts are equally within the knowledge of the plaintiff and defendant, such as the want of consideration of a note.

If in a suit on the note between the original parties, the defendant plead want of consideration, and introduced proof establishing that fact, if the plaintiff offered no proof he must fail, and there would be no question to submit to the jury.

In cases of this kind, however, the means of knowledge are entirely with the company. Witnesses are called on the stand, to testify in regard to the condition of an engine and its appliances, on a particular day, perhaps months before the trial. Under such circumstances, witnesses of the utmost reliability may be mistaken, and the circumstances connected with setting out the fire,

may be of such a character as to leave doubt, in the minds of the court and jury as to the correctness of their testimony. Under such circumstances the question of the credibility of the witnesses must be left to the jury. Suppose a man is on trial for murder, the evidence is purely circumstantial, but sufficient unexplained to convict; he avails himself of his right under our statute, to testify in his own behalf, and swears that the killing was done in self defense, and enters into a minute detail of the circumstances, and there is no rebutting testimony, will it be contended that the court must direct the prisoner's discharge? Or must not the question of his credibility be submitted to the jury? *Durant v. The People*, 13 *Mich.*, 356.

The question of the sufficiency of construction and equipment of the engines of the plaintiff in error, is a question of fact to be determined by the jury, from the direct and circumstantial evidence in the case, and is not a presumption of law to be determined by the court. There is, therefore, no error in refusing the instruction asked. In *Spaulding v. The C. & N. W. R. R.*, 33 *Wis.*, 582, a contrary doctrine is held on what we deem insufficient ground.

The defendant in the court below, asked the court to instruct the jury that, "If the jury believe from the evidence that the fire started within defendant's right of way, and from the natural growth of grass and herbage on said right of way, this of itself is no evidence of negligence on the part of the defendant," which the court refused to give, to which defendant excepted.

The court on its own motion had previously instructed the jury that, "If the jury find from the evidence in this case, that the defendant negligently and carelessly left dry grass or other combustible material upon their right of way at the point where the fire was set, and that the same was set by sparks or coals escaping from the

defendant's engine, and that the same fire so kindled, spread or ran through the grass to the property of the plaintiff, shown to have been destroyed, without any negligence or carelessness on his part, then the jury should find a verdict for the plaintiff, for the amount of damages proven to have resulted from said fire, no matter whether the best appliances for the prevention of the escape of fire were used upon the engine which communicated the fire or not."

In the trial of the cause in the court below, Albert T. Beecher testified that "there were weeds and grass right up to the ties; it caught close up to the ties; the grass was standing, it was dry and tolerably heavy; I did not notice any coals or cinders; I was between thirty and forty rods from the place, when the fire caught."

It was agreed that the right of way at that point was two hundred feet in width.

The fact that a railroad company permitted dry grass and rubbish to remain on its right of way is one from which the jury may find negligence against the company, but is not necessarily so. That question seems to have been fairly submitted to the jury on the evidence, and we will not disturb their finding. The instruction asked, was calculated to mislead the jury, and was properly refused.

It is contended by the plaintiff in error, that the damages proved are too remote; that there was no connection between the fire thrown out by the engine and the destruction of the property in question; that is, the act of setting fire to the grass on the right of way was not the immediate cause of the injury. It is shown by the testimony that a strong wind was blowing at the time the fire was set, that it spread rapidly from the place where it started until it reached the property destroyed, that it was a continuous burning; the destruction of the property in controversy was therefore the

direct and natural result of the escape of fire from the engine. *Clemens v. The H. & St. Jo. R. R.*, 53 *Mo.*, 366. *Kellogg v. The C. & N. W. R. R.*, 26 *Wis.*, 230. *A. T. & Santa Fe R. R. v. Stanford*, 12 *Kan.*, 354.

It is contended that the defendant in error was guilty of contributory negligence in not having fire-breaks plowed around his hedge, and straw ricks. The maxim of the law is "*Sic utere tuo ut alienum non laedas*,"—"Enjoy your property in such a manner as not to injure that of another person." A railroad company has a perfect right to the full and free use of its own property and franchises, but upon what grounds can it impose conditions upon those owning property along its line, in order to shield itself from the negligent use of fire by the company, or its employes? All take the risk of injuries unavoidably produced by the use of fire for the purpose of generating steam, but upon what authority is any one to be deprived of the free and ordinary use of his property, in order to prevent its destruction by the negligent use his neighbor may make of his? We know of no such authority. *Kellogg v. C. & N. W. R. R.*, 26 *Wis.*, 231. *Clemens v. H. & St. Jo. R. R.*, 53 *Mo.*, 464. *Cook v. Champlain*, 1 *Denio*, 91. *Fero v. Buffalo*, 22 *N. Y.*, 209.

It is clearly the duty of a railroad company to take the necessary precautions to prevent the escape of fire from its engines; failing to do so, the question of its negligence will, under ordinary circumstances, be a question for the jury to determine.

It is unnecessary to further examine the case. After a full examination, we see no error of which the plaintiff in error can complain. The evidence would have justified a much larger verdict than that rendered in the case.

The judgment is affirmed.

JUDGMENT AFFIRMED.

JORDAN P. SMITH, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Courts**: TERMS: IMPANELING GRAND JURY. The regular term of a court, fixed by law to be holden on the 13th of September, was adjourned in vacation by the written order of the judge, until the 13th of December following, at which time the grand jury, summoned for the regular term, were returned and impaneled, an indictment found, trial and conviction had; *held*, no error.

2. ——: ADJOURNED TERMS. Where the written order adjourning a term of court, made by the judge in vacation, omitted to name the term, *held*, that it was intended to apply to the regular term next following the promulgation of the order.

3. ——: DISCRETIONARY ACTION. Under provisions of the statute authorizing the district judge by written order to adjourn court, "if sick or for any other sufficient cause unable to attend," the reasons for such adjournment are not subject to review by the supreme court.

4. ——: DUTIES OF CLERK. Where the record shows that a written order adjourning the district court is entered on the journal by the clerk, but it does not appear that the clerk formally adjourned the court, it will be presumed that he performed that duty.

5. **Indictment**: FORM AND CONTENTS. An indictment setting forth all the essential ingredients of the crime of murder, and all necessary allegations that the defendant committed it, is not bad by reason of the omission of the usual conclusion, "and the jurors aforesaid, on their oaths aforesaid, do say, etc., did kill and murder."

6. **Practice in Criminal cases**: CHANGE OF VENUE: CONTINUANCE. Applications for change of venue, and continuance, are addressed to the sound discretion of the court, and its ruling thereon will not be disturbed, where there is no abuse of that discretion.

7. ——: ——. Counter affidavits may be filed on application for a change of venue.

8. ——: IMPANELING JURY. Upon a trial for murder, the court ordered the sheriff to summon a special panel of 96 men from a particular portion of the county, which, on defendant's challenge to the array, was quashed, and a direction given to the sheriff to summon jurors from the "body of the county." In the execution of this order, the sheriff summoned 47 of those who had been on the special panel so quashed, and after all the regular panel and defendant's peremptory challenges had been exhausted, it appeared that the 12 trial jurors were of the original special panel, and each had been challenged for cause on that ground, which challenge had been overruled by the court; *held*, that the jury were legally impaneled.

9. ———: OATH TO JURY: INTENDMENTS OF THE RECORD. Where the record states that the jury were sworn "to well and truly try and true deliverance make upon the issues joined between the parties," it will be presumed that the oath was administered according to the statutory form.

10. ———: CHARGE TO JURY: ACT OF FEBRUARY 25, 1875. The provisions of the act of 1875 (Laws, p. 76), directing the charge of the court to the jury to be written in consecutively numbered paragraphs, is a right which the supreme court will regard as waived, when the charge is not excepted to, or where exception is taken to a particular clause only.

11. ———: ———: A correct instruction of the law, applicable in a trial for murder, is not objectionable because it contains the words, "you will allow no false sympathy to sway you from a proper discharge of your duty."

12. **Homicide**: CAUSES OF DEFENSE: INTOXICATION. Upon a trial for murder, it is proper for the jury to consider any state or condition of the accused, at the time of the killing, that is adverse to the proper exercise of the mind, and the undisturbed possession of the faculties; and if there is evidence that the accused was intoxicated when the crime was committed, the jury may consider the evidence of intoxication as a circumstance to show that the act was not premeditated, and to rebut the idea that it was done in a cool and deliberate state of mind, necessary to constitute murder in the first degree. And unless the jury are satisfied beyond a reasonable doubt that the accused, at the time of the killing, was in such a state of mind that he could form an intention maliciously to kill, and that he did form such an intention, they cannot convict him of a higher crime than manslaughter.

ERROR from the district court of Buffalo county.

IT was an indictment for murder against the plaintiff in error and two others, upon which separate trials were had. That of the plaintiff in error resulted in a verdict of guilty, and he brought the cause here upon writ of error.

The regular term of court for the county of Buffalo was fixed by law to be holden on the second Monday of September. It was adjourned by written order of the judge until the second Monday of December following. The venires for grand and petit juries were issued and made returnable in September. The court not then meeting, the venires were returned in December, and

the jurors summoned then appeared, and the grand jury found the indictment in this case. It also appears from the record brought here, that a special term of court was called to be holden on the eighth day of November, but was suspended by a written order of the judge of that district.

Upon the trial, the court ordered the sheriff to summon a special panel of 96 men from that part of the county outside of a limit of ten miles of the town of Kearney, at which place the crime had been committed. On the prisoner's challenge to the array, after the regular panel had been exhausted, and no jury obtained, this special panel was quashed. The court thereupon ordered the sheriff to summon two additional panels, one of 24 and one of 72 men, from the body of the county, in the execution of which order he summoned 47 men of the original special panel of 96. The regular panel having been exhausted, these jurors were called and each stated on his *voir dire*, that he had been summoned on the 14th day of December, and re-summoned that morning, and that he resided ten or more miles from Kearney. Being challenged for cause on this ground, the court overruled the challenge, to which the prisoner excepted. After the prisoner had exhausted all of his peremptory challenges except one, it appeared that all of the twelve trial jurors were of the forty-seven summoned as above stated. The prisoner thereupon filed his challenge to the entire panel, which was overruled by the court, and he thereupon excepted. All other facts necessary to an understanding of the points, passed upon and decided by the court, will be found in the opinion.

E. F. Gray, *W. A. Marlow* and *S. Boyd*, for plaintiff in error.

I. The term at which the plaintiff in error was convicted was not a regular term of said court as fixed by

statute, neither was it an adjourned term of the September term of said court; neither was it a called term of said court; and for these reasons the term was held without authority of law.

1. The court can be adjourned by written order of the judge only when he is sick or unable to attend. *Gen. Statues*, 256, *Sec.* 26.

2. In the sworn plea in abatement, the truth of which is admitted by demurrer of the state, it is distinctly stated that the judge was not sick or unable to attend court at the regular September term fixed by statute, but that he was present at the place for holding the district court in said county on the second and third days of the term, and these facts again appear in the bill of exceptions.

3. In a proper case for adjournment by written order of the judge, the order is only a direction to the clerk, and the clerk must convene the court and adjourn the same to the day fixed in the order. *Gen. Statutes*, 256, *Sec.* 26.

4. There were other regular terms in the same district intervening between the September term fixed by statute and adjourned term, December, 1875, in other counties. A regular term in any given county cannot be adjourned over beyond a regular term in any other county in the same district. *Archer v. Ross*, 2 *Scammon*, 303. *Davis v. Fish*, 1 *Green*, 406. *Gobd. v. The State*, 2 *Green*, 559.

5. The calling of the special term for November 8th, 1875, was in due form of law, as shown by the plea in abatement and exhibits to the same attached, as appears from the record, and when so called it was imperative that it should be held at the time fixed. *Gen. Statutes*, 260, *Sec.* 51. *Downey v. Smith*, 13 *Ill.*, 673.

6. There was then a term legally fixed in the county to be held on the 8th day of November, and this would

by operation of law terminate any term existing or reaching beyond that time.

II. The record shows that after the general plea of not guilty was entered the defendant filed his motion and affidavits for a change of venue, and thereupon the district attorney filed counter affidavits resisting the application. The defendant then filed his motion to strike the counter affidavits from the files, which motion was overruled and excepted to by the defendant. The application was then heard upon the affidavits for and against the change, and the application was denied and excepted to by the defendant.

1. Counter affidavits resisting an application for a change of venue are not allowed by the letter or spirit of our statutes. *Gen. Statutes*, 823, *Sec.* 455. *Witter v. Taylor*, 7 *Ind.*, 110.

III. The selection of the jurors from a particular portion of the county or class of the inhabitants, is in violation of law. *Burley v. The State*, 1 *Neb.*, 396.

IV. The jury were not sworn as required by statute. *Gen. Stat.*, 827. *Harriman v. State*, 2 *Green*, 285. *Dixon v. The State*, 4 *Green*, 381.

V. The failure of the court to paragraph and number its instructions is a violation of positive statute and by the statute made error for which the cause must be reversed. *Stat. of Neb. of* 1875, 77 *and* 78, *Secs.* 4 *and* 5. *People v. Ah Fong*, 12 *Cal.*, 345. *People v. Demint*, 8 *Cal.*, 423. *Id. v. Payne*, 8 *Cal.*, 321. *Id. v. Beeler*, 6 *Cal.*, 246. *Id. v. Antonio Chares*, 26 *Cal.*, 78.

VI. The indictment is insufficient. It lacks the usual conclusion, to-wit: "and the jurors aforesaid, etc., do say, etc., *did kill and murder.*" This conclusion is

necessary. *State v. Heas*, 11 *La.*, 195. *Dias v. State*, 7 *Blackf.*, 20. *State v. Pemberton*, 30 *Mo.*, 376.

1. It is nowhere charged in the indictment that the plaintiff in error did kill or murder the deceased. Without this charge the indictment is insufficient. *Gen. Stat.*, 720, *Sec.* 3.

George H. Roberts, Attorney General, and M. B. Hoxie, District Attorney, for the state.

I. The first, second, third, fourth, fifth and seventeenth assignments of error may be considered together, as they are all based upon the assumption that the term of court at which the indictment was presented, and at which the plaintiff in error was convicted, was held without authority of law, it being an adjourned term of the district court.

Courts are not limited in their power of adjournment, when not restrained by the constitution or statute law. *Mechanics Bank v. Withers*, 6 *Wheat.*, 107. *Harris v. Gest*, 4 *Ohio State*, 469. *Weaver v. Cooledge*, 15 *Iowa*, 244. *General Statutes*, *Secs.* 18, 19, *pp.* 255–56.

II. Under our statute, the matter of granting a change of venue, when the application therefor is based upon the prejudice of the people, and a motion for a continuance as well, is a matter left entirely to the discretion of the judge, and anything left solely to the discretion of the court is not reviewable by this court, and this disposes of the errors assigned in regard to the change of venue, as well as to the adjournment of the special term. *General Statutes*, *Sec.* 455, *p.* 823. *Lœffner v. The State*, 10 *Ohio State*, 615. *State v. Cox*, 10 *Iowa*, 351. *State v. Ostrander*, 18 *Id.*, 435. *State v. Hutchinson*, 27 *Id.*, 212. *Thompson v. State*, 5 *Kan.*, 159.

III. The jurors were regularly drawn and legally

impaneled. *General Statutes*, 643. *Burley v. The State*, 1 *Neb.*, 385. *Newman v. State*, 14 *Wis.*, 393. *People v. Jewett*, 6 *Wend.*, 386. *Jay v. State*, 14 *Ind.*, 142. *Fuller v. State*, 1 *Blackf.*, 63.

IV. The indictment is sufficient. *Fouts v. The State*, 8 *Ohio State*, 98. *Kain v. State*, 8 *Id.*, 307. *Hagan v. State*, 10 *Id.*, 459.

V. The instruction in regard to intoxication not being a defense, is correctly given. Evidence of intoxication is admissible only as having a bearing upon the question of premeditation and deliberate malice, but constitutes no defense. *Rex v. Meakin*, 32 *Eng. C. L.*, 622. *Com. v. Hawkins*, 3 *Gray*, 463. *People v. Rogers*, 18 *N. Y.*, 9.

LAKE, CH. J.

This is a writ of error to the district court for Buffalo county. There are no less than twenty-one nominal objections to this record in the assignment of errors, but I shall content myself with noticing those only which possess, at least, the shadow of merit.

I. It is objected to the jurisdiction of the court, that it was not in legal session when the indictment was found, and the trial and judgment had. This objection rests solely upon the assumption that the court was held without authority of law, which, if true, would render all of its proceedings absolutely void. The objection urged to the grand jury rests upon the same basis, as this body could have no legal existence, nor perform any valid act, at a time when the court could not be held. The record before us purports to be of the adjourned September term, which was actually held on the second Monday of December following. The regular Septem-

ber term for Buffalo county was fixed by law for the second Monday in September, but it was not then held. It appears that the judge of that district, on the eighth day of September, five days before the time appointed for the court to be held, sent to the clerk an order of adjournment in these words:

"FREMONT, Sept. 8, 1875.

At the request of the attorneys of Buffalo county, I hereby adjourn the district court for Buffalo county until the 2d Monday of next December.

[Signed] SAMUEL MAXWELL, Judge."

This order is not quite as definite as it might have been, or as is desirable, in this, that it omits to name the term to which it was intended to apply; nor does it, by mentioning the day from which the adjournment was to date, or in any other manner specially designate the September term as the one which the order was intended to effect. But no doubt or embarrassment seems to have been occasioned to any one in consequence of this indefiniteness. It is not an unreasonable presumption to hold that it was intended to apply to the next regular term—the term next following the promulgation of the order.

There can be no doubt that in the absence of a prohibitory statute, the district court, when in actual session, may be adjourned by the judge to any time he may see fit, not beyond the next regular term for that county, provided it do not interfere with a regular term in any other county in his district. We regard this as one of the inherent powers of the court, to be exercised at the pleasure of the judge. Therefore had the judge of the third district been present and formally opened said court on the thirteenth of September, he could immediately have adjourned it to the second Monday in December. No legislative authority in such case would have been requisite to the validity of the order.

But in vacation it is otherwise. Then the judge has no authority, nor can he perform any official act whatever, unless specially authorized by the legislature. In respect to the adjournment of the court in vacation, section twenty-six, chapter fourteen of the General Statutes provides: "If the judge is sick, or for any other sufficient cause is unable to attend court, at the regularly appointed time, he may by a written order direct an adjournment to a particular day therein specified, and the clerk shall on the first day of the term, or as soon thereafter as he receives the order, adjourn the court as therein directed." This was the authority under which the judge assumed the responsibility of an adjournment of the court as before stated. But we are told that the judge was not sick nor unable to attend and hold the court, at the time fixed by law, had he been so disposed. We are of opinion, however, that the reason which operated on the mind of the judge, and induced him to send the written order of adjournment, cannot be questioned in this proceeding. It is enough to know that he acted upon grounds which he deemed "sufficient cause," and adjourned the court. He was not required to disclose that cause, but having done so does not subject his action in this respect to judicial criticism by this court.

It is particularly objected that the clerk did not formally adjourn the court upon receiving the order. It is true that the record does not show that he did so, nor was it absolutely necessary that it should. However, the record being silent on this point, the presumption is that he performed his duty, and published the order as the statute requires. The fact that the record makes no mention of any action on his part, is of no consequence; it contains the order of the judge, and that is enough.

II. The objection to the indictment cannot be sustained. The usual formal conclusion, viz.: "And the jurors aforesaid * * * do say * * * did kill

and murder," was omitted. In *Anderson v. The State*, 5 *Pike*, 445, the supreme court of Arkansas held this allegation to be merely formal and unnecessary to a good indictment. The court say "it is only a repetition and conclusion of law from the facts previously stated." And in *Hogan v. The State*, 10 *Ohio State*, 459, it is said: "The allegation purports to be, and is, nothing more than an argumentative statement of the legal results of the facts previously stated," and where it was inserted, could not "cure any defects in the premises on which it assumed to be predicated." See also *Fouts v. The State*, 8 *Ohio State*, 98.

This indictment sets forth with great particularity and certainty all of the essential ingredients of the crime of murder. None of the material facts or words, necessary to show that the defendant committed it, are omitted. The accused is fully advised as to what it is that he is called upon to answer.

III. The motion for a change of venue, and for a continuance, were both addressed to the sound discretion of the court. We discover no abuse of that discretion, and where such is the case the ruling will not be interfered with.

It has been the practice of the district courts to permit counter affidavits to be filed on motions for change of venue, and we see no good reason for excluding them. It would, in our opinion, be conducive of no good whatever, to compel the court to change the place of trial at the mere caprice of the defendant, and on his swearing to a state of facts well known to every intelligent and responsible citizen of the county to have no foundation in truth. While it is the duty of the court to guard well all the rights of a defendant in a criminal case, it is not required, nor would it be good policy, to exclude well established facts bearing directly upon the motion nor to

compel the court to change the venue at the mere whim of a person charged with crime.

IV. The jury that tried the cause was legally impaneled. It is true that one of the orders for talesmen, in directing that they be called from a particular portion of the county, could not have been sustained. But this order, although evidently made with the intention, solely, of obtaining a jury as far removed as possible from the scene of the murder, and in the interest of the accused, was promptly vacated, on objection from his counsel, and direction given that they be drawn from the body of the county. Thus the error which might otherwise have been fatal was effectually cured.

As to the oath administered to the jury, the record does not purport to set it out in the very words used. In one place it recites that "said panel of said twelve jurors was sworn to try the cause," and in another that the "jury were sworn to well and truly try and true deliverance make upon the issues joined between the said parties." This is proof that an oath was administered, and we must presume it to have been, at least substantially, in the words of the statutory form.

V. It is objected to the instructions given by the judge on his own motion: *First.* That although embodying several distinct propositions of law, they were not paragraphed, nor numbered, as required by the act of February, 25, 1875. *Second.* That the law of the case was not correctly given.

As to the first point, it is true that section one of said act declares it to be the duty of the judge to reduce his instructions to writing before giving the same to the jury, unless the same be waived by counsel in open court, and entered of record in the case. This section is no doubt mandatory, and a non-compliance in any case if properly brought to the attention of this court, would call for a

reversal of the judgment. But in this case all of the charge was reduced to writing, at the proper time, and there is no complaint in this respect. Section four of the act provides, among other things, that "all instructions given to the jury by the court on its own motion, must be plainly and legibly written, in consecutively numbered paragraphs, and filed by the clerk before being read to the jury by the court." This provision we regard as so far imperative, that a party may insist upon its being observed by the court. It was intended, doubtless, that each distinct proposition of law, or statement of fact, should be so set forth as to enable counsel readily to comprehend its purport, and if desirable to except to it by a simple reference to its number. It was also intended, or at least it has the effect, when taken in connection with the first section of the act, to obviate the necessity of a formal bill of exceptions in order to obtain a review of the instructions in the appellate court.

But the right given by this section is one that may be waived, and it will be regarded as waived, when the instructions are not excepted to. So too, where a particular clause or sentence of a written instruction is singled out and excepted to as not being a correct proposition of law, as was done in this case, it will be considered as a waiver of the right to have the charge paragraphed and numbered.

The only exception taken to the charge of the court was to these words, "you will allow no false sympathy to sway you from a proper discharge of your duty." We perceive nothing in these words, especially when taken in connection with the context, in the least objectionable; and the entire instruction, so far as it went, laid down the law applicable to the case correctly.

VI. There were a large number of instructions, submitted to the court by the prisoner's counsel, to be given

to the jury. Among them were several which embodied propositions substantially like those already given, and they were properly rejected for that reason. But there were at least four which we think ought to have been given. While the evidence may not lead us to believe that they would have secured a different result, yet inasmuch as there was some testimony to which they were applicable, and the instructions of the court not covering the entire ground, it was the right of the accused to insist upon their being submitted to the jury. These instructions were the third, fourth, fifth, and ninth of the list as submitted to the court, as follows.

Third. "You may take into consideration the intoxication of the accused at the time of the killing, if you find he was intoxicated, as a circumstance to show that the act was not premeditated."

Fourth. "It is proper for you to consider any state or condition of the prisoner at the time of the killing, that is adverse to the proper exercise of the mind and the undisturbed possession of the faculties."

Fifth. "And if you believe that at the time of the killing the accused was intoxicated, you may consider the fact to rebut the idea that it was done in a cool and deliberate state of the mind necessary to constitute murder in the first degree."

Ninth. "Unless you are satisfied beyond a reasonable doubt that the accused, at the time of the killing, was in such a state of mind that he could form an intention maliciously to kill, and that he did form such intention, you cannot convict him of a higher crime than manslaughter."

One witness called by the prosecution had testified that the prisoner "was drunk" at the time of the affray, and one called on behalf of the accused swore that he was "very intoxicated." There was no contradictory

testimony on this point, save the inference necessarily drawn from what he said and did on that occasion.

The court had instructed the jury on this subject, merely, that drunkeness could be considered only "for the purpose of determining from the evidence whether the prisoner was in such a condition, as to be incapable of forming the purpose of taking the life of the deceased, and deliberately carrying that purpose into execution. If you find he was capable of forming such purpose, and deliberately, and with premeditation, carrying such purpose into effect, it would be murder in the first degree."

The last sentence of this instruction was clearly erroneous, although no exception was taken thereto. It, in effect, assumed, that if the prisoner were found to have been *capable* of committing the crime of murder in the first degree, it would be enough to warrant his conviction for that offense, whether he actually formed the purpose, with deliberation and premeditation, to do so, or not. Such being the effect of the instruction given by the court on the subject of drunkenness, the refusal to give those prepared on behalf of the prisoner, above quoted, if substantially correct propositions of law, could not properly be based on the alleged fact, that in substance they had already been given.

We are of opinion, that in view of the testimony before the jury, they should have been instructed substantially as requested in these rejected propositions, and that for the failure to do so the court below committed an error which calls for the reversal of the judgment, and a trial *de novo*.

REVERSED AND REMANDED.

GANTT, J., concurred. MAXWELL, J., having tried the case below did not sit.

AUGUSTUS KOUNTZE, PLAINTIFF IN ERROR, v. GEORGE FRANCIS TRAIN, AND ALFRED BURLEY, SHERIFF OF DOUGLAS COUNTY, DEFENDANTS IN ERROR.

Sheriff's Fees. Under the act of 1875, regulating fees of sheriff, *Laws* 1875, *p.* 81, that officer is entitled to the same commission as special master, where real property sold under a decree of the court is bid in by the plaintiff, as though the amount of the sale was received and disbursed by him. And the act is not prospective in such a sense, as to exclude decrees rendered *before* its passage, and upon which orders of sale are *afterwards* issued.

ERROR from the district court for Douglas county.

THE action in the court below was the foreclosure of a mortgage on real estate. The decree was rendered in 1873, and the sheriff of Douglas county appointed a special master commissioner to make the sale. The order of sale was issued June 10, 1875, and at the sale, on the 20th day of July, 1875, the plaintiff bid in the property in his own name. In taxing up the costs of the sale, the sheriff taxed the sum of $698.50, as his commission on the purchase money, over and above all other costs. Motion was made to retax costs by striking out the item for commission, and allowing the sum of five dollars, as provided by *Gen. Stat.*, 379, which motion was overruled. From the order overruling that motion, plaintiff brought the cause here by petition in error.

George I. Gilbert, for plaintiff in error.

George W. Doane, for the sheriff.

GANTT, J.

The plaintiff complains that there is error in the final order of the court below, overruling his motion to retax

the sheriff's costs, charged as commission on the sale of real estate under a decree of foreclosure. The only question in the case is, is the sheriff entitled to commission on the purchase money, when the plaintiff bids in the property, as was done in this case?

Under the revised code of 1866, "all sales of mortgaged premises under a decree in chancery, shall be made by a sheriff, or other person authorized by the court, in the county where the premises, or some part of them is situated," and in respect to officers' fees, it was provided that "when persons in whose favor the execution or order of sale is issued, shall bid in the property sold on execution or decree, the sheriff or master making such sale, shall receive five dollars as his per cent. on such sale, and no more." It seems very clear that in all other cases the sheriff was entitled only to "commission on all money received and disbursed by him on execution, order of sale, order of attachment, decree, or sale of real or personal property." But by act of February 25, 1875, it is provided that "in all cases where real or personal property shall be in the hands of the sheriff by virtue of execution, order of sale, order of attachment, or decree of the court, and shall be taken in full or in part payment of the debt, or if the money shall be paid to the plaintiff, his agent or attorney, he shall be entitled to the same percentage as though the money was received and disbursed by him." This act took effect from the time of its passage, and repealed all acts in conflict with it. The former acts referred to above, which only allowed commission on money received and disbursed, except the per cent of five dollars on sales upon execution or decree, are inconsistent with this latter act. Again this last act applies to all cases, in which the "*property shall be in the hands of the sheriff*, by virtue of execution, order of sale, order of attachment, or decree of the court" and therefore it is not prospective in such sense as to exclude

judgments, decrees and orders rendered before its passage, and upon which executions and orders of sale are afterwards issued. In respect of "property in the hands of the sheriff," either upon execution or order of attachment, or upon order of sale or decree, we can perceive no distinction; for in each case it may be said that the property is in the custody of the law, and in each case the debtor has a right to redeem the property, by the payment of the debt before the sale.

The last act may be unwise and exact too great a penalty from the debtor for the non-payment of his debt, but it is alone within the province of the legislature to determine these questions, and as it does not in this act infringe the limitations of the constitution, or violate those fundamental, natural rights, which are inherent in the citizen or subject of every enlightened and responsible government, it is not the province of the courts by construction to subvert such legislative action.

The statute having clearly allowed the commission charged in this case, the order of the court below must be affirmed.

JUDGMENT ACCORDINGLY.

THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY, IN NEBRASKA, v. LANCASTER COUNTY.

1. **Taxes**: STATUTORY CONSTRUCTION: CONSTITUTIONAL LAW. Legislation authorizing a land road tax of "four dollars to the quarter section, to be paid in money, or labor at the rate of two dollars per day, at the option of the person so taxed," is not repugnant to any of the provisions of the constitution of 1867.

2. ——: UNIFORMITY. Such a tax is not void for want of uniformity, because it is not assessed against lots in cities and towns, or property occupied as right of way by railroad companies, etc.

3. ——: ——. Under the revenue act of 1869, the words "land tax" were not designed to include town and city lots, right of way of railroad

companies, etc., though lands lying within the limits of a town or city, and not subdivided, are subject to the tax.

4. ———: APPORTIONMENT. There being no constitutional restraint, it is for the legislature to determine what the rule of apportionment in levying taxes should be, and not the judiciary.

5. ———: ASSESSMENT OF ROAD TAX. The word "rate" in connection with the provision of the statute prescribing a land tax in any *rate* "not exceeding four dollars to the quarter section," denotes that one hundred and sixty acres being taken as the unit of quantity, whatever may be the ratio between it and the tax, the same relative proportion must be observed as to any other given quantity of land, more or less, that falls within the apportionment.

6. ———; THE FAILURE OF A ROAD SUPERVISOR to give notice of the time when, and place where, the road tax may be worked out, will not release the land from the lien of such tax; and the fact that the law requires such notice to be given to residents only, does not invalidate the tax assessed on lands of non-residents.

7. ———: ASSESSMENT OF SCHOOL TAXES. *It seems* 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 the mere failure to specify on the tax duplicate of the county, all the uses to which taxes for various purposes of the district are to be applied, will not invalidate the levy. The several items may properly be included under the head of "school district tax."

THIS was an application for an injunction to restrain the collection of road and school taxes assessed, in the year 1874, against lands of the plaintiff lying within the county of Lancaster. The cause was commenced in the district court, where a preliminary injunction was allowed; but before any hearing there, the parties came before this court and submitted the cause upon the pleadings and a stipulation, of which the following is a copy:

"For the purposes of this action, the following facts are admitted to be true:

First. The assessed value of real estate inside of cities, towns, and villages in the county of Lancaster, for the year 1874, amounts in the aggregate to the sum of $789, 698.

Second. The assessed value of personal property in

said county for the year 1874, not including railroads, amounts in the aggregate to the sum of $764 178.

Third. The assessed value of railroad property consisting of depots, road bed, right of way, and rolling stock in said county for the year 1874, was as follows:

Midland Pacific Railway.....	$261,765
Burlington and Mo. R. R. R. Co. in Neb..	312,058
Atchison and Nebraska R. R.....	193,784

Fourth. The land road tax was not levied on any of the property above mentioned.

Fifth. The supervisors have not, in any road district in said county, ever given any notice to the plaintiff of the time when, or place where, it could work out the said tax. The plaintiff's road runs through the following road districts, and no others:

District No. 2, in Highland Precinct.
District No's 1, 2 and 4, in Denton Precinct.
District No. 2, in Yankee Hill Precinct.
District No's 1, 3 and 4, in Lincoln Precinct.
District No's 1 and 2, in Lancaster Precinct.
District No. 4, in North Bluffs Precinct.
District No's 1, 2 and 3, in Waverley Precinct.

Sixth. There is no depot, freight house, or other building belonging to the said railroad company, in any of the road districts in said county, and the said company has no agent or employe residing in any of said road districts, upon whom a notice could have been served to work out said tax.

Seventh. The plaintiff owns land in a large number of road districts in said county, in which no part of its road bed is situated, or through which it passes.

Eighth. All of the plaintiff's lands in said county are wild and uncultivated, and there is no one residing upon them.

Ninth. The exhibits hereto annexed are correct copies of the reports of various boards of the various school

districts mentioned and referred to in plaintiff's petition, and they are to be considered as being introduced as evidence in this cause, and either party may read the same on the hearing of this action.

Tenth. In Lancaster county each United States township, outside of or not included within the limits of cities, towns, or villages are divided into four road districts.

Eleventh. It is further agreed that under the provisions of an act entitled "an act declaring section lines roads in certain counties of the state of Nebraska," there was no damages claimed or paid to the plaintiff, and that the plaintiff then owned the lands described in the petition."

Attached to the stipulation were the various reports of school districts to the county clerk, of the tax voted for school purposes. These were mentioned by some as "Incidentals," "Contingent," "Teachers wages," "Interest on bonds," etc., and by others as "Expense fund," "Books and Maps," "Building purposes," etc., all being classed upon the tax duplicate as "school district tax." All other material facts necessary to an understanding of the case appear in the opinion.

T. M. Marquette, for plaintiff, argued the cause upon an elaborate brief from which the following points are taken:

I. The following fundamental principles must be observed in the levy of a tax:

1. It must be for a public purpose.

2. There can be no taxation without apportionment. Apportionment lies at the foundation of the taxing power. *Emery v. San Francisco Gas Co.*, 28 *Cal.*, 355. *McCulloch v. Maryland*, 4 *Wheat.*, 428. *People v. Mayor*, 4 *New York*, 419.

3. To make an apportionment practicable there must be taxing districts, and the tax levied upon a district must not only be for a public purpose or benefit, but

must also be a local benefit and for local purposes. A tax which is for a state purpose could not be levied on anything less than the property of the state. A tax to be used for county purposes can not be levied upon anything less than the whole county.

II. To allow a tax for county *purposes* to be levied upon anything less than the whole county, would set at defiance the rule of apportionment, which lies at the foundation of the taxing power. *Cooley's Con. Lim.*, 495, 501. *Sanborn v. Rice*, 9 *Minn.*, 273. *Oliver v. Washington*, 11 *Allen*, 268. *Burnett v. Sacramento*, 12 *Cal.*, 76. *Woodbridge v. Detroit*, 8 *Mich.*, 301. *Chicago v. Larned*, 34 *Ill.*, 203.

1. The legislature have, so far as one-third of the taxes are concerned, left no discretion to courts in respect to the purpose of the tax. In Sec. 15, General Statutes, p. 953, we find these words: One-third of the money raised in discharge of road tax shall be at the disposal of county commissioners for the general benefit of the county. There can be no question that this is for a county purpose.

2. If for a county purpose the burden should be spread over the whole county; yet we see exempted from this burden the following real estate in towns and villages, $193,872.00; real estate in cities of the second class, $120,000.00; and the assessed value on personal property, $1,412,497.00.

3. As to one-third of the tax, it clearly comes under the principle of law—that is for the benefit of the *whole county*, and the burden is only spread over a portion of the same.

4. If one-third is void the whole is void. For the reason as it is but one tax, it is a whole. *Cooley's Const. Lim.*, 179.

III. The power of taxation is limited; and as the

power to apportion taxes is a part of taxation it is also limited, and this limitation is independent of constitutional provisions. *Walker v. City of Cincinnati*, 21 *Ohio State*, 14. *Bradshaw v. Omaha*, 1 *Neb.*, 16. *Gordon v. Cornes*, 47 *New York*, 608. *Washington Avenue*, 69 *Penn. State*, 353.

1. The constitutional provisions in the different State constitutions requiring equality in taxation merely declare that an apportionment shall be made of the burden of taxation. *Cooley Const. Lim.* 10 *Am. Law Reg.*, 161.

2. The meaning of apportionment, as well as taxation, is to spread the burden *in equal shares* over the *taxing district*. If a law upon its face makes an unequal apportionment, can it be taxation or apportionment? *Cooley Const. Lim.*, 483-487. *Morford v. Unger*, 8 *Iowa*, 92. *Tyson v. School*, 51 *Penn. Stat.*, 9.

3. Suppose a law should be passed requiring the owners north of O street, in the city of Lincoln, to pay all the taxes of the city, constitution or no constitution, who would say that was law? or, that every odd lot should pay the taxes? A tax of $5 upon every animal in the county would have the appearance of a tax. It would even have appearance of equality. Yet it would not be a tax. It would be a confiscation of every animal from a yearling calf down, and would be a practical exemption to the best blooded horses.

4. The arbitrary levy of $4 on each quarter section is the same in principle as the last illustration. The assessed value per acre ranges from $2 to $300. The same tendency to inequality therefore exists in the one that exists in the other.

IV. If it be true that the tax becomes due and payable without an opportunity given to work the same out, as to plaintiff, or to all who do not reside on the land, then, in that case, the tax is open to the objection that it

is unequal legislation. *Att'y Gen'l v. Sups. of St. Clair*, 11 *Mich.*, 63.

VI. But it is claimed that no matter how this tax is apportioned, that it is a question for the legislature, and courts cannot interfere. This doctrine is laid down in *People v. Mayor of Brooklyn*, 4 *N. Y.*

But later decisions have overturned this doctrine. *Gordon v. Cornes*, 47 *N. Y.*, 608.

VII. There is one construction that can be placed upon the law which might make it valid, and that is this: The levy should be made as follows on the quarter section assessed: the highest levy $4.00, and upon the rest of the land the same rate according to value. This we think the court is bound to do, in accordance with well recognized principles of law.

Brown, England & Brown, for defendant, with whom were also *Chapman & Sprague*, and *George S. Smith*, for the county of Cass.

I. The power of taxation being vested solely in the legislature, it follows that the legislature, in the absence of constitutional restrictions, may exercise the power both as to the objects and modes, and to any extent they may deem proper. *The People v. The Mayor*, 4 *N. Y.*, 419. *McCulloch v. Maryland*, 4 *Wheat.* 428. *N. M. R. R. Co. v. McGuire*, 49 *Mo.*, 490.

II. As taxes cannot be levied without apportionment, it follows that the power to tax, and the power to apportion the tax, are inseparable. The power to do the one implies the power to do the other. "However absolute the right of an individual may be (to his property), it is still in the nature of that right, that it must bear a portion of the public burden. *And that portion must be determined by the legislature.*" *Providence Bank v.*

Billings, 4 *Peters*, 563. *Emery v. San Francisco*, 28 *Cal.*, 345. *Sanborn v. Rice*, 9 *Minn.*, 273.

III. The legislature may adopt, as the basis of apportionment, the *ad valorem* principle, or frontage, or the square foot, or square acre, or as in the case at bar, the quarter section, or any other that it shall in its wisdom determine upon, as best calculated to apportion the burdens in the ratio of the benefits. *Scoville v. City of Cleveland*, 1 *O. S.*, 135. *Dillon on Mun. Corp.*, *Sec.* 596. *Bright v. McCulloch*, 27 *Ind.*, 223. *Morford v. Unger*, 8 *Iowa*, 82.

IV. The legislature also have power, except where an unbending rule has been prescribed for it by the constitution, to select in its discretion the subjects of taxation. The rule of uniformity does not require that every species of property, which the legislature might make taxable, shall be made so in fact. It simply requires that the apportionment of the tax, among that class of property, which has been designated by the legislature as that upon which the tax shall rest, shall be uniform. *Wilson v. Mayor*, 4 *E. D. Smith*, 675. *Hill v. Higdon*, 5 *Ohio St.*, 245.

LAKE, CH. J.

This case is brought here as an original proceeding, to test the legality of certain taxes levied upon the plaintiff's lands, and which the county treasurer threatens, and is about to collect by a seizure and sale of its property, as he is directed by law to do.

Relief is sought against two distinct kinds of taxes, the *first* in order being what is known as the land road tax, and the *second*, those which were supposed to have been voted in the several school districts of the county, and were certified to the county clerk for entry upon the tax duplicate.

By a stipulation, the facts of the case are all agreed upon. As to these, therefore, we can have no trouble, and it only remains for us properly to apply the law applicable thereto, and thus determine whether or not the plaintiff is entitled to the relief prayed.

And first, of the road tax. The objection urged against its validity is radical, and goes to the very foundation on which it rests. No infirmity is claimed to exist in consequence of any omission of duty on the part of any officer charged with the levy, or the collection of taxes, but it is asserted that the statute which directed its imposition was unauthorized and void. This statute, section thirty, of the revenue act, among other things, provides "for roads a poll tax of two dollars or one day's work, and a land tax in any rate not exceeding four dollars to the quarter section, to be paid in money, or in labor at the rate of two dollars per day, at the option of the person so taxed."

Three distinct objections are made to this tax: *first*, that it lacks uniformity; *second*, that there was no necessity for the tax; and *third*, that no provision is made for notice to non-resident land owners as to when, and where, such tax may be worked out, which, as to residents, is required to be given.

Our attention has been directed to a large number of authorities which support the position taken by plaintiff's counsel, that a specific tax, or in other words a tax rated by the acre, or superficial area, is unauthorized, and cannot be enforced. But we have found, without a single exception, that in those states where it has been so held, there is some constitutional restraint put upon the power of the legislature, whereby the burdens of the government are required to be imposed in some particular manner, and in respect of which they are left no discretion whatever.

For instance, in Ohio, where the new constitution

declares that "laws shall be passed taxing by a uniform rule all moneys, credits, etc.," and also, "all real and personal property, according to its true value in money," it was held, that while under the former constitution of that state which contained no similar provision, there was no restraint upon the legislative will in this respect, and "the whole matter of taxation was committed to the discretion of the general assembly," and that the levies "might be made upon such property and in such proportion as that body saw fit," under the provision above quoted, this could no longer be done, and this positive injunction must be obeyed. *Zanesville v. Richards*, 5 *Ohio State*, 589. So, too, in Georgia, a constitutional provision that taxation shall be *ad valorem*, precludes the taxation of cattle by the head. *Livingston v. Albany*, 41 *Geo.*, 21. And in several other states, we find similar checks upon the discretion of the legislature, but for which that body is the sole judge of the necessity for, and the extent of taxation, and also of the sources from whence the revenues shall be drawn. *Scofield v. Cleveland*, 1 *Ohio State*, 126. *Hill v. Higdon*, 5 *O. S.*, 243. *Gordon v. Cornes*, 47 *N. Y.*, 608.

The principal point urged on the argument under the head of want of uniformity is, that the tax is for a public purpose, to be expended throughout the county, and yet is imposed only upon a portion of the taxable property therein, not even upon all the real estate within the limits of the county, which, in respect of this tax, is to be regarded as a single taxing district.

It is true, that it is not the practice to impose it upon town or city lots; nor does the law contemplate that it shall be so levied. We think a fair, reasonable construction of the several sections of the revenue act warrants this conclusion. It is true, that the word "land," in its most comprehensive sense, would include town lots, and in fact every other portion of the earth's surface within

the county. But this, evidently, is not the meaning here intended.

In other sections of the revenue act, we find specific exemptions of real property from the burdens of taxation, which the legislature, undoubtedly, were authorized to make. So, too, in section 34, direction is given to the county clerk as to what the tax lists must contain, their order, etc. In the second paragraph it provides that, "*all the taxable lands in the county*" shall be included; and, in the third paragraph, that "*all the city or town lots in each city or town in the county*" shall be given.

Again, in section seventeen, provision is made for the taxation of the road bed, and other property, of railroad companies, and, also, certain property of other corporate bodies. And the last clause of this section declares that "any real estate belonging to, or represented by, the capital stock of any corporation * * * shall be omitted by the assessor from the return of taxable lands and town lots."

Here we have the word "lands" used in connection with, and in contradistinction to, "town lots," which but strengthens our conviction that by the term "land tax," as used in section thirty, neither town nor city lots, nor lands lawfully occupied for right of way by railroad companies, etc., were designed to be included. But we think the word does include all other real property within the county not otherwise specially exempted from its operation, whether lying within the corporate limits of a city or town or not. In the case of lands lying within a city or town, and not subdivided into lots, they are clearly within the operation of the statute, and subject to the tax.

It is quite manifest that this tax is required to be imposed upon all of a certain class of real estate within the county, by whomsoever it may be owned, unless falling within some one of the authorized exemptions. It reaches all that comes within the meaning of the word "lands," in

the restricted sense in which it is here used. This may be properly designated the "selection" of the kind and class of property upon which this burden shall rest. And this, when taken in connection with the "rate," or rule by which the levy must be made, completes the legislative "apportionment" which is the essence of a legal tax.

But, say the plaintiff's counsel, this apportionment is according to no just rule; it is arbitrary, and operates oppressively; it imposes the like burden upon all lands, whether they be worth three or three hundred dollars per acre. This is all true, and hopeless indeed would be the task to undertake to show that such legislation is founded upon any fair rule or equitable principle whatever. These are considerations which, under the constitution in force, when the taxes complained of were levied, could only be properly addressed to the legislature. It was for that body, not the courts, to determine what the rule of apportionment should be. *The People v. The Mayor*, 4 *Comst.*, 419. *N. M. R. R. Co. v. McGuire*, 49 *Mo.*, 490. *Powers, In re*, 25 *Vt.*, 261. *Cooley on Taxation*, and cases there cited.

It was contended on the argument, however, that if the law should be upheld, then it was evident that the word "rate," as used in connection with this tax, should be construed as meaning a per centage on the valuation of the land, so that the amount of tax levied upon each particular tract should be proportioned strictly according to its assessed value.

There is no doubt that in many places in the revenue act, this word is used in the sense here claimed for it, and that where such is the case an *ad valorem* assessment or levy is imperatively required. But in this connection it is manifestly susceptible of a different meaning—of the one which has obtained in practice, viz.: that a legal subdivision of land known as a quarter section, or one hundred and sixty acres, being taken as the unit of

quantity, whatever may be the ratio between it and the tax placed thereon, the same relative proportion must be observed as to any other given quantity, either more or less, that falls within the apportionment. This, it seems to us, is the only rational construction that can possibly be given to the language here employed.

For these reasons we must hold that under the constition in force, when this tax was imposed it was a valid levy. And although we may think that, in framing the statute in question, there was a manifest lack of wisdom, and a failure to recognize those just and equitable principles which ought to obtain in the apportionment of all the burdens of government, this is no cause for judicial interference. It is a matter which, until our new constitution went into operation, was left entirely to the judgment and discretion of the legislature, to which body alone applications for relief could be properly addressed.

There were several other minor objections urged on the argument, but not mentioned in the petition, as grounds of complaint, which we have not considered it necessary to notice at any length. For instance, that in certain of the road districts no expenditure of money or labor was necessary for the purpose to which this tax is devoted; and that at least one-third of the levy could, at the option of the commissioners, be expended outside of the particular road district where raised. These are matters entirely within the control of the legislature, and with which the courts can have nothing whatever to do. The tax should be regarded, and in truth is, a county levy; it is the same in all the road districts. These districts are created, not as special and distinct taxing districts, but rather to insure a more equal and economical expenditure of the funds raised for road purposes than could be expected if this were intrusted entirely to the county commissioners, or to a single road supervisor elected for the whole county.

The same is true, also, in respect of the provision found in section eight of the road act, requiring each road supervisor to notify all persons owning lands, and living within his district, as to when and where such tax could be worked out, while no notice is provided for non-resident owners. The validity of this tax does not depend upon this notice being given. This is a regulation by which it was intended quite as much to insure the proper improvement of highways as to favor or benefit the land owner. If observed, it operates upon all within the jurisdiction of the supervisor,—upon those whom it would be reasonable to suppose were in a situation, and might desire to work out the tax.

But if the tax be not worked out, even although the supervisor failed to give the proper notice, payment must be made in money. And nothing but the production of the certificate of the proper supervisor of labor having been actually performed, can justify the treasurer in not making the collection, or will operate as a release of the property from the lien of the tax. The statute authorized the plaintiffs to work out these taxes by labor performed upon the highways, and had it appeared that timely offers to do so had been made to the proper supervisors the result might have been different.

As to the second class of taxes against which relief is sought, in the view we take of the petition, a very few words will be all that is necessary.

While we are very strongly inclined to the opinion that, inasmuch as the powers of school districts, and school boards, are purely delegated, exceedingly limited, and strictly defined in the statutes granting them, if their records fail to show that a tax voted is one which they are authorized to levy, its collection cannot be enforced; yet the case as made by the petition is not brought within the operation of this rule. There is no allegation that such is the case in respect of the taxes in

question, and in the absence of such allegation the legal presumption is that the facts would not warrant it.

The allegations of the petition on this point are confined to what is shown by the tax duplicate, and the reports sent up to the county clerk by the district boards. There is no reference made to what was done, or omitted, by the several districts, or the district boards, in the imposition of a single tax. Where there is an omission to state a material fact, one necessary to show a cause of action, the presumption against the pleader is that it does not exist.

With respect to the formality of the tax duplicate, we take the law to be, that the mere failure to particularize all the uses to which the money is to be applied, will not necessarily invalidate the levy. Indeed, the form prescribed in section thirty-six of the revenue act seems to contemplate that the several items may be properly included under the head of "district school tax."

So, too, of the report required to be made by the district board of taxes voted in the district, especially as to those authorized by section thirty-two of the school law, we do not think it was intended, nor would it be reasonable to require that an itemized statement be given of the purposes for which the funds were intended. It certainly could be of no practical use whatever, and the omission to do so could work no possible injury to any one. By section forty-four of the school law, the director is required to keep a record of all the "proceedings of the district in a book to be kept for that purpose," and it is to this and this alone, that resort must be had to ascertain what the district has done, what taxes have been voted, and for what particular purposes they were levied. *Cooley on Taxation*, 247, *and cases there cited.*

For these reasons the preliminary injunction heretofore allowed must be dissolved, and the cause dismissed at the plaintiff's costs.

JUDGMENT ACCORDINGLY.

BETSY A. WEBB, PLAINTIFF IN ERROR, v. EUGENE HOSELTON, MONELL AND LASHLEY, AND JOHN P. LANTZ, DEFENDANTS IN ERROR.

1. **Married Women.** The promissory note of a married woman, given by her in a transaction relative to her separate property, is valid under the act of 1871. *Gen. Stat.*, 465.
2. **Mortgage:** ASSIGNMENT. A bona fide purchaser, for value, of a negotiable promissory note, secured by mortgage, before maturity and without notice, takes the mortgage as he does the note, discharged of all equities which may exist between the original parties.
3. ———: ———. The mortgage is a mere incident to the debt, and passes with it.
4. ———: WHAT CONSTITUTES. A conveyance in the form of a deed of trust to secure the payment of a promissory note, and conditioned that in case of failure to pay, the trustee shall sell, or upon payment, reconvey, is in effect only a mortgage.

THIS was an action brought by the plaintiff in error, a married woman, in the district court of Lancaster county, against Hoselton, to whom she had executed a promissory note, secured by a mortgage on her separate estate, and Monell and Lashley to whom the note had been transferred. Before the assignment of the note, she executed a deed of trust to the same premises, in which the defendant Lantz, was named as trustee. By the terms of this deed, the trustee was empowered, in case of default in the payment of said note, to sell the premises at public auction, but upon full payment of the same, with interest, a reconveyance should be made. The prayer of the petition was that the note and deed of trust be declared void, that upon payment to Hoselton of the just value of certain personal property, which constituted part of the consideration of the note, the same should be delivered up and cancelled, and the said defendant Lantz required to reconvey the premises to the plaintiff. The cause was sent to a referee who reported as follows:

First. That on the 3*d day of February*, 1873, the plaintiff made her promissory note in writing whereby she promised to pay to the defendant Hoselton or order the sum of $1150.00, one year after the date thereof with interest at the rate of ten per cent. per annum and to secure the payment of said note the plaintiff executed a mortgage on the premises described in the petition, bearing the same date as the note.

Second. That on the 22*d day of February*, 1873, the plaintiff at the instance of the defendant, Hoselton, executed a trust deed, a copy of which is annexed to the petition, on the same premises upon which the mortgage was given, in which the defendant, John P. Lantz, was named as trustee, and in case of his death, refusal, or inability to act, Seth Robinson was made his successor, and which was to secure the same note described in the mortgage, and the mortgage was to be cancelled.

Third. That *immediately after the trust was given*, the note which it was given to secure was indorsed by said Hoselton and transferred *before it became due* to the defendants, Monell & Lashley, for the consideration of $800, *without notice of any defense*, and the note and trust deed were delivered to Monell & Lashley as their property.

Fourth. That the plaintiff at the time she gave the said note, mortgage and trust deed, was a married woman, that her husband was temporarily absent, but that the premises described in said mortgage was *her sole and separate property.*

Fifth. That the consideration for which the note, mortgage, and trust deed were given was made up as follows:

1. The defendant, Hoselton, had a pre-emption filing on a piece of government land situated in Adams county, Nebraska, which *right of pre-emption or filing he relinquished*, so that the plaintiff might get a pre-emption

filing on the same land, which was valued by the parties at $400.

2. Improvements on the land above referred to, which Hoselton had placed thereon, consisting of a house, a stable, a well and about twenty acres of breaking which were valued by the parties at $265.00. One span of horses and harness valued by the parties at $300.00. One mowing machine valued by the parties at $135.00. One breaking plow valued by the parties at $25.00. One hay rack valued by the parties at $7.00. One hay rake valued by the parties at $10.00; total, $1142.00. How the other $8.00, was made up does not appear.

Sixth. That the defendant Hoselton did *relinquish his pre-emption filing* and turned over his possession of the land with the improvements thereon and all of the personal property above referred to, to the plaintiff, who took possession of the same sometime *between the middle and last of February*, 1873.

Seventh. That the plaintiff remained in the possession of the land and premises until about *the 12th of March*, 1873, when she abandoned the possession of the same and moved to the city of Lincoln, Nebraska.

Eighth. That while she was in possession of said land and premises *she either lost or disposed of all the personal property turned over to her by the defendant Hoselton.*

Ninth. That immediately upon the abandonment of the land by the plaintiff, the defendant Hoselton made a homestead filing on the south half of the premises, which the plaintiff had abandoned, in his own name and for his own benefit. That all the improvements on the land turned over by Hoselton, to the plaintiff were on the south half and that immediately upon abandonment of the land by the plaintiff, the defendant Hoselton, took possession of the house and all the improvements on said land as his own, and holds them for his own benefit.

Tenth. That the plaintiff at the time she executed the note, mortgage, and trust deed, was in the possession of the premises described in said trust deed and ever since has been and now is in possession of the same.

Eleventh. That at the time plaintiff purchased the pre-emption filing, improvements, and personal property for which the mortgage was given she supposed she could take a pre-emption filing in her own name, and that she was led to this conclusion by representations of defendant, Hoselton, and that Hoselton at the time of the sale supposed she could. That Hoselton is not a lawyer and did not claim to be, but he did claim to be familiar with the laws of Congress pertaining to pre-emptions, and the rules and practice under these laws.

Twelfth. That at the time Hoselton delivered over the property and land to the possession of the plaintiff, he did what he could to cancel his own filing and with the *knowledge and consent of the plaintiff* procured a pre-emption filing on the land in the name of B. G. Webb, who is the husband of the plaintiff.

Thirteenth. That at the time plaintiff executed the trust deed, she did not understand its full scope and effect, but she might, had she exercised reasonable prudence, diligence, and care, and that the defendant Hoselton, was not guilty of any active fraud in her being misled as to its contents.

As conclusions of law the referee found:

First. The note having been given by a married woman is void at law, and the payment of it can only be enforced if at all by a proceeding in equity; hence, it follows that any defense which can be made against the payee is equally available against the indorser of the note, and that the plaintiff is entitled to claim similar relief in this action that she would be, had an action been brought on the note.

Second. The sale of the pre-emption right was abso-

lutely void by the law of Congress which provides that all assignments and transfers of the rights hereby "secured" (meaning the pre-emption right) prior to the issuing of the patent shall be null and void.

Third. It being agreed that the value of the pre-emption right should be $400 and the transfer of the same being absolutely void, so much of the consideration for which the note was given has completely failed, and this amount with interest should be deducted from the note.

Fourth. The question as to what *should be done with the value* of the improvements is one more difficult for me satisfactorily to determine, especially as our legislature seems inclined to sever, so to speak, the improvements from the land and make them the legitimate subject of sale and transfer. But as the contracts of married women are as a rule enforced on only equitable grounds, I think these also should be deducted. It will not be contended that there is any equity in compelling the plaintiff to pay the defendant Hoselton, for improvements from which she never has and never can derive one particle of benefit, and in the ownership and possession of which he has in no sense been injured. The improvements amount to $265.00, which amount would be deducted from the note.

Fifth. The personal property which the defendant Hoselton, transferred and delivered to the plaintiff and which she lost or disposed of she should pay for; this amounts in the aggregate to $477.00 with interest from the date of the note, which amount is a valid and subsisting lien on the premises described in the trust deed and upon the payment of said last mentioned sum together with the costs of this action, the plaintiff is entitled to have said note surrendered up and the mortgage and trust deed canceled.

Exceptions to the report of the referee were filed, and

being sustained, judgment was rendered dismissing the petition, to reverse which the cause was brought here by petition in error.

Tuttle & Harwood, and *Groff & Ames* (with whom was also *E. E. Brown*), for plaintiff in error.

I. A trust deed given as security for a debt, and for no other purpose, merely performs the office of a mortgage, and is in legal and equitable effect nothing else than a mortgage. 4 *Kent.*, 160, 193. *Powell on Mortgages*, 9. 1 *Hilliard on Mortgages*, 40. *Woodruff v. Robb*, 19 *Ohio*, 212.

And an assignee of a mortgage takes subject to all equities existing against it at the time of assignment. *Bailey v. Smith*, 14 *Ohio*, 396. *Walker v. Dement*, 42 *Ill.*, 272. *Johnson v. Carpenter*, 7 *Minn.*, 176.

II. Has our statute changed the common law rule? Has it taken away the shield which the common law gave to a married woman, and does it make her liable at law for her contracts, general in their character, and which in no way refer to her separate property? We think not. The furthest that any of the decisions go is to hold that she may create a lien that may be satisfied out of her separate property by proceedings in equity. *Phillips v. Graves*, 20 *Ohio State*, 371. *Worthington v. Young*, 6 *Ohio*, 335.

The disability of a married woman to contract is removed by the statute only in those cases where she contracts *in reference to her real and personal property*. The giving of a negotiable promissory note is not a contract of this character. *Yale v. Dederer*, 18 *New York*, 265. *Id.*, 22 *New York*, 450. *Corn Exchange v. Babcock*, 42 *New York*, 450.

Lamb & Billingsley, for defendants Monell & Lashley,

in contending that the referee erred in his first conclusion of law, cited *Chapman v. Foster*, 6 *Allen*, 136. *Estabrook v. Earle*, 97 *Mass.*, 302. *Deering v. Boyle*, 8 *Kan.*, 525. *Wicks v. Mitchell*, 9 *Id.*, 80. *Whitesides v. Cannon*, 23 *Mo.*, 457. *Baker v. Gregory*, 28 *Ala.*, 544. *Sheldon v. Clancy*, 42 *How. Pr.*, 186.

Where the note is the principal and the mortgage the incident, if the deed of trust be regarded only as a mortgage, the note and deed of trust would not be open to equities in the hands of third parties when taken before due for value without notice. *Carpenter v. Longan*, 16 *Wallace*, 371. *Foster v. Otis*, 3 *Chandler*, 83. *Bloomer v. Henderson*, 8 *Mich.*, 395. *Potts v. Blackwell*, 5 *Jones Eq.*, 58. *Pierce v. Faunce*, 47 *Me.*, 507.

MAXWELL, J.

At common law the husband and wife are treated as one person, that is, the legal existence of the wife is suspended during marriage, and she becomes incapable of making a valid contract to bind either herself or her estate. Equity, however, following the rules of the civil law, treats the husband and wife as distinct persons, capable of having separate estates, debts and interests, and regards a married woman as to her separate property as a *feme sole*. And the fact that the debt has been contracted during coverture, either as principal or as surety for herself or husband, or jointly with him, seems ordinarily to be held *prima facie* evidence of intention to charge her separate estate, without any proof of a positive agreement or intention to do so. *Balpin v. Clarke*, 17 *Ves.*, 365. *Story's Eq.*, 1400. *Murry v. Beebe*, 4 *Sim.*, 82. *Owens v. Dickerson*, 1 *Craig & Ph.*, 48. *North v. Turrill*, 2 *P. Wm.*, 144.

Our statute provides that "a married woman, while the marriage relation subsists, may bargain, sell and convey, her real and personal property, and enter into any con-

tract with 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. A married woman may carry on any trade or business and perform any labor or services 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 name." In the case of *Yale v. Dederer*, 22 *New York*, 450, where a wife signed a note with her husband as surety, she having a separate estate, the court held that unless the consideration of the contract was one going to the direct benefit of the estate, the intention to charge the separate estate must be stated in and be a part of the contract. And the court refused to permit parol proof to establish that intention. That decision, in our opinion, cannot be sustained on either principle or authority.

In *Ballin v. Dillaye*, 37 *New York*, 35, the defendant, a married woman having separate property, in 1860, under a special agreement purchased certain premises at a mortgage sale; and among other things she agreed to assume a certain mortgage on the premises, and to secure such payment by a new mortgage executed by herself. She received a conveyance of the property and executed a new mortgage omitting two lots, to which she had received an unincumbered title. The mortgage was foreclosed in 1864, and on the sale there was a deficiency of about $600 which the plaintiff sought to make a charge against her other separate property.

The court held: "I have no doubt therefore, in the case at bar, the obligation which the defendant took upon herself, by the execution of the bond, was for the benefit of her separate estate, which is therefore chargeable in equity with the payment of the deficiency in question."

The law permits a married woman to control her own property as she sees fit. She may sell, give away, or

mortgage it; permits her to carry on business on her own account, and to receive the earnings, and she is bound like a *feme sole* by all contracts made by her in relation to her separate business or property. These rights imply the power to contract debts, and to enter into obligations for their payment out of her separate property. The statute by removing her disabilites requires her by implication to subject her property to the payment of her debts, and by incurring an indebtedness she is presumed to intend that it shall be so paid. We have no doubt the note in this case is valid. *See Deering v. Boyle*, 8 *Kan.*, 525. *Todd v. Lee*, 15 *Wis.*, 365.

The referee finds that Monell and Lashley purchased the note and mortgage before maturity and without notice.

In *Bailey v. Smith*, 14 *Ohio State*, 413, the court held that "mortgages were mere choses in action, whether standing alone or taken to secure negotiable or non-negotiable paper; that they are only available for what is honestly due from the mortgagor to the mortgagee." And the courts of Illinois hold substantially the same doctrine.

In *Harkrader v. Lieby*, 4 *Ohio State*, 603, the court held, "it is incorrect to say that a mortgage does no more than create a lien on the property. It operates as a conveyance of the estate by way of pledge or security for the debt, and gives the mortgagee the benefit of all the doctrines applicable to *bona fide* purchasers." This is holding in effect that the mortgagee has an estate in the mortgaged premises during the continuance of the mortgage.

The ancient equity practice, and which continued in England until about the year 1845, was to file a bill for strict foreclosure, whereby a decree was obtained for the payment of the mortgage debt within a short period, to be fixed by the court, in default whereof the mortgagor

and all persons claiming under him were barred and foreclosed of all right and equity of redemption, and the estate became the property of the mortgagee in the character of purchaser. And the court, except in special cases, refused to decree a compulsory sale against the will of the mortgagor, but courts of equity were in the habit of enlarging the time to redeem, according to the equity arising from circumstances. 2 *Van Santvoord's Eq.*, 70. 4 *Kent's Coms.*, 181. *Story's Eq.*, *Sec.* 1026. And this practice seems to have prevailed in the New England states. 4 *Kent's Coms.*, 181. See also, *Higgins v. West*, 5 *Ohio*, 555. And as between the mortgagor and mortgagee, and those claiming under them, after condition broken, the estate became absolute in the mortgagee, subject however to be redeemed at any time before foreclosure. A non-negotiable bond in many cases appears to have accompanied the mortgage, but as a suit on the bond for the deficiency opened the decree, and permitted the mortgagor to redeem, there seems to have been but little inducement to bring such an action. *Dashwood v. Blythway*, 1 *Eq. Cases*, 317. *Perry v. Barker*, 13 *Ves.*, 198. *Lovell v. Leland*, 13 *Vt.*, 581. *Rev. Stat. Mass.*, 1835. *Contra*, *Lansing v. Goelet*, 9 *Cow.*, 346.

In *Howard v. Harris*, 1 *Vern.*, 190, the mortgage contained a covenant to pay £1000 on the —— day of ———, 1686, and £60 per annum interest, in the meantime, by half-yearly payments from the date of the mortgage. It was afterwards held that the omission of the covenant was immaterial. 1 *P. Wms.*, 271. 3 *Id.*, 358. 2 *Atk.*, 496.

Promissory notes payable to bearer or order were made negotiable by statute in the year 1704, (3 & 4 Ann., Ch. 9,) but do not appear to have been used to any extent in connection with mortgages until the present century.

In states like Ohio, where it is held that after condition broken the legal estate is vested in the mortgagee, a mortgage may perhaps be properly regarded as a chose in action, and available only for what is honestly due from the mortgagor to the mortgagee. *Bailey v. Smith*, 14 *Ohio State*, 413. *Allen v. Everly*, 24 *Ohio State*, 97. *Fische v. Kramer's Lessee*, 16 *Ohio*, 126. *Maynard v. Hunt*, 5 *Pick.*, 243. *Winslow v. Merchant's Ins. Co.*, 4 *Met.*, 306. *Frothingham v. McKusick*, 24 *Me.*, 403.

But in this state the mortgagee is not seized of the freehold, either at law or in equity, even after condition broken. The mortgagor retains the legal title, and is entitled to the possession, which he may retain until the sale is confirmed. The mortgage is a mere incident to the debt and passes with it, and nothing whatever passes by an assignment of the mortgage, without the note or debt. If a note is negotiable, as in this instance, and transferred before maturity for a valuable consideration, without notice of any defense, the assignee takes it, and the security, free from equities between the original parties. *Kyger v. Riley*, 2 *Neb.*, 28. *Carpenter v. Longan*, 16 *Wall.*, 371. *Pierce v. Faunce*, 47 *Me.*, 507. *Potts v. Blackwell*, 4 *Jones Eq.*, 58. *Fisher v. Otis*, 3 *Chandler*, 83. *Reeves v. Sculley*, *Walk. Ch.*, 248.

The case of *Mathews v. Wallwyn*, 4 *Ves.*, 118, has no application to this case; had the note been non-negotiable or overdue at the time of the transfer, it would have been subject to equities between the original parties.

The fact that the mortgage in this instance is in the form of a deed of trust, does not change its character from a mere security for the payment of money, nor does it convey the legal title, nor do the restrictions therein contained prevent the plaintiff from availing herself of the safeguards thrown around the debtor to prevent a sacrifice of her property. The judgment of the court below as to Monell and Lashley is affirmed. It

is apparent from the finding of the referee that the defendant Hoselton took advantage of the plaintiff's ignorance in obtaining the note and mortgage, (if he is not guilty of actual fraud,) but no relief can be afforded the plaintiff in this form of action. The petition against Hoselton is therefore dismissed without prejudice.

JUDGMENT ACCORDINGLY.

GANTT, J., dissented.

WILLIAM SUTTON AND JAMES L. YOUNG, PLAINTIFFS IN ERROR, v. WILLIAM A. STONE, DEFENDANT IN ERROR.

1. **Taxes**: CONSTRUCTION OF REVENUE ACT. The statute of limitations in the revenue act of 1869 is not retrospective in its operation. It applies only to tax deeds executed subsequent to the passage of that act.
2. ———: SUFFICIENCY OF DEED. A tax deed must conform substantially to the requirements of the statute under which it is executed. If the "seal of the county" be omitted in its authentication, the deed is void. Nor is it admissible even to show color of title, under the special limitation of the revenue act.

ERROR to the district court of Johnson county. It was an action of ejectment. The land in controversy was entered by William A. Stone. On the 22d day of April, 1865, it was sold for taxes under the revenue act then in force. The treasurer of the county executed a tax deed therefor on the 17th day of June 1867, and Sutton, who was the assignee of the purchaser and the owner of the tax title, went into possession. He afterwards sold to Young.

At the trial below the tax deed was offered in evidence, to which the plaintiff Stone objected, the objection was sustained and defendants excepted, and evidence offered by them to show that they had been in actual possession of the land for over five years previous to the commencement of the action, and that their possession was with

claim and color of title under a tax deed, was also excluded from the jury, and judgment being rendered against them, they brought the cause here by proceedings in error.

E. W. Thomas, for plaintiffs in error, contended that if they were in actual possession of the land in controversy for five years, claiming title under a tax deed, the action was barred. *Laws* 1869, 216. *Leffingwell v. Warren*, 2 *Black.*, 606. *Pillow v. Roberts*, 13 *How.*, 477. *Lewis v. Marshal*, 5 *Peters*, 470. The deed even if void, was admissible to show color of title, in connection with proof of possession for five years. *Blackwell on Tax Titles*, 585. *Edgarton v. Bird*, 6 *Wis.*, 527. The statute applies as well to tax deeds executed before its passage, as to those executed afterwards. *Bowman v. Cockrill*, 6 *Kan.*, 336. *Patterson v. Gaines*, 6 *How.*, 602.

T. Appleget, for defendant in error.

The position taken by the plaintiff in error, that adverse possession for five years under such a deed as his, is wholly untenable for the following reasons:

First. The deed bears date June 18, 1867. Whereas the law making five years adverse possession a complete title was not passed until February 15th, 1869, and therefore, from the very terms of the statute itself has no application to the case at bar. *Laws* 1869, 215.

Second. By the terms of the statute of 1869, he who relies on his five years adverse possession under a tax deed to give him title, must possess such a deed on its face as the statute prescribes.

If he has not *such* a deed, he is driven to the general law of limitations to give him title by adverse possession.

LAKE, CH. J.

The main question in this case, is whether or not the tax deed offered in evidence by the defendants in the court below should have been excluded from the jury. This deed was the corner stone of the defense, and if we shall hold it to have been rightly excluded, all of the remaining testimony offered by the defendants was immaterial, and there was no error in excluding this also. It appears that the taxes were levied, the sale made, and the tax deed executed, under the provisions of the revenue law of February 15, 1864, which act, in substantially the same form, was re-enacted in the revision of 1866; at least all of the provisions bearing at all upon the question now under consideration were left unchanged by the revision. Under this act the form of a tax deed was given. This form has been continued, through all the changes which our revenue system has undergone, to the present time. Its execution, also, by the county treasurer, and its attestation "by the county clerk, *with the county seal*," were all required, precisely the same as under the law now in force. The act as originally passed, also provided, "that *such deed* shall be conclusive evidence of the truth of all the facts therein recited, with the exception of the fact that the payment of taxes for which the lands named therein were sold, had not been made by or on behalf of the proper owner of such lands in due time, and to the proper officer," of which last mentioned fact, it was declared to be merely *prima facie* evidence. But when the act was carried into the revision of 1866, it was so modified in this particular as to make the entire deed *prima facie* evidence only, of all the facts therein recited. Neither in the original act, nor in the revision, was there any provision limiting the time within which an action should be brought to recover the possession of land sold for taxes under it. In

this particular the rights of the parties were left to the operation and control of the general limitation law, and so they have remained ever since, unless changed by the passage of the new revenue act of February 15, 1869, the 105th section of which provided that, "any person who shall hold possession of any land, *by virtue of any such tax deed*, for the term of five years, shall have acquired a complete title to said land, and all persons, after the expiration of said five years, shall be debarred from commencing any action to recover possession of said lands." It is contended by the plaintiff in error, that this section applies to all tax deeds, no matter whether they were executed under the act of 1869, or some prior act. But we are unable to adopt this view. The language employed seems to forbid such a construction. The words, "*by virtue of any such deed*," evidently refer back to deeds which had been before specified in that act—to those provided for in section 68. Had it been intended to apply to deeds executed under former acts, as well as this one, the language would most likely have been, *any tax deed*, which is the usual and proper mode of expressing the idea contended for by the plaintiffs in error. We think the word "*such*" was here used in a descriptive, and also in a *restrictive* sense, and requires not only that the deed shall be executed as provided in the act of 1869, but also, that it must have been executed under the authority of that particular act. This view derives strength from the evident policy of our legislation, from time to time, both before and since the passage of this act, on the subject of revenue, which has generally been to abstain from any interference with rights, either lost or acquired, under former legislation. A reference to the amendment of this identical section, passed June 6, 1871, will show, that its operation is now, in express terms, limited to rights acquired under this act. *Session Laws of* 1871, *page* 82, *Sec.* 2.

We conclude, therefore, that the plaintiffs in error cannot resort to the limitation provided in Sec. 105 of the act of 1869, to make up for defects in the sale under which they claim this land; and even if they could do so, we are of opinion that the deed, under which they claim, must conform, substantially, to the requirements of the statute, or it would not be entitled to go in evidence to the jury. The deed, in this case, was fatally defective, as proof, either of a valid sale, or for the purpose of laying the foundation of a claim under section 105 of the act of 1869, in consequence of the omission of the seal of the county in its authentication. This is a positive requirement of the statute, and is just as necessary to the validity of a tax deed, as is the acknowledgment thereof by the county treasurer.

It was insisted quite strenuously on the argument, by counsel for the plaintiffs in error, that, even although the deed should be adjudged void, yet it was admissible as, at least a colorable title, for the purpose of showing that their possession was under a claim of right. Such is doubtless the rule applicable to cases falling within the general limitation act, where exclusive adverse possession, in hostility to the owner of the fee, is all that is required. But this rule cannot be invoked in a case where, like the one we are now considering, the statute requires the possession to be not only hostile to the true owner of the land, but also under a particular description of sale, which must be evidenced by a deed, the essential and necessary ingredients of which are definitely prescribed.

The supreme court of Kansas, in giving construction to a statute similar to our own on this subject, save that it in terms applied generally to "lands sold for taxes," used this language: "It is only where a tax deed is good *prima facie*, and when, on account of some irregularity in the tax proceedings, the deed is void, or more

properly speaking is voidable if attacked, that the statute of limitations can apply." *Bowman v. Cockrill*, 6 *Kansas*, 339.

And this is the rule, substantially, which we should feel bound to apply in this case if the limitation in the act of 1869 were held to relate to sales under former acts. As the plaintiffs in error seek the aid of the special limitation provided for certain purchasers at tax sales, in order to obtain it, they must bring themselves clearly within its operation. Their deed should conform, *substantially*, to the requirements of the statute, and be, at least *prima facie*, valid.

For these reasons, and especially because the act of 1869 conferred no additional rights upon the plaintiffs in error, we are of opinion that said deed was properly rejected, and the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

DWIGHT J. MCCANN AND THE NEBRASKA CITY NATIONAL BANK, IMPLEADED WITH WILLIAM H. JAMES, PLAINTIFFS IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

Banks: LIABILITY OF, FOR ACTS OF PRESIDENT. The United States being indebted to the State of Nebraska, drew two drafts upon its treasury, in favor of "William H. James, acting governor, or order." The drafts were indorsed by James and by him delivered to McCann, a stock-holder and the president of the Nebraska City National Bank. The drafts were given to McCann, in the banking house, the cashier indorsed the same, and the bank received the proceeds. A portion of the fund was paid by McCann to O'Hawes, who had been the agent authorized by James to collect the same from the general government, and a large part of the balance paid to James on individual checks drawn by him from time to time, some upon McCann, and others upon the bank, but none of the amount was ever paid into the state treasury. *Held*, in an action against

James, McCann, and the bank, that the drafts being the property of the state, James had no interest therein whatever that he could transfer except to the state treasurer, who is the sole fiscal officer of the state; that the drafts contained on their face sufficient to put a purchaser on inquiry as to whether or not James was the owner; that notice to McCann was notice to the bank; that the bank was liable for the full amount of the drafts, nor could any deduction be made on account of payment to O'Hawes, such payments being made without authority of law.

ERROR to the district court for Lancaster county; the case being thus:

In 1871 and 1872, Pat O'Hawes, with a power of attorney executed by William H. James, then secretary of state and acting governor, collected for the state of Nebraska, from the United States, the sum of six thousand eight hundred dollars. This money was collected under an act of congress authorizing the re-imbursement to the territory of Nebraska of certain expenses incurred in repelling Indian hostilities, and by virtue of that act the amount proved up and allowed by the general government was paid by drafts on the treasury of the United States, which with all the subsequent indorsements are as follows:

Draft No. 3373.

No. 3619. War Warrant, Series of 1870, R. B. Treasury of United States C.

Pay to W. H. James, Acting Governor, or Order, four thousand eight hundred and thirty-four .94 dollars.

Washington, D. C., Dec., 7th, 1871.

F. E. SPINNER,
Treasurer of the U. S.

Registered Dec. 7th, 1871,

JOHN ALLISON,
Register of the Treasury,
Ass't Treasurer U. S.

$4834.94, New York."

Indorsed on the back as follows:

William H. James, Acting Governor.

D. J. McCann.

Pay Geo. T. Boker, Cashier, or Order, for collection for account of the Nebraska City National Bank.

W. W. BELL,
Vice-President.

E. E. SCHOFIELD,
Cashier.

Paid January 5th, 1872.

Draft on War Warrant No. 149.

No. 4119, Series of 1870, W. P.

Treasury of the United States,

Pay to Hon. W. H. James, Acting Governor, or Order, one thousand four hundred and sixty-four .10 dollars.

Washington, D. C., January 15th, 1872.

L. R. TUTTLE,
Assis't Treas. of the U. S.

Registered Jan'y 15th, 1872,
JOHN ALLISON,
Register of the Treasury,
Assist. Treas. of the U. S.

"$1,464.10, New York."

Indorsed on the back as follows:

William H. James, Acting Governor.

Pay J. A. Beardsley, Cashier, or Order, for collection for account of Nebraska City National Bank.

J. P. METCALF,
Cashier.

JAS. A. BEARDSLEY, Paid Feb. 2d, 1872."

The first draft was delivered in Washington on the day of its date to the agent, O'Hawes, who in turn delivered

the same to Dwight J. McCann, at that time a stockholder and president of the Nebraska City National Bank, for conveyance to Acting Governor James. It was agreed between O'Hawes and McCann that the draft should be delivered, only upon the condition that James should allow O'Hawes a percentage of the amount, as a fee for collecting the same. Before leaving Washington, McCann paid O'Hawes five hundred dollars by draft on New York, and on his return gave James a certificate of deposit for the amount of the draft, less the five hundred dollars paid to O'Hawes. Prior to these transactions, and before the organization of the bank, McCann did business in Nebraska City by himself, and, associated with others, under the firm name of D. J. McCann & Co., The bank was the successor of D. J. McCann & Co., and had a sign over the place where it did business, to that effect.

The certificate of deposit above mentioned was given in the name of D. J. McCann, and upon its delivery to James, the latter indorsed the treasury draft, it was handed to the officers of the bank, and by them sent on for collection. Afterwards James drew his checks for various amounts on McCann, all of which were paid by the bank. When James had drawn upwards of a thousand dollars in that manner, at the request of McCann, he returned the certificate of deposit, but continued to still draw checks, some upon McCann, some upon McCann and Co., and some upon the bank, all being honored, paid by the bank, and cancelled with the cancelling stamp usually in use in banking houses.

The second draft was brought by O'Hawes in person to Nebraska City, and by an agreement with James, seven hundred and fifty dollars of the amount was paid to O'Hawes, and the balance given to James, or placed to his credit upon the books of the bank.

James still continued drawing checks as above stated,

until he had drawn all of said amount, except about fifteen hundred dollars, when by McCann's direction further payments to James ceased, as McCann claimed to have an account against the state for that amount, on account of disbursements made by him at the time of the Indian hostilities before referred to; and in his answer in this action McCann alleged that said claim was included in the amount allowed by the general government, and paid by the first of the above named drafts. None of the money paid to James, nor that retained under McCann's direction, was ever paid into the state treasury, and the state brought this action in the district court against James, McCann and the bank, to recover the full amount of the drafts. The testimony introduced at the trial tended to establish the facts above stated. It was in evidence, on the part of the bank, that the proceeds of the first draft were placed to the credit of McCann on the books of the bank, and whenever checks came in from James, they were by McCann's direction charged up to that account; and that a part of the proceeds of the second draft were paid to O'Hawes, over the counter of the bank by direction of James, and the remainder either paid to James in the same manner, or else placed to his credit and checked out as above stated. The court charged the jury as follows :

"*First.* The governor of the state of Nebraska is not a fiscal officer of the state, and has no power or authority to negotiate, transfer, or dispose of any bond, draft, or money belonging to the state except to the state treasurer who is the sole fiscal officer of the state.

Second. The treasury drafts received by the governor from the United States, were received by him as a mere naked trustee for the state with no power or authority to negotiate, sell, indorse, or transfer the same, except to the state treasurer the proper financial officer of the state.

Third. And if the jury believe from the evidence that said treasury drafts were indorsed by the defendant James, acting governor, to the defendant McCann, or to the defendant, The Nebraska City National Bank, and that the defendants have collected and received the proceeds of such drafts, knowing the drafts to be the property of the state, then the sums so received were received in trust for the state, and the jury will find for the plaintiff for the full amount of the proceeds of such drafts.

Fourth. If the jury believe from the evidence that the said defendant McCann, had notice of the character and ownership of the treasury drafts so disposed of, he then being president of the bank, notice to him was notice to the bank of which he was president.

Fifth. The fact that such drafts were made payable to the order of James, officially as governor, is notice presumptive that the drafts belonged to the state, and is sufficient to put parties receiving, negotiating or handling the drafts, upon inquiry as to their ownership.

Sixth. If the jury believe from the evidence that the treasury drafts, or either of them, were indorsed and transferred by the defendant James, and delivered to the defendant McCann, an officer of the bank, James believing that the transaction was with the bank, and he intending to deal with the bank; and that McCann on receiving such drafts, made and delivered, or caused to be made and delivered to James a personal obligation showing that the transaction was with McCann individually, James not reading the certificate at the time of its receipt, then the jury may find that the transaction was with the bank, and in respect thereto may find for the plaintiff and against the defendant bank, as well as against the defendant McCann.

Seventh. If the jury believe from the evidence that the said defendants, or either or any of them have negotiated

or handled said drafts, or either of them, without indorsement or authority of the treasurer of the state, the defendants having notice that the drafts, or the proceeds arising therefrom, were the property of the state; or if the defendants without such authority, and knowing such facts, have received or collected the drafts or the proceeds to the credit of any person or officer other than the state treasurer, and that such funds have not been accounted for, or paid to the state treasurer on demand, such acts amount to a conversion of the fund, and the jury will find for the plaintiff and against all of the defendants handling, negotiating, or collecting such drafts, or the funds therefrom arising, with interest from the date or dates of such transactions.

Eighth. If the jury believe from the evidence that the defendant bank, received, negotiated, or handled the treasury drafts in question, knowing them to be state property, and received and collected the same to the credit of any person except the state treasurer, and without his indorsement, then such transaction was not in the ordinary course of business, was unauthorized by law, and the bank is liable therefor.

Ninth. Payment to Pat O'Hawes without warrant of the auditor, if so made, was utterly unauthorized, and the jury will give no credit or abatement from plaintiff's demand therefor.

Tenth. If the jury believe from the evidence that said drafts were indorsed and transferred to or received by the defendant McCann, or to or by defendant bank, for the purpose and with the intention of keeping the same out of the state treasury for a time, such purpose was against public policy and unlawful, and all parties co-operating and assisting therein or consenting thereto are liable for the fund, and the jury will find for the plaintiff and against all the defendants conspiring thereto, or assisting or co-operating therein.

The defendants objected to the instructions so given, and also to the admission of evidence of O'Hawes relative to his transactions with McCann, which objections were overruled by the court and exceptions taken. A large number of instructions asked for by the defendants were refused, and exceptions taken. Verdict for plaintiff against all of the defendants, for the sum of $8,067.52. Motion for new trial overruled. McCann and the bank come here by petition in error.

Mason & Wheedon and *E. F. Warren*, for plaintiffs in error.

I. These drafts are made payable to Acting Governor William H. James' order. He alone could indorse the same. He had the possession of each of them, and the control thereof. He was authorized to receive the money thereon. The drafts were for all purposes commercial paper. Yet notwithstanding this, the first instruction says in plain terms, that Acting Governor W. H. James had no power or authority to negotiate, dispose of, or transfer these drafts except to the state treasurer.

II. If the second instruction be correct, no one could acquire title to, or property in said drafts except through the state treasurer; besides, these drafts are payable generally to the order of W. H. James, Acting Governor. Suppose W. H. James, Acting Governor, had indorsed these drafts direct to the treasury of the United States, and received the money and squandered the same, would the State have had a claim against the general government?

III. The third instruction is very broad and sweeping, and without qualification, and it seems to us does not contain the law, and is not supported by authority.

IV. Notice to McCann could be no notice to the bank,

except in matters where he was dealing for and in behalf of the bank. The jury would, and doubtless did consider that the bank was bound by what took place between D. J. McCann and James, in Washington, and by what Pat. O. Hawes said to D. J. McCann in Washington, under this instruction.

V. McCann acted for himself alone; indeed there is no evidence that he acted otherwise than for himself. Indeed, it is charged in the petition that the drafts were procured by D. J. McCann, and indorsed in pursuance of a fraudulent conspiracy between James and McCann to defraud the state. The bank was not a party to this fraud. The bank simply performed its whole duty in this matter. It should not be held responsible for the conspiracies of McCann made in Washington with Governor James and executed in Nebraska. See the case of the *Bank of Columbia v. Patterson's Adm'r*, 7 *Wend.*, in which it is said by Mr. Justice Parker, all the learning upon the subject of corporate liabilities is exhausted.

VI. In all these matters D. J. McCann did not act officially as president of the bank, and he did not assume to do so, and if he had assumed to do so, it not being within the scope of his authority as president, his acts could not have bound the corporation. *Foster v. Essex Bank*, 17 *Mass.*, 507.

VII. In this case it is to be borne in mind that D. J. McCann was acting out of the line of his duty as president of the bank, and as is alleged, and the proof tends to show, to commit a willful injury, and to perpetrate a fraud. Under such circumstances the bank is not liable.

The evidence in the present case upon this question was not submitted to the jury; and the fact appears in this record that the acts complained of were done only

by D. J. McCann, and in pursuance of an arrangement between him and Acting Governor James. It was error to hold the bank, and to charge the jury in effect, that the bank was liable for McCann's illegal and unauthorized conspiracy with James.

George H. Roberts, *Attorney General* (with whom was *T. M. Marquette*), for defendant in error, in support of the various instructions given by the court, cited the following cases: *Gerrard v. Pittsburgh R. R.*, 29 *Penn. State*, 154. *State v. Bank*, 45 *Mo.*, 544. *Porter v. Bank*, 19 *Vermont*, 410. *Blaisdell v. Stevens*, 16 *Id.*, 179. *Sugden on Vendors*, 522. *Anderson v. Van Alen*, 12 *Johns.*, 343. *Hunter v. Field*, 20 *Ohio*, 340. They also contended that the objection made to the admission of parts of the deposition of Pat O'Hawes were made for the first time at the trial of the cause, and the only objection that could then be insisted upon was irrelevancy and incompetency; that the evidence all tends to show: *First.* That the money paid on the drafts belonged to the state. *Second.* That the defendants had knowledge of the facts. Some of the evidence may be immaterial, but not irrelevant or incompetent. *Mich. Cen. R. R. Co. v. Coleman*, 28 *Mich.*, 445.

MAXWELL, J.

The drafts in question were drawn in favor of W. H. James, acting governor, or order, and were drawn for money due the state from the United States. McCann was a stockholder and president of The Nebraska City National Bank, and was fully aware that the drafts in question belonged to the state, and that James had no interest in them whatever, but was merely the medium to transfer them to the state treasury. James testified in regard to the first draft received, that "the transaction took place in The Nebraska City National Bank. All my conver-

sation with McCann was there. I indorsed the treasury draft at the counter of the bank, and received from him, or some one in the bank, a certificate of deposit. I supposed it to be the certificate of the bank, and not that of D. J. McCann, or D. J. McCann & Co. I did not know there was such a firm, or that he was a member of it. I dealt with him in the bank, and as an officer of the bank, and I supposed I was dealing with The Nebraska City National Bank." In regard to the second draft he testified: "McCann was present, during all the conversation with O'Hawes, and knew the source from whence the fund was derived. The second draft was also a part of the militia indemnity fund, received from the United States, and was part of the same fund as the first draft which McCann brought from Washington. It was not handed to me until I had consented to allow Pat. O'Hawes to be paid the seven hundred and fifty dollars. It was then handed to me, and I indorsed it and handed it to McCann, who turned and handed it to the cashier or clerk that stood near, who must have heard the previous conversation, for without directions or instructions from McCann as to what was to be done with it, he took the treasury warrant so indorsed, and paid O'Hawes, as I supposed, the seven hundred and fifty dollars." This testimony is not contradicted.

The rule is well settled that notice to a director or knowledge derived by him, while not engaged officially in the business of the bank, cannot operate to the prejudice of the latter; but notice to the cashier of a bank ordinarily will be notice to the bank. *Conant v. Seneca County Bank*, 1 *Ohio State*, 298. *Sturges v. Bank of Circleville*, 11 *Id.*, 153.

The president of a national bank, being a stockholder and director, is presumed to be desirous of promoting its welfare. He is its chief executive officer, and has a gen-

eral supervision of its affairs. Notice to him will be notice to the bank. *Porter v. Bank*, 19 *Vt.*, 410.

In this case McCann is shown to have drawn on New York, as president of the bank, for five hundred dollars, in favor of O'Hawes as fees, which appears to have been paid and charged to the bank. It also appears that he received the drafts in the bank, as an officer of the bank; and he as presiding officer has verified the answer of the bank in this case. It is claimed, however, that McCann received the drafts in his own name, and in a transaction of his own separate and apart from the bank, and that after having so received them, he transferred them to the bank and was credited the amount thereof on his account. Therefore, although a cause of action may exist against him, the bank is not liable.

There is no proof whatever of any arrangement between James and McCann, whereby McCann was to take these drafts as an individual, or as a member of the firm of D. J. McCann & Co., while on the other hand James swears positively that he supposed he was dealing with the bank.

The intention of James being, as shown by the testimony, to deliver the drafts to the bank, the fact that McCann received them and afterwards indorsed them, does not change the character of the transaction, nor make it a personal one between McCann and James.

The drafts having been delivered to McCann as an officer of the bank, at its counter during business hours, were delivered to the bank; and notice to McCann that James was not the owner of the drafts, and had no interest therein whatever, was notice to the bank of those facts. And the drafts themselves contained on their face sufficient to put the purchaser upon inquiry as to whether James was the owner or not. It is unnecessary to examine the case farther. The bank having purchased these drafts, with notice that they belonged to the state, and having collected the same, is indebted to the state for the amount so re-

ceived; and no deduction can be made for the amount paid by the bank to O'Hawes, it having been paid without authority of law. The judgment of the district court is clearly right, and must be affirmed.

JUDGMENT AFFIRMED.

ETTA HURFORD AND OTHERS, APPELLEES, v. THE CITY OF OMAHA, AND EDWARD JOHNSON, TREASURER OF SAID CITY, APPELLANTS.

1. **Constitutional Law**: TAXES: STREETS. A statute authorizing a city to grade and improve streets, one half of the expense to be paid by special tax or assessment on lots abutting thereon, *held* constitutional, under that provision authorizing the legislature to organize cities and towns, and restrict their power of taxation, and *assessment*.

2. ———: ———: ASSESSMENT. The authority to levy and collect assessments for municipal improvements, is an express constitutional power, resting alone upon constitutional authority.

3. **Statutes**: CONSTRUCTION. A statute providing that when the grade of a street has been established it "shall not be changed, until damages shall have been assessed and determined, and the amount of damages tendered to property owners, *before any such change shall be made*," is mandatory; and the proceedings of a city council, changing the grade of a street, entering into a contract for work on the same, and levying taxes on adjoining property to pay therefor, without having *first* caused the amount of damages to be ascertained and tendered, are void.

4. ———: DIRECTORY AND MANDATORY LAWS. The distinction between directory and mandatory statutes, in reference to the action of a city council in the exercise of delegated powers, stated.

THIS was an appeal from a decree rendered by Hon. George B. Lake, sitting in the district court of Douglas county, granting a perpetual injunction, restraining the defendants from levying a special assessment upon real estate abutting upon a public street in the city of Omaha to pay one-half the expense of grading the same. The material facts in the case appear in the opinion.

John M. Thurston and *E. Wakeley*, for the appellants, the City of Omaha.

I. The act of 1873, is a legitimate and proper exercise of the taxing power vested solely in the legislative department of the state, and is not in violation of any provision of our state constitution.

1. The power of the legislature to legislate on all matters is supreme and without limit, except as controlled by the constitution, and where the constitution is silent upon any particular subject, the legislature has as much power over it as has the parliament of Great Britain. *Potter's Dwarris on Stat. and Const.*, 61, 414. *Ex parte Newman*, 9 *Cal*, 503. *Fletcher v. Peck*, 6 *Cranch*, 128. *People v. Draper*, 15 *New York*, 545. 1 *Kent's Com.*, 488. *People v. Denniston*, 23 *New York*, 247.

2. The constitutional power of the legislature to authorize the levy of a special assessment upon real estate, abutting upon local improvements, to pay for the same, without regard to whether such property is actually benefited or injured in consequence of such improvement, has always been maintained, and has been confirmed by a uniform course of decisions by the courts of last resort in nearly every state of the Union, and in most cases where the state constitutions contained the provision that "taxation shall be equal and uniform." *Dillon's Mun. Corp., Sec.* 596. *Cooley Const. Law*, 505. *Potter's Dwarris*, 404. *People v. Mayor*, 4 *New York*, 410. *Gordon v. Cornes*, 47 *Id.*, 608. *Butler v. Toledo*, 5 *Ohio State*, 225. *Garret v. St. Louis*, 25 *Missouri*, 505.

3. The above power has been expressly affirmed in cases similar to this in all respects by the supreme courts of Ohio, Wisconsin and Kansas, under the power granted

to the legislature by provisions in their constitutions exactly the same as found in section 4 of article VIII of the first constitution of the state of Nebraska. *Railroad v. Connelly*, 10 *Ohio State*, 165. *Weeks v. Milwaukee*, 10 *Wis.*, 242. *Hines v. Leavenworth*, 3 *Kansas*, 186.

II. The next question presented is, have the municipal authorities substantially complied with the provisions of the city charter in proceeding to let a contract for grading the street, and in attempting to levy the assessment?

We contend that the condition precedent to enable the city authorities to prepare plans and specifications, advertise for proposals to grade, and let a contract therefor, had been performed and that the provision of the section requiring that the damages caused by the change of grade should be assessed, and the amount thereof tendered to the property owners is directory, and is intended solely for the protection of such owners, and that the assessment and tender of such damages after the execution of the contract for grading was an ample protection and a substantial compliance with law, and the delay in making such assessments could not in any event render void the proceedings theretofore taken by the city.

G. W. Ambrose and *Clinton Briggs*, for the appellees.

I. The act is unconstitutional. No mode is provided by which it can be ascertained whether the person whose property is thus subjected to the burden of the tax, has been benefited or damaged by the work. One person may be damaged $1,000, another benefited $1,000 and each, under this rule, must pay the same amount, and this is *called* taxation.

The assertion is ventured that no case can be found, which *seems* to sustain this kind of taxation, but that

the case is expressly put upon the ground, that the tax is levied upon the property *benefited according to the benefit conferred by the work.*

The courts of the country have gone no further than to say that "assessments on property, peculiarly benefited by local improvements, and in consideration of such benefits, are proper." *Hamnit v. Philadelphia*, 3 *Am. Rep.*, 615. *Hoyt v. Saginaw*, 19 *Mich.*, 44.

It is clear that any assessment is wrong which charges lands with a sum beyond the special benefits received. If the cost of any improvement exceeds the local and peculiar benefits, the improvement should either not be made at all, or the excess should be assumed by the public and become a part of the general levy. And there can be no justification for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of appropriating private property to public use, without compensation. *Cooley on Taxation*, 489, 491.

But here, no such immunity from *confiscation* exists.

The legislature have simply said, no matter how much you are damaged, or your neighbor benefited, you have received "*your statutory equivalent*," and you must be content.

What kind of an equivalent has the benefited neighbor received?

Take the case as it stands on the west end of the avenue, where no grade was ever established until 1873. The plaintiff, Rhodes, is filled in front twenty feet. His adjoining neighbor, Gibson, is very materially benefited. No damage can be assessed to Rhodes. Under the law, none of the benefits received by Gibson can be assessed to his property, thereby making the burden equal, but both must pay the same rate per front foot.

This, we are told, must be upheld, because the legislature is supreme and have so provided.

This is a kind of argument which would be invoked, in case the legislature, in their supreme pleasure, should see fit to say by general law, and for general purposes, that all houses standing within one block of a fixed business center should be taxed $1,000 a year, and the houses on the second block should be taxed $800 a year, and so on to the outskirts of the city, by gradual reduction, until you reached the dollar tax on A's house, worth ten times the sum of any of those in the first block, and one equally benefited by the police regulations, and good government of the city.

If there is no limit to the legislative power, then the case put would be upheld. *Kneeland v. Milwaukee*, 15 *Wis.*, 458.

But there is a limit, for the very essence of taxation is that it shall be equal and uniform. *Cooley Con. Lim.*, 499. *Ottawa v. Spencer*, 40 *Ill.*, 211. *Chicago v. Larnard*, 35 *Ill.*, 203.

II. They had no power to make the contract. It was not given them by the statute, and their action in letting it was void. *Hoyt v. Saginaw*, 19 *Mich.*, 44. *Leavenworth v. Rankin*, 2 *Kan.*, 357. *Clark v. Des Moines*, 19 *Iowa*, 199. *Vincent v. Nantucket*, 12 *Cush*, 103. *Donavan v. New York*, 33 *N. Y.*, 291.

GANTT, J.

By act of the legislature, approved February 2d, 1857, the city of Omaha was incorporated, and by virtue of this act, and acts supplemental and amendatory thereof, it has been and still is a municipal corporation. On the 10th day of July, 1874, it entered into a written contract with A. J. Hanscom to grade St. Mary's avenue, and a part of Howard street, according to certain plans, specifications and profile of grade, for a certain specific sum of money to be paid as follows: one-half in warrants to be drawn on the general fund, and one-half in war-

rants to be drawn on a special fund to be raised by assessment to be levied on the property abutting on the line of said street and avenue. The plaintiffs allege that the contract with Hanscom changed the grade of St. Mary's avenue, established in 1866, and the grade of Howard street established in 1868. The defendants deny that any such former grades were established, and aver that the grades of said streets were first established in 1873.

It appears that on the 29th day of July, 1873, an ordinance was passed by the city council and approved by the mayor, entitled "an ordinance establishing the grade of St. Mary's avenue." This ordinance defines what the grade shall be, but it does not appear that any further steps were taken in the matter until the contract was made on the 10th day of July, 1874, with Hanscom, who within a day or two thereafter commenced work under his contract. On the 18th day of July, 1874, the mayor appointed appraisers to assess the damages to owners of property abutting on the streets then being graded; on the 21st of the same month the appraisers made a report, and the damages by them assessed were tendered to the property owners. In respect to the grade established in 1866, evidence was offered on the hearing of the cause. The fact to be ascertained from the proofs, is not whether the council made a complete record of all its proceedings, but whether the grade was officially established on the avenue at that time. The minutes of the council show that on the 11th day of April, 1866, a report of the city engineer was made in relation to the establishing of streets in the southwestern part of the city; that on the 18th day of the same month he was by resolution of the council directed to re-survey and locate the proposed extension of Howard street, and on the 25th day of May in the same year, the council adopted, ratified and confirmed the report of the engineer, and directed the

street commissioner to cause the streets to be opened for public use "as platted by the engineer and placed on file with the city clerk." Again on the 12th day of July, 1866, the city engineer submitted a report of grade, and at the same time it was by the city council resolved "that the profile and proposed grade reported by the city engineer, of St. Mary's avenue, now on file be and the same is hereby adopted as the grade of said avenue within the limits designated by such profile."

E. Dutton testified that he was city engineer since 1874, and that the profile showing the grade of St. Mary's avenue, purporting to have been made in 1866, was kept in his office, but he don't know who prepared it, and has never seen any record of it. B. E. B. Kennedy testifies that he was city solicitor in 1866–7; that the profile in question was made by one Barnard, who was then city engineer; that he saw the profile when Barnard reported it, and identifies it to be the same one upon which the proceedings of the council were had at the time, and also says that he frequently referred to it. We think this evidence was properly admitted, and that the proofs clearly show that the grade of St. Mary's avenue was officially established by the council in 1866. The above statement, substantially, contains all the facts material to the questions raised on the argument of this cause; and the questions presented for consideration may be comprised in the following propositions:

1. Whether the power conferred on the city council, by act of March 28, 1873, to collect one-half of the expense of grading a street by special tax or assessment on lots and pieces of ground abutting thereon, is unconstitutional and inoperative.

2. Whether the proceedings of the council changing the grade of a street, without having first caused the damages to owners of property abutting thereon to be ascertained and tendered, are without authority and void.

The first proposition has special reference to the right of taking private property for public use; and the power of the government and the rights of the citizen in regard to taxation and the right of eminent domain, are clearly defined and explained by Judge Ruggles in the case of *The People v. The Mayor of Brooklyn*, 4 *New York*, 422, to be as follows: "Private property may be constitutionally taken for public use, in two modes: that is to say, by taxation, and the right of eminent domain. These are rights which the people collectively retain, over the property of individuals, to resume such portions as may be necessary for public use. The right of taxation and the right of eminent domain rest substantially on the same foundation. Compensation is made when private property is taken in either way. Money is property. Taxation takes it for public use, and the taxpayer receives, or is supposed to receive, his just compensation in the protection which the government affords to his life, liberty and property, and the increase of value of his possessions by the use to which the government applies the money raised by tax. When private property is taken by eminent domain special compensation is made. Taxation exacts money or service from individuals, as due for their respective shares of contribution to any public burthen. Private property taken for public use by right of eminent domain, is taken, not as the owner's share of contribution to a public burthen, but as so much beyond his share."

These elementary principles are essential to the maintenance of an enlightened and responsible government, and when reduced to a single axiom in the functions of government, it is this: Taxation exacts from the individual merely his proportionate share of contribution to a public burthen, and whatever is taken beyond this, is an exercise of the right of eminent domain. Now, if the first proposition is considered in the light of these fundamental principles, and independent of any affirmative

constitutional provision, I think it should be answered in the affirmative. If the taxing power can only require the individual to contribute his proportional share to the public burthen, upon what principle of ethics, can an assessment against him, as provided for in the statute, be denominated a tax? It seems to me that the injustice of such assessment obtains by reason of its not being co-extensive, as in ordinary taxation, with some one of the civil sub-divisions into which the state is divided for governmental purposes, and by reason of the fact that it is taking the property of a few individuals to pay the expense of making a public highway or street, over and upon which every citizen of the whole city has the same absolute right of use as the individual whose money or property is taken to make it. Those who are compelled to pay for the work, are entitled to no peculiar use of the street not common to the public generally. But it is said that human wisdom cannot devise a system of taxation which will produce complete equity in respect to the apportionment of taxes and the benefits to arise from their expenditure, and, therefore the theory upon which this right to take private property by assessment, is based on the ground that the law assumes that by reason of the work being done, special benefits accrue to the persons against whom the assessments are levied. But upon what principle can the right of the government be maintained to tax the citizen to make improvements for his own benefit? According to the principle upon which the right of taxation rests, the question in regard to the propriety of making a highway or street for public use, is not whether it will benefit some individuals, or greatly injure others, but whether the public convenience or necessity requires the work to be done. It is not properly the business or purpose of government to improve the private property of individuals, and then by an exercise of arbitrary power compel them to pay the cost of such

improvement. I think it will not be claimed that the exercise of such power belongs to the functions of good government, and yet to maintain the theory of such assessments, must necessarily imply the exercise of such power. Therefore, it seems to me, upon sound principle, that when a public highway or street is needed, it is the duty of the government to make it, or if it is not needed for public use, then the public have no right to make it.

Justice Campbell, in an elaborate discussion in support of the proposition that the right to make improvements and charge the cost to the property of individuals, upon the theory of private benefits, cannot be sustained on principle—referring to the case of *The People v. Mayor of Brooklyn*, defining the distinction between taxation and the taking of private property by right of eminent domain, says: "I am unable to see how, under such a distinction, that can be regarded as a legitimate exercise of the taxing power, which requires more than a proportionate share to be contributed. It does not follow because the power is not that of taxing property for public use, that it is the taxing power. It may be neither, and illegal and arbitrary for the reason that it is neither."

Judge Christiancy says, that "to compel individuals to contribute money or property to the use of the public without reference to any common ratio, and without requiring the sum to be paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is, it seems to me, to levy a forced contribution, not a tax, duty or impost within the sense of these terms, as applied to the exercise of power by an enlightened and responsible government." *Woodbridge v. Detroit*, 8 *Mich.*, 291–306.

Justice Paine, in delivering the opinion of the court in *Weeks v. Milwaukee*, 10 *Wis.*, 258, says in reference to making a street, that "it must be for a public purpose; and it being once established that the construction

of streets is for a public purpose that will justify taxation, I think it follows, if the matter is to be settled on principle, that the taxation should be equal and uniform, and that to make it so, the whole taxable property of the political division in which the improvement is made, should be taxed by a uniform rule for the purpose of its construction." And in respect to the system of enforcing special assessments on the ground of private benefits, he says: "I think this is the same in principle, as it would be to say, that the town in which the county seat is, should build the county buildings, or that the county where the capital is located should construct the public edifices of the state, upon the ground that by being located nearer, they derived a greater benefit than others." And now, from a careful examination of the subject, I am constrained to say, in the language of Justice Paine, that "if the question was whether the assessments should be sustained on principle, I should have no hesitation in deciding it in the negative."

But in the determination of the first proposition, the question is not simply whether the theory of special assessments is sound in principle, or inequitable and unjust in its operation, but whether the legislature has power under the constitution to establish such a system. And I think this legislative power is recognized in the 4th section of Article VIII of the constitution. It is declared that the "legislature shall provide for the organization of cities and incorporated villages by general laws; and restrict their power of taxation, *assessment*, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." The constitution of Wisconsin contains a similar provision, and after an elaborate discussion of the meaning and effect of the word "assessment" as used in the constitution, in the case of *Weeks v. Milwaukee*, it seems to have been the unanimous opinion of the court that the word had refer-

ence to the special system of assessments for municipal improvements which had existed and given rise to so much discussion and litigation in other and older states; and although the system has been so far separated and distinguished from general taxation, as to have obtained the distinct name of "assessment," yet the word as used in the constitution is a clear recognition of the existence and legality of the power. The constitution of the state of New York also contains a similar provision, and the decision in the case of *The People v. Mayor of Brooklyn*, seems, in some measure, at least, to be based on this constitutional ground, for Judge Ruggles says that "the constitution in this section recognizes and affirms the validity of the legislation by which city and village assessments for local purposes like that now in controversy, are authorized, and it *seems* to remove all doubt in relation to the legislative power in question." *Hines v. Leavenworth*, 3 *Kansas*, 186. *Railroad v. Connelly*, 10 *Ohio State*, 166.

I must conclude that the word "assessment" as used in juxtaposition to that of "taxation" in the constitution has a specific meaning, and includes all the steps necessary to be taken in the legitimate exercise of the power, just as taxation includes all taxation generally; or in other words that the authority to levy and collect "assessments" for municipal improvements is an express constitutional power, resting alone upon constitutional authority.

The second proposition involves the consideration of many important questions. The authority to levy special assessments is found in section forty, of the act of March 28, 1873, which provides that the "mayor and council of any city governed by this act, shall have power to establish the grade of any street, avenue or alley within the city, and when the grade of any street, avenue or alley shall have been established, such *grade shall not be changed*, except by a vote of two-thirds of the council, and *not then*

until the damages to property owners, which may be caused by such change of grade, shall have been *assessed and determined* by three disinterested appraisers, who shall be appointed by the mayor and council for that purpose, who shall make such appraisement, taking into consideration the benefits, if any, to such property, and file their report with the city clerk within ten days after receiving notice of their appointment, and the *amount of damages so assessed shall be tendered* to such property owners or their agents *before any such change shall be made.*"

Upon application for the change of a street grade, the council must determine as to the propriety of making such change. But the determination of this question, not only involves the inquiry as to whether the public necessities require such change to be made, but it seems that under the provisions of the law conferring the power, the council shall first ascertain the damages which such change of grade shall occasion to the owners of property abutting on such street, and should also have a reliable estimate of the cost of grading, and then under all the circumstances and conditions of things at the time, it can intelligently determine whether the work of such change of grade should be undertaken or not. Again, the exercise of this power, and the execution of the necessary subsequent proceedings, dependent thereon, may necessarily affect rights of property, and therefore the action of the council in such case in the first step taken in its proceedings, may result in divesting the title to real property of one citizen and transferring it to another; and this effect of its action seems clear and unquestionable when we take into consideration the fact that the act provides that the city treasurer, upon the proper certificate delivered to him, describing each lot or piece of ground subject to assessment, and stating the amount assessed thereon, shall, after giving the required notice, proceed

to collect such assessment or special tax by distress and sale of the personal property of the person or persons against whom the same is assessed; and providing further, that whenever personal property cannot be found, a complete delinquent list of all lots and parcels of real estate, upon which such assessments remain unpaid, shall be delivered to the county treasurer, who shall advertise and sell the same for the payment of such delinquent tax or assessment, at the time he sells real estate for delinquent county tax. The statute also makes such special assessment a perpetual lien upon the real estate from the day it is levied. All these questions are involved in the consideration of the general proposition, and with them in view I now approach the inquiry whether the provisions of the statute, as above quoted, are to be regarded as mandatory or directory merely.

It sometimes becomes a very grave question in the construction of statutes, whether particular provisions are to be regarded as mandatory or directory. It is, however, a familiar principle that statutes relating merely to matters of convenience, or to the orderly and prompt conduct of business, and not to the essence of the thing to be done, are generally considered as directory only; but this doctrine has been carried so far in some cases, that it seems impossible to reconcile all the cases in which the question has been considered; and if equal force were given to each case found in the books, it would be a fruitless effort to attempt to fix any settled, discriminate point between a mandatory and a directory statute. *Hebard, J.*, in *Briggs v. Georgia*, 15 *Verm.*, 72, very justly observes: "I am not well satisfied with the summary mode of getting rid of a statutory provision by calling it directory. If one positive requirement and provision of a statute may be avoided in that way, we see no reason why another may not." And in *District Township v. Dubuque*, 7 *Iowa* 276, it is said that "affirmative words

may, and often do imply a negative of what is not affirmed, as strongly as if expressed. So, also, if by the language used, a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise. Affirmative expressions that introduce a new rule, imply a negative of all that is not within the purview." But it is deemed unnecessary to enter into a review of the authorities upon this question.

It will be conceded that the powers of a city council are not derived from the common law; that its only power to act, in any case, is derived wholly from the statute; and therefore it possesses no power but such as is expressly granted by statute, or may be incidentally necessary to carry into execution the power expressly given by the statute. It may also be laid down as a general rule, that the power given must be exercised in the mode prescribed by the statute. Hence, when the statute prescribes a particular mode in which the corporation is to act, it can only act in the mode prescribed. To sanction a contrary doctrine, it seems to me, would place the corporation above the law, and would, to say the least, be fraught with dangerous consequences. If such a doctrine should prevail, is there not reason to fear that corporations might soon become intolerable nuisances? But however this may be, with all due deference to the authorities upon the question of construction, it seems to me, from the most replete examination I could give the subject, that the following rules may be laid down as a safe guide in the interpretation of statutes, relating to the question under consideration:

1. That when the particular provision of the statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of the statute are given with a view to the proper, orderly, and prompt conduct of business merely, the provision may generally be regarded as directory.

2. When a fair interpretation of the statute, which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and pre-requisite conditions must exist prior to the exercise of power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory. And under such statutory provisions, the corporation has no election in the matter as to how or when the duties shall be performed, and municipal officers have no option or authority to act differently from the mode particularly prescribed. And if there be manifest irregularity in the proceedings, presumptions are not indulged to sustain such proceedings, or to give new character to that which is seen to be defective, or to supply the place of that which is not apparent.

3. When the statutory provision relates to acts or proceedings immaterial in themselves, but contains negative terms, either expressed or implied, then such negative terms clearly show a legislative intent to impose a limitation, and therefore the statute becomes imperative, and requires strict performance in the mode or manner prescribed. *People v. Schermerhorn*, 19 *Barb.*, 558; 1 *Kent*, 461, *et seq.; Inhabitants of Veazie v. Inhabitants of China*, 50 *Maine*, 526; *People v. Supervisors*, 11 *Abbott*, 104.

Now, according to these principles, it seems clear that the provisions of the statute are mandatory. They provide that when a grade has been established *it shall not be changed until the damage to property owners which may be caused by such change shall have been assessed and determined; and that the amount of damages so assessed shall be tendered to the property owners or their agents, before any such change of grade shall be made.*

The power conferred concerns both the public and

individuals, and the mode in which the exercise of it is prescribed, is accompanied with very strong negative terms. However the mayor and council, wholly disregarding the mode of procedure prescribed by the statute, and without having any data whatever, from which, under the circumstances and condition of things, at the time, they might decide whether it would be advisable for the city to incur the expense and liabilities of such an enterprise, have attempted to establish a change of grade, and to contract for the grading of the street. Is not such a proceeding a plain violation of the statute? It is said that "no principle is more firmly established or rests on a more secure foundation, than the rule which declares, when a law is plain and unambiguous, whether it be expressed in general or limited terms, that the legislature shall be intended to mean what they have plainly expressed," and again that the intention of the legislature should control absolutely the action of the judiciary. Where that intention is clearly ascertained, the courts have no other duty to perform than to execute the legislative will, without any regard to their own views as to the wisdom or justice of the particular enactment." *Sedg. on Stat. and Con. Law*, 325. Do not these rules of law apply with much greater force to the action of a city council in the exercise of merely delegated powers? But the statute in question imposes a limitation on the exercise of the power delegated, requiring a condition precedent to be performed, and until this pre-requisite is complied with, it seems clear that the council acquires no jurisdiction of the subject matter. The restriction is absolute, and therefore the exercise of the power in any other way than that prescribed, renders the proceedings void. *Swift v. City of Williamsburg*, 24 Barb., 427.

And again, as hereinbefore stated, the action of the council from the first step taken in the matter, may

affect rights of property and result in divesting the title to property of one citizen, and transferring it to another. Hence the statute must be strictly construed, for it has been said that every statutory authority in derogation of the common law to divest the title of one, and transfer it to another must be strictly pursued, or the title will not pass.

In *Creighton v. Mason*, 27 Cal., 728, it is said that "when summary proceedings are authorized by statute, the effect of which is to divest or affect rights of property, the statute must be strictly construed, and the power conferred must be exercised precisely as given; any departure vitiates the whole proceeding." *Stucker v. Kelly*, 7 *Hill*, 25. This rule of law is so well established upon principle, and authority, that it is unnecessary to cite authorities in support of it.

For the reason given in the discussion of the second general proposition, we think the action of the council, at least so far as regards the plaintiffs, was without authority and absolutely void, and therefore the decree rendered in the district court should be affirmed.

DECREE ACCORDINGLY.

N. W. SMAILS, AND OTHERS, PLAINTIFFS IN ERROR, v. CHARLES F. WHITE, DEFENDANT IN ERROR.

1. **Constitutional law**: APPEAL ACT OF 1875. The act "regulating appeals from the judgments of probate judges and justices of the peace," *Laws*, 1875, *p.* 58, being in contravention of that clause of the constitution, that "no bill shall contain more than one subject, which shall be clearly expressed in its title; and no law shall be revived or amended, unless the new act contains the entire act revived, and the *sections amended*," etc., is void.

2. ——: AMENDING STATUTES. Where an act is not complete in itself, but is clearly amendatory of some former statute, it is within the consti-

tutional inhibition above cited. Nor would it make any difference in this respect, whether by its title, or in the body of the act, the new statute assume to be amendatory or not; it is enough if it clearly have that effect.

THIS was a petition in error from a final order of the district court of Lancaster county, dismissing an appeal taken by the defendants from a judgment of the probate court in a civil action therein determined, in May, 1875.

Lamb, Billingsley & Lambertson, for plaintiffs in error, in contending that the appeal act of 1875 was unconstitutional, cited *The People v. McCallum*, 1 *Neb.*, 199. *Cooley Const. Lim.*, 151. *State v. Silver*, 9 *Nevada*, 227. *Winona v. Waldron*, 11 *Minn.*, 515. *People v. Mahaney*, 13 *Mich.*, 497. *Draper v. Falley*, 33 *Ind.*, 470. *The Mayor v. Trigg*, 46 *Mo.*, 288. *City of Portland v. Stock*, 2 *Oregon*, 69.

Groff & Ames, for defendant in error, cited *Bird v. The County of Wasco*, 3 *Oregon*, 282. *Lehman v. McBride*, 15 *Ohio State*, 601.

LAKE, CH. J.

This case calls for a construction of the act of the legislature "regulating the taking of appeals from the judgments of probate judges and justices of the peace," approved, February 24th, 1875. It is contended, on the part of the plaintiff in error, that it violates the provision of the constitution, then in force, which declares that "no bill shall contain more than one subject, which shall be clearly expressed in the title; and no law shall be revived or amended, unless the new act contain the entire act revived, *and the sections amended;* and the section or sections so amended shall be repealed." It is clear that if effect shall be given to the act in question, the appellant was in default in not causing the transcript, and undertaking, to be filed in the appellate court within

ten days from the rendition of the judgment appealed from; and this being necessary to give the district court jurisdiction of the case, the appeal was rightly dismissed. But if, on the contrary, the act shall be declared unconstitutional, then the appeal was well taken, and it was error to dismiss it.

The act in question is as follows:

"*Section* 1. That upon appeal from the final judgment of the probate judge, or any justice of the peace, to the district court of the county where the judgment was rendered, as now provided by law, the appellant shall, *at the time of taking such appeal*, file the transcript and undertaking, now required by law to be filed in cases of appeal, in the appellate court; and the plaintiff shall, within twenty days thereafter, file the petition as required by law to be filed, in civil cases, in the court to which such appeal is taken; and the answer shall be filed and issue joined as in cases commenced in such appellate court.

"*Sec.* 2. All acts or parts of acts inconsistent with this act are hereby repealed.

"*Sec.* 3. This act shall take effect and be in force from and after its passage."

An analytical examination of the first section of this act will show that two objects were evidently aimed at in its enactment: *first*, to shorten the time within which the transcript must be filed, and the case docketed in the appellate court; and *second*, to fix the time for filing the petition, and making up the issue therein. As to the *first* object it is clearly enough expressed in the title of this act; but as to the *second*, it may well be doubted whether the title be broad enough to comprehend it.

We are decidedly of opinion that it is not, and that, in this particular, it is repugnant to the first clause of the sentence of the constitution above quoted. The statute regulating the taking of such appeals, in force when this

act was passed, gave the appellant ten days from the rendition of the judgment within which to give the required undertaking in appeal. *Sec.* 1007, *Ch.* IX, *Tit.* 30, *Gen. Stat.* This was not changed by the act of 1875, now under consideration. And by the next section the appellant is required to procure a transcript of the proceedings before the justice, including the undertaking in appeal, and deliver the same to the clerk of the district court, on or before the second day of the term next following such appeal. Both of these requirements are jurisdictional, and a failure to observe either of them would prevent the appellate court from acquiring jurisdiction of the case, and work a forfeiture to the appellant of all rights growing out of his appeal. Now the act of 1875 does not purport to be a complete appeal law. It does not even provide how an appeal shall be taken. This is left as it was under the former law. Its language is, "that upon appeal from the final judgment of the probate judge, or any justice of the peace, * * * * *as now provided by law*, the appellant shall," etc., thus clearly enough recognizing the necessity of an observance of the old law in respect to the giving of the undertaking therein provided, and the time also within which it must be done. All that it affects, in this particular, is to require the appellant to file the transcript, and also the undertaking itself, instead of a copy thereof as formerly, in the appellate court, *at the time of taking the appeal.* In this respect, while it does not profess to amend any section of the appeal law then in force, it most clearly does so if it be a valid act. In effect it is as clearly amendatory of section 1008 of the old law, as if, in apt words employed in the title, or body of the act, it were expressly declared so to be. What by this section the appellant was given until the next succeeding term of the district court to do, under this act must be done within ten days from the rendition of the judgment, at the same time leaving the

section as to several other provisions which it contains, in full force.

That an act, *complete in itself*, may so operate on prior acts as to materially change or modify them, without being within the mischief designed to be remedied by, or repugnant to this provision of the constitution, is doubtless true. *People v. Mahany*, 13 *Mich.*, 481. *Davis v. The State*, 7 *Md.*, 152. But where, as in the case before us, the act is not complete in itself, but in its effect is simply and clearly amendatory of a former statute, it falls directly within the constitutional inhibition, and is void. Nor will it make any difference, in this respect, whether the new statute by its title, or in the body of the act, assume to be amendatory or not; it is enough if it clearly have that effect.

For these reasons we are very clearly of the opinion that the act in question is repugnant to the constitutional provision above quoted, and it must be held to be merely void. It follows that the judgment of the district court must be reversed, and the appeal re-instated.

JUDGMENT ACCORDINGLY.

SCHOOL DISTRICT NO. TWO, OF DIXON COUNTY, PLAINTIFF IN ERROR, V. JOHN STOUGH, DEFENDANT IN ERROR.

1. **School District Orders**: BONA FIDE HOLDER. School district orders, drawn by its officers, accepted by its treasurer, and indorsed "not paid for want of funds," are not regarded as commercial paper in the hands of a bona fide holder for value, but are subject to the same defense against an indorsee, as against the payee.

2. ——: Where a school district board entered into a contract for the erection of a school house, and issued orders in payment thereof before any work was done, never having been authorized by a vote of the district so to do, and the school house was not erected, although the board had secured a bond from the contractors for the faithful performance of

the contract; *held*, in an action by an indorsee of the orders, that the district was not liable.

3. **School Districts**: POWER OF DISTRICT BOARD. Contracts for the erection of a school house should be made with reference to the funds in the treasury for that purpose. The district board have no authority to draw orders in payment thereof, on a fund which has been proposed, but not raised by taxation.

4. ———: ———. Although a school district may have voted a tax for the purpose of erecting a school house, the fund when collected is beyond the control of its officers, until its expenditure be authorized by a vote of the district.

THIS was a petition in error to reverse a judgment of the district court of Dixon county, obtained against plaintiff in error, who was defendant there. The facts appear in the opinion.

Alexander Hughes, for plaintiff in error, contended, that the district could set up any defense which it would have had in an action brought by the payee of the orders sued on, and cited the following cases: *Dillon on Mun. Corp.*, 406, 407, 412. *Halstead v. The Mayor*, 3 *New York*, 430. *Thomas v. City of Richmond*, 12 *Wall.*, 349. *Webster County v. Taylor*, 19 *Iowa*, 117. *People v. Supervisors*, 11 *Cal.*, 170. *Sturtevant v. Liberty*, 46 *Maine*, 457. *Smith v. Inhabitants of Cheshire*, 13 *Gray*, 318. *Andover v. Grafton*, 7 *New Hamp.*, 298. *School District v. Thompson*, 5 *Minn*, 280. The district did not ratify its acts. *Taylor v. District*, 25 *Iowa*, 450. *Treadwell v. Commissioners*, 11 *Ohio State*, 190.

J. B. Barnes, for defendant in error, contended, that under the circumstances and evidence disclosed at the trial, the district was estopped from making any defense to the orders sued on. It had ample power under the school law to issue them. It ratified its acts by recognizing the contract, the bond given by the contractors, and by paying a portion of the orders. *Commissioners v. Aspinwall*, 21 *How.*, 539. *Meyer v. The City of Mus-*

catine, 1 *Wall*, 394. *Moran v. Commissioners*, 2 *Black*, 722. *Shoemaker v. Goshen*, 14 *Ohio State*, 569. *Supervisors v. Schenck*, 5 *Wall.*, 772.

LAKE, CH. J.

The first question that we will notice is whether or not the orders upon which the action was brought so partake of the character of negotiable instruments as to estop the school district, as against a *bona fide* holder for value, from availing itself of any defense which it would have had in an action brought by the payee. That the indorsee of such orders is in no better situation than the payee, and takes them subject to all their infirmities, such as *ultra vires*, want, or failure of consideration, is too well settled by the authorities to be questioned. In this respect they have none of the elements of commercial paper. *Smith v. Inhabitants of Cheshire*, 13 *Gray*, 318. *Emery v. Maryville*, 56 *Me.*, 315.

This being the law governing the transfer of these orders, how stands the case? Do the facts established by the evidence justify a recovery against the district? The evidence shows:

I. That on the fifteenth day of June, 1872, the district board entered into a contract with Timothy Hurley, and H. Allum, by which the latter agreed, for the consideration of four hundred and seventy-five dollars, to build a school house for said district, and have it completed by the first day of November of the same year. No express authority, or direction, was given to the board by the district to proceed with the work of building the house, or to let the contract therefor. The board appears to have assumed that its authority to do so was ample from the mere fact, that at a district meeting held on the thirteenth day of April of that year a tax of five mills on the dollar was voted for the purpose of building a school house. But such was not the case.

II. At the same time, the board agreed to issue orders upon the district treasurer for the whole amount of the contract price, and deliver the same to the contractors, to enable them to go on with the work. This was done, and a bond taken back to secure the faithful performance of the contract. The orders were presented to the treasurer for payment, who indorsed his acceptance thereon, but did not pay them for want of funds.

III. The orders upon which this action was brought are a portion of those so issued.

IV. The contractors wholly failed to perform their contract, and the school house has not been built. The orders were negotiated the day following their acceptance.

On these facts we are well satisfied that the school district is not liable on these orders. There was no authority for the school board to issue them when they did, nor for the treasurer to accept them. These district boards are created by statute, with certain well defined, but very limited powers. They can act, so as to bind the district, only within the limits which the legislature has fixed; beyond this their acts are void. It will be observed that the incipient step toward raising the money with which to erect this school house, viz.: the voting of the five mill tax, had been taken only a few weeks before the contract was let. Not a single dollar of the levy could be realized until nearly a year from that time. We think it is clear, that the legislature intended that contracts for the erection of school houses should be made with reference to money on hand for that purpose. Certainly, there is no authority anywhere given to the district board to pledge the credit of the district, to draw and accept orders on a fund which the district has proposed, but not yet raised, for the purpose of raising the means necessary to build a school house. It was never

contemplated that contracts for the erection of school houses should be let on the basis of what orders so issued might happen to be worth, or would bring in the market, as in this case, only seventy-five cents on the dollar. In case the delay necessarily occasioned in the raising of money by taxation, would be too great, it is provided in section thirty of the school law, that the "school district shall have power and authority to borrow money to pay for the sites for school houses and to erect buildings thereon, and to furnish the same by a vote of a majority of the qualified voters of said district present at any annual, or special meeting."

But, in whichever way the building fund is raised, it is entirely beyond the control of the district board, except for safe keeping, until the electors of the district, legally assembled, shall give directions as to how it shall be expended, and by whom, whether by the district board, or by a "building committee," as provided in sections twenty-nine and fifty-eight of the general school law. In this case the action of the board was without the shadow of authority, and absolutely void. It is a fundamental principle of law, that, in dealing with these *quasi* corporations, or with their agents, a person must take notice, at his peril, of the nature and extent of their authority. The legislature has set the proper bounds within which they may act, but beyond which they cannot go. This is in the public law, and must be heeded.

We conclude, therefore, that these orders were void in the hands of the payees, and that they are equally so in the hands of the indorsee. For these reasons the judgment of the district court must be reversed, and a new trial awarded.

JUDGMENT ACCORDINGLY.

GEORGE L. MILLER, APPELLEE, v. GEORGE M. MILLS, APPELLANT.

Partition: ACCOUNTING FOR RENTS AND PROFITS. In a partition suit, the defendant was held properly charged with rents and profits received by his son-in-law, who held title to the premises by virtue of a tax title, it appearing in evidence that the defendant was an active agent in procuring such title, bidding the premises off at private tax sale, and that the rents paid to his son-in-law were paid by defendant's direction. *Held*, also, that the defendant was properly charged with the rental value of a portion of the premises, he occupying them in person, and refusing to rent them to others.

THIS was an appeal from the district court of Douglas county. The opinion states the case.

Clinton Briggs and *G. W. Ambrose*, for Mills, the appellant.

A. Swartzlander and *J. M. Woolworth*, for Miller, the appellee.

GANTT, J.

It appears that the plaintiff, Miller, and the defendant, Mills, owned as tenants in common, the west thirty-four feet of lot seven, in block one hundred and twenty, in Omaha city; that in a partition suit between the parties, after the proper proceedings were had, it was ordered by the court that this property be sold. The same was sold to one George T. Mills, which sale was confirmed at the February term, 1874, of the district court, and a deed ordered to be made to the purchaser. At this term of the court an order was made appointing a master to ascertain and report, what incumbrance, if any, existed on the property sold, and also to take an account of the rents and profits received by defendant, Mills, and expenditures made by him for taxes and necessary repairs

upon the premises, since the day an account was taken by a former master, up to the day of the confirmation of sale, and also to take and report the testimony together with his findings thereon to the court.

It appears by the record that the period for which the account was taken, extended from April 1, 1872, to February 23, 1874. The master made a report, to which exceptions were filed by defendant; two exceptions were sustained, and two others overruled; and thereupon the case was referred back to the master to ascertain whether a mortgage upon the property held by E. Creighton was an individual debt of plaintiff, whether the defendant had any interest in the mortgage debt, and which of the parties should remove the incumbrance; and secondly, to ascertain the amount of taxes, with interest thereon, embraced in certain tax deeds and certificates.

The supplemental report was filed. The master finds that the defendant had received and is chargeable with rents, amounting in the aggregate to the sum of $3753.92; that he had paid for taxes and repairs, amounting in the aggregate to the sum of $574.46, which last sum deducted from the former leaves the sum of $3179.46; that for one-half of this last sum, to-wit: $1589.73, the defendant should account to the plaintiff. The defendant excepted to the report and findings of the master, and asked that the report be set aside. The exceptions were overruled, and the report and findings were confirmed. And the same is brought to this court upon appeal.

It appears by the proofs taken on the part of the defendant, that J. S. McCormick, the son-in-law of defendant, holds two tax deeds on the property in question, one whereof bears date, March 12, 1872, and the other September 27, 1872, both made upon purchases at private sale, on the tenth day of March, 1870; and that he also holds a treasurer's tax certificate of sale upon the same premises, dated December 9, 1872. Now, as to the

main ground of defense, it is insisted on the part of defendant, that McCormick, by virtue of these tax deeds, and certificate of sale, acquired rights in the property, and collected a portion of the rents, to which the defendant submitted, and therefore he ought not to be charged with these rents.

In the discussion of this proposition, it may perhaps only be necessary to inquire, under what circumstances, and for what purpose McCormick obtained these alleged muniments of title to the property in question. The proofs manifestly show that they were obtained under private sales, and that the defendant himself was an active agent in procuring them. Sometime prior to the first sale to McCormick, the defendant made application to the county treasurer for a statement of the amount of taxes due on the premises; and the witness, E. C. McShane, testifies that he was county treasurer from November 18, 1871, until November 8, 1873; that soon after he came into the office of treasurer, the defendant twice bid off the property in question, once in the name of George T. Mills, his son, and once in the name of J. S. McCormick; and that he did not have or receive from McCormick any application for the purchase of the premises. We think the proofs fully sustain the finding of the master, that whatever rents were paid to McCormick was done "by consent and direction of the defendant," and that defendant "had control of the rents and profits of said property."

But, may not the key to all these transactions between defendant and McCormick, be found in the defendant's answer to the sixth interrogatory propounded to him in his examination in chief? He says that because the plaintiff refused to account for one-half of the money he, defendant, paid for Merritt's title to the property, and to provide for back taxes, "I wanted to give the store and any rights I had therein to McCormick. He then

inquired how much back taxes there were—I told him to go to the office and ascertain for himself and *secure the title* from the county, and *he might have the property for half what it cost me.* In accordance with that *understanding* he obtained his deed. * * * The store was originally bought for my son George,—McCormick to deal fairly and justly with George and render unto him what was his due."

It seems very clear, according to the ordinary and familiar signification of the words used by the defendant, that the only true interpretation of his language is this: That because the plaintiff refused to do certain things demanded by him, he made an arrangement with McCormick to secure from the county a tax title to the property, and by doing so "he might have the property for half what it cost" defendant; but that, as it was originally bought for defendant's son George, McCormick was to deal fairly and justly with George, and render unto him what was his due. In the language of the defendant "in accordance with that understanding" McCormick obtained his deed. Hence, if the language used means anything, it must mean that, after the tax title was procured, McCormick, might have the property by paying to defendant one-half what it cost him and by rendering to his son George what was his due; and as he does not state what portion was to go to his son George, it may as well be understood to be one-half, or any other part of it.

Was it in pursuance of this "understanding" that the defendant made application to the county treasurer for a statement of the delinquent tax upon the property? Was it for the purpose of carrying into effect this arrangement or "understanding," that the defendant, in December, 1872, at a tax sale, purchased the premises in the name of McCormick, and took the certificate of sale in his name? It seems probable that such

proceedings would naturally follow such an "understanding."

But, does not this whole transaction bear upon its face a manifest contrivance on the part of defendant to defeat and destroy the title of his co-tenant to the property?

We are very clear in our opinion that he cannot by any such "understanding" or contrivance overthrow the title or impair the rights of his co-tenant, and thereby escape his liability to account to the plaintiff for the rents and profits of the premises. This view of the case, which we think is well sustained by the proofs, might be deemed a sufficient answer to the exceptions taken by defendant to the findings of the master; but one other point in the defense demands some notice.

It is urged that the master erred in charging the defendant for rent of the second story of the store house on the premises. The exception is based on the ground that this part of the premises remained vacant. But how is the fact? The proofs show that the defendant and J. S. McCormick occupied this apartment, if not all the time, at least most of the time for which the account was taken; and it further appears in evidence that at one time, the defendant refused a monthly rent of forty dollars offered for this second story to be used as a photographic gallery.

Therefore, under the circumstances and facts shown by the proofs, and especially in view of the fact that the defendant failed to render any account for rents of this apartment, we think the master properly received evidence of its rental value during the term for which the account was taken, and properly charged the defendant with such rent.

Upon a careful examination of the proofs taken in the cause, we fail to discover any good reason for setting aside the master's report as amended by his supplemental

report, and therefore its confirmation and the decree of the court below should be affirmed.

DECREE AFFIRMED.

WILLIAM STARRING, PLAINTIFF IN ERROR, v. OLIVER P. MASON AND CHARLES H. WALKER, DEFENDANTS IN ERROR.

1. **Practice**: TAKING DEPOSITIONS. Unless authorized by special commission, the clerk of a court out of the state has no authority to take depositions.
2. ——: OBJECTIONS TO DEPOSITIONS. Although a court may commit error in refusing to suppress a deposition, yet if the moving party fail to object to its being read to the jury at the trial, he cannot complain of such error in the appellate court.
3. **Agency**: EVIDENCE ESTABLISHING IT. Where the owners of a stallion brought suit for his services to defendant's mares, and there was evidence tending to show that an employe had the management of the horse, making contracts, and collecting pay for his services; *Held*, 1. That a receipt given by such employe in settlement of the account sued on, was improperly excluded from the jury. 2. That evidence of a note given and paid by another party to such employe, should have been admitted, as tending to establish the general agency of the employe.

ERROR from the district court of Otoe county.

Mason and Walker brought suit in that court upon an account for the services of a stallion, performed under a contract by which Starring agreed to pay a certain price for such service. Starring answered, admitting that he made an agreement, for the services of the horse, with one Mastin, the agent or partner of Mason and Walker, and alleging that he paid Mastin in full for such services. There was a trial by jury, verdict in favor of the claim, and Starring brought the case here by petition in error. Plaintiff in error asked but was refused an instruction to the jury in substance, that if Mastin was the agent of the defendants in error, or was jointly interested in the

profits, then a settlement with Mastin was binding on defendants in error.

Scofield & Ireland, for plaintiff in error, cited *Dodge v. McDonell*, 14 *Wis.*, 553. *Mallory v. Mariner*, 15 *Id.*, 172. *Horsey v. Heath*, 5 *Ohio*, 353. *Myers v. Standart*, 11 *Ohio State*, 29. *Choteau v. Raitt*, 20 *Ohio*, 132. *Reid v. Reid*, 2 *Dev.*, 247. *Mitchell v. Ryan*, 3 *Ohio State*, 377.

J. R. Webster, for defendants in error.

There was no evidence tending to show agency, or that Mastin was anything but a hostler. Nor was there evidence of a partnership. Either is an affirmative defense to be proved by the party resting upon it. There was no proof of agency whatever, and the contract between Mastin and defendants in error was not a partnership. *Christian v. Crocker*, 25 *Ark.*, 327. *Wheeler v. Palmer*, 38 *Cal.*, 203. *Lintner v. Millikin*, 47 *Ill.*, 178.

LAKE, CH. J.

Of the errors assigned I will first notice the one that relates to the deposition of the witness, Mastin.

I. Before the trial a motion was made to suppress this deposition on the ground that it was taken by an unauthorized person.

Section 375, of the revised statutes designates those officers who may take depositions, out of the state. This authority, except in the case of a special commission, is limited to "a judge, justice, or chancellor of any court of record, a justice of the peace, notary public, mayor, or chief magistrate of any city, or town corporate."

The deposition of Mastin was taken by the clerk of the district court for Arapahoe county in the territory

of Colorado, who had no authority to take it, and the motion to suppress ought to have been sustained.

But, notwithstanding this error of the court in refusing to suppress the deposition, in order to have made it available to the defendant, he should have objected to its being read to the jury on the trial, and taken his exception if the court ruled against him. *Frost v. Goddard*, 25 *Maine*, 414.

II. The receipt given by Mastin to the defendant should have gone in evidence to the jury. Under the pleadings, and the state of the plaintiff's case, it was clearly admissible for at least two purposes: *first*, as evidence tending to prove a settlement of the account sued on; *second*, as tending, very strongly indeed, to impeach Mastin, who had testified not only that Starring had paid him nothing for the use of the horse, but also, that he had given no receipt showing that he had done so.

There was testimony before the jury from which they could very reasonably have inferred that Mastin had ample authority both to make contracts, and collect pay for the service of the horse.

III. Again, I think the court committed an error in excluding the note for $50, given, and paid, by Straub to Mastin, for the use of the same horse. This note, together with the oral testimony of Straub, showed very clearly that the plaintiffs had at least permitted Mastin to act as their general agent in the management of this horse, and also in making settlement for his services in other cases.

For the same reason, I think the court erred in instructing the jury not to consider the testimony of the defendant as to his agreement with Mastin.

IV. The instruction tendered by the defendant was

not only good law, but pertinent to the testimony, and should have been given to the jury.

For these reasons the judgment of the district court must be reversed and a new trial awarded.

JUDGMENT REVERSED.

THOMAS H. ADAMS, PLAINTIFF IN ERROR, v. THE NEBRASKA CITY NATIONAL BANK AND FRANK M. FARBAR, DEFENDANTS IN ERROR.

1. **Chattel Mortgage.** A mortgage of chattels transfers to the mortgagee the whole legal title to the thing mortgaged, subject only to be defeated by performance of the condition, but the mortgagor may redeem the property at any time before sale.

2. ——— : INJUNCTION. Where upon default in the payment of a debt secured by a chattel mortgage, the mortgagee took possession of the property, and on the same day the owner of a judgment against him levied thereon; *Held*, that an injunction would not lie, at the instance of the mortgagee, restraining a sale under the levy.

ERROR to the district court for Otoe county.

Scofield & Ireland, for plaintiff in error, said that in the cases relied upon by the defendant, the mortgage was the only evidence of the debt, with no provision that in case of default the mortgagee was to do anything except take possession of the property in payment of his debt if he saw fit to do so.

Such is not the case at bar. Here the evidence of indebtedness is three promissory notes, and the mortgage was given as collateral thereto upon conditions to be performed by the mortgagee, as well as the mortgagor, in case of default in *paying the notes*, not the mortgage; and it is submitted that there is a wide difference between a mortgage that represents the debt and the

security for its payment, and a mortgage that is given to secure the payment of a note or bond. *Horsey v. Hough*, 38 *Md.*, 130. *Thompson v. Moore*, 36 *Maine*, 47. *McGriff v. Porter*, 5 *Florida*, 373. *Lyon v. Coburn*, 1 *Cush.*, 278. *Plummer v. Shirley*, 16 *Ind.*, 380.

E. F. Warren, for the defendants in error, in support of the position that a chattel mortgage transfers the whole legal title to the mortgagee, subject only to be defeated by performance of the condition, cited, *Butler v. Miller*, 1 *N. Y.*, 496. *Fox v. Burns*, 12 *Barb.*, 677. A levy on mortgaged chattels as the property of the mortgagee, is good after forfeiture, though he has not taken possession. *Smith v. Acker*, 23 *Wend.*, 668. *Handford v. Archer*, 4 *Hill*, 271. The *mortgagor*, after default, has no leviable interest. *Hall v. Tuttle*, 8 *Wend.*, 375. *Prior v. White*, 12 *Ill.*, 261.

The plaintiff has an adequate remedy at law and a court of equity will not take jurisdiction. Here is a judgment regularly recovered at law against the plaintiff; there is no allegation or pretense that there was any fraud practised in obtaining it, either upon the court or this plaintiff, and no reason assigned why the judgment debtor should not pay it, and yet a perpetual injunction is prayed to prevent the judgment creditor from collecting his demand upon execution. In such a case there is no ground for the interference of a court of equity.

MAXWELL, J.

The plaintiff filed his petition in the district court of Otoe county, alleging that "on or about the eighteenth day of June 1874, Jacob Shoff, late of Otoe county, Nebraska, deceased, made and executed a chattel mortgage to the said plaintiff to secure the sum of $2125, which mortgage was duly recorded in the office of the clerk of Otoe county, Nebraska, on the nineteenth day of June 1874, and by the terms thereof, the sum of $1687.12

is now due thereon; that default has been made in the payment of the last named sum, which is now due and payable, and no proceedings have been had for the collection of the said sum; that said plaintiff took possession of the goods, chattels, wares and merchandize mentioned and described in said mortgage deed, on or about the twenty-second day of October, A. D., 1874; that on or about the fifteenth day of September, A. D., 1874, at the regular term of the district court, in and for Otoe county, Nebraska, holden at Nebraska City, in the county and state aforesaid, the defendant, the Nebraska City National Bank, obtained a judgment against Wesley Conner, J. Gorden Conner, and Thomas H. Adams, for the sum of $1098.15 and $12.60 costs; that on or about the twenty-second day of October, A. D., 1874, the said defendant, the Nebraska City National Bank, sued out an execution against the said plaintiff, directed to the defendant, Frank M. Farbar, as sheriff, who in accordance therewith, and by the direction of the defendant, the Nebraska City National Bank, levied on the goods and chattels described in the chattel mortgage aforesaid, and that said goods and chattels are about to be sold by the said Frank M. Farbar, as sheriff, for the satisfaction of the said execution and judgment in favor of the Nebraska City National Bank. The said plaintiff further avers that he is not the owner of the said goods and chattels about to be sold by the said defendant, Frank M. Farbar, as sheriff, for the satisfaction of said judgment rendered in favor of said defendant, the Nebraska City National Bank, and against Wesley Conner, J. Gorden Conner, and the said plaintiff as aforesaid, but that he is only entitled to the possession, under and by virtue of said chattel mortgage, a copy of which, is attached to and made a part of the petition, and that he is proceeding to foreclose the same, and has advertised the property therein described as required by law, and the terms and condition of said mortgage,

and therefore prays this honorable court, to grant a temporary order of injunction, restraining the said defendants, the Nebraska City National Bank, and Frank M. Farbar, as sheriff, from selling and disposing of said goods and chattels as aforesaid, for the satisfaction of the judgment rendered by the district court as aforesaid, and that upon the final hearing, a perpetual injunction may be allowed, restraining the defendants, and each of them, from disposing and selling said goods and chattels, for the satisfaction of said judgment."

The defendants demurred to the petition, on the ground, that it did not state facts sufficient to constitute a cause of action. In December 1874, the demurrer was sustained, and the cause dismissed, to which the plaintiff excepted. The case is brought into this court, by petition in error.

The rule is well settled, that a chattel mortgage transfers to the mortgagee, the whole legal title to the things mortgaged, subject only to be defeated by performance of the condition. *Butler v. Miller*, 1 *Conn.*, 496. *Tallon v. Ellison & Sons*, 3 *Neb.*, 74. *Brown v. Bement*, 8 *Johns.* 96. *Ackley v. Finch*, 7 *Cow.*, 290. But the mortgagor, may redeem the mortgaged property, at any time before the sale. *Charter v. Stevens*, 3 *Denio*, 33. *Lansing v. Goelet*, 9 *Cow.*, 372. *Hart v. Ten Eyck*, 2 *Johns. Ch.*, 100.

The petition entirely fails to state a case that would authorize the interference of a court of equity to restrain the sale.

Whatever rights, the heirs of the Shoff estate may have in the mortgaged property, the plaintiff is not in a position, so far as appears from the petition, to champion their interests.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THOMAS N. MORROW, PLAINTIFF IN ERROR, v. CHARLES SULLENDER, DEFENDANT IN ERROR.

1. **Practice:** APPEALS. An appeal from the judgment of a justice of the peace, rendered February 20, and filed in the district court March 15, the next regular term of which was fixed for the first Monday in April; *held*, within the time fixed by law. *Gen. Stat.*, 686.

2. ———: EXCEPTIONS TO JUDGMENT. To obtain a review of a judgment of the district court, dismissing an appeal taken from a justice of the peace, no exception need be taken or made part of the record by a formal bill of exceptions.

ERROR to the district court of Nemaha county.

The plaintiff in error having appealed to the district court from a judgment rendered against him by a justice of the peace, and the district court dismissing the appeal, he came here by petition in error.

J. H. Broady, for plaintiff in error.

E. W. Thomas, for defendant in error.

LAKE, CH. J.

The plaintiff's appeal from the judgment of the justice of the peace was well taken, and ought to have been sustained. It appears that the judgment was rendered on the twentieth of February, 1875. There was some dispute as to whether the undertaking in appeal was filed with the justice on the twenty-third of February or on the first day of March. But it is not worth the while to spend any time on this point, for either day is within the time allowed by law for that purpose.

The transcript was filed in the clerk's office of the district court, on the fifteenth day of March, 1875, and the first term of the district court, next after the rendition of the judgment appealed from, was fixed for the first

Monday in April; so that there was no default in these two most essential requisites of an appeal.

But it is contended on the part of the defendant that, in order to entitle the plaintiff to a review of the action of the district court in dismissing the appeal, an exception should have been taken and made part of the record by a proper bill of exceptions. Several authorities in support of this position are cited, and such is the practice in Indiana and Wisconsin.

In *Commercial Bank v. Buckingham*, 12 *Ohio State* 402, it was held, that in order to obtain a review of a *final* judgment or order, no exception is necessary. *See, also, Powell on Appellate Proceedings*, 215, *Sec.* 9, where such an exception is declared to be not only unnecessary, but highly impertinent. And this, I apprehend, is the better practice. Nor was there any necessity for a formal bill of exceptions in order to bring the alleged error into the record. The motion to dismiss the appeal was in writing, specifying particularly the grounds upon which it was based. The court, in sustaining this motion, held that the alleged grounds were sufficient to dismiss the case out of court, thereby leaving the judgment of the justice of the peace in full force. And this judgment of dismissal, *which was a final judgment*, was entered at length in the journal, whereby the whole matter was preserved, and is now brought before us, just as effectually as could possibly have been done by a formal bill of exceptions.

In the case of *Smails v. White*, decided at this term, (*Ante, page* 353) we held the act of February 24th, 1875, regulating appeals from the judgments of probate judges, and justices of the peace, to be unconstitutional; therefore that act can have no effect on this question. The judgment of the district court is reversed, and plaintiff's appeal re-instated.

JUDGMENT REVERSED.

J. N. CONVERSE AND OTHERS, PLAINTIFFS IN ERROR, V. ISAAC N. SHAMBAUGH, DEFENDANT IN ERROR.

1. **Partnership.** Where the existence of a partnership is admitted, or otherwise established, the admission of one of the partners as to any matter between the firm and another party, is evidence against all. But where the partnership is denied, such admission affects him alone, and is no evidence of its existence, so as to create a liability against the others.

2. ———. The existence of a partnership may be proved by the separate admissions of all who are sued, or by the acts, declarations or conduct of the parties; but the simple statement of one claiming to be a partner is not sufficient to establish it.

ERROR to the district court of Otoe county.

Mason & Wheedon, for plaintiffs in error (with whom was *E. F. Warren* for McCann), cited *Harris v. Wilson*, 7 *Wend.*, 57. *Jones v. Hurlbut*, 39 *Barb.*, 403. *Williams v. Souter*, 7 *Iowa*, 443. *Lyon v. Daniels*, 14 *Penn. State*, 197.

E. R. Richardson, for defendant in error, contended that the declarations of McCann as to who composed the firm, were clearly competent, as he was a partner, and the partnership was still in existence, and as the plaintiff was corroborated by the testimony of McCann and Converse, the proof of hiring and by whom hired was complete. *Greenleaf Ev.*, *Sec.* 112. *Pope v. Risley*, 23 *Mo.*, 185.

MAXWELL, J.

The defendant in error (plaintiff in the court below) commenced an action in the district court of Otoe county against Joel N. Converse, William Denison, Joseph T. Thomas, Benjamin E. Smith, Henry Hill, Hugh J. Jewett, S. D. Gray, Dwight J. McCann, Henry C. Lett, and Henry M. Atkinson, defendants, alleging that "they were part-

ners doing business under the name and style of Converse, McCann & Co., and that as such partners were engaged in the grading, building and construction of a certain railroad in the State of Nebraska, known as the Brownville, Fort Kearney and Pacific Rail Road, under and pursuant to a certain contract before that time entered into between the said defendants and said railroad company for that purpose. That on or about the twenty-sixth day of January, 1872, a certain suit was commenced by the Atchison and Nebraska Rail Road Company as plaintiff, against the Brownville, Fort Kearney and Pacific Rail Road Company and W. H. James, acting governor of the State of Nebraska, as defendants, in the district court of Lancaster county, to recover the title to, and possession of, twenty thousand acres of land, which had been conveyed and patented by the State of Nebraska to the Brownville, Fort Kearney and Pacific Rail Road Company, and which lands the defendants in this action had contracted for, and were to have and receive for the grading, building and completion of the railroad of the said Brownville, Fort Kearney and Pacific Rail Road Company, in pursuance of said contract, and as part payment therefor, and had claimed an interest therein, and that for the purpose of protecting their right and interest in said lands they, the said defendants in this action, afterwards, to-wit: On or about the first day of February, 1872, in consideration that the plaintiff at the request of the said defendants in this action, had agreed to appear and act as one of the attorneys of the Brownville, Fort Kearney and Pacific Rail Road Company in defense of said suit for a reasonable reward and compensation, to be paid therefor by the said defendants in this action, become, and was, and acted as one of the attorneys of the said Brownville, Fort Kearney and Pacific Rail Road Company, in the defense of said suit, and as such, and at the request of said defendants in this

action, did diligently attend to the defense thereof, until the same was finally ended and determined, at the April term 1872, of said court. Said suit was determined in favor of the defendants in this suit; that the services so rendered by the plaintiff to the defendants at their request, were reasonably worth the sum of $2500, for which he prays judgment." The defendants answered the petition of the plaintiff denying all the facts stated therein.

On the trial, the jury found a verdict against all the defendants, except Henry C. Lett, for the sum of $1,250. Defendants filed a motion for a new trial, which was overruled by the court, and judgment rendered on the verdict.

The only testimony offered by the plaintiff on the trial of the cause in the court below, to establish the existence of the partnership of the defendants, consisted of certain statements made by McCann to the plaintiff, that the defendants herein constituted the firm of Converse, McCann & Co., and copies of certain letters written by Shambaugh to Converse asking for his fees.

The rule is well settled that when a number of persons have associated themselves together in the joint prosecution of a common enterprise, as in ordinary partnerships, that the acts or contracts of one partner, with reference to the partnership business and affairs, are to be deemed the acts or contracts of all. And when the existence of the partnership is admitted, or otherwise established, the admission of one of the partners as to any matter between the firm and another party, is to be received as evidence against all the partners. But where the existence of the partnership is denied, and there is proof to establish its existence, then the admission of a party that he is a partner, affects him alone, and such admission is no evidence of the existence of the partnership, so as to create a liability against the others. *McPherson v. Rathbone,*

7 *Wend.*, 216. *Nelson v. Lloyd*, 9 *Watts.*, 22. *Cottrill v. Vandusen*, 22 *Vt.*, 511. *Whitney v. Ferris*, 10 *Johns.*, 66. *Jennings v. Estes*, 16 *Me.*, 323.

The existence of a partnership may be proved by the separate admissions of all who are sued, or by the acts, declarations, or conduct of the parties. *Welsh v. Speakman*, 8 *W. & L.*, 257; but the simple statement of one claiming to be a partner, is not sufficient to establish that fact. There being no proof of the partnership of the defendants the cause is reversed, and a new trial awarded.

REVERSED AND REMANDED.

AZARIAH R. LIVINGSTON, PLAINTIFF IN ERROR, v. CHARLES F. COE, DEFENDANT IN ERROR.

1. **Practice**: DISSOLVING ATTACHMENT. A petition headed "Supreme Court of the State of New York," and filed in a district court of this state, is not sufficiently defective to warrant the dissolution of an attachment issued in the cause.

2. ——: ATTACHMENT: CAPTION OF THE WRIT. A writ of attachment which does not run in the name of "The People of the State of Nebraska," as required by the constitution, is voidable only; the defect is curable by amendment.

THIS was an action upon a promissory note, brought in the district court for Thayer county, in which an attachment was issued and levied upon land owned by Livingston. The petition in the cause was headed "Supreme Court of the State of New York." The venue of the affidavit upon which the attachment issued was "State of Nebraska, County of Thayer, ss." Motion to dissolve the attachment was made and overruled, and the cause brought here to reverse that order of the district court.

Griggs & Ashby, for plaintiff in error, contended that the attachment could not properly be issued, there being no petition filed which complied with the provisions of section 92 of the code. *Alexander v. Pringle*, 27 *Miss.*, 358. *Pitkins v. Boyd*, 4 *G. Greene*, 255. The attachment is void not running in the name of "The People of the State of Nebraska." *Curtis v. McCullogh*, 3 *Nev.*, 202. *Reddick v. Clouds*, 2 *Gilm.*, 670. *Cady v. Huntington*, 1 *N. H.*, 139.

J. B. Skinner and *S. C. B. Dean*, for defendant in error, said the court below had full power to permit the amendment to be made to the petition and writ, and cited section 144 of the code. *Isley v. Harris*, 10 *Wis.*, 95. *Furman v. Walters*, 13 *How. Pr.*, 350. *Morgan v. Johnson*, 15 *Texas*, 368.

LAKE, CH. J.

This is a petition in error from Thayer county. The case presents but a single question for our decision.

Although presented in a variety of forms there is really but a single objection in this record to the action of the district court, which was its refusal to dissolve the attachment and release the property upon which it had been levied. There were two motions to quash the order of attachment filed, the first one on the twenty-first day of May, 1873, which was overruled on the twelfth day of June, next following, and the second, filed June 10th, 1874, which on motion was stricken from the files of the court.

This last named motion was properly stricken from the files. It is a wholesome rule of practice not to entertain a second motion, where one for the same purpose has already been heard and overruled, unless leave to file it has been specially given. All of the reasons existing at the time of filing the first motion showing that it

ought to be sustained, save that of want of jurisdiction, should be included therein, and thus be brought to the attention of the court, or they may be treated as waived. Where however there has been an omission to do so through mere inadvertence, or want of knowledge of the existence of a material fact, and there is a desire for a ruling on the matter omitted, the proper course to pursue is, first to obtain leave to file a new motion, in which it may be included, and the court requested to consider it. The granting of such leave is a matter resting entirely in the discretion of the court to which the application is addressed. This leaves us with the first motion only to deal with. It was objected by this motion:

First. "That no petition had been filed as required by law." This objection was based solely upon the fact that the name of the court at the head of the petition was given as the "Supreme Court of the state of New York." This was good ground for a motion to require the plaintiff to amend his petition, but it was not sufficient to warrant a dissolution of the attachment. But even if the mistake in the name of the court had been fatal, it ought to have been more specifically stated; the objection was too general. *Wilson v. Wetmore*, 1 *Hill.*, 216.

Second. It was objected "that the affidavit upon which the order of attachment issued does not describe the nature of the plaintiff's claim." This assignment is untrue in fact. The affidavit upon which the order issued, set forth "that the plaintiff's claim in this action is upon a promissory note, set forth and described in the complaint in this cause." This was a sufficient description of the cause of action in the affidavit.

Third. And it was further objected, that "said order of attachment is not made returnable according to law." The order itself shows that it was returnable on the second Monday after it was issued. This was correct. The order was issued at the commencement of the action.

In such case the return day must be the same as that of a summons (*Sec.* 203, *Code*), which is the second Monday after its date. *Sec.* 66, *Code of Civil Procedure.*

There were several other objections but they were not urged upon the argument, and it is not worth the while to notice them, as they are clearly frivolous. The chief objection, and the one pressed more strongly upon our attention than any other, was that the order of attachment did not run, "*In the name of the People of the State of Nebraska.*" This point was not made in the first motion, but was in the second. While the order was clearly defective in this respect, it was not fatally so. It was merely voidable, *not void.* It was a defect curable by amendment. *State v. Bryant*, 5 *Ind.*, 192. And it makes no difference that the omission is of a constitutional requirement, this as well as one that is statutory, merely, may be amended. *See, Illsley v. Harris*, 10 *Wis.*, 95, which is a case in point.

We discover no error in this record, and the several orders of the district court are therefore affirmed.

JUDGMENT ACCORDINGLY.

JESSE WILLIAMS, APPELLEE, V. ENOS LOWE AND WILLIAM W. LOWE, APPELLANTS.

1. **Trusts**: BY PAROL. An alleged parol agreement whereby shares of stock in a ferry company, sold under a decretal order and purchased by the defendant, were to be held in trust to secure the payment of the purchase money and a debt due from plaintiff, and upon payment thereof to reconvey the shares to plaintiff, accounting for dividends received, *held* not established by evidence of plaintiff, consisting merely of what he had *heard* that defendant had said, and his *understanding* of what defendant would do; nor by subsequent declarations of defendant that he *expected* plaintiff would have the benefit of the stock; nor by proof that defendant had, a number of years after the purchase, paid money to plaintiff from time to time, the plaintiff asking therefor on

account of his want of pecuniary means, and never claiming the shares until he had been paid a considerable amount.

2. **Pleading:** CAUSES OF ACTION: MISJOINDER. A petition contained two counts, one alleging that certain shares of stock, owned by the plaintiff, were purchased at judical sale by the defendant under a parol agreement that defendant should hold the shares in trust and reconvey the same upon payment of a debt due him from plaintiff; and the other alleging want of jurisdiction in the court making such sale, but that defendant under color thereof procured the transfer of the shares on the books of the company, and received dividends thereon in trust for plaintiff. *Held*, not bad by reason of misjoinder.

3. **Equity:** JURISDICTION: VOID SALE. An assessment was levied upon shares of stock in a ferry company, and suit in chancery commenced to subject the shares to the payment of such assessment, although the charter of the company gave it no authority so to do. Service was made by publication, the bill taken *pro confesso*, decree rendered, and the shares sold. *Held*. 1. That the decree was *coram non judice*, and void. 2. That the purchaser having procured title to the shares under color of said proceedings, receiving dividends thereon, held the same in trust for the original owner.

4. **Removal of Causes to U. S. Court.** Upon a motion to transfer a cause to U. S. Circuit Court, under act of March 3, 1875, second session, forty-third Congress, *held*, that the act applies to causes brought in state courts of original jurisdiction, and not to causes pending in the state supreme court.

THIS was an appeal from a decree rendered by Hon. Samuel Maxwell sitting in the district court for Douglas county. It was an action to compel an account, and for the redemption of four shares of stock in the Council Bluffs and Nebraska Ferry Company held by the defendants. The finding in the court below was in favor of the plaintiff, an account stated by a referee, and a final decree rendered against the defendants for $7,532.42.

All the material facts necessary to an understanding of the case appear in the opinion.

E. Wakely and J. M. Woolworth, for the appellants, after an elaborate review of the evidence, contended that it was necessary to the plaintiff's case that he should allege and prove that a consideration of some sort passed between him and the appellants, whether

the theory of it be a resulting trust, arising by implication of law, or that of an express agreement. In that respect the case has wholly failed.

First. The relief here sought in cases of the purchase of property at judicial or forced sale, upon an agreement with and for the benefit of the owner, are all referable to one of two classes.

1. Where the purchaser has bought in the property at a less price, by reason of representations that he was doing so for the debtor who was to have the benefit of the purchase. Here a consideration is shown, namely the advantage to the purchaser in getting the property at the less price. To this class belong, *Brown v. Lynch*, 1 *Paige Ch.*, 147. *Roach v. Hudson*, 8 *Bush*, (*Ky.*,) 410. *McRarcy v. Huff*, 32 *Geo.*, 681. *Paine v. Wilcox*, 16 *Wis.*, 202. *Onson v. Cown*, 22 *Id.*, 329. *Peebles v. Reading*, 8 *S. & R.*, 492.

2. The second class is where the owner, relying on the promises of the purchaser to take and hold the property for him, has desisted from further efforts to save it. Here the consideration consists in the act of the owner. Of this class are, *Rives v. Lawrence*, 41 *Geo.*, 283. *Price v. Reeves*, 38 *Cal.*, 459. *Ryan v. Dod*, 34 *N. Y.*, 807. *Judd v. Mosley*, 30 *Iowa*, 423.

3. Neither of these circumstances appear here. *Bander v. Snyder*, 5 *Barb.*, 63. *Minot v. Mitchell*, 30 *Ind.*, 228. *Botsford v. Burr*, 2 *Johns. Ch.*, 405. *Barnard v. Jewett*, 97 *Mass.*, 87.

Second. It is a fundamental principle of equity, not to give relief to a volunteer.

1. This rule is rigidly applied to cases of trusts, and to this class this case belongs, whether it be deemed a resulting trust, raised by implication of law from the relation of the parties, or an express trust, arising upon the alleged agreement. *Kekewick v. Manning*, 1 *De., G. M. & G.*, 176. *Hughes v. Stubbs*, 1 *Hare*, 476.

Smith v. Warde, 15 *Sim.*, 55. *Bunn v. Winthrop*, 1 *Johns. Ch.*, 329. *Perry on Trusts, Sec.* 97. *Story's Eq. Jur.*, *Sec.* 973.

2. It is also rigidly applied in cases in equity, in respect of contracts, and especially in suits for specific performance. *Hervey v. Audland*, 14 *Sim.*, 531. *Minturn v. Seymour*, 4 *Johns. Ch.*, 497. *Acker v. Phœnix*, 4 *Paige Ch.*, 305.

Third. This case cannot be sustained on the ground of fraud. *M'Culloch v. Cowher*, 5 *W. & S.*, 427. *Barnet v. Dougherty*, 32 *Pa. St.*, 372. *Campbell v. Campbell*, 2 *Jones Eq.*, 364.

Even if the petition stated a case within the rules laid down in these cases, the proof is not sufficiently clear, definite and positive, to entitle the plaintiff to relief. *Lench v. Lench*, 10 *Ves.*, 511, 518. *Steere v. Steere*, 5 *Johns. Ch.*, 1. *Miller v. Stokeley*, 5 *Ohio St.*, 194, 196. *Kendall v. Munn*, 11 *Allen*, 15, 17. *Davis v. Witherell*, 11 *Allen*, 19, 20. *Molin v. Molin*, 1 *Wend.*, 626. *Cutler v. Tuttle*, 4 *C. E. Green*, 549. *Roddy v. Roddy*, 3 *Neb.*, 96.

Fourth. The plaintiff, when he brought his suit, had open to him either one of two courses; either first, to affirm the validity of the judicial sale, and claim, as he did, that the trust arose out of the circumstances of it; or, secondly, to deny its validity and claim the property and its proceeds in specie. He certainly cannot do both in one action, because that would be an infraction of the rule of the code by joining antagonistic causes of action. If we are assailed upon the ground of the trust, we must have a trial to the court; but if we are assailed on the ground that no title passed to us by the judicial sale, then we are entitled to a trial by jury. This is a right so high that it is guaranteed to us by the constitution. It is a right so high that it cannot be taken away from us by any device whatever. If, in this proceeding, we

are open to attack on account of the defects in the judicial proceedings, then by the most unconscionable device we have been deprived of our constitutional right of trial by jury.

George W. Doane and *A. J. Poppleton*, for appellees.

I. The plaintiff claims that this sale passed no title whatever to the purchaser, for the following reasons, to-wit:

That the court acquired no jurisdiction to render any decree by reason that this was not a case which authorized constructive service under the laws and rules of court then in force. (See Rule I, in equity and title 4, Civil Code.)

No jurisdiction could be acquired except by virtue of the specific lien claimed in the bill, and there was no such lien. *Angell and Ames on Corp., Sec.* 355. *Sargent v. Franklin Insurance Company*, 8 *Pick.*, 90.

II. If the sale carried no title to the shares, then they were held by the defendant, Enos Lowe, under an arrangement made between him and the plaintiff in 1863, just before the plaintiff left for Nevada, as a pledge merely, for the security for the balance due to Dr. Lowe, upon his bank account with Henn, Williams, Hooten & Co.; and when the purpose for which the pledge was delivered has been accomplished, the pledgor is entitled to a return and re-assignment of the thing pledged, together with an account of the increase or accumulation of the pledge.

1. Shares in stock of an incorporated company, are subjects of pledge. *Wilson v. Little*, 2 *N. Y.*, 443. *Story on Bailments, Sec.* 290.

2. A pledge may be implied from circumstances, as well as arise by express agreement, and may be for a

limited time, or for an indefinite period. *Story on Bailments, Sec.* 300 *and cases there cited.*

3. Either an action at law for damages, or a bill in equity, to compel an account, and enforce the right to redeem, will lie against a pledgee, who wrongfully excludes the pledgor from his rights in the subject of the pledge.

GANTT, J.

The pleadings in this case, substantially, allege that prior to 1863, the plaintiff was the sole owner of four shares of stock in the Council Bluffs & Nebraska Ferry Company; that by suit in the district court of Douglas county, the company obtained a decree against him, and another, for the amount of assessments previously levied on said shares, and directing the sale of the same to pay said amount, and that on the twenty-eighth day of September 1863, the shares were, by a master of said court offered at sale and sold to Enos Lowe; that prior to said sale Lowe agreed with plaintiff to bid in said shares at such sale, and hold them in trust for the payment of a debt due from plaintiff and others under the firm name of Henn, Williams & Co., to Lowe, and that when plaintiff should pay said debt and repay the purchase money bid for said shares, the said Lowe should reconvey to plaintiff said shares; that after the sale of said shares, the name of W. W. Lowe was substituted in place of said Enos Lowe, for the purpose of placing the shares in the possession and under the control of an apparently innocent purchaser, to deprive the plaintiff of the benefit of the agreement aforesaid, and further, that the court had no jurisdiction of the defendants or the subject matter in the suit in which the decree was rendered for the sale of said shares, and that the defendants acquired no title to said shares of stock by virtue of the proceedings in that suit, but that the defendants nevertheless caused

said shares to be transferred, on the books of the company to the said defendant W. W. Lowe; that the defendants collected and received large dividends, which have from time to time been declared on said shares, and that the defendants hold said shares so transferred, and the dividends by them so received, in trust for the payment of the debt and purchase money aforesaid, and the balance of such dividends, after the payment of said debt and purchase money, for plaintiff; and the plaintiff prays that an account be taken of the dividends received by the defendants and of what is due from plaintiff to defendant, Enos Lowe, and that the balance found remaining be ordered to be paid to the plaintiff by the defendants, and that the defendants be required to transfer and convey to the plaintiff all the interest which they or either of them may have or claim in said shares, and be excluded from all interest in or control over the same, and for general relief. The defendants deny each allegation of the plaintiff in relation to the alleged agreement; and allege that W. W. Lowe became the holder of said shares in good faith for a valuable consideration as between defendants, and without notice of any alleged agreement between plaintiff and Enos Lowe, and that he acquired an absolute title to the shares, and defendants deny any fraudulent purpose in the substitution of W. W. Lowe as purchaser, or that the court had no jurisdiction of the defendants, or the subject matter in the former suit, or that plaintiff is entitled to any dividends, or has any rights or interest in the shares, or that the same are held in trust for him. Under these pleadings, the first question presented for our consideration is, whether the evidence adduced in the case, clearly and satisfactorily establishes a parol trust? In other words, when interpreted by the well settled rules of law, does the evidence sustain the allegation that Enos Lowe, before the sale, entered into a parol agreement with the plaintiff, to pur-

chase the shares at such sale, and hold them in trust to secure the payment of the purchase money and the debt owing and due to him from plaintiff, and upon the payment thereof, to reconvey the shares to plaintiff, and account to him for the balance of dividends, if any remained, in his hands? It is not a question of moral obligation arising exclusively out of a long and intimate acquaintance and friendly relations between the parties, but whether the evidence establishes an agreement creating a trust. The proof relied on to sustain the allegations of the petition consist of that of the plaintiff himself and the declarations of Lowe made to other persons. The plaintiff testifies that in May or June, 1863, he "had a conversation with Enos Lowe as to the shares being sold, that he was then about to leave for Nevada, and Lowe told him that if they (the shares) were sold, he would buy them in and hold them as security for a claim which he had against Henn, Williams, Hooten & Co., and he left him with that verbal understanding;" but on his cross examination, in answer to the question, asking him to state the whole conversation with Lowe, he says. that, "On meeting the Doctor, having heard that he had said in case they were sold, he wished to buy them in as security for a debt which he claimed from Henn, Williams, Hooten & Co., as well as my benefit, I left him with the *understanding* that in case they were sold he would do so; that he consented to do so," and that is as fully as he could recollect the matter at this time.

The declarations of Lowe given in evidence, it appears were made at three different times. W. W. Marsh and F. Murphy testify substantially that at a meeting of the directors of the Ferry Company, in 1866, Lowe was asked to pay the back assessments on the four shares of stock, appearing on the books against Henn & Williams, and that he replied he did not think he ought to pay them—giving as a reason that he had a deposit or unsettled ac-

count with Henn, Williams & Co, and had bought this interest to protect that account, and that when Williams settled with him for the account, he *expected* Williams would have the benefit of the stock.

W. B. Street testified concerning a conversation he had with Lowe, in which Lowe said there would be no justice in taking these shares from Williams, that he had a claim against Henn, Williams & Co., and when he got it out of what the shares yielded, the shares belonged to Williams," but on cross-examination he thinks what he stated was "the result of two conversations," and when asked to state fully these conversations, where they took place, who was present, and what was said by him and by Lowe, he answered, "I can't do it." And G. B. Lake testified that Lowe told him he held the shares as security for the payment of a claim against Williams and was ready to settle with Williams and give up the shares upon being paid the debt Williams owed him, but what Lowe said about security was substantially that the only way he could secure his claim or make himself good, was by the ferry shares, and "Doctor Lowe I think, claimed that the title had passed from Williams by the sale."

On the part of the defendants, Enos Lowe testified very positively that he did not make any such agreement with the plaintiff, and that previous to the plaintiff's departure in the summer of 1863, he had no conversation with him in respect to his purchasing the shares of stock at the sale, if there should be a sale of them. In respect to the letter from plaintiff to Lowe, I shall only observe that, upon an examination of it, I think it develops no facts materially affecting either party in the case, in regard to the alleged agreement.*

* The letter referred to is as follows:

"There is a matter connected with my interest in the Ferry Co., about which I have never written you, or ever talked to you fully on. I will here undertake to state my understanding of the matter, having no doubt but you

Now the evidence of the plaintiff, considered without regard to that of the defendant, Lowe, is certainly indefinite and uncertain; according to the form in which he puts it in his cross-examination, it seems rather to consist of what he had heard that Lowe had said respecting the matter, and his *understanding* of what Lowe would do. The plaintiff gives no details of the agreement; he does not state what amount Lowe should bid for the shares, or that he would repay Lowe any amount he might bid at the sale, or that any time was fixed for the redemption of the property, or say anything that would constitute a mutual contract between him and Lowe, or that would bind him to any contract of purchase of the shares by Lowe; but Lowe testifies very positively that he never made any such agreement with the plaintiff, and that there never was any such conversation between him and the plaintiff. Hence if the determination of the question rested on the testimony of the plaintiff alone, and especially on that of plaintiff and defendant, Enos Lowe, considered together, it seems clear that this evidence is not sufficiently clear, satisfactory and conclusive to establish a parol agreement creating a trust. But it

understanding has always been the same, and that you have acted in all you have done with a view to this *verbal and implied understanding*. In 1862 or 3, or thereabouts, when the business of Henn, Williams & Co. became entangled by *no fault* of mine, but by unforeseen combinations of misfortune, and the *rascality* of my partners from Henn down, you instigated a suit against my ferry stock for an unpaid assessment. I was at the Bluffs when this was done, and although I did not say much to you about it, I talked freely with most of the other members of the company. They *all told* me that you uniformly said to them and anybody else, that you wished it sold, and to buy it in *yourself for the sole purpose* of securing a claim which you had against H. H. Hooten & Co. With this avowal on your part, and with this understanding, I made no defense. I could have even paid the small amount at that time, but I chose to let it go into your hands, as it enabled me to secure your claims. You bought the eighth interest in the Co., I understand, for $125. It has remained in your hands until you have secured as dividends about $3,800. The understanding under which you bought it, and was permitted to buy it, and repeated by you to Capt. Marsh, Bayliss, Lake, Woolworth, etc., as they stated it to me, made it a *contract or bargain*."

was very ably argued that the declarations of Lowe, subsequent to the sale, tended to corroborate the testimony of the plaintiff and to establish the trust. The fact, however, cannot be overlooked that in regard to these declarations, not one of the witnesses say, that Lowe spoke of, referred to, or made any suggestion in relation to an existing agreement, or conversation had between him and the plaintiff, in respect to the shares or the purchase of them; but that Lowe said that he purchased the property to secure the debt due to him from Williams, and that he *expected* Williams to have the benefit of the stock. Under these circumstances, if there is no evidence tending to show a parol agreement creating the trust, at the time of or prior to the sale, these subsequent declarations can have very little, if any, weight at all. It is a contract that is alleged and sought to be proved, and not simply a resulting trust by operation of law only. In *Moore v. Moore*, 38 *New Hamp.*, 389, it is said that "the most that can be said of the complainant's evidence is, that it shows repeated statements of the defendant that he held the premises in trust for her. But such declarations have never been held sufficient to show a trust." *Graves v. Graves*, 29 *New Hamp.*, 142. *Sample v. Coulson*, 9 *Watts & Sergt.*, 66. 2 *Wash. on Real Prop.*, 447, 465.

Again, it is insisted that the payment by Lowe to plaintiff of sums of money, tends to show the existence of a contract and to establish the trust. The plaintiff left in the year 1863, unable to pay his existent debts, and after an absence of two years in the west, and two years in New York, returned still pecuniarily poor, and Lowe says he applied to him for money, giving as his reason for doing so, his want of pecuniary means at the time; and further says that his purpose was voluntarily to pay him a sum, which, with his debt against Williams, would amount to the worth of the shares, and that he

paid him the money on this ground only, and that Williams never set up or made any claim to the shares until he wrote his letter of September 29, 1868. This testimony of Lowe stands uncontradicted. Hence, if there was no proof tending, in some degree, to show some agreement creating the trust, upon what principle can the payment of the sums of money be corroborative evidence of such agreement? And if Lowe was under no legal obligation to pay this money, and his motives and purpose in doing so are not referable to any legal obligation, by what rule of law can such payment of money establish a contract creating a trust? It must be borne in mind that in respect to this branch of the case, the allegation is not that of a resulting trust by operation of law only, but one by verbal agreement between the plaintiff and defendant, E. Lowe, by which the latter agreed to hold the property in trust; and the *allegata et probata* must agree. Therefore, in order to establish the trust by parol proof of such agreement, the terms of the agreement must be clearly and satisfactorily shown. And as such parol evidence is in opposition to a written title, it must, if admissible, be received and examined with great caution. It has been said that courts have always been impressed with the danger of this kind of proof, as tending to insecurity of title and to perjury, and because there is great liability to mistake; that even the slightest mistake, or failure of recollection, may totally alter the effect of what was said. This danger of mistake is greatly increased when a witness undertakes to speak from mere memory of conversations or declarations after a long lapse of time. *Lane v. Deighton*, *Amb.*, 409. *Cascoigne v. Thering*, 1 *Vern.*, 366. *Willis v. Willis*, 2 *Atk.*, 71. *Lench v. Lench*, 10 *Vesey*, 517. *Loyd v. Carter*, 17 *Penn. State*, 216. *Strimpfler v. Roberts*, 18 *Id.*, 298. *Sunderland v. Sunderland*, 19 *Iowa*, 329. *Boyd v. M'Lean*, 1 *Johns. Ch.*, 582. *Parmelee v. Sloan*, 37 *Ind.*,

482. *Miller v. Stokeley*, 5 *Ohio State*, 196. *Davis v. Wetherell*, 11 *Allen*, 19. *Enos v. Hunter*, 4 *Gilm.*, 218. 2 *Wash. on Real Prop.*, 173.

I have thus far only considered the question first propounded, in respect to the alleged agreement creating a trust, and upon both principle and authority, I must conclude that the evidence is not sufficiently clear, satisfactory, and conclusive, to maintain the allegation of a contract creating a trust as alleged in the petition. As neither the pleadings nor the evidence bring this case within the class of cases which are based on some consideration paid, it is unnecessary to discuss the question in reference to such class of cases.

Now, as to the second count in the petition, it is insisted that the plaintiff, by his allegations in the first count, is estopped from pleading want of jurisdiction in the court over the defendants or the subject matter in the suit in which the decree was rendered for the sale of the property, because this count appears to be inconsistent with the first one; and again, that this second count does not present proper subject matter for equity jurisdiction. In regard to the first proposition, I may only observe that it is laid down as a fundamental principle in equity jurisprudence, "that if the plaintiff doubts his title to the relief he wishes to pray, the bill should be framed with a double aspect, so that, if the court should decide against him in one view of the case, it may afford him assistance in another." *Story Eq. Jur.*, *S.* 42. And, again, that "where the title to the relief will be *precisely* the same in each case, the plaintiff may aver facts of a *different* nature, which will equally support his application." *Ibid. S.*, 254. *Mitf. Eq.*, 39. *Cooper's Eq. Pl.*, 14. *Cadwallader v. Granville Alexandrian Society*, 11 *Ohio*, 298. As to the second proposition, it will be observed that the plaintiff in this count of his petition not only alleges want of jurisdiction in the court over the defendants and

the subject matter, but also that the defendants, under color and by virtue of the proceedings in the former suit, procured the shares of stock to be transferred on the books of the ferry company to the defendant, W. W. Lowe; that the defendants hold the shares so transferred, and have received the dividends on them in trust for the plaintiff. And the evidence shows that in accordance with this transfer, certificates for this stock were issued by the company to said W. W. Lowe, vesting in him the only title to the shares which the company could regard.

If the proceedings in the former suit are void, then, I think the defendants hold the shares so transferred to them in trust, and the dividends received by them as a trust fund for the plaintiff, for the reason that, even if they cannot be taken as accountants, and be required to account in equity to the plaintiff, yet the account for the dividends has an equitable trust attached to it by reason of the title to the shares having been transferred to the defendant, W. W. Lowe, thereby vesting the title in him, by virtue of such transfer and the issuance of certificates therefor to him.

In *Bac., Abr., B.*, in speaking of the powers of a court of equity, it is said that "they come to extend their notions; and the person that took the *mesne* profits by wrong, was taken as a trustee for, and accountant to him that had the right," and Story, in his *Equity Jurisprudence, S.* 510, speaks of cases frequently arising out of *tortious* or adverse claims and titles, and in *Section* 454 says, that "whenever the account stands upon equitable claims, or has an equitable trust attached to it, there is no doubt that the jurisdiction is absolutely universal, and without exception, since the party is remediless at law." And as the constitution invests the courts with distinct equity jurisdiction, and as there is no legislative enactment restricting purely equitable pleadings in such

cases, I think, it is a safe rule to follow the settled principles of equity jurisprudence. *Bank of America v. Pollock*, 2 *Edwd. Ch.*, 215.

But the main question raised by the second count in the petition is, whether the decree and proceedings in the former suit are void for want of jurisdiction in the court. To regard them void, there must have been a total want of jurisdiction, for if the court had jurisdiction of either the persons of the defendants or the subject matter of the suit, then, no advantage can be taken of mere irregularities in a collateral proceeding.

The facts are, that on the thirteenth day of March, 1862, The Council Bluffs & Nebraska Ferry Company, commenced suit against Henn & Williams, by bill in chancery, alleging that the defendants were the owners of four shares of stock of the company, upon which an assessment had been levied, and that they were indebted to the company on account of such assessment in the sum of four hundred dollars and interest thereon; that neither of the defendants had real or personal estate subject to levy and execution sufficient to satisfy the debt, and insisted that the company had a lien upon said shares to the amount of the claim demanded, and was entitled to have the shares sold, and asked that an account be taken, the shares be sold for the payment of the same, and that the defendants be ordered to deliver up to be canceled their certificates of stock, to the end that new certificates may be issued to the purchaser under such sale. The affidavit to this petition states that the defendants were both non-residents of Nebraska, and could not be served with process. Upon this showing service was made merely by publication in a newspaper; and upon this kind of service a default was taken, the bill taken *pro confesso*, and the decree was rendered. The jurisdiction of the persons of the defendants is negatived by the affidavit; and therefore, the case may perhaps be

considered in the nature of a proceeding *in rem*. The *rem*, or subject matter of the suit, consisted of shares of stock in the Council Bluffs & Nebraska Ferry Company. What is the nature and character of such property? It seems to be an established rule of law that a corporation is "a body politic, and a distinct person in law from all its members, so created for the express purpose of a distinct and independent existence and capacity, in legal contemplation, so that the corporation may contract and be contracted with, sue and be sued, by any one of its members." From this proposition it must follow as a corollary that the stock owned and held by an individual must be regarded as a distinct property from that of the corporation. *Mass. Iron Co. v. Hooper*, 7 *Cush.*, 187. *State v. Franklin Bank*, 10 *Ohio*, 98.

Hence, I think, the rule is well founded in reason and sound in principle, that stock of a corporation, being thus the separate property of the individual, is, in a legal sense, personal property; it may be sold by the owner of it; it may be conveyed by will, and it may descend from an intestate to the adm'r. 3 *Danes Abr.*, 108. *Hutchins v. State Bank*, 12 *Met.*, 421. *Sargent v. Franklin Ins. Co.*, 8 *Pick.*, 90. *State v. Franklin Bank*, 10 *Ohio*, 97.

The stockholder, however, incurs a personal liability to pay the assessments required by the directors, and the relation of stockholder and company implies a promise to pay such assessments as are legally assessed, and the common law furnishes a remedy for a violation of this engagement by action in *assumpsit*, or *indebitatus assumpsit*. But it seems clear that the power to forfeit and sell stock for default of payment of assessments, does not exist at common law, and therefore the remedy by forfeiture and sale of stock, is exclusively a statutory one, and is cumulative, "unless the charter or general laws of the state provide that no other remedy shall be

resorted to by the company." 1 *Redfield on Railways*, 163. *Peake v. The Wabash R. R. Co.*, 18 *Ill.*, 88. *Hartford R. R. Co. v. Kennedy*, 12 *Conn.*, 506.

It is said that shares of stock may be pledged to the corporation for the payment of debts due to it by a stockholder; but at common law, the corporation has no lien upon the shares for non-payment of assessments or any other debt; such can only be created by statutory authority. *Hussey v. Manf. & Mech. Bank*, 10 *Pick.*, 21. *Sargent v. Franklin Ins. Co.*, 8 *Id.*, 90.

Turning now to the charter of the Council Bluffs & Nebraska Ferry Company, granted by legislative enactment of February 21, 1855, I find that it confers no power upon the corporation to forfeit and sell stock for non-payment of assessments. and that it does not authorize any lien or right of lien on the shares of stock for unpaid assessments, or other debts due from stockholders to the company; and, therefore, it had no authority to enforce any such remedy in the collection of assessments. Hence, regarding the law in relation to a corporation and its stockholders as above stated, I think, as before stated, the suit of the Council Bluffs & Nebraska Ferry Company against Henn & Williams, must be viewed as one in the nature of a proceeding *in rem*. In such actions the universal rule is, that the *locus rei sitae* gives the jurisdiction, for the reason that it is only in the courts of the county, that a *jus in re* can be directly enforced. In a strict legal sense, the jurisdiction can only be exercised by having the thing in the custody of the law. Now, it is manifest upon the face of the whole record, that the property sought to be condemned and sold was not seized and taken into the custody of the court; and in such case it is said in *Boswell v. Otis*, 9 *How.*, 350, that the jurisdiction is not to be presumed upon the general ground that the subject matter of the suit is within the power of the court, but on the contrary, that "no princi-

ple is more vital to the administration of justice than that no man shall be condemned in his person or property without notice, and an opportunity to make his defense. And every departure from this fundamental rule, by a proceeding *in rem*, in which the publication of notice is substituted for service on the party, should be subjected to the strictest legal scrutiny." If, then, the property was not seized and brought under the control of the court, it is difficult to escape the conclusion that the order of publication of notice was wholly without authority of law, and the publication cannot be regarded as constructive service. *Hollingworth v. Barbour*, 4 *Peters*, 475. *Enas v. Hunter*, 4 *Gilm.*, 216. *Cooley on Const. Lim.*, 404.

Entertaining the opinion, then, as shown by the foregoing observations, that in law there was no service had upon the defendants, Henn & Williams, I must conclude that the decree, being *coram non judice*, is absolutely void; and that the defendants in the suit at bar acquired no rights under it; but that for the reason that the defendants, under color of that decree, having secured the title to the shares by a transfer of them to defendant W. W. Lowe, on the books of the company and the issuance of certificates to him for them, and having received the dividends, became trustees, holding the same in trust for the plaintiff.

In regard to the Snyder note, the substance of the proof is as follows: In 1855 or 1856, Snyder, with Enos Lowe as surety or indorser, executed a note to Henn, Williams & Co., for the payment of about three or four hundred dollars. Lowe says that he has an indistinct recollection that, after he became a citizen of Omaha in 1856, some person informed him that the note was among the papers of Henn, Williams & Co. This evidence does not fix the exact amount of the note, nor show whether Lowe was a joint maker of the note or

indorser of the same; nor, if indorser, that he was ever served with notice of protest to fix his liability as such indorser. I think this evidence is entirely too indefinite and uncertain to charge the defendants with this note; and after so long an elapse of time, the presumption is certainly as strong that Snyder paid the note as that he did not. But it seems clear to me, under this evidence, to find that the defendants are liable to be charged with this note, would at best, be a mere *guess* of the fact, and surely it will not be pretended that a liability to pay money can be based on such ground. Therefore, the item in the master's report denominated the Snyder note must be stricken out, and with this modification of, and deduction from the master's report, the same, in all other respects, is confirmed, and ordered that there be now rendered in this court a

DECREE ACCORDINGLY.

Prior to the argument in this cause, the appellees moved that it be transferred to the U. S. Circuit Court, under the act of March 3, 1875, second session, forty-third Congress. It was held *per curiam*, that the motion must be overruled. The act applies to causes in state courts of original jurisdiction, and not to causes pending in this court.

TOOTLE, FARLEIGH & CO., APPELLANTS, v. WHITE, SPIRES AND OTHERS, APPELLEES.

1. **Judicial Sale.** A sale of mortgaged premises was made under a decree of foreclosure which found the amount due plaintiffs to be $724.58, and the amount due two of the defendants, senior mortgagees, $2887.50. The order upon which the sale was made, stated the amount of the decree to be for $724.58, omitting the amount found due the senior mortgagees. The plaintiffs became the purchasers for $3684. . Afterwards upon motion of the mortgagors, plaintiffs assenting thereto, the sale was set aside, but upon motion of the senior mortgagees, this last order was vacated, the sale confirmed, and purchase money ordered paid into court. *Held*, that there having been no sale under the decree in favor of the senior mortgagees, they were not in a position to insist upon a confirmation of it.
2. ———. It is not the design of the law to permit each mortgagee, in such cases, to have a separate order of sale, for the amount found due him, but the order must be as broad as the decree, and issue for the entire amount found due therein, to pass a perfect title by the sale.
3. **Practice in the Supreme Court.** The date of filing indorsed on a transcript by the clerk in a cause brought to the supreme court, is merely *prima facie* evidence of the time at which it was received by him. The court will correct a mistake made in the date, to the prejudice of either party, and affidavits will be received for the purpose of determining when the transcript was delivered to the clerk.

APPEAL from the district court of Cass county.

Chapman & Sprague, for plaintiffs.

T. M. Marquette and *George S. Smith*, for defendants Hamburger and Berliner.

MAXWELL, J.

Tootle, Farleigh & Co., commenced an action in the dsitrict court of Cass county against the defendants to foreclose a certain mortgage executed and delivered to the plaintiffs by the defendants, Francis S. White, Diana White, A. Spires, and L. J. Spires, on the east half of lot six in block thirty-five in the city of Plattsmouth, lots

two, three, four, five, six and seven in block one, in Stiles' addition to the city of Plattsmouth, and the south half of the south west quarter of section eight, town twelve north of range nine east in Saunders County. Hamburger & Berliner answered that they had a mortgage on the east half of lot six, in the city of Plattsmouth, which was prior to that of plaintiffs. On the hearing of the cause, the court found the amount due plaintiff to be the sum of $724.58, and the amount due Hamburger & Berliner to be $2,887.50, and rendered adecree of foreclosure and sale, and that the money derived from the sale of the east half of lot six, in block thirty-five, be brought into court to be applied according to the priority of liens.

On the thirtieth day of December, 1873, an order of sale was issued out of the district court of Cass county directed to the sheriff of said county, commanding him to sell the east half of lot six in block thirty-five in Plattsmouth city, and lots two, three, four, five, six and seven in block one in Stiles' addition to Plattsmouth city, the east half of lot six in block thirty-five to be sold separately, and the proceeds to be brought into court to await the further order of the court. The amount of the decree as stated in the order of sale is seven hundred and twenty-four dollars and fifty-eight cents, with interest and costs.

On the back of the order of sale is the following indorsement; "amount of decree $724.58," being the amount found due plaintiffs in the decree.

The east half of lot six, in block thirty-five, in Plattsmouth city was sold to the plaintiffs for the sum of $3351.00, and lots two, three, four, five, six, and seven in block one, in Stiles' addition to Plattsmouth city, were purchased by plaintiffs for the sum of $334.00. On the twentieth day of July, 1874, White and Spires by their attorneys, Sprague and Wilson, filed a motion in the district court of Cass county, to set aside the sale on

various grounds, and claiming "that the amount of said decree due the plaintiff upon which said order of sale was issued, and upon which said sale was made, has been fully paid off and satisfied," and "that all of said property sold for a sum grossly inadequate to its real value." The plaintiffs by their attorneys gave their assent in writing to have the sale set aside. Affidavits were filed as to the value of the property showing the value thereof to be somewhat greater than the amount of the bids.

The court thereupon set the sale aside. On the twenty-first day of July, 1874, Hamburger & Berliner, by their attorneys filed a motion in said court to vacate the order setting aside the sale of the east half of lot six, in block thirty-five, which motion was sustained, and the sale of the east half of lot six, in block thirty-five, was thereupon confirmed, and the sheriff ordered to pay the proceeds of the sale of said lot into court, to abide the further order thereof.

It is not the design of the law to permit each mortgagee in cases of this kind, to have a separate order of sale for the amount found due him in the decree, but an order of sale must be as broad as the decree and must be issued for the entire amount found due therein, to pass a perfect title by a sale.

Proceedings in foreclosure in this state are governed by statute. All persons having an interest in the mortgaged premises not adverse to the mortgagor are necessary parties to a suit to foreclose a mortgage, in order that a perfect title may pass by a sale under a decree. In an action of this kind the court, on the hearing, finds the amount due on the note and mortgage, or in case of two or more mortgages, the amount due on each, and the priority of liens, and renders a decree of foreclosure and sale, the proceeds of the sale to be applied

to the payment of the amounts found due in the order of their priority. The sale must be conducted in all respects like a sale of real estate upon execution. In this case no attempt was made to sell under the entire decree. The amount found due the plaintiffs was $724.58, and the order of sale was issued for that amount; this may have been, and probably was, a mistake of the clerk, but the sheriff could sell no greater interest than the order of sale authorized him to sell; the interest of Hamburger & Berliner under the decree in the mortgaged premises was neither sold nor offered for sale. Had White & Spires tendered the sheriff the amount of $724.58, at any time before the sale, together with interest and costs, it would have been his duty to have received the amount so tendered, and to have returned the order without making a sale.

White & Spires filed a motion to set the sale aside on various grounds, the plaintiffs consented in writing that the sale might be set aside, and asked to be released from the same, and on the twenty-first day of July, 1874, the plaintiffs filed a motion to set the sale aside, which was overruled.

Courts of equity for a long period have extended every reasonable facility for the redemption of mortgaged premises. The mortgagor remains the owner of the legal title to the mortgaged premises, until a sale is made in conformity to law, and under the act of 1875, until the sale is confirmed.

White & Spires still have the right to redeem the premises in question, by paying the amount due on the decree, and no sale having been made under the decree in favor of Hamburger & Berliner, these parties are not in a position to insist that the sale in question shall be confirmed.

The judgment of the district court is therefore reversed

and the sale set aside, the costs of said sale in the court below to be taxed to the plaintiffs.

JUDGMENT ACCORDINGLY.

UPON a motion to dismiss the appeal taken in the above cause, MR. JUSTICE MAXWELL delivered the opinion of the court as follows:

MAXWELL, J.

Hamburger and Berliner, by their attorneys, at the July term, 1875, filed a motion to dismiss the appeal in this action, assigning various grounds therefor, only one of which it is necessary to notice, viz.: "because plaintiffs failed to file a certified transcript of the proceedings had in the district court, in and for Cass county, within six months after the date of the rendition of the judgment, as the law required." The transcript was indorsed, "Filed, January 28, 1875." The plaintiffs' attorney, by leave of court, filed an affidavit stating that he left the transcript with the clerk of the supreme court, on or about the fifteenth day of January, 1875, and before the twenty-first day thereof, and that there was an error in the *date* of filing. The transcript, it appears, was left with the deputy clerk, who was unable to state the date at which it was received. Section one of an act to provide for appeals in actions in equity, provides that "in all actions in equity either party may appeal from the judgment or decree rendered, or final order made by the district court, to the supreme court of the state; the party appealing shall within six months after the date of the rendition of the judgment or decree or the making of the final order procure from the clerk of the district court, and file in the office of the clerk of the supreme court, a certified transcript of the proceedings had in the cause in the district court, containing the pleadings, the judgment or decree ren-

dered, or final order made therein, and all the depositions, testimony and proof offered in evidence on the hearing of the cause, and have the said cause properly docketed in the supreme court; and on failure thereof, the judgment or decree rendered or the final order made in the district court shall stand and be proceeded in as if no appeal had been taken."

The appellant has six months after the date of the rendition of a judgment in the district court, in which to file a transcript in this court. The date of filing indorsed on a transcript, by the clerk, is merely *prima facie* evidence of the time at which it was received by him. If a mistake has been made in the date, to the prejudice of either party, it is the duty of the court to correct it, and affidavits will be received for the purpose of determining when the transcript was delivered to the clerk.

As it is clearly shown by the affidavit on file that the transcript was delivered to the clerk within six months after the date of the rendition of the judgment, the motion to dismiss the appeal is overruled.

MOTION OVERRULED.

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

1. **Criminal Law:** DEFENSE: INSANITY. Where in a criminal case, the accused relies upon insanity as a defense, the burden of proof is on the prosecution to show sanity.

2. ——: ——: ——. In sustaining such a defense, where there is testimony to rebut the legal presumption that the accused was sane, unless the jury are satisfied beyond a reasonable doubt that the act complained of was not produced by mental disease, they must acquit.

3. ——: ——: ——. But the degree of mental unsoundness, in order to exempt a person from punishment, must be such as to create an uncontrollable impulse to do the act charged. If it be found insufficient to deprive the accused of ability to distinguish right from wrong, he should be held responsible for the consequences of his acts.

ERROR from Otoe county district court.

IT was a conviction upon an indictment for assault with intent to commit murder. The defense was insanity. Exceptions taken to refusal of instructions to the jury requested on behalf of the prisoner, and to charge of the court. Verdict of guilty, judgment and sentence. Cause brought here by writ of error. The instructions requested were:

First. The burden of proof is on the prosecution to show sanity.

Second. If the jury believe that the accused was insane at the time of the assault, they must acquit.

The first instruction was refused. The second modified and given as follows: "If the jury believed the accused insane at the time of the assault, and that such insanity produced a total deprivation of understanding, they must acquit."

The court further instructed the jury in substance, that to justify a conviction, they must find:

First. That the assault was made with intent to mur-

der Carroll, but that the intent to murder may be inferred from the acts of the accused.

Second. That sanity is presumed, and that insanity is a defense to be proved by the accused, distinctly and clearly, so as to satisfy the jury that the deprivation of understanding was total, fixed, and permanent, or if adventitious, that during the frenzy there was a total deprivation of understanding, so as to deprive the accused of the use of reason as applied to the act, controlling his will, taking away freedom of action, and rendering him incapable of distinguishing right from wrong at the time of the offense.

Peckham & Watson, for plaintiff in error, cited *Ogletree v. The State*, 28 *Ala.*, 693. *State v. Bartlett*, 43 *New Hamp.*, 224. *Polk v. The State*, 19 *Ind.*, 170. *Hopps v. The State*, 31 *Ill.*, 385. *Stevens v. The State*, 31 *Ind.*, 485. *Loeffner v. The State*, 10 *Ohio State*, 598. *Chase v. The People*, 40 *Ill.*, 352. *Maher v. People*, 10 *Mich.*, 212.

J. R. Webster, Attorney General, for the People, cited *Graham v. Com.*, 16 *B. Mon.*, 587. *State v. Spencer*, 1 *Zab.*, 196. *Com. v. Rogers*, 7 *Met.*, 500. *People v. Myers*, 20 *Cal.*, 518. *Hilliard on New Trials, sections* 55, 711.

LAKE, CH. J.

There are but two errors assigned in this record. The first is the refusal of the court to give certain instructions to the jury as to the defense of insanity, which had been interposed, and of which there was some evidence. The first instruction requested and refused was, that "the burden of proof is on the prosecution to show sanity."

We find the authorities on this subject very conflicting,

but the question being an open one in this state, we feel at liberty to adopt that rule which to our mind seems, not only to be founded in reason, but, to conform to those humane principles which underlie our system of criminal laws.

It is a familiar rule of the common law, that to constitute a crime, "there must, in almost all cases, be, first, a vicious will, and secondly, an unlawful act consequent upon such vicious will." *Broom & Hadleys Coms., Am. Ed.*, 339. And where an individual lacks the mental capacity to distinguish right from wrong, in reference to the particular act complained of, the law will not hold him responsible. *Flanagan v. The People*, 52 *N. Y.*, 467. *XI Am. Rep.*, 731. *State v. Lawrence*, 57 *Mo.*, 574. *Com. v. Heath*, 11 *Gray*, 303. This mental incapacity may result from various causes, such as non-age, lunacy, or idiocy, and whenever interposed as a defense, the inquiry is necessarily reduced to the single question of the ability of the accused to distinguish between right and wrong, at the time of committing the act complained of. *Freeman v. The People*, 4 *Denio*, 28. But even where insanity is shown to exist, and whether it be general or partial, the rule seems to be substantially as charged by the court below, that if there remain a degree of reason, sufficient to discern the difference between moral good and evil, at the time the offense was committed, then the accused is responsible for his acts. *Hopps v. The People*, 31 *Ill.*, 385.

We now come to the vital question in this case—the point of conflict in the authorities, the one wherein we cannot approve of the rule laid down in the court below, which was that, "the burden of proving the defense of insanity lies upon the accused, * * * * and that it must be proved distinctly and clearly that the accused was incapable of distinguishing right from wrong," etc. This, to be sure, is the rule, substantially, as established

in England, in *M'Naughten's case*, 10 *Cl. & F.*, 200, and which has been followed by many of the courts in this country. By this rule the burden of this defense is shifted from the prosecution to the defendant, which we think ought never to be done.

If the minds of the jury be left in reasonable doubt as to whether, or not, the act charged as criminal, was the product of mental disease, we perceive no good reason why the accused should be deprived of the benefit of that doubt. It being conceded that an act produced by insanity cannot be criminal, it must necessarily follow that whatever uncertainty and doubt there may be as to the sanity of a defendant, must exist also as to his guilt. "Indeed, to make a complete crime cognizable by human laws, there must be both a *will* and an *act*." *B. & H. Com., Am. ed.*, 339. We hold the true rule to be that whenever there is testimony tending to rebut the legal presumption of sanity, the jury should be instructed, substantially, that unless they are satisfied, beyond a reasonable doubt, that the act complained of was not produced by mental disease, the accused should be acquitted on the ground of insanity. *State v. Jones*, 9 *Am. Reps.*, 242. *Chase v. The People*, 40 *Ill.*, 352. *Peck v. The State*, 19 *Ind.*, 170. *People v. Garhutt*, 17 *Mich.*, 23.

We are of opinion, therefore, that this *first* instruction offered on behalf of the defendant should have been given; and that in its rejection, as well as in giving that portion of the charge above quoted, there was manifest error which requires a reversal of the judgment.

As to the second instruction, there was no error in refusing to give it as tendered, nor in giving it as modified by the court. As before stated the degree of mental unsoundness, in order to exempt a person from punishment, must be such as to create an uncontrollable impulse to do the act charged. But if it be found

to be insufficient to deprive the accused of the ability to distinguish right from wrong, he should be held responsible for the consequences of his acts.

The judgment of the court below is reversed, and a new trial awarded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL., A. N. FERGUSON v. JOEL SHROPSHIRE.

1. **Constitutional Law**: DUTIES OF JUSTICES OF THE PEACE. A justice of the peace must hold his office in the precinct for which he is elected. The act of 1875 (*Laws, p.* 58), authorizing justices in cities and towns "to hold their offices in other precincts," etc., is unconstitutional.
2. **Mandamus** will lie against a justice of the peace to compel him to hold his office in the precinct for which he was elected, and any citizen thereof may maintain the action.

ORIGINAL application for mandamus.

A. N. Ferguson, the relator, *pro se.*

C. A. Baldwin and *Joel S. Shropshire, contra.*

GANTT, J.

This is an application for a mandamus to require the defendant to remove his office as justice of the peace to, and exercise the functions thereof in, the sixth ward or precinct of the city of Omaha, a municipal corporation organized and incorporated under the legislative act relating to cities of the first class. There are six wards or precincts, established within the limits of the corporate boundaries. The relator is a resident of the sixth precinct; he is an attorney at law, and is engaged in the practice of his profession in said city. At the general election of the year 1875, the defendant was elected to

the office of justice of the peace in and for said sixth precinct for the term of two years; he duly qualified, and entered upon the discharge of his official duties, but it is said that notwithstanding it is his duty to hold his office in said sixth ward or precinct, yet, disregarding his duty in this regard and contrary to the law of this state, at or about the time of his election, he removed his office into the fourth precinct of said city, and has ever since and still holds the same, and exercises all the functions thereof, in said fourth precinct of said city.

The question presented for consideration is, can a justice of the peace hold his office and exercise the functions thereof outside of the precinct in and for which he was elected and qualified? It is not a question as to the jurisdiction of a justice of the peace, but one in regard to the *situs* of his office, or his duty in respect to the place where he shall hold his office and exercise its functions. Under the general election law of February 27, 1873, and sections 904 and 905 of the civil code, it seems clear that justices of the peace are precinct officers, and must hold their offices in the precincts for which they are elected. But it is contended that under the act of February 25, 1875, the defendant may lawfully hold his court in any part of the city, without regard to the precinct in which he resides. This act provides that "in all cities and towns having within their corporate limits two or more precincts, or any portion thereof, it shall be lawful for any justice of the peace to hold his court in any part of said city or town, without regard to the precinct in which he resides." This act is special legislation; it applies to only a few of a certain class of officers. Is such special legislation repugnant to the constitution? *Sec.* 19, *Art. VI.* of the constitution, provides that "all laws relating to courts shall be *general and of uniform operation;*" and by *Sec.* 5, *Art. III.*, the legislature are inhibited from passing "local or special laws," in a num-

ber of cases enumerated, among which is that of "Regulating the jurisdiction and *duties* of justices of the peace, police magistrates, and constables." It is the duty of a justice of the peace to have a place in which to exercise the functions of his office, known to the public.

Now, the act of February 25, is special legislation in regard to the *duty* of justices of the peace, in applying only to those in cities and towns, and, again, it is not *general* and *uniform in its operation*, and therefore, is clearly inconsistent with both these provisions of the constitution; and, hence, upon the adoption of the constitution, this special act ceased to have any force or effect.

Again, under Section 18, Art. VI, "Justices of the peace * * shall be *elected in* and *for* such district," as may be provided by law; and by Section 20 of the same article, "all officers provided for in this article shall hold their offices until their successors shall be qualified, and shall respectively reside in the district, county or precinct for which they shall be elected or appointed." There can be no doubt as to the construction of these provisions, when viewed in connection with those cited above. It was clearly the intention of the framers of the constitution, that justices of the peace should hold, and exercise the functions of their offices, in the precinct in and for which they are elected.

It is, however, objected that the relator has not shown any such special interest in himself which entitles him to maintain the action. The relator asks not the enforcement of a private, but a public duty—that the defendant shall discharge the duties of his office in the precinct for which he was elected, and the relator has a general interest in this matter. *High on Extraordinary Remedies*, § 341, lays down the rule as follows: "Where the question is one of public right, and the object of the mandamus is

to procure the enforcement of a public *duty*, the people are regarded as the real party, and the relator, at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such interested in the execution of the laws." *Hall v. The People, ex rel.*, 57 *Ill.*, 313. *State, ex rel., v. Judge*, 7 *Iowa*, 202. *Hamilton v. State*, 3 *Ind.*, 458. *The People v. Halsey*, 37 *N. Y.*, 348. The peremptory mandamus is allowed.

WRIT AWARDED.

JOHN A. AND MARY SINGLETON, PLAINTIFFS IN ERROR, V. EUGENE BOYLE AND JOHN LEEDOM, DEFENDANTS IN ERROR.

1. **Practice:** MOTION FOR A NEW TRIAL. The rule laid down in former decisions, that a motion for a new trial must be made in the court below, in order to entitle a party to a review of the case by petition in error—adhered to.
2. **Judgment:** PRESUMPTIONS. The findings and judgments of a court of record will always be presumed to rest upon sufficient evidence, unless the contrary be clearly shown by the record.
3. **Practice:** REMOVAL OF CAUSES TO UNITED STATES COURT. Upon suggestion of diminution of record, certificates of the clerk of the United states circuit court were produced to show that before judgment was rendered, the case had been removed to that court. *Held*, that the question of removal could only be reviewed upon a bill of exceptions showing the course taken to obtain it, and the action of the district court thereon.

ERROR to the district court of Richardson county.

Isham Reavis, for plaintiffs in error.

Mason & Wheedon, for defendants in error.

LAKE, CH. J.

THERE was no foundation laid in the court below, for a review of the judgment by petition in error. There was

no motion for a new trial, which this court has repeatedly held is requisite, in civil actions to obtain a review here of the proceedings on the trial in the district court. *The Midland Pacific R. R. Co., v. McCartney*, 1 *Neb.* 404. *Mills v. Miller*, 2 *Neb.*, 317. *Cropsey v. Wiggenhorn*, 3 *Neb.*, 108.

It is agreed, by one of the stipulations on file, that service by publication was duly made upon the plaintiffs in error in the court below. But this stipulation was hardly necessary. The record of the judgment shows "that all of the defendants have been notified of the pendency of this action as required by law." This finding of the district court is conclusive of the fact so found, until the contrary is clearly established; and to obtain a review of such finding, all the evidence upon which it was based must have been preserved and brought here by bill of exceptions. The findings and judgment of a court of record will always be presumed to rest upon sufficient evidence, unless the contrary be clearly shown from the record. Error is never to be presumed. *Little Miami Railroad v. Collet*, 6 *O. S.*, 182.

On suggestion of diminution of record, several matters are brought before us which can have no bearing whatever upon the case. Several certificates from the clerk of the circuit court of the United States for the district of Nebraska are produced to show that before the judgment was rendered the case had been removed to that court, and that the district court was thereby ousted of its jurisdiction over it. But these certificates form no part of the record, and we cannot consider them. If it were desired to bring the question of removal before this court, the steps taken to obtain it, and the action of the district court thereon, should have been preserved by a proper bill of exceptions. The court below having had jurisdiction, both of the subject matter, and of the parties,

and there being nothing in the record to overcome the presumption of its entire validity, it must be affirmed.

JUDGMENT AFFIRMED.

S. C. ABBOTT, PLAINTIFF IN ERROR, V. OMAHA SMELTING AND REFINING COMPANY, DEFENDANT IN ERROR.

1. **Corporations.** Where one of an association of persons, charged as partners, seeks relief from liability on the ground that such association is a corporation, legally organized, and doing a corporate business, the burden of proof rests on him to show the existence of such corporation. Failing to establish it, he cannot avoid liability on the ground that he does not appear as a subscriber to the capital stock of such association. And the question in such a case is not so much whether such person has held himself out as a partner, but whether he was a *member* of the company, assuming to act as a corporation—holding himself out to the public, using his name, and engaging in its transactions as such.
2. ———. To establish the existence of a corporation *de facto*, a charter or some law under which the assumed powers are claimed to be conferred, and user of the franchise thereby obtained, must be shown.
3. ———: HOW INCORPORATED. In this state, the filing of articles of incorporation, with the county clerk, is a condition precedent to the existence of any corporate franchise. The law and the articles so filed, taken together, are considered in the nature of a grant from the state, and constitute the charter of the company.

THIS was a petition in error to reverse a judgment rendered against S. C. Abbott for the sum of $2792.18, in the district court of Douglas county. He was sued there, with several others as co-partners, under the firm name of The Register Smelting and Refining Company, and on the trial asked the court to instruct the jury as follows:

1. Unless the jury believe from the evidence that Abbott held himself out to the public or plaintiff as a partner in the alleged company, or that he was entitled to receive a part of the profits, and bear a part of the losses, if any, they must find for the defendant.

2. That it is not sufficient of itself to charge Abbott as a partner, to show that his name was used as president of the alleged company, unless it further appears that he was entitled to receive a part of the profits and share the losses.

3. The jury are instructed to find for Abbott, upon the issues joined in the pleadings.

These instructions were refused by the court, and evidence offered by Abbott in defense of the claim set up against him, as one of said partners, excluded. Further facts appear in the opinion.

E. Wakeley and *Clinton Briggs*, for plaintiff in error.

The plaintiff, in the court below, bases his action upon the assumption that the Register Smelting Company, was a partnership, and that Abbott was one of the partners. If he was in no sense a partner in the concern, then this judgment must be reversed.

It would seem that the two first instructions asked by Abbott, and refused by the court, correctly declared the law on this subject. 1 *Pars. Con.*, 174. *Benedict v. Davis*, 2 *McLean*, 347. *Cottrill v. Vanduzen*, 22 *Vermont*, 511. But the rulings of the court throughout were based upon the theory that because the articles of incorporation were not recorded, the Register Smelting Company was *not* a corporation, and *was* a partnership; and that if Abbott was, or held himself out as, president or a member of the company, he was one of the partners. Is it true that because the articles were not recorded the concern was not a corporation? The statute says that the articles shall be recorded before the corporation shall commence any business, "except its own organization;" and that it "may commence business" as soon as the articles are filed. It does not, however, say that it shall not be a corporation until this is done, or, if it is not done. It may be well said that it cannot *rightfully do*

business as a corporation without first recording its articles. But the statute clearly implies that it may have a corporate existence previous to the recording. It may effect "its own organization." What is it that organizes? Is it a corporation or a partnership? Does it organize as a partnership, and become a corporation *eo instanti* that its articles are recorded? Is this the case of a common law grub becoming a statutory butterfly by the transforming agency of a simple record?

George E. Pritchett, for defendant in error, contending in favor of the rulings below, cited *The Welland Canal v. Hathaway*, 8 *Wend.*, 480. *The National Bank v. Landon* 45 *New York*, 411. *Thomas v. Green*, 30 *Md.*, 1. *Burns v. Rowland*, 40 *Barb.*, 368. *Story on Part.*, *Secs.* 65, 77. *Pars. Cont.*, 171. *Wells v. Gates*, 18 *Barb.*, 554. *Cross v. Jackson*, 5 *Hill*, 478.

GANTT, J.

The defendant in error, The Omaha Smelting and Refining Company, sued the plaintiff in error and others, as co-partners, doing business under the name of The Register Smelting and Refining Company, to recover the balance of an account, claimed to be due and owing to it from the plaintiff and others upon business transactions between them. The plaintiff and one Josslyn were the only parties served with process. The plaintiff in error answered the petition, and denied the co-partnership or that he ever became indebted to the defendant in error in any sum whatever; but alleged that by virtue of articles of incorporation entered into by the plaintiff and others, they did, under the general laws of this state, become a corporation under the name of The Register Smelting and Refining Company, elected officers, and as such corporation transacted business, and that the defendant in error dealt with them as such corporation—each

company acting in a corporate capacity in the transaction of the business between them.

The proper reply was filed to this answer.

The main ground of defense to the action is, that The Register Smelting and Refining Company was a corporation, doing business as such, and was so recognized by the defendant, and therefore the action cannot be maintained against the plaintiff in error, and others, as co-partners. It is, however, admitted that the company did not file and have recorded in the office of the county clerk, articles of incorporation. But it is insisted on the part of plaintiff in error that the organization of the company, in all other respects, was in conformity with the requirements of the law; that it transacted its business as such corporate body, and therefore it became and was a corporation *de facto*, if not *de jure*. And the plaintiff now complains, first, that the court below erred in excluding from the jury, evidence tending to show that the defendant in error dealt with and recognized The Register Smelting and Refining Company as a corporation, and gave credit to it as such; and, second, that the court erred in excluding from the jury evidence tending to show that the plaintiff in error was not a stockholder in the company. These two assignments may be considered together, for if the court erred in excluding the evidence offered in the first assignment, then the evidence offered in the second was improperly excluded, and the converse of the propositions is equally true.

In the discussion of these questions it must be borne in mind that it is the plaintiff in error, who asserts that the company was a corporation, and was doing business as such corporate body; and, therefore, the burden of proof rests on him to show that the company was a corporation, either *de jure* or *de facto;* but as above stated, it was admitted on the argument of the case that the company was not a corporation *de jure*. Then, was the

company a corporation *de facto?* I think, in order to establish such a corporation, it is necessary to show user of a corporate franchise by an association of persons, though the organization may be so defective as to render the franchise wholly invalid in a proceeding against it by the state; or in other words, it is necessary to show the existence of a charter, or some law under which the assumed powers are claimed to be conferred, and the user of the franchise claimed under such charter or law. In *Buffalo R. R. Co. v. Cary*, 26 *N. Y.*, 77, it is said that, "if the *papers filed* by which the corporation is sought to be created, are colorable, but so defective that, in a proceeding on the part of the state against it, it would for that reason be dissolved, yet, by acts of user under such organization, it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution, collaterally, by any person." This doctrine seems to be founded upon the principle, that the existence of such corporation, acting under color of a franchise, cannot be questioned in a suit where it would only arise collaterally, because the state, the party chiefly concerned, could not be heard by counsel.

In the case referred to, the company had its "papers filed," and acted under color of a franchise. A franchise as used in relation to corporations, means certain privileges conferred by government on individuals, which do not belong to the citizens of the country of common right. *Angel & Ames, on Corp.*, § 4. *Bank of Augusta v. Georgia*, 13 *Peters*, 595.

Hence, if the acts and proceedings of a company or association consist only of such acts and proceedings as might be performed without an incorporating act, or corporate grant or franchise, a corporation cannot be inferred from such acts. *Greene v. Dennis*, 6 *Conn.*, 302.

Now, had the Register Smelting and Refining Company secured any franchise whatever, under color of

which it could act as a corporation *de facto?* I think the evidence offered does not show any such corporate existence. The right, however, is claimed under the general incorporation law of the state. Section 123 of the statute provides, that "any number of persons may be associated *and incorporated* for the transaction of any lawful business, including the construction of canals, railways, bridges, and other works of internal improvements." Two things are included in this provision; the persons may associate, unite together and then they may be incorporated, and become a body corporate for the transaction of any lawful business. And, hence, it seems to me that the sense in which the word "organization" is used in section 126, means simply the process of forming and arranging into suitable disposition the parts which are to act together in, and in defining the objects of the compound body, and that this process, even when completed in all its parts, does not confer the franchise, either valid or defective, but on the contrary, it is only the act of the individuals, and therefore something else must be done to secure the franchise. Therefore, section 126, provides that the "corporation, previous to the commencement of *any* business, except its own organization, * * * must adopt articles of incorporation and have them recorded in the office of the county clerk of the county, or counties in which the business is to be transacted;" but section 132, permits the "commencement of business as soon as the articles of incorporation are filed by the county clerks of the counties, as required by this subdivision." The purpose of the statute is to confer the right of franchise, or the powers of a corporation without charter, by direct legislative enactment, and to attain this object, it provides that the company must adopt articles of association and must file and have them recorded in the office of the county clerk. These requirements are expressed in

affirmative language, and in *District Township v. The City of Dubuque*, 7 *Iowa*, 276, it is said, that "affirmative expressions that introduce a new rule, imply a negative of all that is not within the purview." Now, if the articles of incorporation are not filed in the office of the county clerk, the parties acting in the matter do not bring themselves within the purview of the statute, because the filing of the articles as required, is a condition precedent to the existence of the corporate franchise, or corporate powers in any respect whatever; this prerequisite, I think, must be complied with. The general law under which the association is formed and the articles of incorporation adopted and filed as required, taken together, are in law considered in the nature of a grant from the state and as the charter of the company. If the mere act of organization by the individuals, conferred the corporate franchise, why should the statute require the articles to be filed and recorded in the office of the county clerk as a pre-requisite to corporate existence? *Eastern Plank Road v. Vaughan*, 14 *New York*, 546. *Welland Canal v. Hathaway*, 8 *Wend.*, 480. *Central Turn Corp. v. Valentine*, 10 *Pick.*, 142. *Schenectady v. Thatcher*, 11 *New York*, 102. And if the filing of the articles is not a condition precedent, why is it provided in section 139, that a failure to comply, substantially, with the provisions in relation to giving notice and the requisites of organization, should make the property of stockholders liable for the debts of the corporation, and not make them liable on failure to file the articles? Perhaps the only satisfactory answer to the question is that, according to the legislative intent, no corporate franchise or power exists until the articles are filed as required.

In *Mokelumne Co. v. Woodbury*, 14 *Cal.*, 427, where the statute provided for the filing of a certificate in the office of the county clerk, and a duplicate thereof in the

office of the secretary of state, it was held that upon filing the certificate in the clerk's office, the right of corporate privileges vested in the association, and upon failure to file a duplicate in the office of the secretary of state, the assumption of corporate powers amounts to a usurpation of the sovereign rights of the state, the remedy for which is a direct proceeding on the part of the state; but the court say, "the general rule is that the existence of a corporation may be proved by producing its charter, and showing acts of *user* under it; but this rule has no application to a corporation founded under the provisions of the general statute, requiring certain acts to be performed before the corporation can be considered *in esse* or its transactions possess any validity. The existence of a corporation thus formed, must be proved by showing a substantial compliance with the requirements of the statute. But there is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made pre-requisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the incorporation is responsible only to the government in a direct proceeding to forfeit the charter. The right of the plaintiff to be considered a corporation, and exercise corporate powers, depends upon the fact of the performance of the particular acts named in the statute as essential to its corporate existence." *Field v. Cook*, 16 *La. Ann.*, 153. And it is said that persons who have contracted in writing with such an association, without any color of franchise, are not estopped from denying its corporate capacity. *Welland*

Canal Co. v. Hathaway, *supra*. *Williams v. Bank of Mich.*, 7 *Wend.*, 539; and, again, that the associates of such company assuming corporate powers, are to be treated as partners. *Hill v. Black*, 1 *Beas. Ch.*, (*N. J.*,) 31.

From these considerations, it seems clear to me, that when persons organize as an association for the transaction of business—assuming to be and acting together as a corporation without any color of a corporate franchise, if any one of the members of such organization could escape responsibility on the ground that he does not appear as a subscriber to the stock of the concern, it might open the door to great fraud upon the public. It would enable him to furnish capital for the concern, to receive profits of the same, to act as a member thereof, and to control and direct the business affairs of the company as an officer, or otherwise, and by the use of his name in such way as to secure to the company the confidence and credit of the public, and yet, upon a failure of the enterprise, he would escape personal liability on the ground that he does not appear as a stockholder in the concern and claims to be a creditor of the same. Such a system of business will not bear the test of ethical criticism; it may be fraught with great fraud upon the public, and certainly the law will not sanction it.

Now, if I have given a correct interpretation of the law of the case, then the question of fact to be found by the jury under the proofs, is not so much whether the plaintiff held himself out to the public as a partner in the concern, or whether he was to receive part of the profits or share part of the losses; but whether he was a *member* of the company, assuming to act as a corporation—holding himself out to the public—using his name, and engaging in its business transactions as such member of the concern. The plaintiff having utterly failed to show that the company had any corporate existence,

the evidence offered was properly rejected; and the instructions requested to be given to the jury on the part of the plaintiff and refused by the court, are inconsistent with this exposition of the law, and therefore, although as abstract propositions of law they may be correct, so far as they go, yet for the reasons given, I think they tended to mislead the jury in this case.

The court, however, instructed the jury that in order to justify a recovery against the plaintiff in error, "the burden is upon the plaintiff (now defendant in error) to establish by a preponderance of evidence the elements necessary to make a partnership between Abbott and some or all" of the parties sued; and further, that "if he, Abbott, were a *member* of the concern styled The Register Smelting and Refining Company, with which the plaintiff (now defendant in error) transacted the business, or if he held himself out as such, as president or otherwise, he is liable in this action." The question of fact for determination by the jury seems, therefore, to have been fairly submitted to them by these instructions; and the instruction asked by the defendant in error, and excepted to by plaintiff is, substantially, the same as those given by the court as above stated, and constitutes no sufficient ground for disturbing the judgment.

JUDGMENT AFFIRMED.

ROBERT KITTLE, PLAINTIFF IN ERROR, v. RILEY DELAMATER, DEFENDANT IN ERROR.

Promissory Notes: EVIDENCE: DEFENSE. The defendant employed A., in New York, to print maps containing a lottery scheme, an act which is prohibited by the statutes of that state, and executed a promissory note in payment of the work. *Held*, that A., although having knowledge of the illegal purpose for which the maps were intended, being employed merely as an artisan to *print* the maps, and having nothing to do with their *publication and distribution*, was not *particeps criminis*, and the defendant was liable in a suit by an indorsee of the note.

ERROR to the district court of Dodge county. For any further understanding of the case, beyond the statement of it in the opinion, reference may be had to *Kittle v. DeLamater*, 3 *Neb.*, 325.

Shed & Marlow, for plaintiff in error, relied mainly upon the decision of the court in the same case, as reported in 3 *Neb.*, they contending that the law as there laid down would prevent any recovery on the note, and citing the same cases as before in support of that view.

N. H. Bell and Seth Robinson for defendant in error, contended, that within the meaning of the New York statute, there must be a publication of the lottery or there could be no offense. That to publish is to make public, to put forth or issue to the public. This is the definition given by the lexicographers and the lawyers; and there is no pretense that any such thing was done or agreed to be done by the payees of the paper in question.

LAKE, CH. J.

This is a petition in error from Dodge county. In the court below the case was tried to a jury and a verdict returned in favor of DeLamater for the amount of the promissory note which was the subject of the action. Kittle thereupon moved for a new trial on the sole

ground that the verdict was "against, and contrary to the weight of evidence, and the law of the case." This motion having been overruled and exception duly taken, we are presented with the simple question, whether the evidence submitted to the jury justified them in their verdict? We are met at the outset with this wholesome rule of practice, a rule which courts generally observe, that the verdict of a jury should not be set aside on the ground of its being against the weight of evidence, unless it is clearly so. And more especially ought this rule to be observed by reviewing courts.

The alleged grounds of defense were three in number: *first*, that DeLamater was not the owner of the note; *second*, that the note was given by Kittle to the payees, Asher & Adams of New York, a firm engaged in the business of printing maps; that the consideration for giving said note was an agreement on the part of Asher & Adams to print and publish for Kittle, a large number of maps of the United States, and the state of Nebraska, on each of which maps there was to be printed a lottery scheme, for the distribution by chance of a large quantity of lots and other property in and about the city of Fremont in this state; and *third*, that Asher & Adams, failed to comply with the terms of said contract in several particulars, especially as to the quality of the work, and the time within which the maps were to be delivered, of all which the plaintiff had notice.

As to the *first* point, it was very clearly shown that the note was duly indorsed to the plaintiff, and that at least whatever interest Asher & Adams had therein, he succeeded to by the indorsement. Of this there could have been no dispute.

On the *second* point we think the testimony shows very conclusively, that this lottery scheme originated with Kittle alone, and was the product of his own brain; and that Asher & Adams, as artisans merely, were employed

by him to *print* the maps and scheme, for a price agreed upon, and nothing more. The publication, or distribution of the maps they had nothing whatever to do with. They may have known, and probably did in fact know, what use Kittle intended to put the maps to, and that it was an illegal one, but that is not enough to make them *particeps criminis*, as we held when this question was before us on another occasion. *Kittle v. DeLamater* 3 *Neb.*, 325, and cases there cited on this point.

As to the alleged failure of Asher & Adams, to perform their agreement, there is some little conflict in the testimony, but the clear preponderance is against the plaintiff in error. It is very satisfactorily shown that the work of printing and mounting the maps went forward under the personal direction and supervision of Kittle, who was in New York at the time, until some twenty thousand copies had been printed, and several thousand actually delivered to him, when, for some reason becoming satisfied that his scheme would not prove to be a success financially, he refused to take any more of them, abandoned the enterprise, and returned home.

We fail to discover any reason, either in the facts or the law of the case, why Kittle should not be required to pay for the maps. The testimony was not only sufficent to sustain the verdict, but we do not see how the jury could have found otherwise.

JUDGMENT AFFIRMED.

L. W. COLBY, PLAINTIFF IN ERROR, v. CHARLES W. LYMAN, DEFENDANT IN ERROR.

1. **Practice**: DEMURRER. The demurrer to an answer should state the grounds therefor; but where a defendant proceeds to argument without objection, the demurrer will be regarded as general that the answer constitutes no valid defense.

2. **Promissory Note**: DEFENSE. In an action upon a promissory note, the answer alleged that plaintiff agreed to furnish and deliver to the defendant a certain bill of lumber at an agreed price; that the plaintiff did not furnish the "quality and quantity of lumber" contracted for, whereby defendant sustained damage; and that the note sued on was given "as the balance of the consideration agreed to be paid" on the contract. *Held*, on demurrer, that the defendant having received the lumber, and given the note in settlement of the balance due therefor, was estopped from claiming damages, no fraud or mistake being alleged.

ERROR to the district court of Gage county.

L. W. Colby, plaintiff in error (defendant below), *pro se.*

N. K. Griggs, for defendant in error.

LAKE, CH. J.

The action in the court below was on a promissory note, executed by the defendant to the plaintiff on the the thirtieth day of December, 1873. The petition was in the usual form.

The defendant answered, in substance, that on or about the first day of November, 1873, the plaintiff entered into a contract to furnish, and deliver to him, a certain bill of lumber to be used in the erection of a dwelling-house, for the agreed price of $300.00, which was to be paid on receipt of the lumber; that the plaintiff agreed to furnish "*best siding*," but actually delivered "*second siding*," whereby he averred he was damaged to the extent of $200.00, for which he prayed judgment against the plaintiff; and that the note in question was given "as the

balance of the consideration agreed to be paid" for said lumber.

To this answer the plaintiff interposed a demurrer, but assigned no reason therefor. The demurrer was sustained, and the ruling of the court thereon is alone assigned as error. In the argument at the bar, it was contended by the plaintiff in error that this demurrer should have been disregarded by the court, because no ground therefor was given. *Section* 109 of the *Civil Code* provides that "the plaintiff may demur to one or more of the defenses set up in the answer, *stating in his demurrer the grounds thereof.*" I think it was intended by this section that the pleader should set forth distinctly in his demurrer the grounds of his objection to the answer; and if he fail to do so, a compliance with this provision should be required on a motion being filed for that purpose. It seems to be the right of a defendant to be informed of the objection taken to his answer so that he may be prepared to meet it. But where, as was the case here, the defendant proceeds to the hearing of such a demurrer without objection, I see no good reason why it may not be regarded as analogous to the case of a like demurrer to a petition, and as a sufficient objection that the answer constitutes no valid defense to the plaintiff's cause of action. This was the course that seems to have been pursued in the court below, and I consider it correct practice. But, does this answer, fairly construed, make any defense whatever to the petition? This question must be answered in the negative, for the following reasons: It is alleged that the plaintiff did not furnish "the quality and quantity of lumber" that his contract called for. In addition to this, all that is averred is, that he delivered "second siding," while the contract called for "best siding." But as to whether there was any substantial difference, in the value of these two qualities, and if so, how much, the answer is silent. If there were any difference, prejudicial to the

defendant, it should have been distinctly set forth. And as to the "*quantity*" nothing further is alleged, and we are left by the pleader in darkness as to the extent of the deficiency. But another and still more formidable objection to this answer is found in the fact which it discloses, that the lumber was all received by the defendant without objection, and was used, and mostly paid for, before this note was given *for the balance due on the account.* In the absence of any fraud, or mistake, neither of which is alleged, this should be regarded as a waiver by the defendant of any merely technical failure on the part of the plaintiff to perform his part of the contract; and as conclusive evidence that the contract was in fact performed to the defendant's entire satisfaction.

From a critical examination of this answer, I am satisfied that it should be regarded as entirely frivolous.

There is no error apparent in the record, and the judgment of the court must be affirmed.

JUDGMENT AFFIRMED.

LUTHER HOADLEY, APPELLEE, v. EBENEZER B. STEPHENS AND OTHERS, APPELLANTS.

1. **Deeds:** EXECUTION. Where a deed is executed and acknowledged in another state before a commissioner of deeds of this state, a notary public, or other officer using an official seal, the law presumes a compliance with the law of the place of execution, and no further authentication is necessary. But in all other cases there must be attached thereto a certificate of the clerk of a court of record or other certifying officer, under his official seal, showing that the person taking such acknowledgment was the officer therein represented; that he is well acquainted with his handwriting; that he believes his signature to be genuine; and that such deed is executed according to the laws of such state.

2. ———: ———. A deed executed and acknowledged by a justice of the peace, in Virginia, offered in evidence to prove that the grantors had parted with the legal title to certain real estate therein mentioned; *Held,*

properly excluded, there being no evidence that it was executed and acknowledged according to the laws of Virginia.

1. ———. At common law lands could be conveyed only by conforming to the law of the place where the lands were situated, but by statute, lands in this state may be conveyed by conforming to the law of the place where the deed is executed and acknowledged.

APPEAL from the district court of Nemaha county.

THE plaintiff alleged that the defendant, E. B. Stephens, executed and delivered to him two promissory notes and two mortgages upon real estate, to secure the payment thereof, and asked for a decree of foreclosure, and that the mortgaged premises should be ordered sold to pay said notes.

The defendant, Dickerson, filed a cross petition, alleging that E. B. Stephens executed and delivered to one Hetzel another mortgage on the same land, and that Hetzel assigned the same to him, and he also asked for a decree of foreclosure.

The defendant, E. B. Stephens, answered separately, admitting the execution of the notes and mortgages, but says that he executed the same as trustee for the appellants.

The defendants, Mary J. Jobson, Sarah A. Rhodes, Maria E. Kite, and Robert H. Stephens, answered jointly, but apart from the other defendants, alleging that they claim title to the land adversely to a certain deed of trust under and by virtue of which the mortgages were executed, and that their title accrued prior to the making of the mortgages. They say that long previous to the making of the mortgages, to-wit, in 1860, one William A. Jobson, being the owner of the land, executed and delivered to the said E. B. Stephens, as trustee, a certain deed of trust, a copy of which is given in the answer; that they are the beneficiaries named therein; that the title to the land became vested in them by said deed; that the said trustee had no authority to mortgage the land,

and that consequently the said mortgages are null and void, as against said beneficiaries.

To this answer, plaintiff and Dickerson replied jointly. They did not deny the allegation that Jobson was the owner of the land, and that he, together with his wife, executed and delivered to E. B. Stephens, as trustee, the trust deed of 1860; but they did deny that the defendants had any title or interest in the land by virtue of said trust deed. They then alleged that the mortgages were made by said Stephens, as trustee, under and by virtue of a power contained in a deed of trust made by Jobson and wife subsequent to the making of the one set up in the answer, to-wit, in 1868. The first trust deed conferred no power on the trustee to mortgage the land. The second contained such authority. All the parties to the action claimed under Jobson and wife, and the question was, which of the said deeds of trust should prevail. The district court decided in favor of plaintiff and Dickerson, and rendered a decree for the sale of the mortgaged premises, and of the foreclosure of any right which the appellants may have had as against the mortgagees.

The defendants, Mary J. Jobson, Sarah A. Rhodes, Maria E. Kite, and Robert H. Stephens, the beneficiaries under the deed of trust, appeal.

E. W. Thomas, for the appellants, contended, *inter alia*, that it was not material whether the first deed was witnessed and acknowledged or not. If it were not witnessed or acknowledged at all, such fact would not affect its validity as a conveyance, but would go only to the effect of the record. A deed not witnessed or acknowledged is good between the parties, and will also prevail against deeds subsequently made to persons who had knowledge of the existence of the first. *Caldwell v. Head*, 17 *Mo.*, 561. *Stevens v. Hampton*, 46 *Mo.*, 404. *Dussaume v. Burnett*, 5 *Ia.*, 104. *Hastings v. Vaughn*,

5 *Cal.*, 315. *Strong v. Smith*, 3 *M'Lean*, 362. *Gibbs v. Swift*, 12 *Cush.*, 393. *Gray v. Ulrich*, 8 *Kan.*, 112.

J. W. Newman, for appellee, in contending that the first trust deed was not properly signed, witnessed, and acknowledged, and was therefore properly excluded, cited *Morton v. Smith*, 2 *Dillon*, 316. *Courcier v. Graham*, 1 *Ohio*, 329. *Clark v. Graham*, 6 *Wheat.*, 577. *Pidge v. Tyler*, 4 *Mass.*, 541. *Meighen v. Strong*, 6 *Minn.*, 177.

MAXWELL, J.

The defendants, Mary J. Jobson, Sarah A. Rhodes, Maria E. Kite and Robert B. Stephens, answered the petitions of the plaintiff and Dickerson, alleging that on the thirteenth day of December, 1868, William A. Jobson and wife, the then owners of the lands in controversy, executed and delivered to Ebenezer B. Stephens as trustee for these defendants, a deed for the lands in question, a copy of which is set out in the answer.

The acknowledgment of William A. Jobson was taken before Geo. E. Sadler, a justice of the peace in the city of Richmond, Virginia, and attached to the deed is a certificate of the clerk of the court of Hustings of said city, stating that the party taking the acknowledgment was at the date thereof, an acting justice of the peace, and that his signature is genuine; but it nowhere appears that the deed in question was executed and acknowledged according to the laws of the state of Virginia.

Sec. 4, chapter 61, General Statutes, provides, in case of deeds: "If acknowledged or proved in any other state, territory or district of the United States, it must be done according to the laws of such state, territory or district, and must be acknowledged or proved before any officer authorized to do so by the laws of such state, territory or district, or before a commissioner appointed by the gov-

ernor of this state for that purpose." Sec. 5, provides, that "if such acknowledgment or proof is taken before a commissioner appointed by the governor of this state, for that purpose, notary public or other officer using an official seal, the instrument thus acknowledged or proved shall be entitled to be recorded without further authentication."

It is not alleged in the answer of the defendants, that the deed in question was executed and acknowledged according to the laws of the state of Virginia. At common law the title to land could be acquired only by conforming to all the requirements of the laws of the place where the real estate was situated. *Coppin v. Coppin*, 2 *P. Wm's*, 291. *United States v. Crosbey*, 7 *Cranch*, 115. *Cutler v. Davenport*, 1 *Pick.*, 81. *Wills v. Cowper*, 2 *Ohio*, 123. But our statute has changed the rule of the common law, so far as deeds executed out of the state are concerned, and requires a compliance merely with the forms prescribed by the law of the place of execution. And when a deed is executed and acknowleged before a commissioner appointed by the governor of this state, for that purpose, a notary public or other officer using an official seal, the law presumes a compliance with the law of the place of execution, and no further authentication is necessary; but in all other cases our statute expressly requires that "the deed or other instrument shall have attached thereto, a certificate of the clerk of a court of record, or other proper certifying officer of the county, district or state, within which the acknowledgment or proof was taken, under the seal of his office, showing that the person whose name is subscribed to the certificate of acknowledgment was at the date thereof such officer as he is therein represented to be; that he is well acquainted with the hand-writing of such officer; that he believes the signature of such officer to be genuine, and that the deed or other instrument is executed

and acknowledged according to the laws of such state, district or territory."

A deed defective in form by reason of a failure to comply with the requirements of the statute in force at the place of execution, may convey the equitable title, and be sufficient to authorize a court of equity to grant appropriate relief, but such a deed will not pass the legal title to the grantee. *Courcier v. Graham*, 1 *Ohio*, 350. *Patterson v. Pease*, 5 *Ohio*, 190. *Clark v. Graham*, 6 *Wheat.*, 577. *Crane v. Reeder*, 21 *Mich.*, 24.

The deed of December 13, 1860, offered in evidence by the defendants, was executed and acknowledged before a justice of the peace of the city of Richmond, Va., and no testimony was offered to show that it had been executed and acknowledged according to the laws of the state of Virginia. It was therefore properly excluded.

This is decisive of the case. The second deed contains full power and authority to authorize the trustee to mortgage the premises in question. The defendants are not in the condition of purchasers for a valuable consideration. So far as appears from the record the *cestui que* trusts have never had either actual or constructive possession of these premises, except so far as the possession of the trustee under the deed of April 15, 1868, may inure to their benefit; they derive their right to these lands from a purely voluntary conveyance, and the transaction was not complete until the delivery to the trustee of a deed conveying the legal title.

It is apparent from the record, that at least a portion of the money obtained on these mortgages was used in the payment of taxes due on the land, if not in making improvements thereon, but whether any portion of the money was so used or not, the trustee had full power, under the deed of April 15, 1868, to execute the mortgages in question. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

B. D. HOLBROOK, PLAINTIFF IN ERROR, v. DAVID MOORE, DEFENDANT IN ERROR.

State Boundaries. A change in the main channel of the Missouri river, does not alter the boundary line between Iowa and Nebraska, as established by Congress. It remains as before, in the old abandoned river bed.

ERROR to the district court for Burt county.

Monk & Selleck, for plaintiff in error, cited *Angell on Water Courses*, 60, 61. 2 *Washburn on Real Prop.*, 444. *Ingraham v. Wilkinson*, 4 *Pick.*, 268. 3 *Kent Com's.*, 428. *Trustees v. Dickinson*, 9 *Cush.*, 544.

Carrigan & Hopewell, for defendant in error.

LAKE, CH. J.

The plaintiff in error brought his action in the court below upon a transcript of a judgment of the district court for Monona county, Iowa.

On the trial of the case to a jury the plaintiff was non-suited on the sole ground that the Iowa court had not acquired jurisdiction of the defendant, the court holding that a certain island where service was made on the defendant, although formerly within the state of Iowa, and a part of Monona county, by a sudden change of the channel of the Missouri river, had become a part of the state of Nebraska, and this ruling of the court presents the only question we are called upon to decide.

It is conceded that up to within a few months before the service of process on the defendant, the main channel of the river was on the west side of the tract of land now constituting the island. It is also conceded that said island was formed by the cutting off of a point of land, and the formation of a new and distinct channel

farther east, through which the main body of the water has since flowed.

By the several acts of the Congress of the United States relating to this subject, the middle of the main channel of the Missouri river was made the boundary between Iowa and Nebraska. This channel up to the time of the change before referred to, having been on the west side of the Island, the question is, did the boundary follow the river to its new channel, or remain in the old abandoned river bed?

The supreme court of the United States, following the rule of the common and the international law in like cases, seem to have settled this question. In the case of *Missouri v. Kentucky*, 11 *Wall.*, 395, in which the boundary line between those two states was in dispute, and involving the right of jurisdiction over Wolf Island, the court having found from the testimony that the main channel of the Mississippi river, which was the true boundary, was on the west side of the island when it was established, held that, notwithstanding the river had subsequently changed its course so as to throw the main channel on the east side thereof, the jurisdiction of the respective states was not at all affected thereby, the boundary line remaining on the west side of the island. That case was strikingly analogous in principle to the one we are now considering, and the question being one of state boundary is peculiarly within the cognizance of the federal courts, whose decisions, therefore, we feel bound to follow. It follows that the island where the service was made upon the defendant was in the state of Iowa, and within the jurisdiction of the district court for Monona county; and for error of the court in non-suiting the plaintiff, the judgment is reversed.

REVERSED AND REMANDED.

ABNER RAY, PLAINTIFF IN ERROR, v. ATCHISON & NEBRASKA R. R. CO., DEFENDANT IN ERROR.

Railroad Companies: LOCATION OF RIGHT OF WAY. A party who is damaged by the location of a railroad across his premises, where the damages awarded have not been paid or deposited with the probate judge, may enjoin the operation of the road, even where the company have appealed from the award of the commissioners to the district court. Following *O. & N. W. R. R. v. Menk, ante, p.* 21.

ERROR from the district court of Richardson county.

IT was a suit to enjoin the operation of defendant's road across plaintiff's premises, unless payment was made of a judgment recovered by him against the Burlington & Southwestern R. R., for damages sustained by the location of that road, it being alleged that the latter road had sold out to the defendant, who completed the construction, etc. A demurrer to the petition was sustained, plaintiff excepted, and brought the cause here by petition in error.

E. W. Thomas and *J. H. Broady*, for plaintiff in error, cited *Bensly v. The Mountain*, 13 *Cal.*, 306. *Horton v. Hoyt*, 11 *Iowa*, 496. *Commissioners v. Durham*, 43 *Ill.*, 86. *Sidener v. Norristown*, 23 *Ind.*, 623. *Powers v. Bears.*, 12 *Wis.*, 213.

S. B. Galey, for defendant in error.

LAKE, CH. J.

We think the facts stated in the petition were sufficient to authorize the injunction as prayed. The law as laid down in the case of the *Omaha and Northwestern Railroad Company v. Menk*, reported in this volume, is decisive of this case. We there held, substantially, that

where the damages awarded for right of way by commissioners appointed in pursuance of the statute, were neither paid nor deposited with the probate judge for the use of the party entitled thereto, the company had no right to operate its road across the land of another against his will, and if it did so the owner of the land had a choice of remedies, viz: he could bring an action for the award, sue for damages occasioned by the trespass, or enjoin the operating of the road across his premises until the award should be paid.

In the case we are now considering, the proceedings to condemn the plaintiff's land for right of way were at the instance, and in the interest, of the Burlington and Southwestern R. R. Co., but no payment, or deposit, either of the amount found by the award or the judgment on the appeal, has ever been made by, or on behalf of, that company. It is clear, therefore, that the Burlington and Southwestern Company never acquired the right to enter upon the plaintiff's land for the purpose of constructing its road against his will. The fact that the company appealed from the award of the commissioners, whose finding in consequence thereof became merged in the judgment of the district court, so far as relates to the remedy by injunction, cannot distinguish this case in principle from the one before referred to. The statute expressly provides that "if said corporation shall, at any time before they enter upon said real estate for the purpose of constructing said road, pay to said probate judge, for the use of said owner, the sum so assessed and returned to him as aforesaid, they shall thereby be authorized to construct and maintain their railroad over and across said premises." And in case an appeal is taken from the assessment of the commissioners, "such appeal shall not delay the prosecution of the work on said railroad, if such corporation *shall first pay or deposit* with said probate judge the amount so

assessed by said freeholders." *Sec.* 92, *C. XI., Gen. Statutes.* Whatever may have been the interests or rights to which the Atchison and Nebraska Railroad Company succeeded, by virtue of the assignment mentioned, it is clear that they cannot be greater than those possessed by the Burlington and Southwestern Company.

JUDGMENT REVERSED.

MAXWELL, J., concurred.

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

Contract: CONSTRUCTION AND EFFECT. The plaintiff owned property, upon which with other property, the father of defendant held judgment liens. They entered into a written agreement whereby the liens were to be discharged, and plaintiff was to purchase in an outstanding title in favor of himself and defendant, as tenants in common. The father of defendant thereupon executed a deed, conveying to plaintiff and defendant "all his estate, right, title, interest, dower, claim or demand whatsoever, of the said * * * as well by reason of any judgments assigned to and held by him, or otherwise, of, in, and to the same, to have and to hold * * * unto the said * * * as tenants in common." Plaintiff bought in the outstanding title, and brought suit to compel his co-tenant to contribute one-half of the amount paid therefor, as well as to recover one-half of the proceeds paid by other parties on account of said judgment liens. *Held*, 1. That under the agreement plaintiff was not bound to contribute anything in the purchase of the outstanding title. 2. That the deed only conveyed the interest of the grantor in the *premises*, and did not transfer or assign any interest in the *judgments*.

ERROR from the district court of Douglas county. The opinion states the facts in the case.

Clinton Briggs and *G. W. Ambrose*, for plaintiff in error.

J. M. Woolworth, for defendant in error.

GANTT, J.

The plaintiff in error, who was plaintiff in the court below, in his petition prays that the defendant "by order and decree of the court be compelled to contribute to him the sum of two thousand and three hundred dollars and interest" thereon, being the one-half of the amount which he alleges he paid to one Merritt for the west thirty-four feet of lot seven in block one hundred and twenty in Omaha city, and also prays for general relief. He alleges that by a compromise contract entered into between him and the defendant, in respect to this property, the defendant agreed to pay him this sum of money. The defendant denies these allegations. From the record it appears that in 1867, the plaintiff purchased this property from Saunders and Burley; that at the time of the purchase, Merritt held a mortgage on the same against Saunders and Burley; that this mortgage was afterwards foreclosed, the property was sold to satisfy the mortgage debt, and Merritt became the purchaser of it at the sale. It also appears that one Lorin Miller, the father of the defendant in error, was the owner of judgments, amounting in the aggregate to about the sum of seven thousand dollars,which he claimed to be liens upon this and other property, and had brought suit against the proper parties to enforce these liens, which suit was pending at the time of this compromise. The plaintiff claimed the property by purchase. In order, therefore, to settle and adjust the differences between them in respect to the property, the parties to this action, did on the fourteenth day of December, 1868, enter into an agreement as follows; "Whereas, Lorin Miller claims liens and interests in the west thirty-four feet of lot seven, in block one hundred and twenty, in Omaha city, and George M. Mills holds the same subject to said liens, it is, in order to finally settle and adjust the differences between them,

agreed that the said premises shall be and the same are hereby discharged from the said liens and claims of said Lorin Miller, heretofore alleged by him; and that a deed, an agreement for which said Mills has made with one Merritt, shall run to said Mills and George L. Miller, and they shall have and hold said premises as tenants in common." On the same day Lorin Miller executed a deed to plaintiff and defendant, whereby he did "grant, sell, remise, release and forever quit claim unto George M. Mills and George L. Miller, the west thirty-four feet of lot number seven, in block number one hundred and twenty, in Omaha city, together with all tenements, hereditaments and appurtenances to the same belonging, and all the estate, right, title, interest, claim or demand whatsoever of the said Lorin Miller, as well by reason of any judgments assigned to and held by him or otherwise, of, in and to the same, or any part thereof. To have and to hold the above described premises with the appurtenances unto the said George M. Mills and George L. Miller as tenants in common, and to their heirs and assigns forever." On the twenty-first day of December, 1868, Merritt and wife executed a quit claim deed to plaintiff and defendant for the same property. This contract and the two deeds include all the written evidence offered by the parties, on the trial of the cause. Some parol proof was also offered in respect to the contract between the parties; but as this parol proof does not establish any subsequent agreement between the parties, in our view of the law, it is deemed unnecessary to examine or endeavor to reconcile the manifest conflict which appears in some of this oral evidence. The contract between the parties was reduced to writing and signed by them, and the deeds, it seems very clear, were executed in accordance with this contract; and if the parol meanings and understandings of witnesses were once allowed to prevail in the interpretation of written

contracts, then, indeed, all distinction between written and parol contracts is at once destroyed. This result would certainly follow the admission of such evidence, in regard to written contracts, and therefore we see the necessity of the rule, which seems to be well founded in reason and policy as well as upon authority, that parol proof cannot be received in evidence to contradict, vary, or modify the legal import of written contracts. This rule should not be questioned or disturbed, and hence, where there is no latent ambiguity to be explained, the agreement alone must speak for itself. *Stevens v. Cooper*, 1 *Johns. Ch.*, 429. *Coffing v. Taylor*, 16 *Ill.*, 40. *Conn. R. R. Co. v. Bailey*, 24 *Verm.*, 465.

Under this rule of law, we must look to the contract alone to ascertain its terms and conditions, in respect to the subject matter of the agreement. And it is said that in the interpretation of agreements, "words must not be forced from their proper signification to one entirely different." We think the words used in this contract are so clear and definite, and their meaning is so well understood in the ordinary use of language, that there is nothing in it to require construction. After reciting the *status* of the parties in respect to the property, it says, that in order to finally settle and adjust the differences between them, "*the said premises shall be, and the same are hereby discharged from said liens and claims of Lorin Miller*," and that the deed from Merritt "*shall run to said George M. Mills and George L. Miller, and they shall have and hold the said premises as tenants in common.*" By one party the premises are *discharged* from the liens of the judgments held by Lorin Miller, and nothing more is required to be done by him, and the other party is to cause the deed from Merritt to be made to them jointly as tenants in common—that is all, and the parties are bound by these clearly expressed terms of their agreement. But it is contended on the part of the plaintiff that the deed

from Lorin Miller vests in him an interest in the judgments referred to in the agreement. The grant in the deed is in the usual form, including all the estate, right, title, interest, claim or demand of the grantor, "as well by reason of any judgments assigned to and held by him or otherwise, of, in and to the property, or any part thereof." It seems to us that the only true sense or meaning of these words is, that all the estate, right, interest, claim or demand, the grantor has in the *premises*, whether claimed by reason of judgments or otherwise, passed by the conveyance, and nothing more; and this interpretation is certainly in strict conformity with the rule in the construction of a deed, that the expression of one thing implies the exclusion of any other.

No assignment or transfer of the judgment, or any interest therein, is expressed in the grant and none can be implied. And, again, this interpretation of the deed is sustained by the *habendum*, which says: "To have and to hold the above described premises," not any judgment or interest therein, "unto the said George M. Mills and George L. Miller, as tenants in common, and to their heirs and assigns forever." Here the grant is limited to the premises described, and this limitation is not repugnant to the grant in the deed. It is said that "in conveyancing, the *habendum* is that part of a deed which usually declares what estate or interest is granted by it, its certainty, duration and to what use." Upon a critical examination of the contract and the deed, we are of opinion that upon both principle and authority the findings of the court below are correct and the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE ATCHISON AND NEBRASKA RAILROAD, PLAINTIFF IN ERROR, v. JOHN LOREE, DEFENDANT IN ERROR.

1. **Railroads**: NEGLIGENCE. A petition charged that in attempting to cross a railroad track, on depot grounds of defendant, the horse which plaintiff was driving became frightened at "an arrangement and scarecrow, caused by the placing of cars and other implements" near the crossing, in such a manner as to present "a horrid and frightful appearance," whereby plaintiff was thrown from his buggy and injured. *Held*, that the facts stated were insufficient to constitute a cause of action against the company.

2. ———: ———. Where it appeared in evidence that the public highway was rendered unsafe for travel, by reason of a ditch dug across it by the company, and plaintiff drove up to a crossing on the depot grounds of defendant, near which lay a hand-car bottom upwards, and another car loaded with wood extended partly over the crossing, but leaving sufficient room to pass, and plaintiff's horse shied at these cars, whereby plaintiff was thrown from his buggy and injured, *it was held*, that the company was not guilty of negligence in such an arrangement of its cars, and that a motion for a non-suit should have been sustained, or the jury directed to return a verdict for the company.

ERROR to the district court of Richardson county.

IT was an action for injuries sustained by defendant in error near a crossing of the railroad, and the trial below resulted in a verdict for him, the damages being assessed at $8,500. Of this amount $3,500 was remitted, and judgment entered against the company for $5,000, to reverse which they brought the cause here by petition in error.

S. B. Galey, for plaintiff in error, cited, *Shearman and Redfield on Negligence, Secs.* 9, 595. *Stucke v. M. and M. R. R.*, 9 *Wis.*, 202. *Sweeney v. Old Colony R. R. Co.*, 10 *Allen*, 372. *Gillis v. Penn. R. R. Co.*, 59 *Penn. State*, 129. *Munger v. Tonawanda R. R. Co.*, 4 *New York*, 357. *Meyer v. Midland Pacific R. R.*, 2 *Neb.*, 341. *Nicks v. The Town of Marshall*, 24

Wis., 139. *Delaney v. The Milwaukee R. R. Co.*, 33 *Wis.*, 67. *Howland v. Vincent*, 10 *Met.*, 374. *Galena R. R. Co. v. Loomis*, 13 *Ill.*, 550.

Mason & Wheedon, for defendant in error, cited, *Johnson v. Hudson R. R. Co.*, 5 *Duer*, 21. *Richards v. Westcott*, 2 *Bosw.*, 589. *Terry v. Central R. R. Co.*, 22 *Barb.*, 574. *Penn. Canal Co. v. Bentley*, 66 *Penn. State.*, 30. *Hackfordv. New York Central*, 43 *How., Pr.*, 222. *Langhoff v. Milwaukee R. R. Co.*, 19 *Wis.*, 489. *McKee v. Green*, 31 *Cal.*, 418. *Lehmann v. Kellermann*, 65 *Penn. State.*, 489. *Wentworth v. Leonard*, 4 *Cush.*, 414. *Priest v. Wheeler*, 102 *Mass.*, 479.

LAKE, CH. J.

I. In my view of this case it is unnecessary to notice more than one of the several errors relied on for a reversal of the judgment.

The action in the court below was brought to recover for personal injuries sustained by the defendant in error while driving across the depot grounds of the plaintiff in error, in consequence of his horse taking fright, and throwing him from his buggy. In his petition, after narrating at considerable length the reasons which induced him to attempt to cross the railroad track at the particular place in question, the plaintiff alleges that he "knew nothing of the arrangement and scare crow which the defendant had placed near the wagon road of said west crossing, by placing its cars and other implements used by the agents and employes of this defendant, in such a manner as to present a horrid and frightful appearance;" that thereupon the horse he was driving "became frightened at the frightful and horrible arrangement of the cars and implements," and suddenly wheeling round threw him violently from the buggy to the ground, doing the injury complained of.

From this statement it is clear that the fright of his horse was the primary cause of the plaintiff's injury. But in order to justify a recovery against the railroad company it must be shown to have contributed thereto by some wrongful or negligent act, which must clearly appear from the petition. Now what have we here? Simply an inferential statement, not a direct allegation, that upon the depot grounds of the company there was an "*arrangement and scare crow*," caused by the placing of "cars and other implements" near the crossing of the railroad track in such a manner as to present a "horrid and frightful" appearance. But there is nothing from which it can be rightfully inferred that there was any "arrangement" of the cars, or other implements, which was unusual and unnecessary in the legitimate transaction of the business of the company, or that it had not a perfect right to make, especially upon its own grounds. Surely there is nothing in the word "*scare-crow*" from which such an inference can be drawn. Webster defines "scare-crow" to be "any frightful thing set up to frighten crows or other fowls from corn fields; hence, any thing terrifying without danger; a vain terror."

It is not enough to allege merely that the cars presented a "frightful" appearance, for that is simply the opinion of the plaintiff, and is altogether too indefinite and uncertain as a matter of pleading. Besides, the mere fact that the appearance was frightful to the plaintiff or to his horse is not sufficient, but it must be shown that the arrangement, whatever it may have been, was neither usual nor customary with railroad companies under like circumstances, and in addition thereto, one which common prudence would condemn as being calculated to frighten teams passing that way. But nothing of this sort is alleged, and I am very clearly of opinion that the demurrer, interposed by the defendant to the petition, should have been sustained.

II. But if we look to the facts established on the trial, the case is no more favorable to the plaintiff. It is shown that there was a "hand" or "rubble" car lying bottom upwards near the railroad track, and near the crossing. Another car loaded with wood, or slabs, was standing on the track, and extending partly over the crossing, but, in the language of one of the plaintiff's witnesses, leaving space enough on the crossing to cross conveniently. Whether there were other cars there does not appear. As to the "hand," or "rubble" car, a witness called by the plaintiff, swore that it was usual to leave such cars bottom upwards when not in use. This is all there was of the "scare-crow" mentioned in the petition, as disclosed by the testimony, and in view of the fact that it was on the depot grounds which are specially devoted to the use of the company, and where it has a perfect right to leave and dispose of its cars in the usual and ordinary mode of railroad companies, I see nothing of which the plaintiff could justly complain. It is true that he had the misfortune to meet with an unexpected and very serious bodily injury in consequence of the shying of his horse at the cars, and the breaking of his buggy seat, whereby he lost control of the animal. But there is a total want of testimony tending even to show that the railroad company was guilty of wrong, or negligence, contributing thereto. The fact that the public highway, some fifty or sixty rods to the east of where the accident occurred, had been rendered unsafe to travel by reason of a ditch having been dug across it by the company, in consequence of which the plaintiff was induced, or even compelled to cross by way of the depot, is entirely immaterial in this action. The plaintiff's claim is not for damages occasioned by the highway being left in an impassable or dangerous condition, but because of an alleged, unwarrantable, and negligent use, by the company, of its own property, on its own grounds.

Even if the petition had stated facts sufficient to constitute a cause of action, there being a total want of testimony to sustain a verdict in favor of the plaintiff, the motion for a non-suit should have been sustained, or the jury directed by the court to return a verdict for the defendant, as requested in the third instruction, which was refused.

The judgment of the district court must be reversed, the demurrer to the petition sustained, and the cause remanded for further proceedings, in conformity with the views herein expressed.

JUDGMENT ACCORDINGLY.

THE UNION PACIFIC RAILROAD v. THE COMMISSIONERS OF COLFAX COUNTY.

1. **County Bonds**: BRIDGES OVER THE PLATTE RIVER. County bonds issued for the purpose of erecting a public bridge over the Platte river, conformable in all respects to the laws of this state, authorizing the issuance of bonds in aid of works of internal improvement, are valid.

2. ———. Such a bridge is a work of internal improvement, and from the course of legislation, in this state, it is clear that aid may be granted in its erection by the issuance of county bonds, by grant from the state, donations, or by two counties bordering on the river uniting in the enterprise. It was not the legislative intention to restrict the aid authorized, to works of internal improvement in which the county has no interest.

3. ———. In determining what constitutes a work of internal improvement, it must be tested by the benefits to be derived by the public, and not by its extent or cost.

APPLICATION for an injunction.

A. J. Poppleton and *E. Wakeley*, for plaintiff.

No appearance for the commissioners, but by leave of the court *George W. Doane* appeared on behalf of some of the holders of the bridge bonds, and in opposition to

the application cited, Internal Improvement Act, *Laws*, 1869, 92. Acts appropriating lands donated to the state for purposes of internal improvement to the erection of certain bridges, passed in 1869 and 1871. *Hallenbeck, v. Hahn*, 2 *Neb.*, 398. *Dillon on Mun. Corp., Sec.* 588. *Sharpless v. Mayor*, 21 *Penn. State*, 496. *Butz v. Muscatine*, 8 *Wall.*, 575.

G. W. Clemens, of Kansas, also appeared on behalf of the holders of the bonds, in opposition to the application.

MAXWELL, J.

This is an application for a temporary order of injunction to restrain the collection of certain taxes in Colfax county, levied for the payment of the interest due on certain bridge bonds which it is claimed are illegal and void.

The petition states: "That for the purpose of borrowing money thereon for the purpose of building bridges in said county and over divers streams situated therein, said county did, on the 14th day of May, 1870, issue and sell its coupon bonds for the sum of eleven thousand dollars divided into sums of one thousand dollars each, running for the term of fifteen years with interest thereon at the rate of 10 per cent. per annum, payable semi-annually on the 5th day of July and January of each year.

That on or about the 1st day of August, 1871, for the purpose of borrowing money thereon to build and erect a wagon bridge over the Platte river at or near the town of Schuyler in said county, the said county issued and sold its coupon bonds to the amount of $60,000; and that on the 1st day of July, 1874, the precinct of Schuyler, for the purpose of repairing said Platte river wagon bridge, issued and sold through its county commissioners its coupon bonds to the amount of $5,000, with interest at 10 per cent. payable semi-annually, and principal payable

fifteen years from date; that the plaintiff is unable to state further in detail the provisions and conditions of said bonds: that they have applied to the county authorities of said county for a copy thereof, but have been unable to obtain the same for the reason, as stated, that no record has been kept by said county. * * That all of said bonds are now outstanding; and the complainant alleges that of the taxes levied as aforesaid by said county the tax designated "bridge bonds, 6 mills," producing a tax against the plaintiff upon its railroad and appurtenances of the amount of one thousand three hundred and twenty dollars and thirty cents, and the tax designated Schuyler precinct bonds amounting to one hundred and forty-six dollars and seventy cents, were levied to raise money to pay interest on the said bridge bonds so called, hereinbefore mentioned. That said bonds so issued, as aforesaid, were not issued in aid of any private person or corporation undertaking the construction of said bridge, but that the same was built by said county, and the said bonds were issued, and the proceeds thereof applied to the erection of said bridge; that the same is not a railroad bridge, or a work of internal improvement, but a mere extension of the public highway across said Platte river, near said Schuyler.

And said plaintiff alleges and charges that said "bridge bond tax," and "Schuyler precinct bond tax," so levied and assessed as aforesaid, were levied without any authority of law whatever, and that they have been assessed and levied without any statute of this state or law of Congress authorizing the same, but such levy and assessment are illegal and void, and ought not to be enforced against this plaintiff."

But two questions are presented by the petition.

First. What is the proper construction of the word *aid* as it occurs in section 19, chap. 9 of the Rev. Statutes of 1866; and in section 1 of an act "To enable counties,

cities and precincts to borrow money on their bonds or to issue bonds to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for that purpose," approved Feb. 15, 1869 (Laws, 1869, page 92)?

Second. Is a bridge of this kind a work of internal improvement?

Sec. 19, chap. 9 of the Revised Statutes of 1866 provides that the county commissioners shall have power to submit to the people at any regular or special election the question whether the county will borrow money to *aid* in the construction of public buildings; the question whether the county will *aid* or construct any road or bridge.

Sec. 23 provides that "where the object is to construct or *aid* in constructing any road or bridge, the annual rate shall not exceed one mill on the dollar valuation."

Chap. 12 of the Rev. Statutes, repealed in 1873, provided in substance that where a county seat was located on the public lands "the tribunal transacting county business shall enter or purchase one quarter section of land for the use of the county, which shall be surveyed into town lots, squares, streets and alleys, and platted and recorded in pursuance of law, and shall select the place for the county buildings thereon, reserving for that purpose so many of said lots as may be deemed necessary, the remainder to be sold at public sale to the highest bidder, and the proceeds of the sale to constitute a fund for the erection of public buildings." It is apparent that the public buildings thus erected were to be owned by the county and that the *aid* to be given by the county in their construction, by borrowing money, was to be for such sum as might be thought necessary to secure their completion, and we think it is quite clear that no narrower construction should be given to the language employed in the same connection in respect to "*aid*" authorized to

be given in the construction of any road or bridge by a vote of the people of the county.

Section 1, of an act to enable counties, cities and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for that purpose, approved February 15th, 1869, provides: "That any county or city in the state of Nebraska is hereby authorized to issue bonds to *aid* in the construction of any railroad or other work of internal improvement, to an amount to be determined by the county commissioners of such county, or the city council of such city, not exceeding ten per cent. of the assessed valuation of all taxable property in said county or city; *provided*, the county commissioners or city council shall first submit the question of issuing bonds to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the Revised Statutes of the state of Nebraska, for submitting to the people of a county the question of borrowing money." *Laws* 1869, 92.

The legislature on the same day on which the above act was passed, also passed an act entitled, "An act to aid in the construction of a bridge across Blue river."

"*Section* 1. That one thousand acres of land in Saline county, donated to said state by the United States, for the purpose of internal improvement, be and are hereby appropriated and set apart to said Saline county, for the exclusive purpose of *aiding* said county in constructing a bridge across Blue river," etc. *Laws* 1869, 278.

On the same day a bill was passed appropriating one thousand acres of land, granted to the state for internal improvement, for the purpose of building a bridge across the Blue river, in the town of Beatrice. *Laws* 1869, 276.

In 1871, the legislature passed an act entitled "An act to provide *aid* to counties for constructing highway bridges across the Platte river," approved, March 1,

1871. Section 1 provides "that fifty sections of the land granted by the general government to the state of Nebraska for internal improvements in the said state, are hereby set apart for the purpose of aiding counties in the construction of highway bridges across the Platte river." Section 4 provides "that all organized counties in the state of Nebraska through which the Platte river runs, or whose north or south boundary is the Platte river, shall be entitled to aid under this act." Section 3 provides, "that counties desirous of receiving aid under this act shall file with the secretary of state a certificate of the probate judge of said county, showing that said county has erected and completed a wagon bridge across said Platte river, stating the point where such bridge is located, the cost of the same, the amount of the bonds issued to build the same, the date of the bonds, the time when the same are payable, the date of interest on said bonds, and the time when the interest is due, and the place where the same is payable, whether said bonds were issued by a county or precinct, and that such bridge is free for all public travel."

It is evident that the word *aid*, as used in this connection by the legislature, has a much broader meaning than that contended for by the plaintiff's counsel, and is not necessarily restricted to works of internal improvement in which the county has no interest. The funds under the control of the county commissioners for the purpose of building bridges and opening roads, are probably sufficient for ordinary cases, but in counties bordering upon or traversed by the Platte river, the amount thus placed at their disposal is clearly insufficient for the purpose of erecting a bridge across the river.

The word *aid*, as used, evidently means that the county may contribute toward the cost of the improvement, by issuing its bonds, a portion of the fund necessary to make the improvement to be contributed in some other

manner, as by grant from the state, donations, by two counties bordering on the river uniting in the enterprise, etc., but does not necessarily repel the conclusion that the county may construct the desired improvement for the benefit of the public. Public bridges are defined to be such bridges as form part of the highway common—according to their character, as foot, horse or carriage bridge. 2 *East.*, 342. The term highway is a generic term for all kinds of public ways whether they be carriage ways, bridle ways, foot ways, bridges, turnpike roads, canals, ferries, or navigable rivers. 1 *Bouvier Dic.*, 667.

What are works of internal improvement? The supreme court of Alabama in defining the phrase, "internal improvements," say: "Where internal improvements under state authority are spoken of, it is universally understood that works within the state, by which the public are supposed to be benefited, are intended; such as the improvement of highways and channels of travel and commerce." *Mayor of Wetumpka v. Newton*, 23 *Ala.*, 660.

The characteristics of the Platte river are a matter of history, and are well known, as well as the difficulty experienced in crossing it. A bridge of this kind affords a safe and convenient means of communication across the river, increases the facilities for transportation and travel, and has all the characteristics of a work of internal improvement. We are accustomed to hear works of internal improvement spoken of as involving miles of railway or canal, and requiring the expenditure of millions of dollars, but neither the cost nor extent of such works determine their character. The St. Mary's ship canal is but one mile in length, yet it establishes a highway around the Falls of St. Mary, and opens Lake Superior to the commerce of the world. Such works must be tested by the benefits to be derived by the public from their construction, rather than by their extent or cost. A public road constructed

through an otherwise impassable portion of the country, is a work of internal improvement; railways are said to be improved roads constructed for public use, although owned by private corporations; and taxation to aid their construction is sustained by the courts on the ground alone that they are essentially public in their character. The Platte river forms to a considerable extent a barrier between the northern and southern portions of the state. A bridge of this kind is designed to open an easy and commodious thoroughfare across the river for the use of the public. Under our statute the commissioners are authorized to levy a cash tax not exceeding five mills on the dollar valuation, to be used exclusively in the construction and repair of permanent bridges and culverts, and they also have under their control one-third of the road tax. The amount derived from these funds is to be expended under their direction for the purposes specified in the statute, but in case the amount thus placed at their disposal is not sufficient to make improvements deemed to be necessary for the public good, they may submit to the people in the manner prescribed by law, the question of issuing bonds to aid in the construction of the desired improvement. If the vote is in the affirmative, and bonds are issued in all respects in conformity to law, and the improvement for which they are issued is a work of internal improvement, the bonds will be valid, but no authority exists to aid a merely private enterprise.

We have no doubt a bridge of this kind is a work of internal improvement within the meaning of our statutes. The grounds of illegality of the bonds in question as set forth in the petition, are not sufficient to authorize a court of equity to restrain the collection of taxes for the payment of interest due thereon.

A temporary order of injunction is therefore refused.

JUDGMENT ACCORDINGLY.

HENRY T. CLARKE, APPELLANT, v. THE OMAHA & SOUTHWESTERN RAILROAD AND OTHERS, APPELLEES.

1. **Corporations**: POWERS. Under the laws of this state, a corporation organized for the purpose of building a railroad, has no power to sell or dispose of its property or franchises, until its road has been constructed.

2. ———: RAILROAD: SUBSCRIPTION TO STOCK. Plaintiff entered into a contract with several parties whereby he agreed in consideration of $10,000 to assign and transfer the rights and franchises of two projected railroad lines, of which he was president, and upon the organization of a new company to take four-tenths of its capital stock and to pay on the first assesment $20,000, the other parties to take balance of stock and pay $30,000. A new company was organized, including among its members the plaintiff and three other parties to the agreement. Articles of incorporation were adopted, and preliminary business transacted. At this organization plaintiff made no mention of said contract, did not ask its adoption or ratification by the new company, or that it be made the basis of a contract between them. At a subsequent opening of subscription books, plaintiff subscribed for 200 shares of stock amounting to $20,000, to be paid for in cash. He paid $10,000, receiving certificates of stock for that amount, and brought suit for the balance subscribed, claiming to have paid therefor by a transfer of the franchises of his two companies, mentioned in said contract. *Held*, that the contract was illegal and void, and even if binding on the parties to it, under the evidence adduced, it did not become a contract between the plaintiff and the new company, and he was not thereby entitled to any credit on his stock account by virtue thereof.

3. **Estoppel**: BY ACTS IN PAIS. Where a stockholder in a railroad corporation has signed a contract disposing of its assets, knowing its contents, and voting at meetings of the company to carry it into effect, he cannot afterward repudiate it, or question the *bona fides* of the transaction, no fraud being shown.

———. MAXWELL, J., *dissented*.

THIS was a petition in equity, filed by Henry T. Clarke, in the district court for Douglas County, and tried before Chief Justice Lake, by whose judgment it was dismissed for want of equity. The plaintiff appealed.

From the record brought here it appears that in 1868 the appellant projected two railroads, the initial point of each of which was Bellevue; one called the Bellevue and

Sioux City railroad, running from Bellevue under the Bluff, and along the Missouri river to Omaha, and thence north through the river counties; the other, called the Bellevue, Ashland and Lincoln railroad, running from Bellevue southerly under the Bluff to Ashland, and thence to Lincoln. In 1869, articles of incorporation, under the general railroad law, had been filed and proceedings to organize the companies had been taken, the regularity and sufficiency of which were disputed by the defendants in this action. In consequence of what had been done, however, these companies claimed to have an exclusive right to build the roads on these respective routes, and for a distance of five miles on each side thereof, under an amendment to section 75 of the general incorporation law, passed June 7, 1867. In the summer of 1869, several parties desiring to construct a road over a portion of the same route, entered into a contract with the appellant, whereby it was agreed that they would become stockholders in a company to be organized as the Omaha and Southwestern Railroad Company, taking stock in proportions named, the plaintiff to be paid $10,000 for the surveys which his companies had made of the route, and for the right of way through Sarpy county, as secured at the time by those companies, he assigning to the new company all the rights of his companies. On the 27th of November the new company was organized, consisting of the appellant, the parties to the above contract, and several others, and preliminary subscriptions made of $100,000 capital stock, the appellant subscribing for $30,000. Fifty per cent was at once called for. The appellant gave his check for $10,000, upon his bankers, with the understanding, as he claims, that it was to be met with a like sum coming to him from the company. This was disputed by the defendants. The check not being paid, was returned to him. On the 6th of December, a resolution of the direc-

tors was passed, that the $10,000 should be paid him upon due and valid assignments, by his aforesaid companies, of all their interests, etc. On the 16th day of December, he was served with notice preliminary to proceedings to forfeit stock, for non-payment of assessments, as provided by Sec. 78 of the general railroad law. Payments were made by others, but he remained delinquent, unless the $10,000 be allowed on his assessments.

On the 31st of December, the books were opened for regular subscriptions to stock, each person taking the same number of shares as before, except the appellant, who subscribed for only $20,000—200 shares. These were subscribed for in four parcels, one in his own name for 100, and another in his own name for 50 shares, and two of 25 shares each, in the names of defendants, Caldwell and Briggs, respectively. The plaintiff made no payments upon any of these shares until January 4, 1870, when he paid $2,500, which he claims was to apply on the shares subscribed in the names of Caldwell and Briggs, but which the defendants claimed applied upon his subscriptions generally.

The other payments were on the 8th of February, $1,000, on the 5th of March $250, and on the 31st of March, $6,250, making $10,000 in all. If the $10,000 claimed by him, under the original agreement, are allowed him, his 200 shares were then paid for in full—if, on the other hand, that sum is not allowed him, only one-half of them as paid by him. The appellant procured an assignment of the rights and property of his two projected companies, and presented them to the new company. After discussion and presentation of the matter at various times, the company declined payment of the $10,000 claimed.

As soon as the company was organized it entered upon the work of constructing its road, south from Omaha to the Platte river, and under a land grant from the state,

it finally became possessed of 40,000 acres of land, as well as a large amount of county bonds, and early in its history, it issued bonds secured by mortgage on its road, to the amount of $300,000, which were taken by the stockholders at 65 cents on the dollar. On the 15th of July, 1871, Caldwell, Alvin Saunders and Francis Smith, entered into a contract with Messrs. Brooks, Denison & Forbes, of the Burlington and Missouri River Railroad Company in Nebraska. It is sufficient to state that this agreement provided for a mortgage upon the company's property, exclusive of its lands received from the state and bonds received from counties, etc., and that in it, Caldwell and his associates undertook to obtain assignments of the stock of the company to Brooks and his associates. Caldwell and his associates also undertook to cause the $300,000 of the company's bonds outstanding, to be exchanged by the holders for a like sum of the bonds provided to be issued. This being done, Brooks was to pay $61,000 and to transfer 40,000 acres of land and county bonds to the stockholders. It was also stipulated that if Caldwell and his associates should be unable to procure a transfer of all the shares and bonds, they should have the right to substitute a guarantee satisfactory to Brooks and his associates, for such thereof as should be still outstanding.

On the 19th of July, a lease of the road of the Omaha and Southwestern was executed to the Burlington Company.

On the 31st of the same month, a contract was drawn by Caldwell, running to the Nebraska Land and Improvement Company, to be signed by the stockholders of the Omaha and Southwestern, ratifying the agreement of the 15th and the lease of the 19th, and stipulating that if said Improvement Company would assume the execution of said agreement of the 15th, the said shareholders would cause to be assigned to said Improvement

Company, the state lands and the county bonds and all the property not leased or conveyed to the Burlington Company, and also the $61,000 coming from it. The Improvement Company was to pay the stockholders fifty per cent. of the par value of their stock in the Omaha and Southwestern, from the first moneys coming from the Burlington Company, and the county bonds to be received for building certain additional road. It was also provided that one share of stock in the Improvement Company, should go to each shareholder in the Omaha and Southwestern, for every $1,000 of stock, and one share in the Improvement Company, for every $1,000 bond held by him in said company. This contract was signed by the appellant, and all the stockholders except one.

Some time in 1871, the appellant bought out Malloy's 100 shares, and King's 25 shares. It remains only to state that the nominal amount of the stock was doubled, in the course of the dealings of the railroad company, without any increased payment, so that the appellant, if originally entitled to 200 shares, was, at the time of filing the petition, entitled to 400 shares in respect thereof, and also to 200 in place of Malloy's stock, and 50 in place of King's, which would give him the 650 claimed.

This was the relief prayed for, and that the appellant be admitted to share in the division of the assets of the company, in proportion to which that number of shares would be entitled. He sought also to restrain the transfer of the assets from the Railroad Company to the Improvement Company, or so much thereof as he was entitled to.

The cause was argued here by *J. M. Woolworth*, for the appellant and *Clinton Briggs* for the appellees, both of these gentlemen filing voluminous briefs, mainly directed to a review of the evidence adduced in support of Clarke's claim.

GANTT, J.

In this case two questions are presented for consideration: 1. Whether the plaintiff is entitled to receive from the Omaha & Southwestern R. R. Co. two hundred shares of its capital stock, in addition to those which have been issued to him. 2. Whether the assignment and transfer of the lands and assets of the Omaha & Southwestern R. R. Co. to the Nebraska Land and Improvement Company should be adjudged void.

First. In the fifth paragraph of his petition, the plaintiff bases his claim for the additional shares on an agreement, executed prior to the organization of the company defendant, between himself of the one part, and H. Gray, S. S. Caldwell, J. Y. Clopper, and O. P. Hurford, of the other part, in which agreement, among other stipulations, the plaintiff, in consideration of ten thousand dollars, agrees to assign and transfer to the Omaha and Southwestern R. R. Co. so much of the rights, lines, and privileges of the Sioux City and Bellevue R. R. Co. as lie south of Omaha, and also the Bellevue, Ashland and Lincoln R. R., with all its rights, property, and franchises. Is such a contract legal and valid? Is it binding on the parties to it? And assuming that the company defendant, after its organization, adopted it as its own contract with the plaintiff, will a court of equity enforce its terms and conditions? The contract relates exclusively to railroad corporations; such corporations can only exist by legislative authority; they can exercise only the powers delegated to them, or such as are incidentally necessary to carry into effect the powers expressly granted.

The general corporation laws of our state (§ 73) provide that any number of persons, not less than five, may associate together and form a company "for the purpose of constructing a railroad," and (§ 74) when formed, as prescribed, "shall thereafter be deemed a body corporate,

with succession," and "shall possess all the powers and be subject to all the rules and regulations" prescribed by the statute relating to railroad companies; and (§ 75) "such corporation shall be authorized and empowered to lay out, locate, construct, furnish, maintain, operate, and enjoy a railroad, with single or double tracks, with side tracks, turn-outs, offices, and depots as shall be necessary;" and (§ 89) "whenever the lines of railroad of any railroad companies in this state, or any portion of such lines, *have been or may be constructed so as to admit the passage of burden or passenger cars* over any two or more of such roads continuously, without breakage, or any interruption," they shall have authority to consolidate themselves into a single corporation, and the mode by which the consolidation may be effected is fully and specially prescribed; and (§ 94) "any railroad company heretofore or hereafter incorporated, may at any time, by means of subscription to the capital stock of any other company, or otherwise, aid such company in the construction of its railroad for the purpose of forming a connection of said last mentioned road with the road owned by the company furnishing such aid, or any railroad company, existing in pursuance of law, may lease or purchase any part or all of any railroad *constructed* by any other company, if said company's lines of road are continuous, or connected as aforesaid, * * * * or any two or more railroad companies, whose lines are so connected, may enter into an arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created." There is also a provision to consolidate, or intersect with railroad companies of adjoining states.

The powers, duties, rights, and liabilities of railroad companies are very fully and clearly defined by the statute; and I have referred to the above provisions, only to show when and how one railroad company may contract with another. There is no power conferred on such com-

panies to contract to sell or dispose of their rights, lines, property, or franchises, or to consolidate until such roads shall have been *constructed*.

Now, at the time this agreement was executed, the two companies therein mentioned had no railroad or any part of such road constructed, and the company defendant had no existence.

In 1 *Redf. on Railways*, 587, it is said that "an agreement between railway companies, without authority of the legislature, transferring the powers of one to another, is against good policy, and a court of equity will not lend its aid to carry any such contract into effect."

It seems the common law rule is well established, that the franchise of a railroad corporation cannot be alienated, and its powers, privileges, and rights cannot be conferred upon another person or body by authority derived from its own incorporation; it requires legislative authority to do so. The rule is based on the ground that its power to act is wholly derived from the statute, and that it can only exercise the powers expressly granted. In the enactment of the general corporation laws of our state, the legislature withheld from such corporation the power to alienate its franchise, or to confer its powers and rights upon another person or body; it has only conferred the power to "lease or purchase any part or all of any railroad *constructed* by any other company," if their lines are continuous or connected. It is alone within the province of the legislature to define, limit, or extend the powers and authority of such corporations, and not that of the courts. Therefore, if the courts were to do so, it would be a usurpation of legislative functions, and an assumption of authority which exclusively belongs to another department of the government, and it will hardly be insisted that, in this disregard of the settled rules of law, the court should, by construction or otherwise, *inject* a power into the general laws which the legislature refused

to grant. *Commonwealth v. Smith*, 10 *Allen*, 455. *Pierce v. Emery*, 32 *N. H.*, 508. *Richardson v. Sibley*, 11 *Allen*, 67. *Madison Plank R. Co. v. Western P. R. Co.*, 7 *Wis.*, 59. *McCullough v. Moss*, 5 *Denio*, 580. *R. R. Co. v. Ryan*, 11 *Kansas*, 602. *Bartholomew v. Bentley*, 1 *Ohio St.*, 41. *Beaty v. Lessee*, 4 *Pet.*, 152. *Bank v. Swayne*, 8 *Ohio*, 286. Hence, without legislative authority, it seems clear that under such a contract as is shown in this case, the grantors do not, in legal contemplation, dispossess themselves of their rights, franchises, and powers, or of their legal right to exercise all of their functions as a railroad corporation; and the grantees acquire no legal rights whatever, and therefore such contract creates no legal, binding obligation on either of the parties to it.

But was this *ante-agreement* adopted as a contract between the plaintiff and the company defendant after its organization? In that agreement the plaintiff agreed to take four-tenths of the capital stock, to assign and transfer to the party of the second part certain railroad lines, privileges, rights, property and franchises, and to pay at the start, as the first assessment, the sum of twenty thousand dollars in cash, and the second party agreed to take six-tenths of the capital stock, and to pay at the start, as the first assessment, the sum of thirty thousand dollars in cash, and all the parties made up as a company agreed to pay the plaintiff ten thousand dollars as the consideration for the above assignments and transfers. The agreement contained other covenants in relation to advancing the contemplated enterprise, and as before stated, it was executed prior to the organization and incorporation of the company defendant. Gray, Caldwell, Clopper and the plaintiff, parties to this agreement, became members and stockholders of the defendant, the Omaha and Southwestern R. R. Co., which was organized on the twenty-seventh day of November, 1869,

and which then adopted articles of incorporation in which the capital stock was fixed at one hundred thousand dollars, divided into shares of one hundred dollars each. At the same time fifteen different persons subscribed for shares of stock; and a board of directors *ad interim* was elected to act until a regular board of directors should be elected as prescribed by law. This subscription for stock, and the election of directors, seems to have been intended to put the company into a position to commence operations at once, for in conformity with section eighty of the statute relative to corporations, notice was given that the books of the company would be opened for subscription to the capital stock of the company, on the thirty-first day of December, 1869, at a place fixed in the notice. Now at the meeting on the twenty-seventh day of November, the plaintiff was silent as to the *ante-agreement;* he did not ask the newly organized company to adopt it, and make it an agreement between him and the corporation; he did not offer to comply with its terms, or ask that it be made the basis of a contract between him and the corporation; but he entered into a new and different contract with the corporation then created. I am unable to find, in all the evidence of the case, that during the pendency of this meeting, on November 27, a single remark was made in regard to this *ante agreement;* and at this meeting the company was organized, articles with all the conditions therein were agreed upon and adopted, subscriptions were made to the capital stock, and the plaintiff agrees to all, and becomes a party to the contract with fourteen other persons; and all he says in his testimony in regard to the matter of his claim, at this time, is that he mentioned the claim to Caldwell in the evening when he gave him his check—that Dr. Lowe was present, and that they "had been to a meeting of stockholders." He offers no explanation why he was silent as to the *ante-agreement*, and why he entered into

a different contract with the corporation; and, yet, this *ante-agreement* is set up in his petition and made the foundation of his cause of action. It is clear that the mention of his claim to Caldwell occurred after the organization was completed, the articles of incorporation were adopted, the subscription was made, and the meeting had adjourned. At the meeting of December 31, 1869, the stock book of the company was opened, and the subscription contract is as follows: "Subscriptions to the capital stock of the Omaha and Southwestern Railroad Company. We, the undersigned, having heretofore informally subscribed the amount of stock set opposite our names, now come, after due publication, and formally subscribe to the capital stock of the Omaha and Southwestern Railroad Company, the number of shares set opposite our names. The shares to be one hundred dollars each, and *payable in cash* to the full amount as may be called for by the directors of said road. Dated, December 31, 1869." Seventeen different persons subscribed for stock, and the whole amount was subscribed in twenty-two different parcels. The plaintiff subscribed, in two parcels, one hundred and fifty shares, and two parcels of twenty-five shares each were severally subscribed by Briggs and Caldwell in trust for plaintiff, on condition, as plaintiff testifies, that "Caldwell and Briggs should sign for the shares and he (plaintiff) should have the privilege if he paid for them in three weeks." It appears from the plaintiff's testimony, these subscriptions were so made on account of some objection to his taking so many in his own name. According to a notice as required by law, at a meeting on the seventh day of February, 1870, the stockholders elected a new board of directors. At a meeting of stockholders on the first day of September, 1870, it was agreed, by resolution adopted without objection, "that the company issue stock to the amount of two hundred thousand dollars, to be divided

among the stockholders, according to their respective interests as shown by the amount of money paid in by each." The plaintiff voted for the resolution, constituting a new contract between the members and the corporation. By this resolution the entire amount of capital stock was fixed at two hundred thousand dollars; and by the conditions of the contract this entire amount of stock was *divided among the stockholders, according to their respective interests as shown by the amount paid in by each.* This contract fixed the stock interest of each stockholder, in the division of the whole stock, in proportion to the amount of money paid in by him; and it appears that the plaintiff had paid in money an amount equal to four hundred and fifty shares of this whole capital stock, as fixed by the resolution, and he afterwards received certificates for that number of shares. A "contract subsisting between the members of the corporate body and the corporation is within the protection of the constitution;" and evidence is inadmissible to vary its terms, unless it tends to show fraud. *Wright v. Shelby,* 16 *B. Monroe,* 5. *Brower v. Appleby,* 1 *Sandf.,* 170. *Kennebeck & Portland R. R. Co., v. Waters,* 34 *Me.,* 369.

The plaintiff, however, contends that his claim should have been credited to him on account of stock, which would have entitled him to the two hundred shares now claimed by him, and insists that the check he drew on Caldwell, Hamilton & Co., on the twenty-seventh day of November, 1869, after the meeting was held, should have been accepted by the corporation as a discharge of or set off to his claim, and as a payment for this stock. But the existent facts, at the time, and the circumstances under which the check was given, are inconsistent with the theory contended for by the plaintiff, for the reason that, as testified by Caldwell, when the plaintiff gave the check, he said he would make it good in a day or two, having no funds in the hands of the drawees at the time

but the check was not paid, and was in a few days afterwards returned to the plaintiff, and that was the end of that matter; and for the further reason, that the plaintiff did not then have any authority to assign and transfer the franchises, rights, surveys and property of the companies he represented, or produce any assurances that he could procure such transfers to be made; and the still further reason that there is no proof tending to show that the matter of his claim was at all mentioned during the meeting of the members on the twenty-seventh day of November, or that there was any agreement in relation to the matter between him and the corporation. And I may further observe here, that the proofs are silent as to who, if any persons, other than McCormick, Gray, Clopper and Gise were present at negotiations with plaintiff prior to the organization of the company defendant; and also fail to show that any of the corporators, except Gray, Caldwell, Clopper and Gise had knowledge of those prior negotiations and the agreement, until after the meeting of November 27th, and their knowledge after that time is only inferable from the evidence. It therefore, seems to me, that the facts, circumstances, and acts of the plaintiff, clearly negative the theory that his claim was to be credited on account of stock. It is said in *Henry v. Vermillion & Ashland R. R. Co.*, 17 *Ohio*, 191, that "stockholders who have attempted to secure by agreement, a privilege of paying up their stock subscription in goods or otherwise, except in money, as contemplated by the charter, will not be allowed the benefit of such stipulations. Such agreement will be considered a fraud on the other stockholders, and the amount must be collected in money." *Noble v. Cadwallader*, 20 *Ohio St.*, 208. *Downie v. White*, 12 *Wis.*, 176.

It is, however, insisted that the payment of two thousand and five hundred dollars, made by the plaintiff, on the fourth day of January, 1870, should have been

appied on the stock subscribed in the names of Briggs and Caldwell. The plaintiff testifies that he intended it to be so applied, but does not say he gave any directions to have the money so applied, when he deposited the amount to the credit of Caldwell, Hamilton & Co., in Chicago; and Caldwell testifies that no such directions were given in regard to the application of the money, and he paid it over to the treasurer of the corporation without any such direction. Hence, under the common law rule, the corporation had the right to apply the amount paid, upon any legal demand it had against the plaintiff. 2 *Par. on Con.*, 629.

It may be further observed in respect to these shares, that Malloy testifies, "the reason that these two subscriptions were not taken in his (plaintiff's) own name was that they were afraid he would control the concern." The plaintiff, however, testifies that Briggs and Caldwell were "to sign for the shares, and he was to have the privilege if he paid for them in three weeks." This is a direct conflict of testimony; but I think the acts of the plaintiff at the meeting of November 27, and subsequent thereto clearly indicate that he gives the true reason for these subscriptions being made in the names of B. and C. One other remark in respect to the testimony of Malloy; he says that the new company was to take what the plaintiff had, and allow him ten thousand for it, and that this amount was to be applied in paying for his stock. This testimony can have no weight as applying to the corporation, because the proofs wholly fail to show that any such contract was mentioned at the meeting of November 27, and because the plaintiff entered into a contract with the corporation to pay the stock subscribed by him, in cash; and such agreement is also negatived by the plaintiff's contract of September 1, 1870. If this testimony is to be applied to the *ante-agreement* of the plaintiff and the individuals signing it with him, it is

correct so far as it relates to the amount they agreed to allow him. The witness must have had in his mind, what he understood in relation to the prior negotiations between the plaintiff and the parties then negotiating with him.

Much has been said in regard to the number of shares voted by the plaintiff at the meetings of the stockholders. It will be remembered that on the first day of September, 1870, the stock was doubled and the whole amount was divided among the stockholders according to the amount of money paid in by each, and that this action constituted a contract between the members and the corporation. On the third day of the same month, at a meeting of the stockholders, the shares were voted as formerly, and the same course was pursued at another meeting on the thirtieth day of the same month, except that the plaintiff only voted one hundred shares. At a meeting on February 6, 1871, it appears the right to vote was based upon the contract of September 1, 1870, and a list was prepared by the secretary, showing the number of shares each stockholder was entitled to vote, giving to the plaintiff three hundred, but it seems no votes were cast; and after this, at the meetings held August 18, December 15 and 20, 1871, January 23 and February 5, 1872, the plaintiff voted his four hundred and fifty shares, and did not ask to vote more until after he had commenced his suit.

Now, I think, in view of the facts and the acts of plaintiff, to say that the manner in which the shares were voted, constitutes on the part of the corporation, a recognition of the plaintiff's claim, would be an unwarrantable presumption, which cannot be sustained upon any principle of ethics or law. *Query:* If a person does two wrongs, even unopposed, will such acts confer a legal right? Will they constitute a recognition of a disputed claim? I think not.

After the company defendant had organized, and after the plaintiff had entered into a contract with the corporation to take certain shares of the capital stock and to pay for them in cash, and soon after the meeting of November 27, the controversy sprung up between the parties, not in regard to the enforcement of the ante-agreement, and its conditions, but in regard to the claim of ten thousand dollars made by him against the corporation. The resolution of December 6, 1869, moved by Mr. Clopper was an attempt to adjust this controversy, but it seems to have accomplished no result in the way of a settlement of the matter, and the controversy has continued.

Upon a careful examination of all the proofs in the case, I must conclude that the plaintiff's claim to the two hundred additional shares of stock is not sustained by the evidence or the law.

Second. The second proposition is, whether the transfer of the lands and assets of the company to the Nebraska Land and Improvement Company should be adjudged void. And in the discussion of this question, it must be borne in mind that the company defendant, had previously leased its entire railroad and all its equipments to the Burlington and Missouri River R. R. Co.; that these lands and assets constituted no part of the railroad, its tracks, depot grounds or equipments, and were excepted from the lease, and remained at the disposal of the defendant.

The contract transferring these lands and assets to the Nebraska Land and Improvement Company was executed, July 31, 1871, and was signed by the plaintiff as well as the other members of the corporation.

In the execution of this contract eighteen hundred shares are represented, and it appears by the record, that this includes all the shares which were issued under the contract of September 1, 1870, when the stock was

"watered;" two hundred shares never having been taken and paid for. The plaintiff never entered any protest to this transfer contract, but says in his testimony that he "thought of disputing it before he got up the injunction suit." S. S. Caldwell testifies that he took the papers to the plaintiff in his back room where they were together over an hour; that he read the contract to the plaintiff; that the plaintiff read it, and they discussed the shares and the bonds, and then the plaintiff signed it. He further testifies that there was some difficulty in carrying out the contract, and that in the latter part of 1871, or possibly in the beginning of January, 1872, at several meetings the matter was fully discussed and was finally harmonized, all of which the plaintiff understood and assented to, and that no objection was made by any member to this final arrangement. The plaintiff's testimony corroborates that of Caldwell, for he says that he knew the nature and terms of the transfer contract on the day he signed it; that at a meeting on the fifth day of December, when the resolutions were adopted to carry the contract into effect, he says they discussed the matter, and after the discussion he voted in favor of the resolutions. This testimony in relation to the final adjustment of the difficulties in the matter stands uncontradicted. The resolutions adopted at the meeting of December 5, 1871, authorized and directed the conveyance, by proper warrantee deed in the name of the corporation, of all its lands and the delivery of all its assets to the Nebraska Land and Improvement Company, "for the purpose of carrying into effect the covenants and agreements contained in the contract bearing date, July 31, 1870." The plaintiff executed the contract with knowledge of its conditions; after full discussion of the subject matter of the contract, he votes his four hundred and fifty shares in favor of the resolutions to carry it into effect, and even after the commencement of his

suit, at a meeting to harmonize some difficulties in regard to the transfer, he makes no objection to the action then taken, but assents to the final adjustment of all these matters. No fraud is shown, and there is no evidence that any deception was practiced on the plaintiff in relation to this contract. Now, if there is any validity in contracts, it seems clear that the plaintiff, not only by his execution of the agreement, but by his full and complete ratification of the same, as evidenced by acts afterwards, is bound by the obligations and covenants of his contract in this case. To sanction the doctrine that a person, without proof of any fraud, deception or mistake, may at his will rescind, or rather repudiate his contract, made in good faith by the parties upon a subject matter in respect to which they may lawfully contract, would in effect prevent the enforcement and destroy the validity of solemn contracts, and establish a rule pregnant with litigation.

Upon the whole, I am of opinion that the decree of the court below should be affirmed.

DECREE AFFIRMED.

LAKE, CH. J, concurred. MAXWELL, J., dissented, and filed the following opinion:

MAXWELL, J.

This is an action for the specific performance of a contract, alleged to have been entered into by the plaintiff, for the purchase from the defendant, of certain shares of stock of the O. & S. W. R. R. Co. The seventh paragraph of the petition alleges, "that on the 31st day of December, 1869, the said parties met for the purpose of permanently organizing said company, when further objections being made to said plaintiff taking so many as 300 shares, he then and there waived his claim thereto, and subscribed

for 100 shares in one parcel, and for 50 shares in another parcel, both in his own name, and for 25 shares in the name of C., and 25 shares in the name of B., and was thereafter, for about eighteen months, recognized as the owner of 150 shares in his own name, and of 50 shares in the names of B. and C."

The eighth paragraph alleges, "that one Malloy, and one King, were originally subscribers and owners of stock, the former holding 100 shares, and the latter 25 shares of stock, all the assessments upon which have been duly paid, and which 125 shares are now held and owned by plaintiff."

The answer to the seventh paragraph states, "that the defendants permitted him to subscribe only 100 shares in one parcel, and 50 in another, at his urgent request. Also, the said company permitted said C. and B. to subscribe each 25 shares, to be transferred to the plaintiff, provided he paid for the same in a reasonable time—all of said stock to be paid for by said plaintiff in cash, the same as other stockholders, all this being a matter of grace and favor to the plaintiff, for the purpose of keeping said additional shares of stock from passing into other hands, before the plaintiff could pay for the same; that such reasonable time has long since elapsed, yet the plaintiff has not paid for said stock, or any part thereof, and is not the owner of the same, except the 100 shares; that he paid for said 100 shares as follows: Jan. 4, 1870, $2,500; Feb. 8, 1870, $1,000; March 5, 1870, $250, and on March 6, 1870, $6,250,—in all $10,000; this being all the money he has ever paid upon stock in said company; that plaintiff never made any payment whatever upon the 50 shares subscribed by him in one parcel, nor upon the said 50 shares in the name of said C. and B., nor did he ever offer to pay any sum whatever." The reply denied the new matter contained in the answer.

The plaintiff testified that "the first payment of $2,500

on the 4th day of January, was made in Chicago, to the credit of Caldwell & Co. On the 30th of December, I think it was, that the subscription was taken. They, and Mr. Paddock in particular, insisted that I should not sign for so much. He said I could afford to credit the Omaha and Southwestern company with $2,500, and it was agreed that Mr. C. and Mr. B. should sign for the shares, and that I should have the privilege, if I paid for them in three weeks. They were for me, and I placed this money to their credit for those shares, as directed by Mr. C., when I left Chicago. This was the agreement for the parcel of shares subscribed in trust for me.

Mr. Caldwell testified: "I was present on the night of the organization. He (Clarke) gave a check to the treasurer of the company for $10,000, and said to me that the check would be made good in a few days. The check was drawn on C. H. & Co. I was one of the company. He said what I stated about the check, that he would make it good in a day or two. He said that to me. His check should have been for $15,000, for the payment of the 50 per cent of his 300 shares. 100 shares he was to pay for when he received pay from the company, which would amount to $10,000. I wish to state further, in connection with the check, that Mr. Clarke wished it to be retained for the $10,000, that the company were to pay him. He asked it of me and I declined, and he asked it of others of the company, and they declined. It must be cash to operate on. That check was not paid. It was not paid because there was not money to Clarke's credit to meet it. Mr. Clarke testified to putting up $2,500 to our credit in Chicago. I only remember the money was placed to our credit. I believe it was paid on his stock. We were to receive it from the treasurer of the company in payment for stock. I did pass it over. I don't know whether this was the last payment he made

on his stock. In passing it over to Dr. Lowe, *I gave no special directions.*"

None of this testimony is denied.

At a meeting of the board of directors of the defendant, held on the sixth day of December, 1869, on motion of Mr. Clopper, it was resolved, "that the president be instructed to draw his order on the treasurer for the sum of $10,000, to be paid to H. T. Clarke for the surveys and right of way over so much of the Bellevue and Sioux City Railroad line, as lies south of Omaha, and for the surveys and right of way over the Bellevue, Ashland and Lincoln Railroad line, when he shall have made in behalf of the said companies a full legal transfer of the same, together with all other interests of every nature in the franchises claimed by them, to the Omaha and Southwestern Railroad Company."

On the seventeenth of December, 1869, at a meeting of the stockholders, "on motion of Briggs, it was resolved that the board of directors be instructed to collect the subscriptions of stock now delinquent before two P. M. to-morrow (December 18), and that if such subscriptions are not paid, they are directed to take the necessary legal steps for the forfeiture of said stock to the company." On the thirty-first day of December, 1869, the company was formally organized. The stock books being regularly opened, subscriptions were made as follows:

"Subscriptions to the capital stock of the Omaha and Southwestern Railroad Company. We, the undersigned, having heretofore informally subscribed the amounts of stock set opposite our names, now come, after due publication, and formally subscribe to the capital stock of the Omaha and Southwestern Railroad Company the number of shares set opposite our names. The shares to be one hundred dollars each, and payable in cash to the full

amount as may be called for by the directors of the road."

Alvin Saunders	Fifty shares	....	$ 5,000
S. S. Caldwell	" "	....	5,000
John Y. Clopper	" "	....	5,000
Clinton Briggs	" "	....	5,000
Enos Lowe	" "	....	5,000
H. T. Clarke	One hundred "	....	10,000
F. Smith, by S. S. C., ag't,	Twenty-five "	....	2,500
Henry Gray	Fifty "	....	5,000
John F. Young	" "	....	5,000
A. S. Paddock	" "	....	5,000
Jonas Gise	" "	....	5,000
H. T. Clarke	" "	....	5,000
Clinton Briggs	Twenty-five "	....	2,500
S. S. Caldwell	" "	....	2,500
Jacob Weightman	Fifty "	....	5,000
Thomas F. Malloy	" "	....	5,000
Alvin Saunders	Twenty-five "	....	2,500
Smith Saunders	Fifty "	....	5,000
G. W. Smith, by S. S. C., ag't,	Twenty-five "	....	2,500
John H. Green	Fifty "	....	5,000
Thomas F. Malloy	" "	....	5,000
Charles F. Bailey	Twenty-five "	....	2,500

On the seventh day of February, 1870, at a meeting of the stockholders of the company the following resolution was adopted:

"Whereas, thirty days' notice has been given by publication to the stockholders, to meet at this time and place, for the purpose of choosing directors for the company; therefore, for the purpose of saving all questions as to the regularity of the election of directors held November 27, 1869, be it resolved, that the stockholders do now proceed formally to elect, by ballot, nine directors for said company."

The former board of directors were elected, and immediately after their election they held a meeting, at which the following resolutions were adopted:

"Resolved, That all *acts, contracts and obligations*, heretofore incurred, made or assumed by the company, be and the same are hereby adopted, ratified and confirmed. That this company believes its organization of the twenty-seventh of November, 1869, to be in all respects regular and in strict compliance with law, and that the formal proceedings this day had in the election of a board of directors and officers, are only for the purpose of removing any captious or possible doubts which might hereafter be raised as to the regularity of said organization on the twenty-seventh day of November, 1869."

Mr. Briggs testified: "I told Mr. Clarke that I considered the evidence thus far presented worthless to us. (The assignment of plaintiff's railroad companies to defendant.) I did not regard them as of any legal validity, and I stated generally the objections to them. I cannot say when it was, but it was some time in the winter of 1870, perhaps the latter part, about two months after the company was organized. There was a meeting of the board of directors, at which Mr. Clarke was present, Mr. Caldwell, Clopper, myself and others, but I cannot remember their names. There was a quorum present at the meeting. At the request of the president, I made a report of the papers which I found in the office, which Mr. Clarke said was the evidence of the companies' surveys and the right of way, etc. I made it as an attorney of the company. In that report I stated emphatically to the board, in the presence of Mr. Clarke, that I would NOT advise them to accept what he had offered to the company, for the reason that in my opinion there was no legality in any of the proceedings; that Mr. Clarke had nothing that I could govern myself by to advise the Omaha and Southwestern. The matter was then dis-

cussed. Mr. Clopper made an extensive speech, quite an elaborate one, proposing not to give Mr. Clarke anything for his $10,000 claim. Mr. Paddock then spoke against it. I certainly did on that occasion. After the discussion was protracted two or three hours, a feeling was engendered in the way of compromise. I got up and stated to the board, in the presence of Mr. Clarke, that if they were willing, I proposed myself to Mr. Clarke that I would offer a resolution giving him, or voting him, in settlement of everything, $5,000, so as to end the matter. Mr. Clarke then stated to me that he wished I would not offer the resolution, and I did not."

Mr. Clopper testified: "My impression is that by the terms of the writing at the organization of our company, it was understood that we were to pay him (Clarke) $10,000 in cash. It was agreed afterwards to be paid in stock. I cannot fix the date when that was given. It was either at the meeting, or the conclusion of different members at Mr. Caldwell's bank. I had a discussion with Mr. Caldwell as to the amount of money it would cost Clarke to make the survey."

Thomas Malloy, an original stockholder and superintendent of grading of the first ten miles of defendant's railroad, testified as follows:

"Q.—Were you ever a member of said defendant's Railway Company—if so, when did you become such and how long did you continue such?

A.—I was at its organization, and from that time to about March 1st, 1870.

Q.—What, if any, representations did he (Clarke) make as to having received right of way for his company?

A.—He claimed he had received it for some miles, no definite number being stated.

Q.—What, if any, representations did he make as to his right to transfer the rights, property, and franchises of said company?

A.—He made none. He was to let his companies subside and the new company come in their place.

Q.—What, if any, representations did he make about his ability to secure $75,000 Sarpy county bonds for said defendant company?

A.—He said $75,000 had been voted his company and the defendant company would get it; but he said nothing about his ability to get it for said defendant company, nor that his companies would transfer same to it.

Q.—For what purpose and under what circumstances were those statements made by Clarke?

A.—They were not made at any one time, but from time to time during the negotiations. They were made as one man urges the advantages of his property when he offers it for sale.

Q.—How did they influence the other side in these negotiations?

A.—Not at all. Beyond this they did not care whether Clarke's companies were valid or not; it made no difference to them and they knew all about the other matters. What they wanted was to get rid of all competition, get his lines and get the road built as soon as possible. The negotiations with Clarke, in one way and another were pending a long time, and we all knew all the facts and acted on our own information rather than his representations.

Q.—What were the circumstances requiring the early construction of the road?

A.—The state had passed a general law that companies building ten miles of road within a certain time, should have 2,000 acres of land for fifty miles of road, the time was nearly out and there was no time to lose. Besides as the Omaha people had promised to give $150,000 to any road running from there southwest, and as two roads could not get it, one had to be formed combining all interests. Clarke was on the ground with his surveys

made and all ready to begin grading and was the only party who had done so much. For this reason he had the advantage.

Q.—How much stock did Clarke subscribe for, in whose names were the subscriptions made, and why were any of them in the names of other parties than himself?

A.—He subscribed for one hundred shares in his own name, also fifty shares in his own name, also twenty-five shares in name of S. S. Caldwell and twenty-five shares in name of Clinton Briggs. The reason that these two last subscriptions were not taken in his own name was that many were afraid he would control the concern. He had an agreement for taking more stock. Then he was compelled to take only three hundred shares; then the fifty were taken in Caldwell and Briggs' name to put a further check on him.

Q.—What agreement, if any, was there about the mode of paying him the $10,000 coming to him for his surveys, etc.?

A.—It was to be applied in paying for his stock.

Q. How came the directors to pass the resolution in January that he should be paid the $10,000 when he should make a legal transfer of all the interests of the two companies?

A.—In order to make a point on him to cut him out of his stock.

Q.—What difference did it make to the company whether the transfers of stock of plaintiff's two companies were made or not?

A.—None. It had gone on to the line of said two companies, they had yielded up their ground. We had got all they ever had and they were out of our way.

Q.—Do you know anything about Clarke's giving the company his check for $10,000 to pay assessments? If you do, state on what agreement he did so.

A.—He gave his check for that amount on the express

agreement with Caldwell, and full understanding by us all, that it was to be paid by the $10,000 coming to him from the company.

Q.—How did the line of the Omaha and Southwestern Railroad compare with that of Clarke's companies?

A.—It was the same with very slight variations.

Q.—What advantage did the Omaha and Southwestern derive from the agreement with Clarke?

A.—It was enabled to build the ten miles within the time limited in order to get the land grant. It would never have accomplished anything, if it had not made such agreement."

On the 1st day of September, 1870, a meeting of the stockholders was held pursuant to notice. The following stockholders were present: Messrs. S. S. Caldwell, Thos. F. Malloy, Henry Gray, Clinton Briggs, A. S. Paddock, H. T. Clarke, Jonas Gise, Isaac Weightman and C. F. Bailey.

On motion of Mr. Briggs, the following resolution was adopted by vote of stock:

Whereas, the twenty miles of railroad now constructed will cost, when all the debts are paid and the road is equipped, at least the sum of $500,000; and whereas, it will be necessary in order to liquidate said debts and equip said road to issue bonds of the company to the amount of $300,000; and whereas, it is desirable that the stock of the company, together with said bonds, should equal the said cost of said road; therefore be it

Resolved, That the Company issue stock to the amount of $200,000, to be divided among the stockholders according to their respective interests as shown by the amount of money paid in by each.

The vote on the foregoing was as follows:

For the resolution—

S. S. Caldwell, fifty shares.

Clinton Briggs, fifty shares.

Enos Lowe (by W. W. Lowe), fifty shares.
H. T. Clarke, one hundred shares.
Henry Gray, fifty shares.
A. S. Paddock, fifty shares.
H. T. Clarke, fifty shares.
C. Briggs and S. S. Caldwell (for H. T. Clarke in trust), fifty shares.
Isaac Weightman, fifty shares.
Thos. F. Malloy, fifty shares.
Geo. W. Smith (by S. S. Caldwell), twenty-five shares.
John F. Young, twenty-five shares.
Francis Smith, twenty-five shares.
Thos. F. Malloy, fifty shares.
Jonas Gise, fifty shares.
Chas. F. Bailey, fifty shares.
In all seven hundred and fifty shares.

At a meeting of the stockholders on the 3d of September, 1870, it was resolved, "that said bonds be and they are hereby apportioned among the stockholders in proportion to the stock to which they are entitled; that such stockholders shall pay into the treasury of the company, on or before September 25, 1870, sixty cents on the dollar on one-half of the bonds to which each is entitled as aforesaid, and shall on or before the 10th day of October, 1870, pay sixty per cent. on the other half of said bonds to which each stockholder is entitled; and such payments shall be in full payment and satisfaction of the same."

At this meeting Clarke voted 200 shares of the original stock. At the meeting of the stockholders of the company held at their office in Omaha, on the 20th day of December, 1871, Clarke claimed the right to vote 650 shares (of the watered stock) instead of 450 shares, which claim was not allowed, and the secretary was directed to "*make a minute of that fact.*" At a meeting of the stockholders held at the office of the com-

pany, in the city of Omaha, on the 23d of January, 1872, Clarke claimed the right to vote 650 shares, "whereupon the following resolution was adopted: Resolved, that H. T. Clarke be permitted to vote no more than 450 shares, the number to which he is entitled, and that his proffered vote of 200 additional shares be rejected, for the reason that he is not the owner thereof."

At a meeting of the stockholders held at the office of the company, on the 5th day of February, 1872, Clarke claimed the right to vote on 650 shares, when a resolution of like character to that of January 23, 1872, was adopted, declaring he could vote only on 450 shares.

It is conceded by counsel for the defendant that the plaintiff *subscribed* for the stock in controversy, and the only question that it is necessary to consider in this case is whether he has paid for it.

The resolution adopted by the company on the 6th day of December, 1869, that the president be instructed to draw his order on the treasurer for the sum of ten thousand dollars to be paid to H. T. Clarke, for the *surveys* and *right of way*, etc., shows what was understood by the defendant at that time as embraced in the assignment; while the resolution of February 7, 1870, "that *all the acts, contracts and obligations* heretofore incurred, made or assumed by the company be and the same are hereby ratified and confirmed," affirmed the resolution of December 6, 1869. It is shown by the testimony that the plaintiff immediately turned over the maps and surveys of the lines south of Omaha to the defendant, and that the first ten miles of road were constructed from them. It is also shown that the plaintiff gave the right of way across his own land, and that his brothers did the same across their land, and so far as he was able he procured the right of way for the defendant. It is difficult to perceive what difference it made to the defendant whether the plaintiff's railroad companies were legal

organizations or not. The naked franchises could not be transferred to the Omaha and Southwestern R. R. Co., so as to enable the assignee to claim any rights under them, and the right of way even if obtained would not under such circumstances pass to the assignee. Mr. Briggs testified that the papers Clarke turned over to the company were not of much value in procuring the right of way, but we are nowhere informed how much the defendant was compelled to pay for the right of way, which is claimed to have been purchased from the plaintiff. It is evident from the testimony, however, that no very large sum was paid. Had the defendant intended to organize as the *assignee* of the Bellevue and Sioux City and the Bellevue, Ashland and Lincoln railroad companies there would be force in the objections urged, but nothing of the kind was attempted or intended. There is not a particle of evidence before us to show that these surveys of the plaintiff were not made in good faith, with the expectation of constructing the roads in question, making Bellevue the initial point, and the fact that the plaintiff had expended considerable sums of money in making surveys, and procuring right of way, is evidence to that extent at least of good faith.

It is urged however, that the plaintiff made no formal assignment of his interest in the companies named, for a long period after December 6, 1869, and that he has never made such an assignment as that required by the resolution of December 6, and that such an assignment is a condition precedent. It is apparent that the plaintiff has substantially complied with the agreement. The testimony of Malloy is nowhere contradicted, that in consequence of this agreement with the plaintiff, "it (the defendant) was enabled to build the ten miles within the time limited, in order to get the land grant. It would never have accomplished anything, if it had not made such agreement." Several witnesses testified that the

assignment was of but little value, but these facts are not denied, and it is apparent that they refer more particularly to the assignment of the right of way. That the defendant agreed to pay plaintiff $10,000 for the surveys and right of way in question, there is no doubt. The defense is that the plaintiff made false representations as to the *status* of his companies, and that in consequence of such representations, the defendant was defrauded. The proof entirely fails to establish fraud on the part of the plaintiff, and no objection of this kind appears to have been made, until about the time of the completion of the first ten miles of road. No attempt is made in this action, to set up, by way of counter-claim, any money that may have been paid to others by defendant, for any portion of the right of way purchased from Clarke. A considerable portion of the grading for the first ten miles of the defendant's road, must have been completed at the time of the *formal* organization of the company on the 31st day of December, 1869, yet no objection appears to have been made to the plaintiff subscribing for 200 shares of stock. The nature and extent of the interest purchased from him, must have been known at that time, if not before, yet on the 7th day of February, 1870, the board of directors passed a resolution, adopting, ratifying, and confirming all the *acts*, *contracts*, and *obligations* "heretofore incurred, made, or assumed." This certainly includes the plaintiff's claim. The parties were capable of contracting, and should be required to perform their agreement.

The defendant's attorney testified that perhaps about two months after the company was organized, he "proposed to Mr. Clarke, that he would offer a resolution, giving, or voting him *five thousand dollars*, in settlement of everything, so as to end the matter." While this was proposed as a compromise, it is reasonable to suppose that the attorney regarded the assignment as

being at least of that value to the defendant, and that he made the proposition in the interest of his client. It is urged however, that even if the defendant is indebted to plaintiff, that it cannot be applied in payment of stock, and we are cited to cases where the subscriptions were to be paid in goods, as cases similar to this. *Henry v. V. & A. R. R. Co.*, 17 *Ohio*, 187. *Noble v. Cadwallader*, 20 *Ohio State*, 208.

It was held in these cases that subscriptions could not be paid in goods, as it would be a fraud on other stockholders, evidently because the goods would not be equivalent to money in value. But the reason for the rule does not apply in this case. The amount is due in *money*, and no reason has been shown why one claim should not be set off against the other. But the proof shows that it was to be so applied. Clarke, Clopper, and Malloy testify that such was the case, and there is no direct denial on that branch of their testimony. Paddock testified: "The board objected so far as issuing stock for the claim, still there was no distinct refusal, but no affirmative action by the board." He also testified: "The question came up how payments should be made. I think Judge Briggs said it should be cash, in order to be valid. We acted on this, with the understanding that when Clarke's claim should be paid it should be paid in cash, and he should be compelled to pay cash for his stock." Mr. Caldwell also testified: "It must be cash to operate on." Clarke was permitted to hold the one hundred shares of stock in question, and voted on them without objection at the meetings of the stockholders, until after the 3d of September, 1870. And it is clearly shown that Clarke, during the construction of the road, loaned his credit to the company, in connection with other stockholders, for the purchase of material, on the basis of being the owner of two hundred shares of stock, it not being known at the time that he owned the Malloy stock. But defendant's

counsel insists that the company forfeited the stock in controversy, and we are referred to page 90 of the printed record for a copy of the notice. The notice is as follows:

OMAHA AND SOUTHWESTERN RAILWAY,
SECRETARY'S OFFICE, OMAHA, Dec. 17, 1869.

MR. HENRY T. CLARKE, *Stockholder, etc., O. & S. W. R'y:*

Dear Sir: I am instructed by the board of directors to send you a copy of the resolution adopted this day at a meeting of the stockholders of this company. The resolution is in the following words:

Resolved, That the board of directors be instructed to collect the subscriptions for stock of this company now delinquent, before 2 o'clock p. m. to-morrow, and that if such delinquent subscriptions are not paid at that time, they should take the necessary legal steps at once to forfeit said stock to the company. Yours, etc.,

A. S. PADDOCK,
Secretary Omaha & Southwestern Railway.

This notice would apply to all the stock subscribed for by the plaintiff, and the record shows that he paid $10,000 on the stock subscribed for by him, after the service of this notice. Our statute provides: "If any installment of stock shall remain unpaid for sixty days after the time it may be required, or specified in the call by order of the board of directors, whether said stock is held by an assignee transferee, or original subscriber, the same may be collected by an action of debt, or the directors may, at their election, serve upon such stockholder, in case he shall be a resident of the state, thirty days' notice in writing that such installment has been due and unpaid for the term aforesaid, * * * and if the installment shall not be paid, with all the charges and expenses incurred in the proceedings, within ninety days after the service of no-

tice or the last publication provided for as aforesaid, the said stock, and all the right, title, and interest of the assignee, transferee, or original subscriber therein, shall, by virtue of such failure, and without further action by such company, become forfeited, and may be disposed of by said company as it sees proper." No valid forfeiture can be had under such a notice. The law in regard to proceedings in the forfeiture of shares is held very strictly. Notice must be given in the precise time and in the exact form required by the statute, and the sale must, in all respects, correspond precisely with the requirements of the provisions of the law. *Redfield on Railways*, 179.

But it is urged that by the resolution adopted Sept. 1, 1870, "that the company should issue stock to the amount of $200,000, to be divided among the stockholders according to their respective interests, as shown by the amount paid in by each," concludes the plaintiff. It is only necessary to say that if he was the owner of the stock in controversy at the time this resolution was adopted, no act of the board of directors could forfeit his rights in this summary manner. The resolutions of Dec. 20, 1871, Jan. 23, 1872, and Feb. 5, 1872, that the plaintiff "be permitted to vote no more than 450 shares, the number to which he is entitled, and that his proffered vote of 200 shares additional be rejected, for the reason that he is not the owner thereof" do not affect the plaintiff's right, the first resolution being passed nearly two years after the original subscription was made. It appears, from the record, that the stock held in trust for Clarke, was not returned to the company until the 3d of Feb., 1872, as show by this notice:

OMAHA, NEB., February 3, 1872.

Whereas there is twenty-five shares of original stock, as subscribed, standing in each of our names, making a

total of fifty shares, for which no payment has been made and no certificates of stock ever issued; and as we are not the owners of the same, although standing in our names as aforesaid, we and each of us do hereby transfer and assign the said stock, to-wit: Twenty-five original shares each, to the Omaha and Southwestern Railroad company being the real owner of the same.

S. S. CALDWELL,
CLINTON BRIGGS.

In presence of John F. Young, Milton T. Barlow.

The plaintiff testified in regard to these shares: "I placed this money ($2.500, Jan. 4, 1870), to their credit for those shares, as directed by Mr. C. when I left Chicogo. *This was* the agreement for the parcel of shares held in trust for me." This is not denied. The rule is well settled that the debtor may at or before the time of payment prescribe the application of the payment, and if he pay with one intent, and the creditor receive with another, the intent of the payer will prevail. *Jackson v. Bailey*, 12 *Ill.*, 161. *Hussey v. Bank*, 10 *Mich.*, 415. *Martin v. Draker*, 5 *Watts*, 544. *Bruwell v. Mason*, 12 *Vt.*, 608. *Boneffe v. Woodberry*, 12 *Pick.*, 456. There is nothing in the record to show that the defendant attempted to make an application of the money paid, to any particular portion of the stock held by the plaintiff. Mr. Caldwell testified that he "gave no special directions" as to the application of the $2,500.

It is clearly shown by the record that the plaintiff was recognized as the owner of the st ck in controversy, until after the completion of twenty miles of road north of the Platte River, and 50 shares of stock were held by the trustees for the plaintiff at the time this action was commenced, and for some time thereafter. The other payments made by the plaintiff, amounting to the sum of $7,500, so far as the record discloses, were

made upon all the stock subscribed for by the plaintiff, and no proceedings have been had to forfeit the stock or any portion of it. Under these circumstances if the court should find that no portion of the sum due from the defendant to the plaintiff should be applied in payment of stock, yet the plaintiff is entitled to a decree for the stock subscribed for by him on payment into court of the amount remaining unpaid on his subscription with interest.

The defendant's counsel admits that the defendant is indebted to the plaintiff, but not for the amount claimed. But for aught that appears in the testimony the maps and surveys were worth the full amount claimed by the plaintiff. Aside from the contract, the question is not what was their cost, but what was their value at that time. The Omaha and Southwestern Railroad Company was organized at the commencement of winter and ten consecutive miles of its line must be constructed as a first class railroad, complete in every respect and ready for the rolling stock by the 15th of the following February, in order to secure the land grant. The testimony of Malloy is not denied that in consequence of the assignment made by plaintiff to defendant, the company was enabled to complete ten miles of its road in time to secure the land grant, which it would not otherwise have accomplished. The decree of this court should be that the defendant deliver to plaintiff 200 shares of stock as prayed for in the petition. As the interest of the plaintiff in the property of the Improvement Company depends to a great extent on his right to the shares in controversy it is unnecessary to review that branch of the case.

BOWKER, KENNARD AND WHEELER, PLAINTIFFS IN ERROR, v. GEORGE W. COLLINS AND W. H. B. STOUT, DEFENDANTS IN ERROR.

Homestead. Judgment was recovered against C., in April. He was at that time the owner of certain real estate, and in October following entered upon and occupied the same with his family. While in possession, execution issued, levy and sale made. *Held*, that the premises were not exempt as a homestead.

ERROR to the district court of Pawnee county.

George M. Humphrey and *Mason & Wheedon*, for plaintiffs in error, cited *Freeman on Judgt's.*, *Sec.* 338. *Hale v. Heaslip*, 16 *Iowa*, 451. *Reinbach v. Walters*, 27 *Ill.*, 393. *Upham v. Bank*, 15 *Wis.*, 449. *Massingill v. Downs*, 7 *How.*, 760. *Gunn v. Barry*, 15 *Wall.*, 610. *Elston v. Robinson*, 21 *Iowa*, 531. *Thurston v. Maddock*, 6 *Allen*, 427. *Seaton v. Son*, 32 *Cal.*, 481. *West v. Ward*, 26 *Wis.*, 579. *Ward v. Hunt*, 16 *Minn.*, 159.

M. H. Sessions and *A. H. Babcock*, for Collins. Construing Secs. 476 and 477, Civil Code, together, and we do not see how it can be held that lands which are *exempt by law* can be made subject to the payment of debts. The latter section does not give a lien upon such lands, for the two sections must be construed together. It would be most arrogant nonsense to say that a lien was *created by law* upon that which is exempt by law. But what is *exempt by law?* The statute does not make an absolute and unqualified exemption. A *homestead* becomes exempt from levy and sale if the debtor demands it. The exemption springs into existence when *claimed* by him, and not before. When is he to make this selection? Under section 526, *at the time* of the levy. When

he does this the property becomes *exempt by law*, and not subject to sale upon the execution. *Rector v. Rotton*, 3 *Neb.*, 171. *Frost v. Shaw*, 3 *Ohio State*, 273. *Sears v. Hawkes*, 14 *Id.*, 298. *The People v. Plumstead*, 2 *Mich.*, 465. *Sullivan v. Winslow*, 22 *Ind.*, 153. *Fogg v. Fogg*, 40 *N. H.*, 282. *Fishback v. Lane*, 36 *Ill.*, 437. *Tunstall v. Jones*, 25 *Ark.*, 272. *Smith v. Brackett*, 36 *Barb.*, 571. *Horton v. McCall*, 66 *N. C.*, 159. *Young v. Brown*, 45 *Geo.*, 553. *Brown v. Martin*, 4 *Bush.*, 47. *Monroe v. May*, 9 *Kan.*, 466. *Morris v. Ward*, 5 *Kan.*, 239. *Doyle v. Coburn*, 6 *Allen*, 73.

MAXWELL, J.

On the fifteenth day of April, 1874, Bowker, Kennard and Wheeler recovered a judgment in the district court of Pawnee county, against G. W. Collins and W. H. B. Stout, for the sum of $718.12 and costs of suit. Collins at that time was the owner of the undivided half of the north-east quarter of section seventeen, township one, north of range eleven, east, in Pawnee county, which appears to have been unoccupied. On or about the sixteenth day of October, 1874, the defendant Collins removed with his family on to the land in question, and has ever since resided thereon. On the eighth day of February, 1875, an execution was issued out of the district court of Pawnee county, on the judgment heretofore mentioned, and was levied on the interest of Collins in the above described land. On the thirteenth day of February, 1875, the defendant Collins served a notice on the sheriff that he claimed the land above described as a homestead; the land was sold to W. H. B. Stout. Afterwards, on motion of Collins, the sale was set aside, on the ground that the land in question was exempt from sale under the homestead law, to which the plaintiffs excepted, and now bring the case into this court by petition in error.

"The statute makes it a material condition, to the exemption of the property, that it is owned and occupied by a resident of this state; the word 'homestead' means a place of residence, which again implies occupancy, possession." *Upham v. Bank*, 15 *Wis.*, 453. "If the property is not a homestead, when the judgment is obtained, it is a lien upon it. The property not being a homestead, in other words, not being exempt when the judgment is obtained, the judgment creditor has a right to levy upon it to the exclusion of other adverse interests subsequent to the judgment, and when the levy is made, the title of the creditor relates back to the judgment, so as to cut off intermediate incumbrances." *Ib.*, 452.

In *Fogg v. Fogg*, 40 *N. H.*, 285, the plaintiff had no other real estate; the buildings were erected by him, for the purpose of being occupied as his family home, and just completed and ready for his family. He had commenced moving in before the attachment, and had got in a substantial part of the furniture, intending to finish that day, and would have done so, but for the attachment. Under these circumstances, the plaintiff was considered as being in possession, at the time of the levy of the attachment.

It is clearly shown, that the lien of the judgment had attached to the lands in question, at the time Collins entered thereon for the purpose of claiming the same as a homestead; does the right of homestead attach in such a case so as to defeat the lien of the judgment? We think not. The law evidently requires that the lands to be selected as a homestead, shall be actually used for that purpose at the time the judgment is recovered. The homestead law being remedial in its character, should receive the most liberal construction consistent with justice, for the purpose of preserving a home to the unfortunate. But it must not be forgotten, that the payment of just obligations is the foundation on which

rests our industrial and commercial prosperity. And the design of the homestead law, is not to enable those claiming its benefits to evade the payment of debts justly due, but to prevent the household being broken up and destroyed; and to leave under the control of the debtor the means by which he may by economy retrieve his fortune, and be enabled in time to meet his obligations. But lands not occupied for homestead purposes, at the time judgment was recovered, it is reasonable to suppose were used as a means of obtaining credit; their occupation at that time, not being considered necessary for the purpose of preserving a home for the family.

A party cannot be permitted to defeat the payment of his just debts, by afterwards removing thereon and asserting a claim of homestead. To sanction such doctrine, under the pretext of liberality of construction of the homestead law, opens the door to gross abuse and fraud, and offers a premium to dishonesty—while but few of those for whom the homestead law was designed would be benefited thereby.

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

REVERSED AND REMANDED.

STATE BANK OF NEBRASKA, APPELLANT, V. JOHN L. CARSON, AND OTHERS, APPELLEES.

1. **Homestead.** A proper construction of the statutes of this state, makes a judgment recovered in the district court, a lien upon all the real estate of the debtor, situated in the county where the judgment is recovered. But no sale can be had of the proper portion selected as a homestead by the debtor, as long as the premises so selected are owned and occupied for that purpose.
2. **Judgment:** MORTGAGE: PRIORITY OF LIENS. Judgment was rendered against W., at a time when he occupied certain premises as a homestead, execution issued, levy made, and returned not sold for want of bidders. During these proceedings W., made no claim to any part of said premises as a homestead, and for a time after the recovery of the judgment, abandoned the same. *Held*, in a suit to foreclose a mortgage given by W., and wife on the same premises, after the rendition of said judgment, that the judgment was the prior lien.

THIS was an action to foreclose a mortgage, executed by defendants, Wilcox and wife, upon certain property in Brownville, Nemeha county, on the third day of February, 1872. The defendant Carson answered, alleging that he was the owner of a judgment against the defendant Wilcox, and one Green, obtained in 1871, which was a lien upon the same premises; that execution was issued on said judgment in 1873, a levy made, and returned not sold for want of bidders; that at the time of such levy, the Wilcoxes made no objection thereto, and made no claim that such real estate was exempt as a homestead; that prior thereto, in 1871, they abandoned the premises, and took up a home in Saline county, under the laws of the United States, and never returned to that in Brownville. The other defendants made default. The district court rendered a decree of foreclosure, and ordered the property to be sold, the proceeds thereof to be first applied in payment of Carson's judgment, and second, in payment of plaintiff's mortgage. From this decree plaintiff appeals.

E. W. Thomas, for the appellant, cited *Green v. Marks*, 25 *Ill.*, 221. *Lamb v. Shays*, 14 *Iowa*, 567. *Morris v. Ward*, 5 *Kan.*, 247. *Gen. Stat.*, 605. *Revalk v. Kraemer*, 8 *Cal.*, 66. *Pardee v. Lindley*, 31 *Ill.*, 187. *Cook v. McChristian*, 4 *Cal.*, 23. *Cox v. Wilder*, 2 *Dillon*, 46. *Eli v. Gridley*, 27 *Iowa*, 376.

J. H. Broady, for defendant, Carson, cited *Smith v. Bracket*, 36 *Barb.*, 573. *Hoyt v. Howe*, 3 *Wis.*, 752. *Tillotson v. Millard*, 7 *Minn.* 513. *Blackwell on Tax Titles*, § 104. *Rector v. Rotton*, 3 *Neb.*, 171. *State v. Melogue*, 9 *Ind.*, 196. *Haynes v. Meek*, 14 *Iowa*, 320. *People v. Plumstead*, 2 *Mich.*, 465.

MAXWELL, J.

The record presents but a single question for our determination. Does the lien of a judgment attach to a homestead?

In *Hoyt v. Howe*, 3 *Wis.*, 758, the court held, "we think it clear, that if the lien attaches, and the effect of the statutes above recited is merely to exempt the homestead from forced sale, the property becomes subject to sale like any other property of the debtor: to hold the contrary would be to maintain that property, which is bound by, and subject to a judgment, and only exempted from sale to satisfy the judgment by means of its peculiar character, with the consent and act of the owner, is nevertheless, still exempted from sale."

In *Smith v. Brackett*, 36 *Barb.*, 574, it is held that "the exemption is a mere personal privilege, which the statute secures to the debtor, and his widow and children after his decease, which does not run with the land, and cannot be transferred to another with the land."

In *Folsom v. Carli*, 5 *Minn.*, 337, the court say: "The real estate in controversy at the time the judgment above spoken of was rendered and docketed, was occupied

by one of the judgment debtors as a homestead, and had been set off to him as such. It was afterwards conveyed to the plaintiff in this action, but before the levy and sale mentioned in the pleadings. It is now urged that because the property was a homestead, exempt from sale in the hands of his grantee, that the judgment was never a lien upon it. We cannot adopt this view of the case. The statute in force at the time, made the judgment a lien from the time of docketing on all the real property of the judgment debtor in the county, owned by him, or afterwards acquired."

In Iowa, under a statute providing that the owner may from time to time, at his pleasure, change the limits of his homestead by changing the metes and bounds as well as the record of the plat and description, or he may change the homestead entirely, the new homestead to the extent in value of the old to be exempt in all cases where the old or former would have been exempt, it was held that the lien of a judgment did not attach while the premises were used as a homestead. *Lamb v. Shays*, 14 *Iowa*, 570. *Cummings v. Long*, 16 *Id.*, 42. There is also a provision in the laws of Iowa that the husband cannot mortgage the homestead, without the concurrence of the wife. *Lamb v. Shays*, 14 *Iowa*, 571.

Sec. 9, *Art.* 15, of the constitution of Kansas, provides that "a homestead to the extent of one hundred and sixty acres of farming lands, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated *without the joint consent of husband and wife, when that relation exists*, but no property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon; provided the provisions

of this section shall not apply to any process of law obtained by virtue of a lien given by consent of *both husband and wife.*" Under this provision the supreme court of Kansas, in *Morris v. Ward*, 5 *Kansas*, 245, held that the lien of a judgment did not attach to the homestead.

The reasons assigned are that as the husband cannot create a specific lien on the homestead without the consent of the wife, therefore no general lien can be created by the recovery of a judgment against him, that will attach to the homestead; and the same reasons are urged in *Lamb v. Shays, supra.* But there are no such restrictions in this state on the power of the husband to incumber, or alienate the homestead. In *Rector v. Rotton*, 3 *Neb.*, 176, this court held: "The legislature never intended by this statute to assume a guardianship over the owner of a homestead, and render him disqualified to make valid contracts respecting it. It imposes no restraint upon him whatever in this respect; even the wife when the title is in the husband has no power to prevent him making such disposition of it as he may think best."

Sec. 468, of the code provides that "the lands and tenements of the debtor, within the county where the judgment is entered, shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered."

Sec. 525, provides that "the homestead owned and occupied by any resident of this state, being the head of a family, shall not be subject to attachment, levy, or sale upon execution, or other process issuing out of any court in this state, so long as the same shall be *owned* and *occupied* by the debtor as such homestead."

In *Rector v. Rotton*, the court held: "the homestead act was passed for the purpose of protecting the home of the family against a sale, without the consent of the owner. But the right thus guaranteed to the head of a

family is a purely personal one, which he may at any time waive, or renounce at his own pleasure. * * * We have seen that the homestead shall *be selected by the owner thereof*, and when a levy is made upon the lands and tenements of one whose homestead has not been selected by metes and bounds, he may notify the officer at the time of the levy of what he regards as his homestead. This of course requires affirmative action on his part; he cannot be permitted to lie idly by and permit a sale of his homestead to be made, and then come forward and lay claim to it as exempt."

We have no doubt under our statute that a judgment recovered in the district court becomes a lien on all the real estate, owned by the judgment debtor at the time, in the county in which the judgment is recovered. But no sale can be had of such portion as may be selected as a homestead by the judgment debtor, or his authorized agent, so long as the premises thus selected are owned and occupied for that purpose.

In this case it is clearly shown that Wilcox had abandoned the premises in question, before the decree of foreclosure was obtained. He interposes no claim for a homestead on the premises in question, and the plaintiff cannot do so for him. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

D. H. HULL, INTERVENOR FOR THE WEST HALF OF THE NORTH HALF OF SECTION 36, TOWN 2, RANGE 15, PLAINTIFF IN ERROR, v. P. B. MILLER, TREASURER OF RICHARDSON COUNTY, DEFENDANT IN ERROR.

1. **Statutes**: ENACTMENT. A bill originating in the senate, was passed by the house of representatives 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.

2. ———: ———. If the journal of either house state that a bill, on a suspension of the rules by the required constitutional majority, was read more than once on the same day, the reasons for such suspension need not be given. What constitutes a "case of urgency" authorizing such suspension is a matter of legislative discretion.

3. ———: PLEADING: PETITION. An act of the legislature relating to the foreclosure of tax liens, set forth the requisites of a petition to be filed by the county treasurer. *Held*, that a petition which conformed substantially to the requirements of the act was sufficient to support the judgment.

THIS was an action brought in the district court of Richardson county to recover a judgment against certain lands and lots in said county for the delinquent taxes of the years 1870 and 1871, under the provisions of an act passed February 27, 1873, entitled "an act to provide relief for delinquent tax payers." *Gen. Stat.*, 940. D. H. Hull intervening on behalf of part of section 36, town 2, range 15, brought the cause here by petition in error to review the proceedings below.

G. P. Uhl and *Mason & Wheedon*, for plaintiff in error, referring to the legislative journals of 1873, and the passage of the bill for the act in question, contended that it was unconstitutional; that the sections of the fundamental law on this subject were plain and imperative; that it was not optional with the legislature to perform or disregard them; that they were designed to fix the responsibility of each member of a legislative body,

to place each upon the record, and to furnish conclusive evidence whether or not the bill passed by the requisite majority; that a strict compliance with these constitutional requirements and that alone could give to legislative enactments vitality, and the force of law; and the journals of either house, which are the records of the proceedings therein, must show that these directions have been obeyed. *Cooley Con. Lim.*, 140. *Spangler v. Jacoby*, 14 *Ills.*, 297. *Supervisors v. People*, 25 *Ills.*, 187. *Prescott v. Illinois Canal*, 19 *Ill.*, 324. *Fordyce v. Godman*, 20 *Ohio St.*, 1.

The journals must also show that a "case of urgency" existed, which would warrant a suspension of the rules, and the reading of the bill, twice on the same day.

Schoenheit & Towle and A. J. Weaver, for the treasurer.

It is not required by the constitution that the yeas and nays should be taken in such cases upon the amendment, and unless the journals show such a change by the amendment, as to obliterate the intention and operation of the law as originally passed, it must be presumed that the law was constitutionally enacted. The rule is fixed by the courts that all presumptions are in favor of the constitutional validity of a statute, and that before a court can declare it invalid, it must clearly appear to be unconstitutional. *Leavenworth Co. v. Miller*, 7 *Kan.*, 479. *Haynes v. Heller*, 21 *Kan.*, 381.

LAKE, CH. J.

This record presents really but two questions for our consideration; *first*, that of the constitutionality of the "act to provide relief for delinquent tax-payers," approved February 27, 1873; and *second*, whether the facts stated in the petition are sufficient in law to constitute a cause of action. The fact that the judgment was rendered

while there was a demurrer on the files undisposed of, by which the question of the sufficiency of those facts was raised, although irregular practice, is of itself no ground for reversal. In effect the judgment overruled the demurrer and held the alleged facts to be adequate to sustain it. It was probably through an oversight that the demurrer was not formally disposed of, but inasmuch as it nowhere appears that the defendant desired to answer over, he was probably willing to submit the case upon the petition, if the court held it to be sufficient. At all events this is the effect of the course pursued as disclosed by the record, and if the facts pleaded justify the judgment rendered it must be sustained, but if they do not, it should be reversed.

But I will first dispose of the constitutional question which is raised. It is disclosed that the bill for the act in question originated in the senate, where it was passed by the constitutional majority, the yeas and nays being duly called, and entered on the journal. In the house, the bill was amended, and then duly passed. Upon its return to the senate, all that the journal discloses with respect to it is, that the amendments of the house were adopted, but by what majority, or in what manner the vote was taken, the journal of the senate is silent. It is contended by counsel for the plaintiff in error, that the constitution required the observance of the same formality in the vote by which the amendments of the house were concurred in, as was required on the final passage of the bill before it left the senate, and that the journal of that body should show an observance of this requirement. As to the vote on the final passage of the bill, in either house, the position of counsel is clearly correct. Sec. 11, Art. II, of the Constitution of 1867, declares that "on the passage of every bill in either house, the vote shall be taken by yeas and nays, and entered on the journal; and no law shall be passed in either house with-

out the concurrence of a majority of all the members elected thereto." This provision is most clearly mandatory, and its non-observance in the passage of any bill would render the act absolutely void. "The office of the journal is to record the proceedings of the house and authenticate and preserve the same. It must appear on the face of the journal that the bill passed by a constitutional majority." *Cooley's Const. Lim.*, 140. *Spangler v. Jacoby*, 14 *Ill.*, 297. *The People v. Mahany*, 13 *Mich.*, 481. *Fordyce v. Godman*, 20 *Ohio State*, 1. *McCulloch v. The State*, 11 *Ind.*, 424.

But it will be observed that the provision of the constitution above quoted refers only to the vote on the passage of bills. There are numerous other votes necessary during the progress of a bill to its third reading, to which it has no sort of reference whatever. These are left to the control of the house, under its usual parliamentary rules, except only that by another provision of the same section of the constitution, any three members of the senate, or five of the house, may require the yeas and nays to be entered upon the journal, whereby the vote may be preserved and known.

In *McCulloch v. The State*, 11 *Ind.*, 424, which seems to be a case directly in point, it was held that where a senate bill had been amended in the house and returned, if the journal only showed the amendments to have been concurred in, it was sufficient. The provision of the constitution of Indiana, then under consideration, is substantially like our own; and we accept this construction as being a sound exposition of its true meaning, and of the full extent of its scope and effect upon legislative action.

It is urged also against the validity of this act, that it was read twice in the senate on the same day, in disregard of section 19 of the constitution, before mentioned, which provides that "every bill shall be fully and distinctly read *three different days*, unless in case of urgency

three-fourths of the house in which it is pending shall dispense with this rule." On this point the journal of the senate shows that the rule was suspended by a vote of three-fourths of the members; and while it is silent as to the reason for the suspension, the presumption is that it was a case of urgency within the constitution. Whether any given state of circumstances present a "case of urgency" authorizing a suspension of this rule, is not a question for the courts to determine, but is one left to the sole judgment and discretion of that branch of the legislature in which the bill is pending. Had the journal shown affirmatively that this bill was read twice on the same day without a suspension of this rule, the case would have presented an altogether different aspect, and its result might not have been what it now is. To my mind it is clear that this particular command of the constitution, that every bill shall be read on three different days, in each house, unless on account of urgency this rule shall be dispensed with by a three-fourths majority, is just as imperative, and its observance quite as essential to the validity of any act, as any other provision of the fundamental law. But inasmuch as it is not required, as it is in respect of bills on their final passage, that each house shall enter upon its journal, and preserve the evidence of its having obeyed this rule, it will be presumed that they did so unless the contrary clearly appear. *Cooley Const. Lim.*, 135.

On the question of the sufficiency of the petition to support the judgment, all that need be said is, that a careful inspection shows that it conforms to all the requirements of said act. In fact it is much fuller than it need to have been. As to the necessary allegations in such a petition, it is stated with particularity that the petitioner is the treasurer of Richardson county; that the taxes in question, giving the amount thereof for the years 1870 and 1871 respectively, were duly levied, had

not been paid, and were still subsisting liens upon the respective parcels of land on which they were imposed. There is also a proper prayer for judgment. A reference to section nine of the act in question, will show that this is all that the petition proper need contain. It is true that the petition must be verified, and have certain exhibits attached thereto, but any omission in respect to these matters is no ground for demurrer.

The objection that the petition should have contained a statement of facts showing that the preliminary notice required by section three of said act was duly given, is not tenable. The notice was no part of the petition; it was merely an exhibit, whose only office was to show that the court had jurisdiction of the case. Had it failed in any respect to conform to the provisions of the statute, a special motion would have been the proper mode of reaching the defect.

But this question in respect of the notice is set at rest by the finding of the court below. It is recited in the judgment "that due notice of the intended application for judgment has been given in the manner prescribed by law," and no proper foundation having been laid for reviewing this finding, it is conclusive, and cannot now be questioned. We see no reason for disturbing the judgment of the court below, and it must be affirmed.

JUDGMENT AFFIRMED.

THOMAS KANE, PLAINTIFF IN ERROR, v. THE PEOPLE, EX REL., HENRY SNYDER, DEFENDANT IN ERROR.

1. **Practice:** SUMMONS. The appearance of a defendant for any other purpose than to challenge the jurisdiction of the court, is a waiver of all defects in the summons.

2. **Quo warranto.** An information filed by consent of the district attorney, and in his name, but not officially signed by him, *held*, no error.

3. ———: JURISDICTION. The act relative to proceedings in cases of contested elections, does not deprive the district court of jurisdiction in cases of *quo warranto*. The provisions of the statute are merely cumulative.

4. ———: EVIDENCE: CONTESTED ELECTION. On the trial of an information by *quo warranto* it appeared from the poll books and returns of the judges of election, that the relator had a majority of all the votes cast, but that the board of canvassers had opened the packages of ballots, required by law to be sealed and deposited in the office of the county clerk, made a pretended recount thereof, and declared the respondent duly elected. The respondent offered in evidence the abstract so made, and the packages of ballots so opened, and offered to produce all the individual voters of the county, for the purpose of showing that he had received a majority of the votes cast by them. *Held*, that the evidence was inadmissible, the canvassers having no authority to go behind the poll books and returns and inspect the ballots.

THIS was an information in the nature of a quo warranto, filed in the district court of Cheyenne county, to test the right of Thomas Kane to hold the office of county treasurer of that county. On the trial of the cause before Hon. Samuel Maxwell, and a jury, L. Connell, the county clerk, was introduced as a witness, and testified: "I voted at the general election for a person for the office of county treasurer." Thereupon counsel for said Kane asked, "For whom did you vote?" Objected to as immaterial; objection sustained. Thereupon counsel for said Kane offered to produce other witnesses, for the purpose of showing that said Kane received a majority of the legal votes cast at said election for county treasurer, by producing all the individual voters of said county who

voted for him at said election, asking them how they voted for said office; which proposal the said court would not entertain, on the ground that such evidence would be irrelevant.

L. Connell further testified, "I am county clerk. I have in my possession the poll books and returns of the several precincts in this county of the election held on the 14th of October, 1873. (Poll books introduced in evidence, and showed that said Henry Snyder received for the office of county treasurer, eighty-three votes, and Thomas Kane, the defendant, seventy-eight votes.) These returns were received by me within the time requiring their return. The ballots were returned sealed up in packages. They were opened by the canvassers, and we found that Thomas Kane had a majority of the votes cast. The poll books and returns showed Snyder had a majority of the votes, but in counting the ballots returned, they gave Kane a majority, and the abstract of votes made by the canvassers was as to treasurer made upon that count. None of the poll books were rejected by the canvassers. (Abstract offered in evidence, and excluded.) There is no record in my office of a copy of the abstract on the books, and never was." Thereupon the defendant requested that said ballots might be brought into court and counted by proper persons in presence of the jury, but the court excluded the profert of such evidence, on the ground that the canvassers and clerk could not go behind the poll books and returns, and had no authority to inspect the ballots, to which ruling of the court, the defendant excepted.

Upon this evidence, under instructions of the court, the jury returned a verdict for the relator, and judgment of ouster being rendered against Kane, he brought the cause here by petition in error.

Charles H. Brown and *J. M. Thurston*, for plaintiff in error.

I. The court had no jurisdiction, unless the information was filed by the district attorney. The law gives him discretionary powers, and the exercise thereof is an act judicial in its nature, and must be performed by him in his official capacity. *Gen. Stat.*, 646, 871. *High on Ex. Legal Remedies*, 45. His official signature was required to the information, and the authority to affix it could only be delegated by the appointment of a deputy. *Chapman v. Inhabitants* 56 *Me.*, 390.

II. Where an express remedy is given by statute, mandamus will not lie, and a party must resort to his special remedy. The same rule applies with equal force to *quo warranto*. *High Ex. Legal Rem.*, *Sec.* 617. *Cooley Con. Lim.*, 622. *Tecumseh Town Site*, 3 *Neb.*, 367. A contestant at an election must pursue his statutory remedy; failing to do so he cannot proceed by *quo warranto*. *Com. v. Garrigner*, 28 *Penn. Stat.*, 9. *Com. v. Baxter*, 35 *Id.*, 263. *State v. Marlow*, 15 *Ohio State*, 114. *State v. Cockerel*, 2 *Rich.*, 6.

III. The returns of the canvassing board, and of the judges and clerks of election, are not conclusive. *People v. Seaman*, 5 *Denio*, 409. *People v. Van Slyck*, 4 *Cow.*, 297. *Cooley Con., Lim.*, 622. *High Ex. Leg. Rem.*, *Sec.* 638. The question is who received the most votes? The court, therefore, erred in excluding the evidence offered by plaintiff in error.

M. B. Hoxie, District Attorney and *John DeLaney*, for the relator, defendant in error.

I. The court had jurisdiction. *State v. Fitzgerald*, 44 *Mo.*, 425. *State v. St. Louis*, 38 *Mo.*, 402 *Hummer v. Hummer*, 3 *G. Greene*, 42. *People v. Holden*, 28 *Cal.*, 129.

II. The evidence was properly excluded. *The State v. Donnewirth*, 21 *Ohio State*, 216. *The People v. Cicott*, 16 *Mich.*, 294.

LAKE, CH. J.

I. The sole object of a summons is to bring the defendant before the court; and although irregularly, or even illegally issued, if there be an appearance for any other purpose than to challenge the jurisdiction of the court the defect will be waived. *Cropsey v. Wiggenhorn*, 3 *Neb.*, 108. *Crowell v. Galloway*, *same*, 215. The defendant having answered to the merits thereby waived the objections which he had previously made to the summons, and it is not necessary to determine whether they were valid or not.

II. It was objected to the information that it was not filed by the district attorney of that district, and a motion to dismiss it on that ground was interposed. In overruling this motion it is insisted that the court erred. But this objection cannot be sustained. The record shows that the information was filed by consent of the district attorney and in his name, and he subsequently appeared in person and assisted in the conduct of the case. The course pursued was unobjectionable, and we see no cause for complaint on that ground.

III. The third objection is that the court had no jurisdiction of the case; or rather that inasmuch as the statutes provide a mode for contesting an election to this office, it, in effect, deprives the court of all jurisdiction by *quo warranto*, and can alone be resorted to. And it has been so held by the supreme court of Ohio. *The State, ex rel., v. Marlow*, 15 *O. S.*, 114. The constitution of Ohio provides that "the general assembly shall determine by law, before what authority, and in what

manner, the trial of contested elections shall be conducted." Whether or not the same conclusion would have been reached in the absence of such a constitutional provision we are unable to say, but we are inclined to think that it would not.

In speaking of the fact that the constitution gave to the court general jurisdiction in *quo warranto*, which it had been contended could not be abridged by the legislature, they say on page 133: "The constitution expressly confers original jurisdiction in *quo warranto* upon the supreme and district courts of the state, and looking to these provisions alone, it might well be claimed that such plenary jurisdiction was intended, as could be exercised in that behalf at common law. * * * But it is clear that the power thus conferred may be modified or limited by other provisions of the same instrument, equally express." Reference is then made to the twenty-first section of the second article of the constitution of that state, which provides in respect to contested elections as before stated, and the conclusion is reached, that the legislation thereby enjoined "has in effect the same high sanction," as though it formed a part of the constitution itself. And that "jurisdiction being thus specially conferred upon other tribunals, and the mode of its exercise prescribed, it cannot be inferred that it was intended by the constitution to be differently exercised by a proceeding in *quo warranto*, as at common law, or by the supreme court, and district courts, under a more general grant of jurisdiction in *quo warranto*." But inasmuch as our constitution contains no similar direction to the legislature, this case, upon which much reliance seemed to be placed, cannot be said to be directly in point. Indeed, even if our constitution were the same as that of Ohio in this respect, still we should hesitate long before adopting the conclusion that a contest under the statute was the exclusive mode of determining, in all cases,

between conflicting claimants for an office. We should as at present advised be strongly inclined to hold that the remedy by *quo warranto* still remained as a *concurrent* remedy, to be resorted to at the option of the state, or of one claiming an office, against an incumbent wrongfully holding the same. But even if the propriety of the rule as laid down in Ohio under the peculiar provision of the constitution of that state be conceded, still it is very clearly wholly inapplicable here. A due regard for a remedy not only clearly recognized by our constitution, but expressly given by the legislature, forbids that we should lay down any such narrow rule in this state.

Section 3, Art. IV, of the constitution of 1867, declares that "the supreme court shall have appellate jurisdiction only, except in cases relating to *revenue*, *mandamus*, *quo warranto*, *habeas corpus*, and such cases of impeachment as may be required to be tried before it; and both the supreme and district courts shall have both chancery and common law jurisdiction." And *quo warranto* being a common law remedy, it follows that the courts named in this section have this valuable remedy, as exercised under the common law, secured to them irrevocably, except by a change of the fundamental law. The legislature may doubtless provide other remedies in cases to which this one would be quite appropriate, and also invest other tribunals with jurisdiction to administer them, but they would be auxiliary merely, and could not take from the supreme and district courts their jurisdiction by *quo warranto*.

In addition to this constitutional authority given to these courts, and of which the legislature is powerless to deprive them, we have chapter 42 of the Revised Statutes, which would authorize this proceeding, even if the constitution were silent on the subject. Section one pro-provides: "When any citizen of this state shall claim any office which is usurped, invaded, or unlawfully held and

exercised by another, the person so claiming such office shall have the right to file in the district court an information in the nature of a *quo warranto*," etc. *Gen. Stat.*, 1873. This shows the entire harmony existing between the constitution and our legislation on this subject, and leaves us in no doubt whatever as to the full and complete jurisdiction of the district court in this case.

IV. The most important question remaining to be disposed of, is that raised by the alleged error in excluding certain testimony from the jury. This election was held under the provisions of the general election law of 1873. There is no dispute as to the entire regularity with which it was conducted, up to the canvass of the returns required to be made by the county clerk and two disinterested electors. In this canvass however there seems to have been a grave and inexcusable error committed. The sealed packages of ballots, returned from the several precincts, were broken open, notwithstanding the statute requires them to be kept by the clerk unopened and uninspected, except for certain specified purposes, and were recounted in utter disregard of the law. Instead of making the abstract as shown by the several poll books, as the statute imperatively requires, and from which alone they have any authority to make one at all, these were entirely disregarded, and a pretended re-count of the ballots made, upon the basis of which the respondent was declared elected, and a certificate to that effect issued to him. It is an undisputed fact that the returns from the judges of election conformed in every particular to the requirements of the law. There was no reason then, nor has any since been shown, for questioning their entire correctness. And it is admitted that these returns gave the relator a clear majority, over the respondent, of five votes. This being so, it was the plain duty of the board of canvassers so to have declared, and of the clerk

to have certified accordingly. There is no doubt that cases may arise wherein it would be the duty of a contest board, or a court, to go behind the poll books, and resort to a recount of the ballots. Such course is plainly contemplated in the provision requiring the ballots to be kept securely sealed and uninspected until brought before the tribunal where they are to be used; but it should be resorted to only when the poll books are directly attacked for fraud or mistake, and their verity put in issue. It is only in such a case that a party has the right to go behind the returns, which the statute declares shall be the evidence upon which the certificate of election shall be issued.

There was no issue presented by the pleadings in this case, justifying the admission of the testimony which the court excluded; and as the case stood under the proofs, the court was justified in directing a verdict in favor of the relator.

JUDGMENT AFFIRMED.

NELSON MOSES, APPELLEE, v. G. W. COMSTOCK AND WIFE, APPELLANTS.

1. **Promissory Note:** CONSIDERATION. Where the statute of a state prescribes certain words to be inserted in the body of a negotiable note, given for a *patent* right, subjecting it to all the defenses as if owned by the original promisee, *Held*, that if the note is executed in the ordinary form—omitting the words prescribed—a *bona fide* purchaser of the same before maturity and without notice, takes it divested of all equities between the original parties, and may enforce the payment thereof.
2. **Mortgage:** ASSIGNMENT. A *bona fide* purchaser for value of a negotiable promissory note, secured by a mortgage, before maturity and without notice, takes the mortgage as he does the note, discharged of all equities which may exist between the original parties. Following *Webb v. Hoselton*, *ante.*, *p.* 308.

APPEAL from the district court of Douglas county.

E. Wakeley, for the appellants, cited *Bank v. Donnaley*, 8 *Pet.*, 361. *Bartsch v. Atwater*, 1 *Conn.*, 409. *Stebbins v. Leowolf*, 3 *Cush.*, 137. *Andrew v. Herriot*, 4 *Cow.*, 508. *Le Prince v. Guillemot*, 1 *Rich. Eq.*, 187. *Aymer v. Sheldon*, 12 *Wend.*, 439. *Williams v. Wade*, 1 *Met.*, 82.

C. A. Baldwin, for the appellee, cited *Zimmerman v. Rote*, 75 *Penn. State*, 188. *Norris v. Langley*, 32 *Vt.*, 320. *Converse v. Foster*, 3 *Scam.*, 387. *Carpenter v. Longan*, 16 *Wall.*, 271.

GANTT, J.

This is an action to foreclose a mortgage, and is brought into this court upon appeal from the decree of the district court. The mortgage was executed by the defendant to one W. G. Wilson, January 2, 1872, to secure the payment of a promissory note of the same date, executed by the same parties to said Wilson, and payable two years after the date thereof.

The proofs show that on the twelfth day of March, 1872, for a valuable consideration, Wilson sold and assigned the mortgage to one J. T. Deweese, and that on the fifteenth day of March, 1873, for a valuable consideration, Deweese sold and assigned the note and mortgage to Charles and Nelson Moses. Charles Moses afterwards sold and assigned his interest in the note and mortgage to Nelson Moses, the plaintiff in this action. The note, mortgage, and the assignments, were executed in the state of Ohio, where the parties resided. The mortgaged property is situated in Omaha, Douglas county, in this state; the plaintiff brought his action in that county, and the *lex fori* must govern as to the remedy.

The main ground of defense alleged and relied on is, that the consideration in the note and mortgage was a patent right for a sewing machine treadle, and the good

will and certain personal property of the "Champion Manufacturing Company," doing business in the city of Cleveland, Ohio; that all this property was valueless and that under the law of the state of Ohio, the note was not negotiable and was void. The note is as follows:

"$2500. CLEVELAND, Jan'y 2, 1872.

Two years after date we promise to pay William G. Wilson, or order, twenty-five hundred dollars, value received, with interest at six per cent. per annum.

GEO. W. COMSTOCK.
CLARA L. COMSTOCK."

It is drawn in the ordinary form of a negotiable note; the plaintiff purchased it before maturity, in the regular course of business, and paid for it a full consideration without notice of any existent equities between the original parties, or of any defense against it by the payors. Hence, under the well settled rules of law, so far as the face of the note shows, the plaintiff took it unaffected by any equities whatever. But it is alleged that the note was given, in part at least, for a patent right, and that the law of the state of Ohio prescribes certain particular words to be inserted in the body of such notes, subjecting them to all defenses as if owned by the original promisee; and therefore the omission of such words renders the note void.

The rule will not be questioned that, at common law, the purchase of a patent right is a good consideration for a note; it is said that when the consideration is a license to use and vend an invention regularly patented, the unprofitableness of the invention does not vitiate the note. 3 *Am. R.*, 435. *Nash v. Lull*, 102 *Mass.*, 60. Therefore, if this defense can be set up, it must be in pursuance of some positive law, and strictly within the purview of such law.

The proofs, however, do not clearly establish the fact that the patent right was any part of the consideration of the note. It may perhaps be inferred from all the transactions between the original parties; but assuming the fact may thus be inferentially deduced from the evidence, as between the original parties, still the assumption will not benefit the appellants anything, because there is an entire absence of proof tending to show any statute law in force in Ohio as alleged. And "the established doctrine now is that no court takes judicial notice of the laws of a foreign country, but they must be proven as facts." *Story's Const. Law*, § 637. And again, suppose a statute as alleged was in force in Ohio, at the time of the transaction, it would not vitiate and avoid the note, because the purpose of such law is simply to prevent such notes from being put into the market as commercial paper, divested of all equities, and imposes a penalty for the omission of the words required to be inserted in the body of the notes. But assume that the note was given for a patent right, and that the law as claimed was in force, yet as it is commercial paper, in the ordinary form of a negotiable note, the fact that a patent right was the consideration of the note cannot be set up as a defense against it in the hands of an innocent *bona fide* holder without notice. In such case the law protects the innocent holder and owner of the note from the neglect or wrong of the original parties. *Zimmerman v. Rote*, 75 *Penn. St.*, 188.

It is, however, contended that "the note was taken in violation of the statute; that the payee could not enforce it, and of course could not enforce the mortgage securing it," and therefore, while the note might not be void in the hands of a *bona fide* holder, the mortgage is subject to the same defense as if held by the mortgagee. As already stated there is no proof of any statute in force in Ohio in regard to such notes. But it is further contended that "when the note and mortgage were executed and

assigned," under the laws of Ohio, the mortgage was not negotiable, and "if transferred even to a *bona fide* holder it would be subject to any defense that could be made against it in the hands of the mortgagee." This proposition does not necessarily involve a discussion of the law as to the construction of contracts; the *lex loci contractus* is well established. But the question involved in the proposition relates to a general principle of law in regard to the nature, character and qualities of a mortgage, given to secure the payment of a negotiable note. Is such mortgage in the hands of an innocent purchaser of the note, without notice, divested of all equities between the mortgagor and mortgagee? In other words, does the doctrine of negotiability inhere in the mortgage just as it does in the note? In support of the proposition, the appellants rely on the case of *Smith v. Bailey*, 14 *Ohio St.*, 396, in which the opinion of the court was delivered by Judge Ranney; and I think his reasoning upon the question carries great force with it; but the case of *Carpenter v. Longan*, 16 *Wall.*, 271 (citing a number of authorities), overrules the case of *Smith v. Bailey;* and the case of *Webb v. Hoselton*, in our own state, decided at this present term of the supreme court, affirms the doctrine laid down in *Carpenter v. Longan.*

And now it is not necessary to review the authorities *pro* and *con* upon this question, and hence I need only further observe that the doctrine seems now to be established, as the common law rule, that negotiability inheres in the mortgage just the same as it does in the note; and we must be governed by this rule, howbeit the reasoning of the cases in support of it may fail to satisfy me that a mortgage is *not* precisely the same instrument, with the same inherent charater and qualities, whether it be made to secure a note negotiable or non-negotiable, or no note at all; or that a mortgage has not a character of its own, as a deed or instrument conveying an equitable title to,

or interest in lands, within the purview of the registry acts, the statute of frauds and the general legislation and rules of law relating to landed property, notwithstanding the legal title remains in the mortgagor. But under the rule now established, the decree of the court below must be affirmed.

DECREE AFFIRMED.

S. W. HARDEN, PLAINTIFF IN ERROR, v. ATCHISON AND NEBRASKA R. R. CO., DEFENDANT IN ERROR.

1. **Pleading**: ANSWER. A petition against a railroad company alleged that "defendant carelessly, negligently, and wantonly ran its engine and cars over and upon plaintiff's mare," etc. The answer denied that the "defendant carelessly, negligently and wantonly ran over said mare." *Held*, 1. That this was not a denial of the injury complained of. 2. That under these pleadings the court erred in instructing the jury that such denial "puts the plaintiff upon proof of his cause of action."

2. ——: ——. A denial must be direct and unambiguous, and answer the substance of each direct charge; such facts as are not denied are, for the purposes of the action, taken as true.

3. ——: VERIFICATION. But while denials must be positive and direct, the verification need only be that the defendant believes the facts stated in his answer to be true.

ERROR to the district court of Richardson county.

George P. Uhl, for plaintiff in error, cited *Drakely v. Gregg*, 8 *Wall.*, 242. *Hickman v. Jones*, 9 *Wall.*, 197. *Newman v. City*, 18 *Ohio*, 323.

Galey & Lambertson, for defendants in error.

MAXWELL, J.

The plaintiff filed his petition in the district court of Richardson county, alleging that on the twenty-first day of July, 1873, a mare belonging to plaintiff, was on the railroad track of the defendant, in Falls City precinct,

Richardson county, when a certain train of cars belonging to the defendant, and managed and controlled by its agents and employes, was passing over the railroad track. That the said agents and employes of said railroad, negligently, carelessly, and wantonly, ran its engine and train of cars upon, over and against said mare, breaking one of her legs and causing other injuries, to the damage of the plaintiff in the sum of $75.00," etc. It was also alleged in the petition, that the railroad was not fenced, and that it had been constructed more than six months, at the time the injury was committed.

The defendant answered the petition of plaintiff as follows: "The defendant, answering the petition of said plaintiff, heretofore filed against it in the above entitled cause, says and denies that it negligently, carelessly, and wantonly ran its engine or locomotive and train of cars over or against the said mare of the said plaintiff. Defendant denies that the notice required by the statute, in such cases made and provided, was given it by said plaintiff, as to entitle said plaintiff to double damages. Defendant denies that said mare was worth the sum of seventy-five dollars. Defendant alleges that said mare of said plaintiff was injured in the manner alleged by said plaintiff's petition by and through the negligence and carelessness of the said plaintiff."

On the trial of the cause, the court instructed the jury as follows: "This suit is brought by the plaintiff to recover damages of defendant, alleged to be sustained by plaintiff, by reason of the defendant negligently, carelessly, and wantonly, running its engine upon and so badly injuring his mare as to render it worthless. The defendant denies that its engine or locomotive and train of cars ran over or against the mare of the plaintiff. This denial, puts the plaintiff upon proof of his cause of action; has he proved the injury was done by the defendant, or any of its employes? I must instruct

you as a matter of law, that the plaintiff has failed to prove that the defendant committed the injury, and your verdict must be for the defendant." To this instruction the plaintiff excepted. The jury found a verdict for the defendant. The plaintiff filed a motion for a new trial, which was overruled, and judgment was rendered dismissing the case. The case is brought into this court by petition in error.

Sec. 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."

Without considering the admissions contained in the answer, is there any denial therein, that the injury complained of was committed by the defendant? We think not. It is denied that the "defendant negligently, carelessly, and wantonly ran its engine, or locomotive and train of cars over, or against the said mare of the said plaintiff," but this is a mere denial of negligence on the part of the defendant, and not a denial that the defendant occasioned the injury complained of. "A defendant must answer the charges directly, without evasion, and not by way of negative pregnant." 1 *Vansantvoords, Eq.*, 204. *Moaks Van Sant, Pl.*, 814. *Baker v. Bailey*, 16 *Barb.*, 56. *Fish v. Redington*, 31 *Cal.*, 194. *Robins v. Lincoln*, 12 *Wis.*, 8. A denial must be direct and unambiguous, and must answer the substance of each direct charge; and such facts as are not denied by the answer for the purposes of the action, are to be taken as true. This requirement of the statute is not designed to prevent the defendant from denying such facts in the petition, as he believes to be untrue, but to prevent the introduction of fictitious issues; and while denials must be positive and direct, the verification need only be, that

the defendant believes the facts stated in the answer to be true.

There being no denial in the answer that the defendant committed the injuries complained of, no proof of those facts was required. The court therefore erred in instructing the jury to find for the defendant. The judgment of the district court is reversed, and the case remanded for further proceedings.

REVERSED AND REMANDED.

LAKE, CH. J., concurred.

GEORGE C. THOMPSON AND GEORGE RHODES, PLAINTIFFS IN ERROR, v. THE PEOPLE OF THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Practice in Criminal Cases.** If a party fails to object in the court below, to an indictment containing two counts for larceny, and two counts for receiving stolen property, on the ground that they refer to separate and distinct offenses, such objection, after a verdict of guilty on the larceny counts, will not be considered in the appellate count.

2. ———: VERDICT. Upon the trial of such indictment the jury returned a verdict of guilty on the larceny counts, and not guilty on the others, and also found "the property described in the indictment to be of the value of one hundred and fifteen dollars." *Held*, in the absence of any evidence upon the counts for receiving stolen property, that the valuation would apply to the property mentioned in the larceny counts.

3. ———: LARCENY: INSTRUCTIONS TO JURY. Upon the trial of an indictment for larceny, the court instructed the jury that "larceny is defined to be the taking and carrying, or leading away, the personal property of another, without his consent, and against his will, with intent to appropriate the same to the use of the taker. Hence if the taking of the property was with the intent to convert the same to the use of the taker the offense is complete." *Held*, erroneous, in this, that it omits to charge that the taking must be with a felonious intent.

4. ———: ———: POSSESSION: BURDEN OF PROOF. In a prosecution for larceny it is error to instruct the jury, that "if the stolen property was in the possession of the accused, it is incumbent upon him to *prove* how that

possession was obtained." Possession *soon after* the theft, is, however, *prima facie* evidence of guilt, proper to be left to the jury, who are the sole judges of its effect, and if there be a reasonable doubt of guilt, the accused is entitled to an acquittal.

5. ———: OBJECTIONS TO INSTRUCTIONS. Since by statute in this state (Laws 1875, p. 76), the charge of the court to the jury is required to be in writing, filed with the clerk and made a part of the record, if it appears that a charge given in a case of felony had a tendency to prejudice the accused, under any state of facts, the appellate court will correct the error by granting a new trial, even though no objection was taken to such charge in the court below.

ERROR to the district court for Nemeha county.

E. W. Thomas, for plaintiffs in error, contended that the verdict was insufficient in law, that the court erred in instructing the jury that the possession of stolen property, unaccompanied by other circumstances of guilt, is sufficient to warrant a conviction, that the court erred in stating to the jury the charge contained in the indictment, and also, in giving a definition of larceny. Our statute gives no definition of larceny, and consequently, the term is to be understood as meaning the same as at common law. *The People v. Chambers*, 18 *Cal.*, 382. *The People v. Antonio*, 27 *Id.*, 404. *Durant v. The People*, 13 *Mich.*, 351. 3 *Green Ev.*, 151, 157. 2 *Whart., Crim. Law*, 1750–1769.

George H. Roberts, *Attorney-General*, and *J. H. Broady*, *District Attorney*, for the People, contended, mainly, that the points must be raised in the court below, which will not be reversed without an opportunity to exercise its judgment, and no party can be allowed to lie in wait to originally raise points in the court of last resort; else no conviction would stand, and every conviction would be reversed to endless extent, and the practice of taking exceptions or raising points in the trial court would soon be obsolete. The defendant has his counsel, and that, too, paid by the state if he is not able; and he

has his right to a bill of exceptions, motion for new trial, motion in arrest of judgment, and writ of error to the appellate court where he comes wholly within the rule of practice in civil cases relating to exceptions, etc. *Tecumseh Town Site*, 3 *Neb.*, 267. *Hughes v. Kellogg*, *Id.*, 186. *Patton v. Cobb*, 26 *Ark.*, 616. *Criminal Code*, *Sec.* 482. *Parks v. State*, 4 *Ohio Stat.*, 234. *State v. Ostrander*, 18 *Iowa*, 436. *State v. Jones*, 7 *Nev.*, 408. *State v. Griggs*, 48 *Mo.*, 557.

LAKE, CH. J.

The defendants in the court below were jointly indicted, tried, and convicted of the crime of horse stealing, and have brought the case here for review by writ of error.

I. The indictment contains four counts: the first and third counts charging the defendants with the larceny of certain horses, and the second and fourth counts charging them with receiving horses, of a similar description, knowing them to have been stolen. It was contended on the argument, by counsel for the prosecution, that the property mentioned in the second and fourth counts was the same as that described in the other two, which charge the larceny. This may be so, but if we look to the indictment alone no such inference could be properly drawn. For aught that appears, the several counts refer to separate, and entirely distinct offenses. But however this may be, inasmuch as no objection was made on that ground in the court below, and the jury having found the defendants guilty as charged in the larceny counts, it is too late to raise it for the first time in this court. *Shotwell's Case*, 27 *Cal.*, 394. *People v. Burgess*, 35 *Cal.*, 115.

II. It is objected that the verdict is insufficient in law for the reason that it does not show the value of the

property *stolen*. This objection cannot be sustained. The language of the verdict is, "We the jury impaneled, and sworn, and charged, in this cause, do find the defendants George C. Thompson and George Rhodes guilty as they stand charged in the first and third counts of the indictment, and not guilty as they are charged in the second and fourth counts of the indictment. And we further find the property described in the indictment to be of the value of one hundred and fifteen dollars."

Now we think it would be quite unreasonable to presume that this valuation was of any other than the property which the jury found the defendants guilty of stealing. So far as disclosed by the record, it does not appear that any evidence was introduced upon the counts for receiving stolen property. That subject was not even alluded to by the judge in his instructions, which were confined to the counts charging the defendants with the larceny of the horses. To justify the reversal of a judgment, the alleged error must be manifest in the record, and not depend alone upon the possibilities of construction.

III. Objection is made also to certain portions of the instructions given to the jury as to the law of the case. The charge of the judge was in writing, and became a part of the record of the case by being filed as directed by section four, of the act amendatory of section fifty-eight, Ch. 14, of the General Statutes, approved February 25, 1875. Until the passage of this act, the instructions given to a jury could become a part of the record only by means of a bill of exceptions, formally allowed, and certified by the presiding judge.

In at least two essential particulars these instructions are clearly erroneous; *first*, in the definition given of larceny, and *second*, in the statement of the effect to be

given to the fact of possession of the property by the defendants, after it was taken from the owner.

On the first point the instruction was this: "Larceny is defined to be the taking and carrying or leading away the personal property of another, without his consent and against his will, with intent to appropriate the same to the use of the taker. Hence, if the taking of the property was with the intent to convert the same to the use of the taker the offense is complete." The fault to be found with this definition is, that an important ingredient, that which distinguishes larceny from a simple trespass, is omitted, viz: the *animus furandi*, without which a taking is no larceny. *People v. Reynolds*, 2 *Mich.*, 422. *Keeley v. State*, 14 *Ind.*, 36. Larceny is not defined in our statutes, and resort must be had therefore to the common law to ascertain what its constituent elements are. "Simple larceny is the felonious taking and carrying away of the personal goods of another, with intent to deprive the owner permanently of his property therein." *Broom & Hadley's Com., Vol.* 2, *Am. Ed.*, 513. The taking of the goods must be with a felonious intent, otherwise there is no larceny. *State v. Gresser*, 19 *Mo.*, 247. *Phelps v. The People*, 55 *Ill.*, 334.

Now admitting that the testimony before the jury fully supported the instruction above quoted, and such is the presumption where the evidence is not preserved, and that it was clearly proved that the defendants had done all that the jury were told would constitute a larceny, and authorize a verdict of guilty, it would amount only to a simple trespass, nothing more. And this being so, it is clear that this instruction was not only erroneous, but must have operated directly to the prejudice of the accused. No other conclusion would be reasonable.

The jury were further instructed that " the general rule of law is, that whenever the property of one man which has been taken from him without his knowledge or con-

sent, is found upon, or in the possession of another, or others, it is incumbent on such person or persons in whose possession it is found to prove how they came by it; otherwise the presumption of law is that he or they obtained it feloniously." Here it will be observed that the idea is again pressed upon the attention of the jury, that the mere proof of the fact that the subject of the alleged larceny was taken from the owner "without his knowledge or consent," would make the crime complete, and if the property were found in the defendants' possession it would warrant their conviction, unless they had "*proved*" that they had come by it honestly.

Altogether too much importance is here given to the simple possession of the property by the accused, for even if the felonious taking were fully established, and the possession of the fruits of the larceny were the only evidence implicating the defendants in the transaction, they were not bound to "prove" how that possession came about.

There is some conflict in the authorities as to the effect to be given to the proof of possession of stolen property, but we doubt very much if one case can be found which goes to the extent of this instruction. Indeed, some authorities hold that possession alone is not sufficient, in any case, to warrant a conviction. On this point, see *People v. Antonio*, 27 *Cal.*, 404. *Durant v. The People*, 13 *Mich.*, 351. The better rule however seems to be, that if the possession of the stolen article be *recent* after the theft, such evidence is sufficient to make out a *prima facie* case, proper to be left to the jury, who are the sole judges of the effect that should be given to it. *State v. Merrick*, 19 *Maine*, 398. 1 *Phil. on Ev.*, 634.

In the case of *State v. Merrick*, above cited, the prisoner was charged with the larceny of certain sheep, and the court in commenting on the instructions given to the jury say: "It was, in our judgment, too strong to

instruct the jury that they must convict the accused unless he had proved to their reasonable satisfaction that he came by the sheep otherwise than by stealing." And in this case, while it might have been impossible for the defendants to prove how they came to be possessed of the property, still, if they had succeeded in raising in the minds of the jury a reasonable doubt that they stole it, they were entitled to an acquittal.

IV. But it was urged in argument by counsel for the prosecution that, no exception having been taken to the charge in the court below, it is too late to assign these errors here as ground for a reversal of the judgment.

The rule here invoked is properly applicable in all civil cases, and quite generally in criminal cases also. But in the latter class it is not of universal application, especially in capital and other felonies, where reviewing courts not unfrequently correct errors prejudicial to the accused, or where the charge cannot be correct in any conceivable view of the case, although no objection was interposed on that ground in the court below. This instruction, as before stated, is a part of the record of the case, made so by statute, and is therefore properly before us. There is no doubt whatever that the charge as here set out was given, and the alleged errors in fact committed. It is equally certain that it had a direct tendency to prejudice the accused, no matter what the testimony may have been. Under these circumstances we deem it to be our plain duty to correct the wrong by awarding to the defendants a new trial.

In the case of *Leoffner v. The State*, 10 *Ohio State*, 598, where error was alleged in the charge to the jury on the question of insanity, and no exception had been taken, the supreme court of Ohio did not refuse on that ground to consider it. The want of such exception having been suggested, Mr. Attorney-General Walcott, representing

the state, made use of the following language which we here quote with approval: "While this seems to be the rule in this state in civil cases, it does not comport with my conviction of duty to argue that where a charge is spread upon the record, so as to be legitimately before the reviewing court, and it is apparent that the prisoner has been vitally or substantially prejudiced by an erroneous ruling of the charge, the reviewing court ought not, *suo sponte*, to take notice of the error and reverse the judgment. No man's life should be forfeited because of the omission of his counsel to take exception. The interests of public justice do not, in my opinion, require, or even permit me to urge this objection against considering any error in the charge of the court."

We conceive the same rule to be appropriate in all cases of felony where the ends of justice seem to require its application. *People v. Levison*, 16 *Cal.*, 98.

REVERSED AND REMANDED.

WILLIAM FRASHER AND OTHERS, PLAINTIFFS IN ERROR, v. S. A. INGHAM AND OTHERS, DEFENDANTS IN ERROR.

1. **Judicial Sale.** The rule of *caveat emptor* applies to judicial sales, because from the nature of the transaction there is no one to indemnify the purchaser for any loss he may sustain.

2. ———. Where the sheriff by mistake, levied upon certain tracts of land covered with timber, which were appraised in the aggregate at the sum of $1,634, and plaintiff, relying upon the levy and appraisement, purchased the same for $1,090, procured a confirmation of the sale, and a deed from the sheriff, and it was afterwards discovered that the *numbers* of the land, levied upon and sold, did not include the timber land, but consisted of worthless sand banks on the waters edge of the Missouri river, *it was held*, on a petition of the purchaser to set the sale aside, that he was entitled to relief, and the rule of *caveat emptor* did not apply.

3. ———: COSTS. But as the defendants did not appear to be in fault, *it was held*, that the costs should be taxed to plaintiff.

ERROR from the district court of Nemeha county.

E. W. Thomas and *J. H. Broady*, for plaintiff in error, cited *Hilliard on Vendors*, 584. *Anderson v. Foulke*, 2 *Harr. & G ll.*, 346. 22 *Barb.*, 167. *Ritter v. Henshaw*, 7 *Iowa*, 97. *Dean v. Morris*, 4 *G. Greene*, 312.

T. B. Stevenson, for defendants in error, cited *Gatling v. Newell*, 9 *Ind.*, 572. *Ruffner v. McConnell*, 17 *Ill.*, 212. *Sugden on Vendors*, 378. 10 *Ohio State*, 577. *Dickerman v. Burgess*, 20 *Ill.*, 266. 6 *Ohio*, 477. 14 *Ohio*, 285. 14 *Penn. State*, 9.

MAXWELL, J.

The petition alleges "that on the 13th day of November, 1866, the plaintiff recovered a judgment against the defendants, for the sum of $4,003.65, and $18.63 costs; that by virtue of an execution issued out of the district court of Nemeha county, upon said judgment, dated November 27, 1867, and a *venditioni exponas* issued from said county on said judgment, dated April 9, 1868, and both directed to the sheriff of said county, the said sheriff did duly levy upon, appraise, advertise and sell certain real estate of the defendant, W. H. Denman, situated in said county of Nemeha, at public auction, to the plaintiffs herein, and did by mistake hereinafter set forth, include, and carry through the entire record of the proceedings under said writs, issued upon said judgment, as having been duly levied upon, appraised, advertised, and sold to the plaintiffs under said writs, the following described real estate of the defendant W. H. Denman, situated in said county, to-wit: Lot three in section twenty-six, and lot two in section thirty-five, in town seven, range fifteen east, supposed to contain 52.88 acres; that on the 18th day of September, 1868, said court con-

firmed said sales, and ordered deeds to be made by the sheriff to the purchasers accordingly; that said sales were made on the 16th day of May, 1868, and the amount bid and paid by plaintiffs at that time for the above described lands, was the sum of $1,090. * * * The lands above described were at the time of said appraisement, advertisement, and sale, and ever since then have been, mere sand banks on the waters edge of the Missouri river, and absolutely of no value whatever. Near by the lands above described, and separated therefrom only by a slough projecting from said river, is another tract of land, which is good timber land, and of great value—all laboring in said proceeding under said writs, under the gross and material mistake of fact, that the description herein before inserted applied to, and described, said tract of timber land. Said sheriff levied upon said timber land, and the appraisers duly chosen, went upon and appraised the said tract of timber land at the sum of $1,634, and the said plaintiffs purchased the same as aforesaid, for the sum of $1,090, all the time in the full faith that they were levying upon said timber land, and in such full faith and belief afterwards obtained a confirmation of the sale, and a deed from the sheriff for said tracts of land, etc. Wherefore plaintiffs pray judgment that said sale be set aside," etc.

The defendants demurred to the petition on the ground that the facts stated therein were not sufficient to constitute a cause of action. The court sustained the demurrer, to which plaintiffs excepted and brought the case into this court by petition in error.

In *McGhee v. Ellis*, 4 *Littell*, 250, where the debtor had no title to the property sold on execution, the court say: "But still it would be iniquity to say that he (the debtor) should avail himself of the advantage and leave the innocent purchaser a loser; and it is in cases where right exists without remedy at law, that a court of equity

applies its helping hand. That court, when any legal advantage is gained by one, which he may keep, and that advantage has resulted to him by operation of law in lieu of a former claim or advantage over a third person, will relieve the case by applying the doctrine of substitution, and clothe him who is the loser, for the benefit of him who has gained, with the rights which such gainer first had against such third person."

In *Laight v. Pell*, 1 *Edwd. Ch.*, 577, where a mistake had been made in the description of the dimensions of a house, sold on an order of sale, the court say: "A fair competition at master's sale is encouraged, while at the same time purchasers should understand that no deception will be permitted to be practiced upon them; and in a contract between them and the court, they will not be compelled to carry it into effect under circumstances where it would not be perfectly just and conscientious in an individual to insist upon the performance of it against the purchaser."

In *Muir v. Craig*, 3 *Blackford*, 293, the question presented was whether the purchaser at sheriff's sale of land to which the execution debtor had no title, but which belonged at the time to the United States, could recover from the debtor in equity the amount of the purchase money paid to the sheriff, though no fraud in relation to the sale be imputed to the debtor. The court say: "We find this question, so far as it could arise in a case of the sale of a negro, decided in the affirmative by the court of appeals of Kentucky. *McGhee v. Ellis*, 4 *Litt.*, 224. Our opinion is in accordance with that decision, the principle of which must, we conceive, be applicable to a case of the sale of land. Craig's debt to Jennings as to $295.00 has been paid by Muir; the consideration for that payment, viz.: the land sold by the sheriff to Muir as Craig's property, has entirely failed; Muir must be entitled in equity to recover from Craig, who has received the

benefit of the purchase money paid to the sheriff for the land."

In *Yates & Woodruff v. Little*, 6 *McLean*, 511, in an action of partition, lots one and two, in block thirty, in Saginaw City, with the warehouse and wharf, were appraised at $7,000, and alloted to plaintiffs. Lot three, in block thirty, was appraised at $200 and alloted to the defendant. Little and wife executed a quit claim deed for lots one and two to the plaintiffs. It was afterwards discovered that twenty feet of the warehouse extended on to lot three. The court held: "The case made by the bill is one of flagrant injustice, though it occurred not by the contrivance of the defendant but through the mistake of the appraisers and of the parties. Lots one and two, with warehouse and wharf, were valued at $7,000. Can any one suppose that one hundred feet only of the warehouse was valued? Can any one doubt that the entire warehouse and the ground on which it stood, with the wharf, were included in the valuation? * * * The parties were misled, and very naturally, by the report of the appraisers. In making partition and executing conveyances, they were governed by that report. They failed to do what the plaintiffs and defendant intended to do, and it is most unjust and unequitable for the defendant to claim the advantage in the partition which the mistake has given him."

There is no doubt the rule of *caveat emptor* applies to all judicial sales of real estate, for the reason, as stated by the supreme court of the United States, that "from the nature of the transaction, there being no one to whom recourse can be had for indemnity against any loss which may be sustained." *The Monte Allegro*, 9 *Wheat.*, 616.

Our statute requires, "whenever execution may be levied upon any lands and tenements, the officer levying the same shall call an inquest of two interested freeholders

who shall be residents of the county where the lands taken on execution are situated, and administer to them an oath impartially to appraise the property so levied upon, and such officer together with said freeholders shall appraise said property at its real value in money." It is also provided that in no case shall the officer sell any such land for less than two-thirds of the appraised value. These provisions of the law are intended primarily for the protection of the debtor; but it is reasonable to suppose that a valuation thus made under oath by disinterested freeholders, residing in the county, is frequently accepted by bidders personally unacquainted with the land offered for sale as a correct estimate of its value, and they bid accordingly.

If it should be made to appear on an application to confirm a sale of real estate that the sale had not been conducted fairly, or that a fair opportunity to bid had not been given to every one desiring to purchase, or that any of the essential requirements of the law had not been complied with, it would be the duty of the court to set the sale aside.

In sales of this kind the court becomes the agent through which the property of the judgment debtor is sold, and the proceeds applied in payment of the judgment. But only real estate to which the debtor has the legal title can be sold on execution, and while there is no warranty of the title, the purchaser takes the interest of the debtor therein. The intention of the law is that the purchaser shall receive an equivalent for the purchase money in the debtor's interest in the property sold. If therefore the debtor have no interest in the land sold, or if the purchaser receives nothing in return for the purchase money, and he has been induced to purchase under an entire misapprehension of the facts in regard to the title or condition of the property, a court of equity will grant relief in a proper case, and the rule of

caveat emptor has no application. It is for the interest of all parties concerned—debtors as well as creditors—that judicial sales should be fairly conducted in all respects. Ordinarily it will be found that bidders at such sales understand the exact condition of the title of the property they are endeavoring to purchase. But to refuse relief in a proper case discourages competition and tends to depreciate the value of real property offered for sale under process of the court.

The petition clearly states facts sufficient to constitute a cause of action. The judgment of the district court is therefore reversed and the cause remanded for further proceedings, but as the defendants do not appear to have been in fault, the costs will be taxed to the plaintiffs.

JUDGMENT ACCORDINGLY.

LAKE, CH. J., concurred.

STATE OF NEBRASKA, EX REL., THE ATCHINSON AND NEBRASKA RAILROAD v. THE BOARD OF COUNTY COMMISSIONERS OF LANCASTER COUNTY.

1. **Taxation:** COMMENCEMENT FEE IN THE SUPREME COURT. The imposition of a tax upon parties commencing suits in the supreme court, is not in violation of the constitution, providing that the mode of levying taxes shall be by valuation, and giving the legislature power to tax certain specified business classes, among which litigants are not enumerated.
2. ——: POWER OF THE LEGISLATURE. The taxing power vested in the legislature is without limit, except such as may be prescribed by the constitution itself.
3. ——: ——. The maxim—*expressio unius est exclusio alterius*—does not apply in the construction of constitutional provisions regulating the taxing power of the legislature.

THIS was a motion for an order of the court requiring the clerk to file and enter upon the appearance docket,

and other proper records, the application of the relator for a writ of mandamus against the defendants. The grounds for the motion were that the clerk had refused to file the application, unless the relator paid the fee of ten dollars imposed by the provisions of section twenty-six, of chapter twenty-two, of the General Statutes 1873, entitled "Fees."

These sections of that chapter were enacted in 1867, in pursuance to a clause contained in the constitution then in force, and providing that the amount so taxed should be held as a judiciary fund, to be applied in payment of the salaries of the justices of the supreme court. *Constitution of* 1867, *Article IV, Sec.* 7. The statute itself does not provide that the tax thus imposed shall be used for the payment of the salaries of the judges, and the judiciary fund and its disposition, only existed by virtue of the constitutional provision just mentioned. By virtue of the statute, the money is paid into the state treasury in the same manner as all other taxes.

With these provisions in force, on the first day of November, 1875, the present constitution took effect.

S. B. Galey and *R. G. Knight*, for the motion.

GANTT, J.

The only question raised by this motion is, whether section 26, chapter XXII, General Statutes of 1873, requiring a tax to be paid on the commencement of any suit in the supreme court, is inconsistent with the new constitution.

The act provides that "upon the commencement of any suit in the supreme court, the party so entering the same, shall pay to the clerk of that court the sum of ten dollars." The act further provides that if the person desiring to commence a suit, shall file with the clerk an affidavit, that he is unable on account of poverty, to pay

the fee, the clerk shall enter the fact on his journal, and the suit upon the docket, and the fee shall be taxed and collected as other costs. The clerk shall pay the fees so collected to the treasurer of the county in which the court is held; and the county treasurer shall pay the amount of such fees so received by him to the state treasurer.

Section 1, Article XVI, of the constitution declares "that no inconvenience may arise from the revisions and changes made in the constitution of this state, and to carry the same into effect, it is hereby ordained and declared that all laws in force at the time of the adoption of this constitution, not inconsistent therewith, * * * * shall continue to be as valid as if this constitution had not been adopted."

But section 1, Article IX, entitled "Revenue and Finance," provides that "the legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

It is therefore contended on the part of the relator, that by this section the taxing power of the legislature is limited to the objects and classes of business enumerated, and that as the tax required to be paid on the commencement of suits, is not included in any one of the classes thus enumerated, the act imposing such tax is inconsistent with the constitution and void.

The constitution vests the legislative authority in a senate and house of representatives, with certain re-

strictions and limitations imposed on that body, plainly expressed in the instrument itself; but independent of these limitations, it is said that the legislative power is supreme within its proper sphere. Hence, the constitution of the state, according to the rule which seems to be well settled, is not regarded as a grant but rather as a restriction of legislative power, and so "in an inquiry as to whether a statute is constitutional, it is for those who question its validity to show that it is prohibited." Cooley in his work on Constitutional Limitations, 479, says that "the power to tax rests upon necessity, and is inherent in every sovereignty;" and Chief Justice Marshall, in the case of the *Providence Bank v. Billings*, 4 *Pet rs*, 563, says that "the power of legislation, and consequently of taxation, operates on the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally." The rule is well settled that the taxing power vested in the legislature is without limit, except such as may be prescribed by the constitution itself.

But does the section of the revenue article, now under consideration, limit or restrict this power of taxation exclusively to the objects and classes therein enumerated?

The theory of construction, advanced on the part of the relator, assumes that this power is limited by implication, upon the principle, *expressio unius est exclusio alterius;* but does this rule apply to the taxing power of the legislature? I think not. And as no positive restriction is imposed on the exercise of this power in respect to other matters, not included in the objects and classes enumerated, I think the rule is, that the framers of the

constitution relied for protection in this regard upon the wisdom and justice of the representative body and the accountability of its members to the people, rather than the restraining power of the courts of law. It is said that "the courts can enforce only those limitations which the constitution imposes, and not those implied restrictions, which, resting on theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." *Cooley Con. Lim.*, 129. *State v. McCann*, 21 *Ohio State*, 210.

In construing constitutions with a provision that the tax shall be "equal and uniform," it has been held that these words apply only to a direct tax on property, in order to prevent an arbitrary taxation without regard to value in respect to the kind or quality of property; and that such clause is no limitation on the power of the legislature as to other objects of taxation. Hence, under such clause, specific taxes have been sustained as a valid exercise of legislative power. *Sawyer v. City of Alton*, 3 *Scam.*, 127. *Alanier v. Governor*, 1 *Texas*, 637. *Franklin v. National Insurance Co.*, 43 *Missouri*, 491.

And in *Sawyer v. City of Alton* it is further held, that "it is competent for the legislature to exercise all powers not forbidden in the constitution of the state, and delegated to the general government, nor prohibited to the state by the constitution of the United States."

In *Pullen v. The Commissioners*, 66 *North Carolina*, 364, the facts showed that P. S. died, leaving a will, by which she bequeathed a large amount of personal property to strangers, and made the plaintiff her executor. The property was taxed uniformly with other property, and was also subjected to a tax as a legacy—not regarded as a tax on property, but rather as a tax imposed on the succession, on the right of the legatee to take under the will. The court said "it was argued, that because the constitution (Art. V., Sec. 3,) says that 'the general

assembly may also tax trades, professions, franchises, and incomes,' and as the right of succession cannot be technically classed under either of these heads, it must be implied that the legislature was forbidden to tax such a right on the rule of interpretation that the expression of a thing implies the exclusion of another." *Held*, that this implication is too slight and does not apply in such case, and that "it is not by such artificial rules that constitutions are to be construed."

Upon both principle and authority we are of opinion that the motion must be overruled.

MOTION OVERRULED.

ALL of the judges concurred.

JOSEPH B. MCDOWELL, PLAINTIFF IN ERROR, V. SAMUEL G. THOMAS, DEFENDANT IN ERROR.

1. **Arbitration**: Where it is clearly shown that an award of arbitrators has been obtained by fraud, corruption, or other undue means, it should be set aside; but the fact that a party seeking to avoid the award swears that he *believes* it has been so obtained, is no evidence whatever. The facts and circumstances on which the affiant bases his belief should be set out in detail, and all the evidence on which he relies presented to the court to which the award has been returned.

2. ———: APPEALS. A party aggrieved by a judgment affirming or setting aside an award of arbitrators may appeal, but the evidence presented to the court below must be preserved by bill of exceptions, otherwise no foundation has been laid on which to predicate an appeal.

JUDGMENT having been rendered against McDowell in the probate court of Jefferson county upon an award of arbitrators, he appealed to the district court, and judgment being rendered there dismissing his appeal, he brought the cause here by petition in error.

N. K. Griggs, for plaintiff in error.

W. P. Freeman and *Paren England*, for defendant in error.

MAXWELL, J.

Title 28, Chapter 57, General Statutes, page 658, entitled "Arbitration," under which the proceedings in this case were had, provides that "all controversies which might be the subject of civil actions may be submitted to the decision of one or more arbitrators as hereinafter provided;" that "the parties themselves, or those parties who might lawfully have controlled a civil action in their behalf for the same subject matter, must sign an agreement specifying particularly what demands are to be submitted, the names of the arbitrators, and the court by which the judgment on the award is to be rendered," which must be signed by the parties and acknowledged before a justice of the peace; that "all the rules prescribed by law in cases of referees are applicable to arbitrators, except as herein otherwise provided, or except as otherwise agreed upon by the parties;" and that "the award may be rejected by the court for any legal and sufficient reasons, or it may be re-committed for a rehearing to the same arbitrators, or any others agreed upon by the parties."

In the case of *The Boston Water Power Co. v. Gray*, 6 *Met.*, 131, the court held: "It is clearly settled that an award is *prima facie* binding on the parties, and the burden of proof is upon the party who would avoid it. In general, arbitrators have full power to decide upon questions of law and fact which directly or incidentally arise in considering and deciding questions embraced in the submission. As incident to the questions of fact, they have power to decide all questions as to the admission and rejection of evidence, as well as the credit due to

evidence, and the inferences of fact to be drawn from it. * * * The class of cases in which the court will set aside the award upon matter not arising out of the submission and award is, when there is some corruption, partiality, or misconduct on the part of the arbitrators, or some fraud or imposition on the part of the party attempting to set up the award, by means of which the arbitrators were deceived or misled. In neither of these cases is the result the deliberate and fair judgment of the judges chosen by the parties: the former is the result of prejudice, uninfluenced by law and fact; the latter may be a true judgment, but on a case falsely imposed on them by the fraud of a party."

Where it is clearly shown that an award has been obtained by fraud, corruption, or other undue means, it is the duty of the court to which the award has been returned to set it aside. But the fact that a party swears that he *believes* an award has been so obtained is no evidence whatever. All the facts and circumstances on which the party bases his belief must be presented to the court, and an opportunity given to all parties interested to be heard, before an award can be set aside on the grounds herein alleged. Then if either party is dissatisfied with the judgment of the court, and desires to appeal, it is his duty to preserve the evidence by a bill of exceptions, and the case may then be reheard on the testimony. It is apparent from the bill of exceptions that there was no evidence whatever before the probate court of Jefferson county to sustain the charges of the plaintiff in error.

We place no stress whatever on the agreement of the parties that the award "shall be final and conclusive," because such a stipulation cannot bind a party to abide an award obtained against him by fraud or corruption. There being no grounds on which to predicate an appeal, the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

RICHARD D. CURRY, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Practice in Criminal Cases**: CHALLENGE OF JURORS. A juror challenged for cause, after stating that he had formed and expressed an opinion, added, "I talked pretty loud when I heard of the assault. My opinion is based upon general rumor, and newspaper reports. *Think* I could return a fair and impartial verdict. I think I could now, *but I might possibly lean a little the other way.*" *Held*, incompetent.

2. ———. The scope and effect of section 468, of the criminal code, relating to the causes for challenge of jurors—stated.

3. ———; INSTRUCTIONS TO JURY. It is not error to refuse to give correct instructions, if the court has already charged the jury substantially as asked.

4. ———: AVERMENTS OF INDICTMENT. Where in an indictment for an assault with intent to commit murder it was averred, that the assault was made with "deliberate and premeditated malice," *held*, that a conviction might be had, where the assault was committed purposely and maliciously, but without deliberation and premeditation.

5. ———: INSTRUCTIONS TO JURY. On the trial of an indictment for an assault with intent to murder, the court charged the jury, that "if a person willfully does an act which has a direct tendency to destroy another's life, the natural and *necessary* conclusion from the act is, that he intended to destroy such person's life." *Held*, erroneous, in this, that as death was not produced but only a serious bodily injury, while the intention to destroy life might have been a *reasonable* presumption, it was not necessarily the *only one*. A person is presumed to do that which he voluntarily and willfully does in fact do; but if the intent is to be carried *beyond* the result actually produced by the acts of the accused, evidence must be introduced to justify the jury in so finding.

6. ———. Upon the question of intent, the jury were further instructed if they found that a dangerous and deadly weapon was willfully used with a violence sufficient to produce death, they would have the right to infer from that fact the intention to produce death. *Held*, error, not being warranted by the facts of the case.

7. ———. Where the charge of the court is wholly unsupported by the evidence, and calculated to mislead the jury, the judgment will be reversed.

ERROR to the district court of Douglas county.

It was an indictment for an assault upon Edward Rosewater, with intent to murder. The trial below before Savage, J., resulted in a verdict of guilty, and the sentence of the prisoner to the penitentiary for four years. He sued out a writ of error to this court. Among other instructions asked for on his behalf, and refused, was the following: "The jury, before they can convict in this case, must find from the evidence that the attack upon Rosewater was made by Curry unlawfully, willfully, feloniously, maliciously, purposely, and of his the said Curry's deliberate and premeditated malice, to commit a murder. That if they are not satisfied beyond a reasonable doubt of the truth of the aforesaid allegations, contained in the indictment, they must acquit."

Further facts appear in the opinion.

C. A. Baldwin, for plaintiff in error, contended, *inter alia*, that there was error in refusing the above instruction, which was in the very language of the indictment; that although the indictment would be good without the allegation of "deliberate and premeditated malice," yet being so averred, it must be proved as made. *State v. Copp*, 15 *N. H.*, 212. *Commonwealth v. Atwood*, 11 *Mass.*, 93. *Com. v. Tuck*, 20 *Pick.*, 356. *Com. v. Hope*, 22 *Pick.*, 1. *State v. Noble*, 15 *Me.*, 476. The plaintiff in error committed an assault and battery, nothing more. The law will presume that he intended to commit an assault and battery, and nothing more. If any intent beyond the act done is claimed, it must be proven, as by threats, etc. In this case there is no evidence of intent other than that relating to the assault. The intent is the gist of the offence, and must be specifically proved. *Morgan v. State*, 13 *Smedes & Marsh.*, 243. *Miller v. People*, 5 *Barb.*, 203. *People v. Shaw*, 1 *Park.*, 327.

W. J. Connell, *District Attorney*, for the state, cited, *Sharp v. The State*, 19 *Ohio*, 379. *State v. Nichols*, 8 *Conn.*, 496. *Walker v. The State*, 8 *Ind.*, 290. *Bond v. The State*, 23 *Ohio State*, 356.

LAKE, CH. J.

Several errors are assigned, but we shall content ourselves with noticing those only that were relied upon in the argument as ground for a reversal of the judgment.

I. During the formation of the trial jury, several exceptions were taken on behalf of the prisoner to the rulings of the judge, which call for a construction of *Sec.* 468, of the criminal code. And, on this point, it will suffice to take the case of a single juror for the purpose of giving our views of the scope and effect of this section, and the extent of its modification of the common law rule of the courts on this subject.

J. O. Corby was called into the jury box, and being examined on his *voir dire* said, that he had both formed and expressed an opinion as to the prisoner's guilt. He said further, "I talked pretty loud when I heard of it" (the assault). "My opinion is based upon general rumor, and newspaper reports; *think* I could return a fair and impartial verdict. I think I could now, but *I might possibly lean a little the other way.*" This was very frank in the juror, and was a plain expression of some doubt in his own mind of his ability to decide, impartially, between the state and the accused. He "*might lean a little the other way*" from an upright, impartial attitude; but just how far, or in the direction of which party, he did not inform the court.

Our constitution, in section eleven of the bill of rights, guarantees to every person accused of crime, "*a speedy, public trial, by an impartial jury of the county, or dis-*

trict in which the offense is alleged to have been committed." This is the paramount law, and if the section of the statute under consideration could be said to be in conflict with it, in any particular, to that extent the statute would of course be inoperative. But we fail to perceive any conflict between these two laws, and we regard them as being in full harmony with each other. The statute, if properly interpreted, requires the utmost care and fairness in the selection of jurors in criminal trial.

If a person called as a juror "has formed, or expressed, an opinion as to the guilt or innocence of the accused," and nothing further be shown, it is good ground, under this statute, for challenge for cause. And before the court would be justified in overruling such challenge, and in retaining the juror, it must appear that he is clearly within the exception to the general rule of disqualification just stated, which is,—"*Provided*, that if a juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine on oath such juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumor or hearsay, and *not* upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror shall say, on oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that said juror is impartial and will render such verdict, may in its discretion admit such juror as competent to serve in such case."

We think it is clear that where the ground of challenge is the formation, or expression, of an opinion by the juror, before the court can exercise any discretion as to his retention upon the panel, it must be shown by an examination of the juror, on his oath, not only that his

opinion was formed solely in the manner stated in this proviso, but, in addition to this, the juror must swear, unequivocally "that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence." If he express the least doubt of his ability to do so he should not, in the face of a challenge for cause, be retained. And even where by his formal answers, the juror brings himself within the letter of the statutory qualification, if the court should discover the least sympton of prejudice or unfairness, or an evident desire to sit in the case he should, in justice both to the state and the accused, be rejected.

The juror Corby was of opinion that he "might lean a little the other way," that is, against the return of an impartial verdict. But it is altogether immaterial whether he leaned little or much. To render him competent he must not lean at all, neither for nor against the one party or the other. No inquiry can be entered upon, as to the extent of a juror's bias or prejudice; if he be not certain of their non-existence he ought not to be permitted to sit upon the jury in any case.

We are of opinion that Corby's examination showed him to be disqualified. But he was retained against the challenge of the accused, who was compelled to resort to one of his peremptory challenges for his removal. In this there was error to the prejudice of the prisoner.

The examinations of several other of the jurors, who were challenged for cause on the ground of the formation of opinions, are far from satisfactory. One of the positive requirements of this proviso is, that the juror's opinion must be shown, affirmatively, not to have been formed from "conversations with witnesses of the transaction" to which it relates. But the jurors to whom we now refer answered simply that the persons with whom they conversed, and from whom they derived their information, "did not claim to be witnesses of the transaction."

For aught that is disclosed, they may have been eye-witnesses of the entire affray, or, at least, the jurors may have supposed they were from the character of the communications made, which would have been equally objectionable and fatal to their qualification to sit in the case.

But the change wrought in the practice, by this section of the statute, as to the qualifications of jurors in criminal cases, is not so extremely radical as might perhaps seem at first blush. The strictness that formerly obtained in many of the courts and which still continue in those of some of the states, had been considerably modified in our own when this statute was enacted. In our district courts the rule obtained pretty generally, we believe, that the formation or expression of a merely hypothetical opinion as to the guilt or innocence of the accused, dependent upon a particular state of facts, as to the existence of which the juror had formed no opinion, was not good ground for challenge. And such seems to have been the holding of the courts in Ohio, Virginia, Alabama, Mississippi, Tennessee, Indiana, Illinois, and in several other of our sister states. Especially was this the rule where such hypothetical opinion left no bias or prejudice on the jurors' mind, which would prevent him from being entirely open to conviction by the testimony produced upon the trial. *See Gardner v. The People*, 3 *Scam.*, 88. *State v. Johnson*, 1 *Walker* (*Miss.*), 392. *McGregg v. The State*, 4 *Black.*, 406. *State v. Williams*, 3 *Stewart*, 454. *Pierce v. State*, 13 *N. H.*, 536. *Leoffner v. The State*, 10 *Ohio State*, 538. *State v. Wright*, 53 *Maine*, 328. But in New York and Massachusetts it has been held, and it is probably the rule, "that the formation of an opinion, based entirely on the assumption that a particular state of facts as given by rumor is correct," disqualifies the juror. *People v. Mather*, 4 *Wend.*, 229. *Com. v. Knapp*, 9 *Pick.*, 496.

If, however, the opinion of a juror, based upon *news-*

paper statements or common rumor, be not merely hypothetical but decided and so fixed as to require testimony to overcome it, should he be retained if challenged for that reason? We think not. Surely such a juror cannot be said to stand impartial between the parties, and to hold him to be competent would in our opinion violate not only the constitutional guarantee of a fair and impartial jury, but also the spirit, if not the letter, of the section of the statute above quoted. It is true that where the juror's opinion shall be shown to have been formed in a certain specified manner, the statute provides that the court, if satisfied the juror is impartial and will render a verdict according to the law and the evidence, "may in its discretion" admit the juror as competent to serve. But in the exercise of a sound discretion, how would it be possible to reach the conclusion that a juror, who, without any qualification whatever, declares that he has a fixed and abiding conviction of the prisoner's guilt which would require evidence to remove, can be fair and impartial between the state and the accused? Would it not rather be an abuse of judicial discretion to so hold? It is very clear that a panel composed of such jurors would fall far short of fulfilling the legal requirement of a fair and impartial jury, to which an accused person is entitled.

II. It is also assigned for error that certain instructions to the jury, as requested by defendant's counsel, were refused. But we discover no error in the action of the court in this particular. All, save one, of these instructions were given substantially in the charge prepared by the court on its own motion, and it was not error to refuse to repeat them, although expressed in language somewhat different from that used by the court. *Bond v. The State*, 23 *O. S.*, 356. As to the first instruction requested, and which the court refused to give, it was very clearly erroneous. It was based upon

the idea that before a conviction could be had, it was necessary that all the essential ingredients (except the death of the person assaulted) to constitute murder in the first degree, should be found to exist. The indictment, it is true, charges that the assault as made was characterized by all these requisites; that it was made not only purposely and maliciously, but of deliberate and premeditated malice. It charged upon the prisoner all the criminal qualities of heart found in one who commits the highest grade of criminal homicide, murder in the first degree. In this respect however, more was alleged than was necessary under the statute which defines the crime charged.

Section 14 of the crimes act provides that "if any person shall assault another with intent to commit *a murder*, * * * * upon the person so assaulted, every person so offending shall be imprisoned in the penitentiary not more than fifteen, nor less than two years." It will be noticed that this section does not limit the word "murder" to either one of the two degrees recognized in our law. All that is required to make the offense complete is, that the assault be made with intent to murder the person assaulted. In an indictment for this offense it is necessary to charge the assault as having been made purposely and maliciously at least. Such an assault, if death ensue, therefore, would be murder in the second degree. But it is no objection to an indictment, even where the facts as proved on the trial go no further than this, that it also charges the malice to have been deliberate and premeditated. Even in the case of an indictment for murder in the *first* degree, a conviction for murder in the second degree, or manslaughter, will be sustained.

III. To the instructions as given by the court to the jury on its own motion, no exception appears to have been taken, and it was urged by the district attorney

that for this reason, no advantage could now be taken of any error therein. This as a general rule is true, in criminal as well as in civil cases. But as we have already held during the present term in the case of *Thompson v. The People*, this rule is not of universal application, especially in cases of felony where if the instructions are properly preserved, and are legitimately before us, and it is apparent that a radical error was committed, which in any view of the case must have been prejudicial to the prisoner, we regard it as our plain duty to correct it, even if there were a failure to except. These instructions were in writing, and are legitimately before us.

Among the several principles of law laid before the jury for their guidance, and which with the exceptions presently to be noticed were correct, and eminently just to the prisoner, are two, to which we cannot give our assent, and which could not have failed as we think to greatly prejudice the defense with the jury. On the subject of intent, which without doubt was the vital question in this case, as the assault seems to have been admitted, this instruction was given: "In considering the question of intent, it is proper to bear in mind this rule: Every person is presumed to contemplate and intend the ordinary, natural, and probable consequences of his own acts." This is doubtless correct, but in making the application of the rule this language is used: "If therefore, a person willfully does an act which has a direct tendency to destroy another's life, the natural and *necessary* conclusion from the act is that he intended to destroy such person's life." The same language was used by the court in the case of *Commonwealth v. York*, 9 *Met.*, 103, in commenting on the presumption arising from the act of killing, where no other fact or circumstance was shown. In such a case the rule here asserted would doubtless be correct, but where as in the case before us death was not produced, but only a serious

bodily injury, while under all the facts and circumstances the intention to take the life of the person assailed might have been a *reasonable presumption, it was not necessarily the only one.*

The correct rule undoubtedly is, that a person is presumed to intend to do, that which he voluntarily and willfully does in fact do. *Com. v. Webster*, 5 *Cush.*, 295. But if the intent is to be carried beyond the result actually produced by the acts of the accused, it will be necessary to introduce evidence which would justify the jury in so finding. The fault in this instruction lies in the restriction of the jury to the single presumption of an intent to destroy life, when it may have been quite as reasonable to have presumed that only great bodily harm, *the act really done*, was in fact intended. Indeed, it was only by a consideration of all the facts and circumstances, bearing legitimately upon the case, that the jury would have been justified in presuming more than this. Under this instruction however, the jury were not permitted to limit the intent to the commission of bodily harm; nothing short of an intent to destroy life would answer. The jury were thus deprived of the right to exercise that discretion which clearly belonged to them. That the direct tendency of this was to prejudice the prisoner cannot be doubted.

IV. The jury were further instructed: "Upon this question of intent you may also consider the character of the weapon used by the defendant, and if you find that a dangerous and deadly weapon was willfully used, *with a violence sufficient to produce death*, you have the right to infer from that fact the intention to produce death." In this there was an assumption not warranted by the facts of the case, which is error. The blows were *not* sufficient to produce death, although they may have been well calculated to cause that result. Where the charge of the court is wholly unsupported by the evidence, and

calculated to mislead the jury, as this undoubtedly was, the judgment should be reversed. And this is the rule even in a civil case. *Meredith v. Kennard*, 1 *Neb.*, 812. *Caw v. The People*, 3 *Neb.*, 357.

V. As to the sufficiency of the testimony to sustain a conviction, we shall express no opinion whatever. That is a question for the jury to determine, under proper instructions from the court, uninfluenced by any suggestions on our part.

The judgment of the district court must be reversed, and a new trial awarded.

REVERSED AND REMANDED.

FRANCIS A. WHITE AND OTHERS, PLAINTIFFS IN ERROR, V. JACOB BLUM AND OTHERS, DEFENDANTS IN ERROR.

1. **Practice**: APPEALS. The appeal act of March 3, 1873, has no retrospective operation, and does not apply to cases determined previous to its passage. And *it seems* that the remedy given by the act is not exclusive, but concurrent with the remedy by error. *Gen. Stat.*, 628-632.

2. ——: STAY OF EXECUTION. The taking of a stay of execution, prior to the act of February 23, 1875, is not a waiver of the right to prosecute proceedings in error in the supreme court.

3. **Railroad Companies**: LIABILITY OF STOCKHOLDERS. In this state, where the amount due from each stockholder in a railroad corporation, on account of subscriptions to its capital stock, equals or exceeds the demand of a creditor of such corporation, a joint judgment therefor may be rendered against all of said stockholders. The stockholders in such case are treated as partners.

4. ——: ——: CONSTRUCTION OF STATUTE. The subdivision of the general incorporation law, entitled "Corporations," applies to railroad companies organized under said law, and a failure to comply with its provisions renders the stockholders individually liable for the corporate debts. *Per* LAKE, CH. J.*

ERROR from the Otoe county district court.

*See Abbott v. Omaha Smelting Company, *ante*, p. 416.

Seth Robinson, for plaintiffs in error.

E. R. Richardson and *E. Wakeley*, for defendants in error.

LAKE, CH. J.

This is a petition in error from Otoe county, brought to obtain a reversal of the judgment of the district court rendered against the plaintiffs in error, who were stockholders in the Midland Pacific Railway Company, a corporation organized and doing business under the general incorporation law of this state. The defendants in error were contractors with said company for doing the grading of a certain portion of its road-bed between Nebraska City and Lincoln, and had recovered a judgment on their contract for the sum of $8,000, as a balance due them for work done thereunder. Being unable to collect any portion of this judgment from the company by execution, they brought their action against the plaintiffs in error as stockholders therein, to recover the amount of the judgment, on the ground of an alleged personal liability on their part for the debts of the corporation. This individual liability was claimed on the ground, *first*, that these stockholders had conspired together to cheat and defraud the plaintiffs out of the amount due to them under their contract, and to this end had appropriated to themselves a large amount of the capital stock of the company, for which nothing whatever was paid; *second*, and for the reason that in pursuance of the same evil design, they actually diverted a large proportion of the assets of the company from the purposes to which they could have been legitimately applied, to their own individual uses, by a fraudulent division of the same among themselves, without any valuable consideration whatever; and *third*, for the further reason, that there was a total failure to comply with several of the essential requirements of the statute

in the organization of the company, and in the management of its affairs, whereby the stockholders were made liable for the corporate debts.

By the several answers filed by the defendants, all the material averments of the petition, except as to the want of a full compliance with all of the provisions of the last subdivision of Ch. XXV. of the Revised Statutes, entitled "Incorporations," were fully denied. The case was submitted to the court without the aid of a jury upon the pleadings and proofs, and a joint judgment rendered against the plaintiffs in error for the full amount of the demands of the defendants in error.

Several errors are assigned in the record, but I shall notice only those that were urged upon our attention in the argument as sufficient ground for a reversal of the judgment. It was urged by counsel for the defendants in error, as a preliminary question, that this case is not properly here. The ground taken was, that it being an equitable action it should have been brought here by appeal, as provided in the act of March 3, 1873, and not by petition in error. But I cannot adopt this view. In my opinion, the case as made by the petition and supported by the evidence, is a purely legal, and not an equitable one. The liability alleged against the defendants, if made out, was original, direct, and one which called for the exercise of none of the equity powers of the court in its enforcement. And besides, this judgment was rendered on the eighteenth day of December, 1872, nearly three months before the passage of the act providing for appeals in actions in equity, so that even if the case were an equitable one, this act would not apply to it. This act has no retrospective operation, and applies only to cases pending and undetermined at the date of its passage, and to those afterwards brought. We hold, too, that this remedy by appeal is not exclusive, but that in equitable actions a party may bring the case here for re-

view either by appeal or by petition in error, as he may elect, by taking the requisite steps therefor. There is nothing in this act from which the inference can possibly be drawn that the legislature intended any abridgment of existing remedies, and its effect, therefore, is to furnish an additional and concurrent one.

In the construction of statutes it is a universal rule that they must be limited to a prospective operation, unless it is evident from the language employed that they were designed to be retroactive. *Quakenbush v. Danks*, 1 *Denio*, 128. *State v. Auditor*, 41 *Mo.*, 25.

The record shows that a stay of execution was taken by some of the defendants in the court below, and on this ground it was claimed that the plaintiffs in error had waived the errors, if any existed, and were estopped from proceeding in this court to obtain a reversal of the judgment. Until the passage of the act "to provide for a stay of execution and orders of sale," approved February 23, 1875, there was no statutory provision in this state depriving a suitor of the right to prosecute proceedings in error after taking a stay of execution. That law of course cannot affect this case, and we are of opinion that the taking of the stay did not operate to the prejudice of the defendants in bringing the case here for review. Having thus disposed of these preliminary objections, I will now turn to the vital question in the case, the one principally discussed at the bar, viz.: Can this judgment be sustained under the law applicable thereto?

I. It was not seriously questioned on the argument that if under the law an ordinary civil action could be maintained against these stockholders for the debts of the company, the testimony was amply sufficient to support the finding of the court upon the issues. At all events this court is not disposed to interfere with the decisions of questions of fact by inferior tribunals, and will

never do so unless found to be clearly against the weight of the evidence, and manifestly prejudicial to the party seeking a reversal of the judgment. It is true, doubtless, that in the absence of any provision of statute to the contrary, a stockholder is not liable in an action at law at the suit of a creditor of the company. In the case of a corporate body the law recognizes only the creature of the charter, and knows not the individuals composing it. *Angell & Ames on Corporations, Sec.* 595. But in this state this rule has been considerably modified by statute, and to the extent, at least, of the amount due and unpaid on the capital stock held by him, a stockholder in a railroad company is personally liable to a creditor of the corporation. *Sec.* 112, *Ch. XXV., Rev. Stat.*, 1866.

It was contended, however, that even admitting this statutory legal liability, it was a *several*, and not a *joint* liability, being limited to the amount which might happen to be due from each one of the stockholders to the company, when the action was instituted. It is true that the section of the statute above cited so limits the liability of a stockholder; but in case of a joint action, where the amount due to the company from each stockholder sued, equals, or exceeds, the creditors' demand, we know of no sound reason why a joint judgment may not be rendered, especially where no objection on the ground of misjoinder is made in the court below. In such case, certainly no injustice would be done to the stockholder, for whatever amount he might be compelled to pay in satisfaction of such judgment would be a credit in his favor to be allowed in his subsequent settlement with the company. Doubtless if the amount due from any one of the defendants to the company were *less* than the judgment rendered, it would, as to such stockholder, be erroneous. It has frequently been held under statutes which declare that the stockholders shall be individually liable for the debts of the corporation,

without any restriction as to the extent of such liability, that they could be treated as partners to all intents and purposes. *Mokelumne Hill Canal Co. v. Woodbury*, 14 *Cal.*, 265. *Davidson v. Rankin*, 34 *Cal.*, 503. And I am of the opinion that the same wholesome rule should be applied in the enforcement of the remedy given by Sec. 112 of our statute, where the claim of the creditor does not exceed the amount due from any one of the defendants on his capital stock. These considerations, without adding anything more, would, doubtless, justify an affirmance of the judgment of the district court. And I may add, it is upon this ground alone that my brother Maxwell unites in the conclusion to which we have arrived.

II. But, I desire to go a step farther, as the point is distinctly made in the case, and give an additional, and to my mind, equally satisfactory reason why this judgment should not be disturbed.

The testimony shows very conclusively—in fact it was not denied by the answers, that several of the essential requirements of the last subdivision of the general incorporation act were totally disregarded by this company. Indeed, none of the provisions of this subdivision were observed, save those that are found also in the subdivision next preceding, entitled "Railroad Companies." The following are some of the more important of those provisions thus disregarded, or openly violated, viz: *first*, sections 130 and 131, which provide for the publication of a certain notice in some newspaper near the companies "principal place of business, for four weeks;" *second*, section 136, which requires notice to be given annually, "of the amount of all the existing debts of the corporation;" and *third*, section 141, which prohibits a fraudulent division of the corporate property among the members under severe penalties. It is also provided

by section 139: "If any corporation fail to comply substantially with the provisions of this subdivision in relation to giving notice, and other requisites of organization, the property of all the stockholders shall be liable for the corporate debts." And the last clause of section 136, which declares that "if any corporation" shall fail to give notice, annually, "of the amount of all the existing debts of the corporation," the stockholders "shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such notice is given." Now it is not denied, that, independently of any other consideration, if these several sections apply to railroad companies, the defendants are clearly liable, and the judgment should be affirmed.

But it is contended on behalf of the plaintiffs in error; *first*, that this last sub-division has no application to railroad companies, and that, as to them, all that is required, is a compliance with the next preceding sub-division of the act; and *second*, even admitting that this sub-division was intended to apply to railroad as well as other incorporated companies, then it was insisted that inasmuch as section 112 fixes a limited liability, and declares that there shall be none other to a creditor of the company, it shall be given precedence over the more general language of these subsequent sections. In my opinion both of these positions are untenable. It must be borne in mind that these several provisions, as they now stand upon the statute book, were enacted as one law, and at the same time. One is in fact no older than the other; they were created by the same legislative fiat, and must be considered *in pari materia*, and interpreted together according to the well established rules of statutory construction applicable to such cases. That this last subdivision was intended to refer to railroad, as well as all other companies incorporated under this general incorpo-

ration act, of which there are several particular sub-divisions, cannot, it seems to me, be seriously questioned. In the very first section (123) "railways," and "other works of internal improvement," are particularly mentioned. And section 126, in direct terms refers to "every corporation," which would include a railroad corporation just as certainly, and effectually, as if it were mentioned by name. So too, by section 127, it is provided that "corporations for the construction of works of internal improvement" must file a copy of their articles of association in the office of the secretary of state. Now it cannot be said that this railway company was not organized for the purpose of constructing a work of internal improvement. Indeed, this was the sole object in view, as expressly declared in its articles of association. But it is unnecessary to make further particular reference, for, in almost every subsequent section, there is language used which, if given its ordinary meaning, necessarily includes all private companies incorporated under our general law. It must be conceded that this chapter on incorporations, as a specimen of clear, concise, and harmonious legislation, is not entitled to a very high rank. It is far from what it should be in this respect. In appending this last sub-division there was caused much repetition and conflict, which had better been avoided. But it is the duty of the courts to expound and enforce the laws, not to make them. This sub-division is here before us, demanding at our hands the same consideration that any other portion of the chapter is entitled to receive. It is our duty to harmonize and give effect to every sentence and word employed, if possible, but if this cannot be done, then, as I understand the rule applicable to antagonistic provisions, the last must be given the preference. In *Brown v. Commissioners*, 21 *Penn. St.*, 37, the court say: "When the statutes are so flatly repug-

nant that both cannot be executed, and we are obliged to choose between them, the latter is always deemed a repeal of the earlier. *This rule applies with equal force to absolute and irreconcilable conflict between different sections or parts of the same statute.* The last words stand, and the others which cannot stand with them go to the ground."

With regard to the personal liability of stockholders, however, under our law, I perceive no serious conflict. Section 112, as before observed, gives to the creditors of an incorporated company, a right of action against the respective stockholders in a railroad company, to the extent of the amount due on their capital stock, and this right of action is absolute, not depending, as is the case in respect to the liability provided for in the subsequent sections, upon the omission of some duty, enjoined upon the company in its organization, or in the conduct of its business. The *first*, is the only individual liability to which a stockholder in a railroad company can possibly be subjected if the law be faithfully observed, while that given by sections 136 and 139, may be regarded as being in the nature of a penalty denounced against all the members of a corporation whenever it fails to observe those reasonable rules which the legislature seems to have considered necessary for the protection of the public against the evils of corrupt and irresponsible organizations that might otherwise exist.

Therefore, being clearly of the opinion that the last sub-division of the general incorporation act applies to railroad companies, and that there was such a failure by the Midland Pacific Railway Company to comply with its provisions, as to render the stockholders individually liable for the corporate debts, on this ground, as well as on that first above stated, I think the judgment of the district court should be affirmed.

MR. JUSTICE MAXWELL, concurs in the judgment of affirmance on the first ground.

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

JUDGMENT AFFIRMED.

JAMES H. STEWART, PLAINTIFF IN ERROR, v. JARVIS W. CARTER AND OTHERS, DEFENDANTS IN ERROR.

1. **Practice**: PLEADING: JOINDER OF ACTION. Under the code, a petition to obtain the correction of an official bond, and to recover a money judgment for an alleged breach thereof, is not subject to demurrer for misjoinder of causes of action.

2. **Official Bonds**. A failure to insert the names of sureties on an official bond, in the body of the instrument, cannot defeat a recovery for a breach thereof.

3. ———: ACTION UPON. In an action by a private person for a breach of the conditions of the official bond of a county officer, the county is not a necessary party, even where a reformation of the bond is part of the relief sought.

4. ———: APPEALS. An appeal from a judgment sustaining a demurrer to a petition, on the ground of misjoinder of causes of action, does not lie to the Supreme Court. The remedy is by petition in error.—LAKE, CH. J., *dissenting*,

5. ———; ———. The motion to dismiss the appeal was sustained, but as the transcript was on file, leave was granted the plaintiff to file a petition in error.

ERROR to the district court of Gage county.

The cause was first brought here upon appeal, but upon motion the appeal was dismissed, and leave being granted to file a petition in error, the cause was heard on the assignments of error therein set forth.

S. C. B. Dean, for plaintiff in error, cited: *Gen. Stat.*, 538. 1 *Story's Equity*, 159. 1 *Nash's Pl.*, 771. *Wells v. Yates*, 44 *N. Y.* 525. *Bryce v. Lorillard Ins.*

Co., 55 *N. Y.*, 240. *Globe Ins. Co. v. Boyle*, 21 *Ohio State*, 120. *State v. Boring*, 15 *Ohio*, 507. *Ex parte Fulton*, 7 *Cow.*, 484.

N. K. Griggs and *L. W. Colby*, for defendants in error, cited: *De Witt v. Hays*, 2 *Cal.*, 469. *Voorhies v. Childs*, 17 *New York*, 354. *Penn v. Cox*, 16 *Ohio*, 30. *Pearson v. Bedford*, 3 *Pet.*, 446. *Bennett v. Butterworth*, 11 *How.*, 675.

LAKE, CH. J.

The petition in the court below, was framed with two objects in view, *first*, to obtain a correction of the official bond upon which the action was brought; and, *second*, to recover a money judgment, for an alleged breach of one of the conditions thereof.

To this petition the defendants McDowell and Wehn demurred, alleging the following grounds therefor: "*First.* That the said plaintiff, has in his said petition, improperly joined causes of action, which cannot legally be joined in the same petition. *Second* That there is a defect of parties plaintiff and defendant." This demurrer was sustained and the case dismissed.

We are of opinion, that there was no misjoinder of causes of action in this petition, even if a correction of the bond were necessary to entitle the plaintiff to recover a judgment for damages thereon. Sec. 87, of the Code of Civil Procedure, provides that "the plaintiff may unite several causes of action, whether they be such as have heretofore been denominated legal, or equitable, or both, when they are included in either of the following classes." The *first* of these classes is where the causes of action are included in "the same transaction, or transactions connected with the same subject of action." We think the plaintiff's case, according to the theory upon which it was instituted, came clearly within

the operation of this section, and that there was no misjoinder of causes of action. The practice adopted by the plaintiff is eminently proper, where the correction of a written instrument is essential to a recovery for an alleged breach of its conditions. It operates as a great saving of time and expense to all the parties concerned, and no sound objection can be advanced against it. *Globe Ins. Co. v. Boyle*, 21 *Ohio State*, 119. *Welles v. Yates*, 44 *N. Y.*, 525.

But we are of the opinion that the first mistake was made in supposing any reformation or correction of this instrument to be necessary. The failure to insert the names of the sureties in the body of the bond was of no consequence. The character of the instrument, the obligation which the parties respectively assume, and their relation to each other are all apparent from a reference to its terms alone. There is no ambiguity or want of certainty in any essential particular, and the defendants' signatures at the foot of the instrument was sufficient to render them liable for any failure on the part of the defendant Carter, as probate judge, to observe its conditions. There being, therefore, no necessity for any correction of the bond, all of the several allegations of the petition directed to that end, might have been treated as surplusage, and the action proceeded with as one at law merely.

And this view of the case substantially disposes of the *second* ground of demurrer, for that was urged upon the theory that in an action to correct or reform such a bond, the nominal payee should be a party. It was conceded that in an action upon the bond simply to recover damages for a breach of its condition, the person injured by such breach could maintain an action in his own name alone. Indeed this right is expressly given by statute. *Sec.* 643, *Code of Civil Procedure.*

But we are not prepared to assent to the proposition

that the county is a necessary, or even a proper party, in any case of injury done to a private person by a failure of the probate judge to perform the conditions of his bond—not even where a reformation of the instrument is a part of the relief sought by the action. For these reasons the judgment of the district court is reversed, and the case remanded to the court below for further proceedings. MR. JUSTICE MAXWELL concurs.

REVERSED AND REMANDED.

UPON the motion to dismiss the appeal taken in this action upon its first presentation to this court, MR. JUSTICE MAXWELL filed the following opinion.

MAXWELL, J.

In this case McDowell and Wehn, by their attorneys, demurred to the petition, assigning as grounds therefor: "*First.* That the plaintiff has in his said petition improperly joined causes of action which cannot legally be joined in the same petition. *Second.* That there is a defect of parties plaintiff and defendant." The court sustained the demurrer and dismissed the case, to which the plaintiff excepted. Plaintiff appealed to this court. Defendants now move to dismiss the appeal.

A case of this kind should be brought into this court by petition in error, and not by appeal; but as the transcript is on file the plaintiff has leave to file petition in error. The motion to dismiss the appeal is sustained. MR. JUSTICE GANTT concurred.

APPEAL DISMISSED.

LAKE, CH. J.

I cannot agree with the majority of the court that this appeal should be dismissed. In my opinion not only the authorities under the code practice, but reason as well, requires that the appeal should be sustained. There

are two causes of action set out in the petition. The *first* is an equitable one, wherein facts which are supposed to be sufficient to entitle the plaintiff to a reformation of a certain official bond, on account of a mistake in its execution, are alleged; and in the *second*, damages are claimed under the bond when reformed, in consequence of an alleged forfeiture. There is no doubt whatever that under the code, Sec. 87, these two causes of action may be joined in the same action.

Where a reformation of the instrument upon which the claim for damages is based is first required in order to justify a recovery thereon, the proceeding is essentially an equitable one, notwithstanding the fact that the court is authorized afterwards to try the question of damages arising under such reformed instrument in the same action. Indeed, in such case, the legal cause of action is secondary, depending upon the equitable one, and cannot exist without it. The mere fact that after the equitable relief is given, and the instrument made to conform to the intention of the parties, the court is authorized to retain the case for an inquiry as to the alleged damages, does not rob it of its equitable character, nor give to it a legal one. In my opinion this case is clearly within the act of March 3d, 1873, providing for appeals in actions in equity.

In the case of *Cythe v. La Fontain*, 51 *Barb.*, 186, in which the plaintiffs cause of action was purely legal, being for the recovery of the possession of land from a purchaser who had made default in the payment of the purchase money, and in which the defendant interposed an equitable defense to the forfeiture, the court held that this defense gave to the case an equitable character, so far as to allow it to be reviewed on appeal, although it could not have been so reviewed if it had been strictly a legal action. *Gooding v. M'Alister*, 9 *How., Practice Repts.*, 123.

It seems to me very clear that the case at bar falls within the rule of the authority above cited, and that the motion to dismiss the appeal should be overruled.

J. C. WILCOX, PLAINTIFF IN ERROR, v. PLATT SAUNDERS, DEFENDANT IN ERROR.

1. **Evidence**: ADMISSION OF DECREE IN FORMER SUIT BETWEEN SAME PARTIES. Saunders brought suit against Wilcox, to enforce a specific performance of a contract concerning land, and in the decree rendered in his favor it was adjudged "that for the rent, use and occupation of the land, and improvements, and all damages thereto by Wilcox, further suit must be had or adjustment made therefor by the parties as they see fit." In a subsequent action between the same parties, for trespass, waste, etc., alleged to have been committed by Wilcox upon the same premises, Saunders introduced in evidence the decree of the court rendered in the former suit, and the deed made to him in pursuance thereof. To this, objection was made on the ground that Wilcox had taken an appeal from that decree to the supreme court. *Held*, that as the right of appeal did not exist at the time of the rendition of the decree, the attempt to appeal was a nullity, and the evidence was properly admissible for the purpose of showing Saunders' title, and that his damages occasioned by the occupation of Wilcox had not been adjudicated.

2. ———. The course of legislation on the subject of law and equity reviewed, and the action of the district court, in its disposition of the several demands in the former suit between Saunders and Wilcox, sustained on the ground that under the chancery practice which still exists in this state, such demands could not properly be joined in an action for the recovery of title to land. *Per* GANTT, J. LAKE, CH. J. and MAXWELL, J. *not concurring*.

3. ———. The nature and effect of the act of 1867 abolishing the distinction between law and equity,—stated. *Per* LAKE, CH. J. and MAXWELL, J.

4. **Practice**: APPEALS. An appeal is not a remedy to correct errors of law only, but brings the case to the appellate court for a trial *de novo*.

5. ———: ———. The act of March 3, 1873, granting the right of appeal in equity causes, is not retrospective in its operations.

6. ———: QUALIFICATION OF JURORS. An objection that a juror was disqualified by reason of his non-residence within the county for a sufficient length of time, should be made by way of challenge before the trial. Or

if the disqualification were not known then, the record should show that an effort was made to ascertain the fact by an examination of the juror on his *voir dire;* otherwise, a new trial will not be granted.

7. ———: BILL OF EXCEPTIONS. If the bill of exceptions does not affirmatively show that it contains all the evidence, the supreme court will not examine the question whether the verdict is against evidence.

8. **Evidence.** A paper offered in evidence to establish a *tri-partite* contract, being signed by one party only, *held*, inadmissible.

SAUNDERS brought suit against Wilcox in the district court of Douglas county, and judgment being rendered against the latter, he brought the cause here by petition in error. The cause was tried below before Chief Justice Lake. This court united in an affirmance of the judgment, giving in the order of their presentation here the following opinions.

B. E. B. Kennedy, for plaintiff in error.

John D. Howe, for defendant in error.

GANTT, J.

In the consideration of this case, it seems necessary in the first place to recur to a former suit between the parties to this action. September 15th, 1870, Saunders brought suit against Wilcox for the specific performance of a contract entered into between these parties, wherein Wilcox agreed to convey to Saunders a certain parcel of land. This suit was determined December 7th, 1872, and the court found that such contract was made between the parties, and that the plaintiff was entitled to a specific performance of the contract, and to a deed for the land from the defendant; and further found that an accounting should be had between the parties, and that the plaintiff had paid the defendant on said contract for said land over and above the amount due therefor; and further found "that for the rent, use and occupation of the land, and improvements, and all damages thereto by

defendant, further suit must be had, or adjustment made therefor by the parties as they see fit." It was decreed that the defendant execute and deliver to the plaintiff, within twenty days, a good and sufficient deed for the premises, and in default of him doing so, that the sheriff of the county, as master commissioner in that behalf, make a deed to the plaintiff, and that the defendant pay to the plaintiff the balance found due to him. Afterwards the decree was so modified as to extend the time for making such deed to sixty days, upon condition that the defendant execute to plaintiff and deposit with the clerk of the court for the use of plaintiff such deed for said premises, and at the end of which time, if the defendant shall not have procured the case to be docketed in the supreme court and given the undertaking required by law, the clerk shall deliver said deed to the plaintiff. April 13, 1873, the clerk delivered the deed to the plaintiff; and on the twenty-sixth day of the same month the defendant filed a transcript of the case in the supreme court, which was taken and filed as an appeal, and not upon petition in error.

The case now under consideration is an action in tort for trespass, waste and other wrongful acts alleged to have been committed by Wilcox, defendant in the court below, upon the same premises in controversy in the former suit. And as one ground of defense in this action, the defendant set up in his answer, that he had taken an appeal from the decree in the former case to the supreme court, and that the same was still pending in said court; and therefore he insists that the court erred in admitting the record and decree in the former case to be received in evidence on the part of plaintiff to show a determination of the controversy between the parties in respect to the land. It may be conceded that, if an appeal authorized by law, had been duly taken from the decree in the former suit to and was still pend-

ing in the supreme court, the pendency of such appeal would be a bar to this action, for the appeal brings the case into the appellate court for trial *de novo*, and therefore all matters involved in, or depending on the determination of such case, could not properly be litigated in another action between the same parties while such appeal is pending. But did the defendant have the former case in the supreme court upon an appeal authorized by law?

An appeal is not a remedy to cure or remove an error in matter of law only, but it is a re-trial of the whole case upon the pleadings and proofs. In 3 Bouvier's Institutes, 70, it is said that an appeal, in a civil suit, is a proceeding unknown to the common law. It is authorized by statute in a variety of cases, and is regulated entirely by the provisions of the act; it cannot be extended beyond the plain and obvious import of the statute granting it.

By act of February 15th, 1864, incorporated in the revised code of 1866, as title XXIV, entitled "Chancery," the right of appeal in equity cases was provided for, and the necessary provisions were made regulating the practice in such appeals; but by the act of June 19th, 1867, this entire title, entitled "Chancery" was repealed, and hence, the statutory right of appeal from the district court to the supreme court in equity cases then wholly ceased to exist. And the settled rule of law seems to be that when an act is repealed, it must be considered the same as if it had never existed, except such parts, if any, which are saved by the repealing statute. *Butler v. Palmer*, 1 *Hill*, 328. *Surtees v. Ellison*, 4 *Mann & Ryl.*, 586.

It will not be questioned that to obtain redress by appeal, the right to appeal must exist at the time; this right is not one at common law; it can only exist by statute, and as there was no statute granting such right

of appeal, at the time the decree was rendered, the legal sequence is, that there was no appeal, and therefore the filing of the transcript in the supreme court as an appeal in the former suit was a mere nulity—and I may remark by way of parenthesis it was afterwards so considered by the court, and for that reason dismissed. But did the defendant Wilcox, acquire any right of appeal under the provisions of the act of March 3d, 1873? This is entitled "an act to provide for appeals in actions of equity;" and the first section simply grants the right of and regulates the practice in such appeals. The second section provides that "in actions *hereafter heard and determined*, when the proofs and testimony are taken orally before the court, on the hearing of the cause, the same shall be reduced to writing, in form similar to bills of exceptions and be allowed by the judge hearing the cause, as in cases at law." In this respect, then, by express terms the right applies only to suits "heard and determined" after the passage of the act. By the third section, the right of a *supersedeas* by bond, is expressly limited to cases pending and undetermined at the time of the passage of the act, and to actions brought thereafter. And in the whole act there certainly is no provision giving it a retrospective operation; on the contrary its whole tenor clearly indicates that it should apply only to causes determined after its passage. In the interpretation of statutes, it is a familiar doctrine that they can have no retrospective operation beyond the time of their commencement, unless so declared by express words or positive enactment, and in such case they will be considered as inoperative and void, if they affect or change vested rights. *Butler v. Palmer*, *supra*. *Calkins v. Calkins*, 3 *Barb.*, 310. *Burch v. Newberry*, 10 *New York*, 392. 1 *Kent Com.*, 455. It is therefore very clear that the defendant acquired no rights under this last named statute.

Again, as another defense in the case under consideration, the defendant alleges that the plaintiff in his petition in the former suit claimed for use and occupation of the premises, prior to and during the pendency of that suit, and that the said suit is still pending in the supreme court. As already shown that suit was not pending in the supreme court.

But can an action in tort and one purely in equity be joined in the same petition? If it cannot, then there is clearly no error in the ruling of the court in admitting the record of the former suit in evidence for the purpose for which it was offered.

In the discussion of this question it may be proper in the first place to recur briefly to the past legislation of the territory in respect to law and equity jurisprudence. It appears that the first session of the legislature, by act of March 16, 1855, provided that "the district courts shall have original and exclusive jurisdiction over all matters and suits at law and in chancery," except in cases in which the amount did not exceed twenty-five dollars, where justices of the peace had jurisdiction, and the same act provided for appeals to the supreme court from "final judgments and *decrees* in chancery."

The act of November 1, 1858, which substantially forms the basis of our present code of civil procedure, in the third section declared that "the distinction between actions at law and the forms of all such actions" theretofore existing were abolished, and substituted in their place but one form of action, called a civil action. It will be observed that this section referred only to actions at law, and that it was not, by implication or otherwise, the legislative intent to include within its operation suits in equity; and this fact is clearly indicated by the act of November 3, passed at the same session, entitled "an act for the appointment of masters in chancery," which provides that some person residing in each county be ap-

pointed a "master in chancery, who shall have power to perform the duties of master in chancery, together with the powers of the judge of the district court of chancery in vacation." The act of February 15, 1864, entitled "an act to regulate practice and proceedings in chancery," provided a full and complete code of chancery practice and proceedings.

In the revision of the code of civil procedure, by act of February 12, 1866, by the second section, it is declared that "the distinction between actions at law and the forms of all such actions and suits heretofore existing are abolished, and in their place there shall be hereafter but one form of action, which shall be called a civil action;" but by title XXIV., entitled "Chancery," of this same civil code, the legislature re-enacted the chancery code of 1864, as a full and complete system of equity practice and proceedings, separate and distinct, and in contradistinction to that part of this code in respect to actions at law. And hence it seems clear that by legislative construction, when the code is taken as an entirety, as well as by legislative intent, a marked distinction between actions at law and in equity was preserved, and that the revised code attached to the judge of the district court all the attributes and vested him with all the powers of a court of law and with all the powers of a court of equity. If such had not been the intention of the legislature, it would not, as a part of the same code, have enacted a separate and distinct system of equity practice, complete in itself. Therefore, by the passage of the general code there certainly was no abolition of the distinction between actions at law and in equity, or of the forms of all such actions and suits; in other words, there was no merger of the two jurisdictions of the courts. And this course of legislation was in conformity with the fundamental rule provided by the organic act, which declared that the "supreme and district courts, respectively, shall possess chancery

as well as common law jurisdiction." Thus the statute law, as it existed from the organization of the territory, remained when the constitution of the state went into force, on the first day of March, 1867. And by *express* provision of the constitution, "*both the supreme and district courts shall have both chancery and common law jurisdiction*," and hence the distinction between law and equity is clearly preserved by the fundamental law of the land. But it may be urged that by act of June 19, 1867, title twenty-four of the code of civil procedure, entitled "Chancery," is repealed, and that it is provided that causes of actions which theretofore had been determined legal and equitable, or both, might be joined in the same petition in all cases in which joinder of causes are allowed in actions at law; and that by section one of this act it is further provided "that the distinction between actions at law and suits in equity and the forms of actions and suits heretofore existing, are abolished; and in their place there shall hereafter be but one form of action, which shall be called a civil action." There are three distinct propositions contained in this act: *First.* The abolition of the distinction between actions at law and in equity. *Second.* The abolition of all forms of suits in equity as well as actions at law heretofore existing. *Third.* The substitution in their place of but one form of action, called a civil action; or in other words, the merger of the two jurisdictions and the blending of law and equity in one form of action, called a civil action. But at this same legislative session, by act of June 24, it is provided that under certain circumstances, whenever a person who is bound by a contract to convey real estate shall die before making the conveyance, the person entitled thereto may have a bill in chancery to enforce a specific performance of the contract by his heirs, devisees, or the executor or administrator of the deceased party who made the contract. Hence it

seems that at this same session of the legislature equity jurisdiction was again restored to the courts, at least to some extent. But can the legislature abolish the jurisdiction given to the courts by the constitution? It is conceded that the legislature may abolish the distinctions which heretofore existed in mere matters of form in actions at law or suits in equity, and provide that each shall be commenced by petition, in which a statement of the facts, in ordinary and concise language, constituting the cause of action and a prayer for the relief sought, shall be sufficient in either case; and again, that the legislature may by statutory provisions allow equitable defenses to actions at law to be pleaded and maintained which do not exist under the rules of the common law, will not be questioned; but an attempt to blend the two in respect to matters of substance and principle, it seems to me, would not only subvert the jurisdiction of the courts but would also be clearly repugnant to the constitution. It is a familiar doctrine, well understood, that the distinction between actions at law and equity consists in the different modes of relief in the two jurisdictions; in the one, with few exceptions, the relief consists in a pecuniary compensation in damages for the injury received, and in the other the court has power, in its discretion, to give such relief as the circumstances of the case may require; in the one case the party is entitled to a trial by jury, and in the other the hearing is exclusively by the court upon the pleadings and the facts. How, then, is it possible to make these two modes of relief identical? Indeed the very nature and purpose of each, when considered in respect to their modes of trial and relief, are such as clearly demonstrate the impossibility of abolishing the distinction.

But if the legislature has not the power to blend law and equity into one action, called a civil action, and thereby *subvert* the one to the other jurisdiction, or to abolish

the distinctions between actions at law and in equity, upon what principle is it possible to maintain the power to do so on the ground that it has indicated the exercise of such power by piecemeal in various sections of the code? Would not such a process of reasoning be getting within a very small circle? The logic is this: although the power of the legislature is constitutionally inhibited in certain respects, yet in various parts of the code it is strongly indicated that it has exercised such power; therefore the power does exist. Such rule of interpretation need only to be mentioned to see its absurdity. I think the only safe rule is to follow the fundamental law as it is plainly written, regardless of consequences, and even if inconveniences may result from doing so yet such inconveniences should have no weight, for neither courts or legislatures can remove such inconveniences, if any do exist; it can only be done by those who made the instrument. It is certainly the duty of courts and legislatures to take the constitution as it is plainly declared by the people in the instrument, and if they should depart from this rule it might become impossible for the people to fix constitutional boundaries to the government. The constitution gives the citizen the right to seek his redress by action at law or in equity, according as the nature of his claim or demand may require the one or the other mode of redress. Can the legislature deprive him of this right? The constitution gives the supreme and district courts "both *chancery and common law jurisdiction.*" Will it be contended in the face of this *express* constitutional provision that the legislature has power to blend together law and equity, and thereby subvert the jurisdiction of the courts in regard to the one or the other action?

It is said that a constitution is the form of government delineated by the people in which fixed principles are established; that it is the supreme law of the land,

made by the people themselves in their original, sovereign and unlimited capacity; that legislatures are creatures of the constitution, owe their existence to it, derive their power from it, and therefore every legislative act clearly repugnant to it is void. *Vanhorn v. Dorrence*, 2 *Dall.*, 308. *Marbury v. Madison*, 1 *Cranch*, 176. *Oakley v. Aspinwall*, 3 *Comst.*, 547. *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 *Wend.*, 63. *Sedg. on Const. Law*, 468, 493.

It will hardly be contended that the act of June, 1867, is conformable to the constitution.

The sixty-ninth section of the code of New York provided that "the distinction between actions at law and suits in equity, and the forms of all such actions heretofore existing, are abolished;" but the constitution of that state declared that "there shall be a supreme court having general jurisdiction in law and equity." The question in respect to the power of the legislature to abolish the distinction between actions at law and in equity and the form of such actions existing prior thereto, came before the court of appeals in the case of *Reubens v. Joel*, 3 *Kern.*, 493. And in this case it is said that the most marked distinction between these actions consists in their different modes of relief, which cannot be made identical. "It is possible to abolish the one or the other, but certainly it is not possible to abolish the distinction between them," but "will it be contended that in the face of these (constitutional) provisions that the legislature has power to abolish the jurisdiction of the courts, either at law or in equity? * * * It is plain, without authority, that the constitution by conferring jurisdiction in law and equity, has not only recognized the distinction between them, but has placed that distinction beyond the power of the legislature to abolish, which it could only do by abolishing one or the other of the two jurisdictions."

In *Voorhies v. Childs, Exr.*, 17 *N. Y.*, 361, the same doctrine is held, and it is said that the constitution "presents an inseparable barrier to any legislative merger of the two jurisdictions," and that it "is easy to show that to blend the two in respect to matters of substance and principle would be virtually to *subvert* the jurisdiction of the courts, in regard to the one or the other, which the legislature certainly has not the power to do."

In *Parsons v. Bedford*, 3 *Peters*, 446, it is held that the distinction between the two forms of action was present in the minds of the framers of the constitution, and that the "phrase, common law, found in the constitution is used in contradistinction to equity." In *Clausen v. Lafrange*, 4 *G. Greene*, 226, the counsel alleged that law and equity were blended by the statute and attempted to justify under it, declaring that it abolished all distinctions in the forms of action, and removed all demarkation between law and equity jurisdiction. The court however, said that "the constitution declared that the 'district court shall be a court of law and equity.' The district court is vested with all the powers of a court of law and with the powers of a court of equity. Here the two distinct attributes are attached to the district judge. He is vested with chancery jurisdiction, and all the general powers of a court of law. In conferring the separate powers on the district court, the constitution makes an obvious distinction. Law is as much distinguished from equity, as civil matters are distinguished from criminal," and therefore it is held, "that the distinction between law and equity cannot be constitutionally abolished." *Bennett v. Butterworth*, 11 *How.*, 675. *Cooper v. Armstrong*, 3 *G. Green*, 123.

This doctrine in the construction of statutes, clearly repugnant to the constitution, seems to me to be so firmly established by both authority and principle, that any attempt to shake it must be vain. And hence, under our constitu-

tion in bringing actions by petition, legal and equitable causes should not be blended in one action. The distinction between law and equity is preserved, and therefore when the cause of action is purely upon a legal claim, and especially one in tort, it must be an action at law, and the case must be determined according to the rules of law, and when the claim is one purely of an equitable nature, the action must be determined according to the rules regulating proceedings and practice in equity. If these views of the law are correct, then it is clear that the claim for damages set up by the plaintiff in his petition in the former suit between these parties was an improper joinder of action, and the court properly refused to permit the joinder of such cause of action in the case, and dismissed the same. *Mayo v. Madden*, 4 *Cal.*, 27. *Winnipissiogee v. Worster*, 9 *Foster*, 442. *Story's Eq., Pl., Sec.* 10; and upon this ground the conclusion is inevitable that no error was committed as complained of in admitting in evidence the record and decree in the former suit. This view of the case also disposes of the error complained of in admitting in evidence the deed from defendant to plaintiff.

The affidavit of defendant setting forth that after the trial was ended he discovered that one of the jurors in the case had not been a resident long enough to become an elector is not sufficient ground to set aside the verdict and grant a new trial. "If the objection had been taken before the trial by way of challenge it would have prevailed on strictly technical grounds, but after the trial it was too late. It is an objection which does not affect the impartiality or intelligence of the juror, and furnishes no presumption against the justice of the verdict." *Rockwell v. Elderkin*, 19 *Wis.*, 368. *Eastman* v. *Wright*, 4 *Ohio St.*, 160. *Parks v. State*, 4 *Ohio St.*, 236.

Again a new trial was asked on the ground that the verdict was excessive and is not sustained by sufficient

evidence. This ground of complaint cannot be examined in this court, because the bill of exceptions does not either expressly or by necessary implication show that it contains all the evidence given to the jury on the trial. The nature of the inquiry suggested by such grounds for a new trial demonstrates the necessity for the rule, that the record must affirmatively show the fact that all the evidence given to the jury on the trial is contained in it. The inquiry does not involve a question of law, but simply one in the nature of an appeal from the jury on the facts; and without all the evidence given to the jury, it is impossible to say whether it justified the verdict or not. *Eastman v. Wright*, 4 *Ohio St.*, 159. *Walker v. Lessee of Devlin*, 2 *Ohio St.*, 593.

The paper offered in evidence to establish a co-partnership between plaintiff in error, defendant, and one A. Saunders, in regard to the cultivation of trees, grape vines and fruits was properly rejected, because, as shown by the copy in the bill of exceptions, there was only the signature of one person subscribed to the paper, and therefore it could not be made evidence of a tri-partite contract. The judgment must be affirmed.

The opinion of a majority of the court in affirmance of the judgment was delivered by CHIEF JUSTICE LAKE, as follows:

LAKE, CH. J.

There is no conflict between the different members of the court in the conclusion to which we have come, that the judgment of the court below should be affirmed. But we do not agree as to the reasons which have lead to this result.

In the opinion prepared by Mr. Justice Gantt we find expressed certain peculiar views in regard to one of the leading provisions of the Code of Civil Procedure,

so decidedly at variance with our own, that we shall give very briefly not only our reasons for the affirmance of the judgment, but also the views entertained by a majority of the court as to the constitutionality, and effect, of that section of the Code which he has criticised so severely.

The action in the court below was brought by Saunders against Wilcox to recover for damages alleged to have been sustained in consequence of the wrongful occupation of, and injury to, certain premises of the plaintiff. These premises had been the subject of a prior litigation between these same parties, in an equitable action brought by Saunders wherein he recovered the legal title from Wilcox, who was the former owner of the fee. Saunders' right to maintain this second action, therefore, depended upon the judgment he had recovered in the former suit.

One of the principal defenses interposed by Wilcox in this action for damages was the alleged pendency of the former suit, in consequence of his having prosecuted an appeal to this court.

Had this allegation been true in fact, it would have been a complete defense to this action, for an appeal brings up the whole case for trial *de novo*, and the rights of Saunders to the *locus in quo* would have been postponed until final trial and judgment here. But on the trial in the district court it was held, that no appeal had been taken, or, in other words, that it was not an appealable case, and so it was subsequently decided by this court on review. Under this ruling the plaintiff was enabled to go forward with his case to final judgment; and this is one of the errors now complained of.

There was no error, however, in holding that no appeal had been taken from the former judgment. That question was set at rest by the action of this court on the motion of Saunders to dismiss the alleged appeal in

the former case. And as to the admission of the record of that suit in evidence, that was proper for the purpose of showing title in the plaintiff to the premises in question. And this record was also proper, and necessary, for still another purpose. It was answered that this claim for damages to the lands, etc., was included in the former action, and could not therefore be made the subject of another suit. But this record showed that, although these matters were included in the petition, they were expressly excluded by the court, and not taken into account in the decision of that case. The language of the court was, "that for the rent, use and occupation of the land, and improvements, and all damages thereto by the defendant, further suit must be had, or adjustment made therefor by the parties as they shall see fit."

Now the question here is not whether this claim for rents, damages, etc., could properly be joined in the action for the recovery of the title from Wilcox, for, whatever the rights of Saunders may have been in this particular, it is enough for our present purpose to know that these demands were not adjudicated in the former action, but were by the express order of the court excluded from that case and remitted to the parties themselves for settlement by suit or otherwise, but the question is whether the record of the former suit was properly admitted in evidence in this one. And the majority of the court hold that it was competent evidence and properly admitted to show, *first*, that Saunders was the owner of the land; and, *second*, to prove that his damages, occasioned by the wrongful occupation thereof by the defendant, had not been adjudicated. We hold further that whether rightfully or improperly done the court had actually excluded these matters entirely from its consideration, and therefore they were a proper subject for litigation in the present suit. That judgment being still in full force was conclusive and

binding upon both parties, and could not be assailed indirectly by questioning its correctness in another action. But, while it is final as to all questions then before the court, and upon which it assumes to pass, this is all that can properly be claimed for it; while as to all those matters expressly dismissed from the consideration of the court, they were left in the same condition precisely as if they had never been brought into the case. The practical effect of this order of the court was a dismissal of these claims, without prejudice to a future action thereon.

Now this disposition of these several demands, especially the one sounding in tort, is justified by our brother Gantt on this ground alone, that under the old chancery practice, which he holds the legislature was powerless to abolish, they could not be properly joined in the action for the recovery of the title to the land.

But a majority of the court do not assent to this doctrine. We hold that the legality of that order is not now in controversy. Whether right or wrong, all questions thereby determined must so remain as between these parties unless changed by their own voluntary action.

Nor do we conceive it to be either necessary, or profitable, now to determine whether or not these demands could have been joined, under the code, in the action for the recovery of the title from Wilcox. On this point however it may not be out of place to quote from the decision of the supreme court of the state of Ohio, in the case of *Sturgess v. Burton*, 8 *Ohio State*, 218, where this language is used; "by the provisions of the code the plaintiff may unite in one action all causes of action arising from the same transaction or transactions connected with the same subject of action, and this includes causes of action legal and equitable, *ex contractu* and *ex delicto;* but if the causes of action do not arise from the same transaction, or transactions connected with the same

action, then the causes of action *ex contractu* cannot, in general, be united with causes of action *ex delicto*."

From this there would seem to be no doubt that, in a real action for the recovery of the land itself, not only a demand for use and occupation, but also one for damages caused by a tortious injury to the premises, might be included in the same petition. But it is not so clear, indeed we think it is quite doubtful, that in an action for the recovery of the legal title from one holding it in trust, a claim for such damages could be united.

In regard to the power of the legislature, under the constitution of 1867, to blend law and equity cases in one form of action by the abolition of the distinction formerly existing between them, and authorizing their joinder in the same petition, we entertain no doubt whatever. On the contrary we think the authority to do all that the code provides in this particular is clear.

The constitution, it is true, confers upon the supreme and district courts "both chancery and common law jurisdiction." All, however, that could have been intended by this was to unite in these courts respectively the two distinct jurisdictions which were formerly vested in separate and entirely distinct tribunals. Whatever the rights of a suitor under the constitution and laws of the state might have been, whether of a legal or an equitable nature, these courts in a proper case made, were authorized to enforce. And, doubtless, in the absence of all legislation on the subject of procedure, these courts would have been justified in resorting to that established by the chancery and common law courts, respectively, as their guide.

We cannot give assent to the notion that it was the design of the constitution to deprive the legislature of the authority to control the action of these courts in matters of mere practice, so long as no substantial right of a suitor was taken from him.

The code does not profess to abrogate that distinction, which in the very nature of things must always exist between legal and equitable rights and remedies, nor to deprive any person of as complete redress, for every conceivable wrong done to him in his person or estate, as he formerly could have had. But it does require that, whatever the nature of the right to be enforced, or the wrong to be redressed may be, whether such as formerly would have been cognizable in either a court of chancery, or in a court of law, the simple form of a "*civil action*" must be followed, in which a plain statement of the material facts constituting the cause of action, or the defense, must be set forth in concise language, and without repetition. Thus while the ancient forms of action are now abolished, all the various remedies known to the law still remain, and are administered through the medium of the single "civil action" of the code, quite as certainly and much more speedily, than they were under the former practice.

Mr. Willard in his admirable work on Equity Jurisprudence, under the code of New York, in language equally applicable to our own says: "The continuance of equity as a distinct branch of jurisprudence, and of the application of equitable as well as legal remedies, are plainly inferrable from the language of the code, and have been repeatedly recognized by the courts. The former names of actions are dispensed with. The subject matter which constitutes the basis of the claim to relief must be stated now as well as formerly, but the cumbrous phraseology which sometimes obscured a former bill in chancery is dispensed with, and the material *facts* alone, in distinction from matters of evidence are required to be set forth." *Wil. Eq. Jur.*, 37. And, again on page 43, he says: "Relief may be obtained under the code in all cases where it could be granted before, whether at law or in equity. The subject of rights and wrongs remains unchanged. The remedy to enforce them, or to prevent

their violation, or to obtain satisfaction for their violation, still exists, but under a different name. A civil action, *nomen generalissimum*, comprises within itself all the former actions both at law and in equity."

This is sufficient, we think, to show that, notwithstanding the two systems of procedure—the common law with its arbitrarily formal actions, of assumpsit, debt, detinue, trespass, trover, and the like, on the one hand—and the chancery with its next to interminable bills, having their nine distinct sub-divisions on the other, together with their almost endless paraphernalia, have been dispensed with in this state, and by the act of June 19th, 1867, at the first session of the legislature under our former constitution, the two systems united in one single form of action,—still the constitutional jurisdiction of the courts was not thereby in the least abridged, but in complete harmony with both the language and the spirit of the code of civil procedure, yet remains as formerly, and extending to all rights and remedies of whatsoever nature, whether of chancery or common law cognizance under the former system. The mere forms, it is true, have departed, but the entire substance of both jurisdictions is still preserved to us.

The admission of the deed from Wilcox to Saunders in evidence is also assigned for error. But the views above expressed as to the pendency of the appeal in the former suit disposes of this question also. This deed was made in obedience to the judgment of the district court. It was a necessary link in the plaintiff's chain of evidence to prove his title to the land, and was properly admitted for that purpose.

The objection that one of the jurors was disqualified by reason of his non-residence within the county for a sufficient length of time comes too late. If the disqualification were known, the objection should have been made by a challenge of the juror before the trial, but if

not known, then the record should show that a timely effort was made to ascertain the fact by an examination of the juror on his *voir dire*. And this is the rule even in capital cases. *Parks v. The State*, 4 *Ohio St.*, 236.

Another objection is that the verdict was excessive, and not sustained by sufficient evidence. This question cannot now be considered for the reason that the bill of exceptions does not purport to give all the evidence submitted to the jury. It is well settled that an appellate court will presume the verdict to be right, and the evidence ample to sustain it until the contrary is shown. *The Midland Pacific Railroad Co. v. McCartney*, 1 *Neb.*, 398.

As to the writing offered in evidence by Wilcox for the purpose of showing the existence of an alleged co-partnership between defendant in error, one A. Saunders, and himself, for the cultivation of trees, fruits, etc., upon the land during at least a portion of the time of his adverse occupancy, it was rightly rejected. It may have been intended to make it the evidence of such an agreement, but having been signed by but a single one of the parties it cannot be so considered.

For these reasons we are of opinion that the judgment should be affirmed. MR. JUSTICE MAXWELL concurs.

JUDGMENT AFFIRMED.

INDEX.

ABSENCE.

See LIMITATION OF ACTIONS, 1.

ACCOUNT.

See PARTITION, 1.

ACTION.

See RAILROADS, 1. COUNTY COMMISSIONERS, 3.

ADJUTANT GENERAL.

See CONSTITUTIONAL LAW, 3, 4, 5.

ADVERSE POSSESSION.

1. **The Title to Land** becomes complete in an adverse occupant, when he has maintained an actual, continued and notorious possession, claiming the same as his own against all persons for the full extent of the statutory period; and the enclosing of such land within a fence, the maintenance of such fence, cultivation of the land and payment of the taxes on the same, for said period, with said intention, is sufficient in law to constitute adverse possession. *Horbach v. Miller*, ... 31

AGENT.

See PRINCIPAL AND AGENT.

APPEALS.

1. **In Cases of Contested Elections.** A party aggrieved by any alleged error of the board of justices, chosen to hear contests relative to the election of any county officer, has his remedy by appeal to the district court, and a writ of mandamus from the supreme court to compel the correction of such error, does not lie against them. The statute regulating appeals in ordinary civil actions governs such appeal, and the appellate court has ample jurisdiction, though the cause must be tried by the judge without the aid of a jury. *The People v. Martin*, ... 49

2. **An Appeal** taken on the 22d of August, from a judgment rendered February 21st, is not within the six months prescribed by act of March 3, 1873. *Gen. Stat.*, 716. *Glore v. Hare*, ... 131

3. **Default.** A defendant, appealing from a judgment of the probate court, is not in default in the district court until after the rule day for filing his answer has elapsed. *Rich v. Stretch*, ... 186

4. **Act of 1875** (*Laws, p.* 58), regulating appeals to district court, is unconstitutional and void. *Smails v. White*, ... 353

5. **An Appeal** from the judgment of a justice of the peace, rendered February 20, and filed in the district court March 15, the next regular term of which was fixed for the first Monday in April; *held*, within the time fixed by law. *Gen. Stat.*, 686. *Morrow v. Sullender*, 374

6. **The Act of March 3, 1873**, has no retrospective operation, and does not apply to cases determined previous to its passage. *White v. Blum*, 555 *Wilcox v. Saunders*, ... 569

7. **An Appeal** from a judgment sustaining a demurrer, on the ground of misjoinder of causes of action, does not lie to the supreme court. The remedy is by petition in error. *Stewart v. Carter*, ... 564

8. **An Appeal** is not a remedy to correct errors of law only, but brings the case to the appellate court for a trial *de novo*. *Wilcox v. Saunders*, 569

See ARBITRATIONS. ELECTIONS. PRACTICE.

ARBITRATION.

1. **Arbitration.** Where it is clearly shown that an award of arbitrators has been obtained by fraud, corruption, or other undue means, it should be set aside; but the fact that a party seeking to avoid the award swears that he *believes* it has been so obtained, is no evidence whatever. The facts and circumstances on which the affiant bases his belief should be set out in detail, and all the evidence on which he relies presented to the court to which the award has been returned. *McDowell v. Thomas* 542

2. ———. APPEALS. A party aggrieved by a judgment affirming or setting aside an award of arbitrators may appeal, but the evidence presented to the court below must be preserved by bill of exceptions, otherwise no foundation has been laid on which to predicate an appeal. *Id.*, ... 542

ASSIGNMENT.

See MORTGAGES, 1, 2.

ATTACHMENT.

1. **Cannot be** maintained in an action of tort. *Handy v. Brong* . . . 60

See PRACTICE.

ATTORNEY'S FEES.

See PRACTICE, 15.

ATTORNEY GENERAL.

See CONSTITUTIONAL LAW, 1.

BANKS.

1. **Promissory Note**: ACTION UPON. The right to sue upon a note executed exclusively for the benefit of a banking corporation, vests in the bank, and the indorsement of its cashier, to whom as cashier such note is made payable, is not necessary. *Lacey v. Central National Bank*, ... 179

2. ——— : LIABILITY OF, FOR ACTS OF PRESIDENT. The United States being indebted to the State of Nebraska, drew two drafts upon its treasury, in favor of "William H. James, acting governor, or order." The drafts were indorsed by James and by him delivered to McCann, a stockholder and the president of the Nebraska City National Bank. The drafts were given to McCann, in the banking house, the cashier indorsed the same, and the bank received the proceeds. A portion of the fund was paid by McCann to O'Hawes, who had been the agent authorized by James to collect the same from the general government, and a large part of the balance paid to James on individual checks drawn by him from time to time, some upon McCann, and others upon the bank, but none of the amount was ever paid into the state treasury. *Held*, in an action against James, McCann, and the bank, that the drafts being the property of the state, James had no interest therein whatever that he could transfer except to the state treasurer, who is the sole fiscal officer of the state; that the drafts contained on their face sufficient to put a purchaser on inquiry as to whether or not James was the owner; that notice to McCann was notice to the bank; that the bank was liable for the full amount of the drafts, nor could any deduction be made on account of payment to O'Hawes, such payment being made without authority of law. *McCann v. The State*, ... 324

See NATIONAL BANKS.

BONDS.

See BRIDGES. OFFICIAL BONDS.

BOUNDARIES.

1. **Evidence**: INSTRUCTIONS TO JURY. The identity of a block of lots depended upon the correct location of another block, some distance off, a corner of which had been taken as an initial point in making the survey; and a surveyor testified that in 1857, a fence was erected around the block, of which he had personal knowledge; that the fence was destroyed in 1862; and in making

the survey in question, he found the west line and southwest corner, by remains of fence posts, there being old bark and rotten wood about every seven feet: *held*, that the correct location of the initial point was property submitted to the jury, upon an instruction, that in order to determine whether the fence was built upon the true line of the block, they might take into account the time when it was built, the fact that it was about the time of the survey, when the corners were easily ascertained, and if they believed the testimony warranted it, they might presume that the fence was built on the line of said block. *Horbach v. Miller*, ... 31

2. **State Boundaries**. A change in the main channel of the Missouri river, does not alter the boundary line between Iowa and Nebraska, as established by Congress. It remains as before, in the old abandoned river bed. *Holbrook v. Moore*, ... 437

BRIDGES.

1. **County Bonds**: BRIDGES OVER THE PLATTE RIVER. County bonds issued for the purpose of erecting a public bridge over the Platte river, conformable in all respects to the laws of this state, authorizing the issuance of bonds in aid of works of internal improvements, are valid. *U. P. R. R. v. Colfax County*, ... 450

2. ———. Such a bridge is a work of internal improvement, and from the course of legislation in this state, it is clear that aid may be granted in its erection by the issuance of county bonds, by grant from the state, donations, or by two counties bordering on the river uniting in the enterprise. It was not the legislative intention to restrict the aid authorized, to works of internal improvement in which the county has no interest. *Id.*, ... 450

3. ———. In determining what constitutes a work of internal improvement, it must be tested by the benefits to be derived by the public, and not by its extent or cost. *Id.*, ... 450

4. **Contracts** for the erection of bridges should be let to the lowest competent bidder. *The People v. Commissioners of Buffalo County*, . . 150

CASES IN NEBRASKA REPORTS CITED AND CONSTRUED.

Caw v. The People, 3 Neb., 357, ... 555
Cropsey v. Wiggenhorn, 3 Neb., 108, ... 415, 512
Crowell v. Galloway, 2 Neb., 215, ... 512
Kittle v. De Lamater, 3 Neb., 325, ... 428
Kyger v. Riley, 2 Neb., 28, ... 218
McReady v. Rogers, 1 Neb., 124, ... 231
Meredith v. Kennard, 1 Neb., 312, ... 555
Mills v. Miller, 2 Neb., 317, ... 43, 415
People, *ex rel.*, v. Weston, 3 Neb., 323, ... 159
Rector v. Rotton, 3 Neb., 176, ... 501
Sioux City v. Washington County, 3 Neb., 42, ... 148

Strader v. White, 2 Neb., 360, ... 231
Tallon v. Ellison & Sons, 3 Neb., 74, ... 373
Taylor v. Tilden, 3 Neb., 339, ... 96
The N. P. R. R. v. McCartney, 1 Neb., 404, ... 43, 414
Wells, Fargo & Co. v. Preston, 4 Neb., 446, ... 5

CHATTEL MORTGAGES.

See MORTGAGES.

CITIES.

See MUNICIPAL CORPORATIONS.

CONSTITUTIONAL LAW.

1. **Salary of Officers.** The constitution fixing the salary of an officer, and providing that "the auditor shall draw warrants of the state quarterly" therefor, "which shall be paid out of any funds not otherwise appropriated," appropriates by law the amount necessary to pay such salary, and no legislative act is necessary. *State, ex rel., Roberts v. Weston*, ... 216

2. **Jurisdiction of District Court.** The act of February 25, 1875 (Laws 1875, 31), authorizing any judge of the district court to designate the county in his district where an indictment may be found, and persons tried for felony committed in any unorganized county attached to such district, or in any county where no district courts are held, so far as it applies to such unorganized counties, is not unconstitutional; and the court of any county so designated has jurisdiction of the offense. *Dodge v The People*, ... 220

3. **Executive Officers:** ADJUTANT GENERAL. The office of adjutant general exists in this state by virtue of an appointment from the Governor as commander-in-chief of the military forces, acting under authority given him by Congress (1 Statutes at Large, 273), and the act of March 4, 1870. *Gen. Stat.*, 470. *State, ex rel., Tzschuck v. Weston*, ... 234

4. ———: ———. Such an office is not executive within the meaning of the constitution which provides that "no other executive state office (aside from those mentioned), shall be continued or created." *Id.*, . 234

5. ———: SECRETARY OF STATE: SALARY. One holding the office of secretary of state is eligible to that of adjutant general, and the allowance to him of a salary therefor, does not conflict with that section of the constitution, fixing the salary of the secretary of state, and providing that he shall not receive to his own use "any fees, costs, perquisites of office, or other compensation." *Id.*, ... 234

6. **Taxation.** Legislation authorizing a land road tax of "four dollars to the quarter section, to be paid in money, or labor at the rate of two

dollars per day, at the option of the person so taxed," is not repugnant to any of the provisions of the constitution of 1867. *B. & M. R. R. v. Lancaster County*, ... 293

7. ——— : APPORTIONMENT. There being no constitutional restraint, it is for the legislature to determine what the rule of apportionment, in levying taxes should be, and not the judiciary. *Id.*, ... 294

8. **Taxes.** STREETS. A statute authorizing a city to grade and improve streets, one half of the expense to be paid by special tax or assessments on lots abutting thereon, *held* constitutional, under that provision authorizing the legislature to organize cities and towns, and restrict their power of taxation and *assessment*. *Hurford v. City of Omaha*, ... 336

9. ——: ASSESSMENTS. The authority to levy and collect assessments for municipal improvements, is an express constitutional power, resting alone upon constitutional authority. *Id.*, ... 336

10. **Appeal Act of 1875.** The act "regulating appeals from the judgments of probate judges and justices of the peace," *laws* 175, *p.* 58, being in contravention of that clause of the constitution, that "no bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived or amended, unless the new act contains the entire act revived, and the *sections amended*," etc., is void. *Smails v. White*, ... 353

11. **Amending Statutes.** Where an act is not complete in itself, but is clearly amendatory of some former statute, it is within the constitutional inhibition above cited. Nor would it make any difference in this respect, whether by its title, or in the body of the act, the new statute assume to be amendatory or not; it is enough if it clearly have that effect. *Id.*, ... 353

12. **Taxation**: POWER OF THE LEGISLATURE. The taxing power vested in the legislature is without limit, except such as may be prescribed by the constitution itself. *State—ex, rel., v. Lancaster County*, . . . 537

13. ——:——. The maxim—*expressio unius est exclusio alterius*—does not apply in the construction of constitutional provisions regulating the taxing power of the legislature. *Id.*, ... 537

14. **Statutes:** ENACTMENT. A bill originating in the senate, was passed by the house of representatives 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*, ... 503

15. ——: ——. If the journal of either house state that a bill, on a suspension of the rules by the required constitutional majority, was read more than once on the same day, the reasons for such suspension need not be given. What constitutes a "case of urgency" authorizing such suspension is a matter of legislative discretion. *Id.*, 503

See JUSTICE OF THE PEACE. MUNICIPAL CORPORATION. TAXES, 3.

CONTRACT.

1. **Conditions**: EVIDENCE. Where a building contract provides that the work shall be done under the direction and supervision of an architect "to be testified by a certificate or writing under his hand," such architect is thereby constituted sole arbiter between the parties, and by his certificate, stating "balance due in full of contract price," the owner of the building is bound, no fraud being alleged or proven. In such a case evidence offered to show the character and quality of the materials furnished, and a subsequent certificate stating that the architect could not without detriment to his reputation "sign a certificate for the work being done in accordance with the plans and specifications," is inadmissible. *Mercer v. Harris*, ... 77

2. **Subscription**: CONDITIONS PRECEDENT. Where a subscription is made to the capital stock of an insurance company, upon the condition that the same is not payable until a certain specified amount has been subscribed, such a condition is a condition precedent, performance of which is essential before the company can enforce the payment of a note given for such subscription; nor will it avail the company that the condition is complied with after suit brought, but before the trial; the right to recover must exist at the time the action is commenced. *McCann v. American Central Ins. Co.*, ... 256

3. **Construction and Effect.** The plaintiff owned property, upon which with other property, the father of defendant held judgment liens. They entered into a written agreement whereby the liens were to be discharged, and plaintiff was to purchase in an outstanding title in favor of himself and defendant as tenants in common. The father of defendant thereupon executed a deed, conveying to plaintiff and defendant "all his estate, right, title, interest, dower, claim or demand whatsoever, of the said * * * as well by reason of any judgments assigned to and held by him, or otherwise, of, in, and to the same, to have and to hold * * * unto the said * * * as tenants in common." Plaintiff bought in the outstanding title, and brought suit to compel his co-tenant to contribute one-half of the amount paid therefor, as well as to recover one-half of the proceeds paid by other parties on account of said judgment liens. *Held*, 1. That under the agreement plaintiff was not bound to contribute anything in the purchase of the outstanding title. 2. That the deed only conveyed the interest of the grantor in the *premises*, and did not transfer or assign any interest in the *judgments*. *Mills v. Miller*, . 441

See COUNTY COMMISSIONERS, 2. MARRIED WOMEN. SCHOOL DISTRICTS, 1, 5, 6, 7, 8.

CONVEYANCE.

1. **Mortgage**: REDEMPTION. Mortgage premises were conveyed by deed to M., with covenant against incumbrances, M. giving a note in part payment thereof. The premises were sold under the mortgage, and M. afterwards paid the purchaser the full amount of the mort-

gage debt, with interest and costs, taking a deed of quit-claim therefor. *Held*, in a suit upon the note, that the amount paid to discharge the incumbrance was for the redemption of the premises, to be applied as a credit upon the note. *Mills v. Saunders*, ... 190

2. **Covenant against Incumbrances:** SET-OFF. An incumbrance by way of taxes upon land must be first paid, before the vendee can plead the same as a set-off, in an action for the recovery of the purchase money. *Id.*, ... 190

See DEEDS. FRAUD. MORTGAGE. NATIONAL BANKS.

CORPORATIONS.

1. **Corporation.** Where one of an association of persons, charged as partners, seeks relief from liability on the ground that such association is a corporation, legally organized, and doing a corporate business, the burden of proof rests on him to show the existence of such corporation. Failing to establish it, he cannot avoid liability on the ground that he does not appear as a subscriber to the capital stock of such association. And the question in such a case is not so much whether such person has held himself out as a partner, but whether he was a *member* of the company assuming to act as a corporation—holding himself out to the public, using his name, and engaging in its transactions as such. *Abbott v. Omaha Smelting Co.*, ... 416

2. ———. To establish the existence of a corporation *de facto*, a charter or some law under which the assumed powers are claimed to be conferred, and user of the franchise thereby obtained, must be shown: *Id.*, ... 416

3. **How Incorporated.** In this state, the filing of articles of incorporation, with the county clerk, is a condition precedent to the existence of any corporate franchise. The law and the articles so filed, taken together, are considered in the nature of a grant from the state and constitute the charter of the company. *Id.*, ... 416
See, also, semble of LAKE, CH. J., *in White v. Blum*, ... 555

4. **Powers.** Under the laws of this state, a corporation organized for the purpose of building a railroad, has no power to sell or dispose of its property or franchises, until its road has been constructed. *Clarke v. O. & S. W. R. R.*, ... 458

5. **Railroad:** SUBSCRIPTION TO STOCK. Plaintiff entered into a contract with several parties whereby he agreed, in consideration of $10,000, to assign and transfer the rights and franchises of two projected railroad lines, of which he was president, and upon the organization of a new company to take four-tenths of its capital stock and to pay on the first assessment $20,000, the other parties to take balance of stock and pay $30,000. A new company was organized, including among its members the plaintiff and three other parties to the agreement. Articles of incorporation were adopted, and preliminary business transacted. At this organization plaintiff made no mention of

said contract, did not ask its adoption or ratification by the new company, or that it be made the basis of a contract between them. At a subsequent opening of subscription books, plaintiff subscribed for 200 shares of stock amounting to $20,000, to be paid for in cash. He paid $10,000, receiving certificates of stock for that amount, and brought suit for the balance subscribed, claiming to have paid therefor by a transfer of the franchises of his two companies, mentioned in said contract. *Held*, that the contract was illegal and void, and even if binding on the parties to it, under the evidence adduced, it did not become a contract between the plaintiff and the new company, and he was not thereby entitled to any credit on his stock account by virtue thereof. *Id*, ... 458

See CONTRACT, 2. EMINENT DOMAIN, 7. MUNICIPAL CORPORATIONS. RAILROADS, 8, 9. SCHOOL DISTRICTS.

COUNTY COMMISSIONERS.

1. **Duties of, in the Erection of Public Buildings and Opening Roads.** In letting contracts for the erection of county buildings, and for the improvement of such roads as may be of general necessity, county commissioners must award the same to the lowest responsible bidder. *The People v. Commissioners of Buffalo County*, ... 150

2. ———: BRIDGES: LETTING CONTRACTS FOR. Public bridges are parts of public roads, and the provisions of Sec. 16, Chap. 67, Gen. Stat., requiring contracts for the construction of roads to be let to the lowest competent bidder, apply to the letting of contracts for the erection of bridges; and it is the duty of county commissioners to adopt plans and specifications, in advance of the letting, as a basis on which bids may be received. LAKE, CH. J., *dissenting*. *Id.*, . . . 150

3. **Action Against.** Where precinct or county bonds are placed at the disposal of county commissioners for the purpose of erecting a wagon bridge over the Platte river, it is their duty to let the contract for the construction of the same to the lowest responsible bidder; failing to do so, such bidder or a tax-payer of the county may maintain an action to compel them to so award the contract. *Id.*, ... 150

4. ———. The commissioners have no authority to require each bidder for the erection of a bridge to accompany his bid with his own plans and specifications, they adopting such plans as they see fit and accepting the bid accompanying the same, no opportunity being given to others to bid on such plans. Such conduct opens the door to corruption, favoritism, and fraud; and a contract awarded on such a letting is void. *Id.*, ... 150

COURTS.

1. **Terms:** IMPANELING GRAND JURY. The regular term of a court, fixed by law to be holden on the 13th of September, was adjourned in vacation, by the written order of the judge, until the 13th of

December following, at which time the grand jury, summoned for the regular term, were returned and impaneled, an indictment found, trial and conviction had; *Held*, no error. *Smith v. The State*, . . . 277

2. **Adjourned Terms.** Where the written order adjourning a term of court, made by the judge in vacation, omitted to name the term, *held*, that it was intended to apply to the regular term next following the promulgation of the order. *Id.*, ... 277

3. ——— : DISCRETIONARY ACTION. Under provisions of the statute authorizing the district judge by written order to adjourn court, "if sick or for any other sufficient cause unable to attend," the reasons for such adjournment are not subject to review by the supreme court. *Id.*, 277

4. ——— : DUTIES OF CLERK. Where the record shows that a written order adjourning the district court is entered on the journal by the clerk, but it does not appear that the clerk formally adjourned the court, it will be presumed that he performed that duty. *Id.*, ... 277

COVENANT.

1. **Pleading**: INCUMBRANCES. A petition alleged that a guardian, from whom plaintiff's grantor derived title, "procured the sale of the premises by order of the proper court, as it is said, but as it now appears there is no record of any of the proceedings of such guardian sale as required by law, and so far as the proper records show, nothing appears properly and according to law." *Held*, on demurrer, insufficient as an allegation showing a breach of covenant against incumbrances. *Scott v. Twiss*, ... 133

2. **Seizin.** If a grantor, at the time of conveyance, is in exclusive possession under claim of title, the covenant of seizin is not broken, until the purchaser or those claiming under him are evicted by title paramount. *Id.*, ... 133

3. **Pleading**: SET-OFF. An incumbrance by way of taxes must be first paid before a vendee can plead the same as a set-off, in an action for the recovery of the purchase money. *Mills v. Saunders*, ... 190

CRIMINAL LAW.

1. **Defense**: INSANITY. Where in a criminal case, the accused relies upon insanity as a defense, the burden of proof is on the prosecution to show sanity. *Wright v. The People* 407

2. ———: ———. In sustaining such a defense, where there is testimony to rebut the legal presumption that the accused was sane, unless the jury are satisfied beyond a reasonable doubt that the act complained of was not produced by mental disease, they must acquit. *Id.*, ... 407

3. ———: ———. But the degree of mental unsoundness, in order to exempt a person from punishment, must be such as to create an uncontrollable impulse to do the act charged. If it be found insufficient to

deprive the accused of ability to distinguish right from wrong, he should be held responsible for the consequences of his acts. *Id.*, . 407

See PRACTICE IN CRIMINAL CASES, 12, 14, 15, 22, 24, 25, 31, 32.

DAMAGES.

See EMINENT DOMAIN. RAILROADS.

DEEDS.

1. **Proving Deed a Mortgage.** Evidence that a deed absolute in its terms was intended to be a mortgage, must be clear, consistent and satisfactory. *Deroin v. Jennings*, ... 97

2. **Execution.** In the absence of fraud, mere imbecility or weakness of mind in a grantor, however great, will not avoid his deed, unless there be evidence to show a *total* want of reason or understanding. *Mulloy v. Ingalls*, ... 115

3. ——: WITNESSES. The presence of the attesting witness to a deed or mortgage, at the time it is subscribed by the parties thereto, is not essential, if he is immediately afterwards told by them that such instument is their agreement, and is by them requested to subscribe the same as a witness. *Id.*, ... 115

4. ——. Where a deed is executed and acknowledged in another state before a commissioner of deeds of this state, a notary public, or other officer using an official seal, the law presumes a compliance with the law of the place of execution, and no further authentication is necessary. But in all other cases there must be attached thereto a certificate of the clerk of a court of record or other certifying officer, under his official seal, showing that the person taking such acknowledgment was the officer therein represented; that he is well acquainted with his handwriting; that he believes his signature to be genuine; and that such deed is executed according to the laws of such state. *Hoadley v. Stephens*, ... 431

5. ——. A deed executed and acknowledged by a justice of the peace, in Virginia, offered in evidence to prove that the grantors had parted with the legal title to certain real estate therein mentioned; *Held*, properly excluded, there being no evidence that it was executed and acknowledged according to the laws of Virginia. *Id.*, . 431

6. ——. At common law lands could be conveyed only by conforming to the law of the place where the lands were situated, but by statute, lands in this state may be conveyed by conforming to the law of the place where the deed is executed and acknowledged. *Id.*, 431

See COVENANT, 1, 2.

DEPOSITION.

See PRACTICE, 12

ELECTIONS.

1. **Procedure in Contested Elections of County Officers.** The board of justices, chosen under Sec. 26 of the general election law, *Gen. Stat.*, 359, in case of the contested election for any county office, should reduce all the evidence given before them to writing, in order to make the same available in case of an appeal to the district court; and though the statute is silent as to whom the custody and control of such testimony shall be intrusted, there is ample inherent power in the appellate court, to compel its production upon consideration of the case there. The trial in the appellate court should be confined to the testimony so taken, though in case of its loss or destruction, neither party would be debarred from introducing necessary evidence to supply such omission. *The People v. Martin*, ... 49

See APPEALS, 1.

EMINENT DOMAIN.

1. **Damages Allowable.** An award of damages for the location of right of way for a railroad, although not contemplated in the statute (*Gen. Stat.*, *Sec.* 97, p. 191), contained a provision that the party owning the premises, part of which were taken for right of way, might "move back his house" therefrom; *Held*, valid. *O. & N. W. R. R. v. Menck*, ... 21

EQUITY.

1. **Jurisdiction:** VOID SALE. An assessment was levied upon shares of stock in a ferry company, and suit in chancery commenced to subject the shares to the payment of such assessment, although the charter of the company gave it no authority so to do. Service was made by publication, the bill taken *pro confesso*, decree rendered, and the shares sold. *Held*, 1. That the decree was *coram non judice*, and void. 2. That the purchaser having procured title to the shares under color of said proceedings, receiving dividends thereon, held the same in trust for the original owner. *Williams v. Lowe*, ... 382

See NEW TRIAL, 1, 2. TAXES, 2.

ESTOPPEL.

1. **By Acts in Pais.** Where a stockholder in a railroad corporation has signed a contract disposing of its assets, knowing its contents, and voting at meetings of the company to carry it into effect, he cannot afterward repudiate it, or question the *bona fides* of the transaction, no fraud being shown. *Clarke v. O. & S. W. R. R.*, ... 458

See PRINCIPAL AND AGENT. PROMISSORY NOTE.

EVIDENCE.

1. **Admissions and Declarations.** In an action upon a promissory note, where the defense was that the note had been given in part payment

of real estate, upon which an incumbrance existed, proof that one of the payees had said that "if the defendant would pay off the incumbrance plaintiffs would owe the defendant, $5,000," *held*, inadmissible. *Mills v. Saunders*, ... 190

2. **Presumptions.** In the absence of evidence showing the purpose and object of the assignment of a mortgage to a national bank, it cannot be presumed that it was for a debt created *in presenti*, in violation of the National Banking act. *Richards v. Kountze*, ... 200

3. **Confessions.** The degree of credit, ordinarily to be given to the confession of a prisoner, should be left to the jury, under proper instructions, with reference to the evidence in each particular case. But a confession alone is not sufficient evidence of the *corpus delicti*. There should be other proof that a crime has been committed and the confession admitted only for the purpose of connecting the defendant with the offense. *Dodge v. The People*, ... 220

4. ———. Instructions asked for by a prisoner with reference to an alleged confession, made by him and admitted in evidence, *held*, properly refused, there being nothing in the record showing the nature of the confession, to whom made, its extent, or whether corroborated or not. *Id.*, ... 220

See PROMISSORY NOTES. QUO WARRANTO.

5. **Admission of Decree in Former Suit Between Same Parties.** Saunders brought suit against Wilcox, to enforce the specific performance of a contract concerning land, and in the decree rendered in his favor it was adjudged "that for the rent, use, and occupation of the land, and improvements, and all damages thereto by Wilcox, further suit must be had or adjustment made therefor by the parties as they see fit." In a subsequent action between the same parties, for trespass, waste, etc., alleged to have been committed by Wilcox upon the same premises, Saunders introduced in evidence the decree of the court rendered in the former suit, and the deed made to him in pursuance thereof. To this, objection was made on the ground that Wilcox had taken an appeal from that decree to the supreme court. *Held*, that as the right of appeal did not exist at the time of the rendition of the decree, the attempt to appeal was a nullity, and the evidence was properly admissible for the purpose of showing Saunders' title, and that his damages occasioned by the occupation of Wilcox had not been adjudicated. *Wilcox v. Saunders*, ... 569

6. ———. A paper offered in evidence to establish a *tri-partite* contract, being signed by one party only, *held*, inadmissible. *Id.*, . . . 569

See BOUNDARIES, 1. CONTRACT, 1. DEEDS, 1. FALSE IMPRISONMENT, 2. FRAUD, 1. PRACTICE, 3, 6. PROMISSORY NOTES. PARTNERSHIP. PRINCIPAL AND AGENT. RAILROADS. RIPARIAN RIGHTS.

EXECUTORS.

1. **The District Court** has jurisdiction over executors and others holding a fiduciary relation, and may compel the proper application of trust funds committed to their care. *Blake v. Chambers*, ... 90

2. **Misapplication of Trust Funds.** A petition alleged that an executor had fraudulently invested assets of the estate in land, taking the title thereto in his own name, never having accounted for the same in his final report to the probate court. *Held*, on demurrer, that a creditor of the deceased had an equitable lien on the land for the payment of the amount due him from the estate. *Id.*, ... 90

FALSE IMPRISONMENT.

1. **Malicious Prosecution**: PLEADING: SUFFICIENCY OF PETITION. Although an action for malicious prosecution cannot be maintained, if the proceedings complained of were had by a court having no jurisdiction, yet a petition alleging that in consequence of such proceedings plaintiff was arrested, imprisoned, etc., is sufficient as a complaint for false imprisonment. *Painter v. Ives*, ... 122

2. **Evidence.** In such an action, the information made by the defendant, upon which the warrant issued for the arrest of the plaintiff, is admissible in evidence. *Id.*, ... 122

3. ——: INSTRUCTIONS TO JURY. There being evidence before the jury showing that plaintiff was arrested by a sheriff, at the request of the officer holding the warrant who had telegraphed him for that purpose, and imprisoned in jail until the arrival of such officer, the defendant asked the court to charge the jury that "in estimating damages, in case the jury found for plaintiff, they should not consider the fact of such imprisonment." *Held*, properly refused. *Id.*, 122

4. **Defense.** One who procures the arrest and imprisonment of another, upon void process, is liable in an action for false imprisonment, and mere good faith in making the affidavit, by virtue of which the arrest is made, is no defense. *Id.*, ... 122

FEES.

1. **Sheriff's Fees.** Under the act of 1875, regulating fees of sheriff, *Laws* 1875, *p.* 81, that officer is entitled to the same commission as special master, where real property sold under a decree of the court is bid in by the plaintiff, as though the amount of the sale was received and disbursed by him. And the act is not prospective in such a sense, as to exclude decrees rendered *before* its passage, and upon which orders of sale are *afterwards* issued. *Kountze v. Train*, ... 291

See PRACTICE, 15. TAXES, 12.

FRAUD.

1. **Fraudulent Conveyance**: EVIDENCE. The question of intent, in

case of an alleged fraudulent conveyance of property, by a husband to a wife, is one of fact for submission to a jury. *Monteith v. Bax*, 166

See LIMITATION OF ACTIONS, 3.

HOMESTEAD.

1. **Homestead.** Judgment was recovered against C., in April. He was at that time the owner of certain real estate, and in October following entered upon and occupied the same with his family. While in possession, execution issued, levy and sale made. *Held*, that the premises were not exempt as a homestead. *Bowker v. Collins*, . . 494

2. **Lien of Judgment.** A proper construction of the statutes of this state, makes a judgment recovered in the district court, a lien upon all the real estate of the debtor, situated in the county where the judgment is recovered. But no sale can be had of the proper portion selected as a homestead by the debtor, as long as the premises so selected are owned and occupied for that purpose. *State Bank v. Carson*, ... 498

3. **Mortgage:** PRIORITY OF LIENS. Judgment was rendered against W., at a time when he occupied certain premises as a homestead, execution issued, levy made, and returned not sold for want of bidders During these proceedings W., made no claim to any part of said premises as a homestead, and for a time after the recovery of the judgment, abandoned the same. *Held*, in a suit to foreclose a mortgage given by W., and wife on the same premises, after the rendition of said judgment, that the judgment was the prior lien. *Id*. 498

HOMICIDE.

1. **Causes of Defense:** INTOXICATION. Upon a trial for murder, it is proper for the jury to consider any state or condition of the accused, at the time of the killing, that is adverse to the proper exercise of the mind, and the undisturbed possession of the faculties; and if there is evidence that the accused was intoxicated when the crime was committed, the jury may consider the evidence of intoxication as a circumstance to show that the act was not premeditated, and to rebut the idea that it was done in a cool and deliberate state of mind, necessary to constitute murder in the first degree. And unless the jury are satisfied beyond a reasonable doubt that the accused, at the time of the killing, was in such a state of mind that he could form an intention maliciously to kill, and that he did form such an intention, they cannot convict him of a higher crime than manslaughter. *Smith v. The State* 278

HUSBAND AND WIFE.

See FRAUD. MARRIED WOMEN.

INDICTMENT.

1. **Form and Contents.** An indictment setting forth all the essential

ingredients of the crime of murder, and all necessary allegations that the defendant committed it, is not bad by reason of the omission of the usual conclusion, "and the jurors aforesaid, on their oaths aforesaid, do say, etc., did kill and murder." *Smith v. The State*, . . . 277

See PRACTICE IN CRIMINAL CASES, 22, 30.

INJUNCTION.

See MORTGAGES, 6. NEW TRIAL, 1, 2. TAXES, 2.

INSURANCE COMPANIES.

See CONTRACT.

INTEREST.

1. **Rule of Computation.** Partial payments made upon a debt drawing interest should be first applied in payment of the interest, and afterwards to the reduction of the principal. *Mills v. Saunders*. . . 190

INTERNAL IMPROVEMENTS.

See BRIDGES.

JUDICIAL SALE.

1. **Judicial Sale.** A sale of mortgaged premises was made under a decree of foreclosure which found the amount due plaintiffs to be $724.58, and the amount due two of the defendants, senior mortgagees, $2,887.50. The order upon which the sale was made, stated the amount of the decree to be for $724.58, omitting the amount found due the senior mortgagees. The plaintiffs became the purchasers for $3,684. Afterwards upon motion of the mortgagors, plaintiffs assenting thereto, the sale was set aside, but upon motion of the senior mortgagees this last order was vacated, the sale confirmed, and purchase money ordered paid into court. *Held*, that there having been no sale under the decree in favor of the senior mortgagees, they were not in a position to insist upon a confirmation of it. *Tootle v. White*, 401

2. ———. It is not the design of the law to permit each mortgagee, in such cases, to have a separate order of sale for the amount found due him, but the order must be as broad as the decree, and issue for the entire amount found due therein, to pass a perfect title by the sale. *Id.*, ... 401

3. ———. The rule of *caveat emptor* applies to judicial sales, because from the nature of the transaction there is no one to indemnify the purchaser for any loss he may sustain. *Frasher v. Ingham*, . . . 531

4. ———. Where the sheriff by mistake levied upon a certain tract of land covered with timber, which was appraised in the aggregate at the sum of $1,634, and plaintiff, relying upon the levy and appraisement, purchased the same for $1,090, procured a confirmation of the sale, and a deed from the sheriff, and it was afterwards discovered that the

numbers of the land, levied upon and sold, did not include the timber land, but consisted of worthless sand banks on the water's edge of the Missouri river, *it was held*, on a petition of the purchaser to set the sale aside, that he was entitled to relief, and the rule of *caveat emptor* did not apply. *Id.*, ... 531

5 ———: COSTS. But as the defendants did not appear to be in fault, *it was held*, that the costs should be taxed to plaintiff. *Id.*, ... 531

JUDGMENT.

1. **Presumptions.** The findings and judgments of a court of record will always be presumed to rest upon sufficient evidence, unless the contrary be clearly shown by the record. *Singleton v. Boyle*, ... 414

See HOMESTEAD. PRACTICE, 15, 23.

JURISDICTION.

1. **Jurisdiction of United States Courts in Nebraska.** The federal courts have no jurisdiction of the crime of larceny, alleged to have been committed on an Indian reservation in the State of Nebraska. *Painter v. Ives*, ... 125

2. ———. All the territory embraced within the boundaries of the state, was withdrawn from the jurisdiction of the federal courts by the act admitting the state into the Union. *Id.*, ... 122

See BOUNDARIES, 2. EXECUTORS. NEW TRIAL, 1, 2. PRACTICE IN CRIMINAL CASES, 5, 6. TAXES, 2. QUO WARRANTO, 2.

JUSTICES OF THE PEACE.

1. **Constitutional Law**: DUTIES OF JUSTICES OF THE PEACE. A justice of the peace must hold his office in the precinct for which he is elected. The act of 1875 (*Laws, p.* 58), authorizing justices in cities and towns "to hold their offices in other precincts," etc., is unconstitutional. *State, ex rel., Ferguson v. Shropshire*, ... 411

2. **Mandamus** will lie against a justice of the peace to compel him to hold his office in the precinct for which he was elected, and any citizen thereof may maintain the action. *Id.*, ... 411

LARCENY.

See JURISDICTION, 1. PRACTICE IN CRIMINAL CASES, 24, 25.

LIEN.

See HOMESTEAD. MECHANIC'S LIEN.

LIMITATION OF ACTIONS.

1. **Absence.** The mere temporary absence of a debtor from the state, when such debtor has a usual place of residence therein where ser-

vice of summons can be had upon him, does not suspend the statute of limitations. *Blodgett v. Utley*, ... 25

2. **Statutory Construction**. The change in the statutory period for bringing actions for the recovery of real estate, from twenty-one to ten years, made by amendment to Sec. 6, of the civil code, February 15, 1869, applies to actions brought since the taking effect of the amendment. The time existing between the passage and taking effect of the act, was allowed by the legislature for the purpose of bringing actions on claims then existing, before the same were barred by the new enactment. *Horbach v. Miller*, ... 31

3. **Fraud**. In actions for relief on the ground of fraud the statute of limitations does not begin to run until the discovery of the fraud. *Blake v. Chambers*, ... 90

4. **Taxes**: CONSTRUCTION OF REVENUE ACT. The statute of limitations in the revenue act of 1869 is not retrospective in its operation. It applies only to tax deeds executed subsequent to the passage of that act. *Sutton v. Stone*, ... 319

See ADVERSE POSSESSION, 1.

MALICIOUS PROSECUTION.

See FALSE IMPRISONMENT.

MANDAMUS.

See COUNTY COMMISSIONERS. JUSTICES OF THE PEACE, 2. PRACTICE, 17. SCHOOL DISTRICTS, 4.

MARRIED WOMEN.

1. **Liabilities of.** The promissory note of a married woman, given by her in a transaction relative to her separate property, is valid under the act of 1871. *Gen. Stat.*, 465. *Webb v. Hoselton*, ... 308

MECHANIC'S LIEN.

1. **A Mechanic's Lien** is assignable, and the assignee thereof may maintain an action to foreclose the lien. *Rogers v. The Omaha Hotel Co.*, 54

2. ———. The distinction between statutory liens and common law liens depending on possession, stated. *Id.*, ... 54

MORTGAGES.

1. **Assignment to National Bank.** Notes secured by mortgage were assigned to a national bank, and by it to plaintiff. *Held*, in an action of foreclosure, that the mortgages were not extinguished by the assignment to the bank, and were valid in the hands of plaintiff, he being a *bona fide* purchaser. *Richards v. Kountze*, ... 200

2. **Assignment**. A *bona fide* purchaser, for value, of a negotiable promissory note, secured by mortgage, before maturity and without notice,

takes the mortgage as he does the note, discharged of all equities which may exist between the original parties. *Webb v. Hoselton*, . 308
Moses v. Comstock, ... 516

3. ———. The mortgage is a mere incident to the debt, and passes with it. *Id.*, ... 308

4. **What Constitutes.** A conveyance in the form of a deed of trust to secure the payment of a promissory note, and conditioned that in case of failure to pay, the trustee shall sell, or upon payment, reconvey, is in effect only a mortgage. *Id.*, ... 308

5. **Chattel Mortgage.** A mortgage of chattels transfers to the mortgagee the whole legal title to the thing mortgaged, subject only to be defeated by performance of the condition, but the mortgagor may redeem the property at any time before sale. *Adams v. Nebraska City National Bank*, ... 370

6. ———: INJUNCTION. Where upon default in the payment of a debt secured by a chattel mortgage, the mortgagee took possession of the property, and on the same day the owner of a judgment against him levied thereon; *Held*, that an injunction would not lie, at the instance of the mortgagee, restraining a sale under the levy. *Id.*, ... 370

See CONVEYANCE. DEEDS, 1, 2. 3.

MUNICIPAL CORPORATIONS.

1. **Cities of the Second Class.** An ordinance passed by a city of the second class, punishing persons who willfully, maliciously, or mischievously meddle with, or trespass upon, the personal or real property of others, is not repugnant to the constitution or laws of the state. *City of Brownville v. Cook*, ... 10

2. **Process and Proceedings in Police Courts.** A prosecution for the violation of a city ordinance should run in the name of "*The People of the State of Nebraska*," and not in the name of the city. *Id.*, . . 10

3. **Statutes:** CONSTRUCTION. A statute providing that when the grade of a street has been established it "shall not be changed, until damages shall have been assessed and determined, and the amount of damages tendered to property owners, *before any such change shall be made*," is mandatory; and the proceedings of a city council, changing the grade of a street, entering into a contract for work on the same, and levying taxes on adjoining property to pay therefor, without having *first* caused the amount of damages to be ascertained and tendered, are void. *Hurford v. City of Omaha*, ... 33

4. ———: DIRECTORY AND MANDATORY LAWS. The distinction between directory and mandatory statutes, in reference to the action of a city council in the exercise of delegated powers—stated. *Id.*, . . 33

See CONSTITUTIONAL LAW.

NATIONAL BANKS.

1. **Mortgage.** Notes secured by mortgages were assigned to a National Bank, and by it to plaintiff. *Held*, in an action of foreclosure, that the mortgages were not extinguished by the assignment to the bank, and were valid in the hands of the plaintiff, he being a *bona fide* purchaser. *Richards v. Kountze*, ... 200

2. ———: EVIDENCE: PRESUMPTIONS. In the absence of evidence showing the purpose and object of the assignment to the bank, it cannot be presumed that it was for a debt created *in presenti*, in violation of the National Banking Act. *Id.*, ... 200

3. ———. *Semble*, that the limitations of the act apply to transactions in real property, independent of legitimate banking operations, and not to mortgage securities. *Id.*, ... 201

See BANKS. PROMISSORY NOTES.

NEGLIGENCE.

See RAILROADS.

NEGOTIABLE INSTRUMENTS.

See PROMISSORY NOTES. SCHOOL DISTRICTS, 5.

NEW TRIAL

1. **Jurisdiction of Courts of Equity.** Where it would be proper for a court of law to grant a new trial, if the application had been made while that court had the power, it is equally proper for a court of equity to do so, if the application be made when the court of law has no means of granting such trial, but it will only interfere in case of newly discovered evidence, surprise or fraud, or where a party is deprived of the means of defense by circumstances beyond his control. *Horn v. Queen*, ... 108

2. ———. H. commenced an action in the district court, to enjoin the collection of a judgment obtained against him before a justice of the peace, and praying for a new trial of the cause, alleging that he was called away on account of the dangerous illness of his son, during which time service of summons was made by leaving a copy at his residence, that he returned home on the day of the trial, but was too sick to attend thereto on that day and for twenty days thereafter, when it was too late for the court in which judgment was rendered to grant any relief, and that he had a good defense to the action, which was fully set forth. *Held*, on demurrer, that a new trial should be granted. *Id.*, ... 108

See PRACTICE, 2.

OFFICERS.

1. **Constitutional Law**: EXECUTIVE OFFICERS: ADJUTANT GENERAL. The office of adjutant general exists in this state by virtue of an ap-

pointment from the Governor as commander-in-chief of the military forces, acting under authority given him by Congress (1 Statutes at Large, 273), and the act of March 4, 1870. *Gen. Stat.*, 470. *State, ex rel., Tzschuck v. Weston*, ... 234

2. ——: ——: ——. Such an office is not executive within the meaning of the constitution which provides that "no other executive state office (aside from those mentioned), shall be continued or created." *Id.*, ... 234

3. ——: ——: SECRETARY OF STATE: SALARY. One holding the office of secretary of state is eligible to that of adjutant general, and the allowance to him of a salary therefor, does not conflict with that section of the constitution, fixing the salary of the secretary of state, and providing that he shall not receive to his own use "any fees, costs, perquisites of office, or other compensation." *Id.*, ... 234

4. **Resignation.** The acceptance of a resignation of a municipal office, by the authorities to whom it is tendered, is not necessary to make the same effective. *State, ex rel., Roberts v. The Mayor*, ... 260

See CONSTITUTIONAL LAW. FEES. ELECTION.

OFFICIAL BONDS.

1. **Official Bonds.** A failure to insert the names of sureties on an official bond, in the body of the instrument, cannot defeat a recovery for a breach thereof. *Stewart v. Carter*, ... 564

2. **Action Upon.** In an action by a private person for a breach of the condition of the official bond of a county officer, the county is not a necessary party, even where a reformation of the bond is part of the relief sought. *Id.*, ... 564

PARTIES.

See OFFICIAL BONDS, 2. PRACTICE, 9.

PARTITION.

1. **Accounting for Rents and Profits.** In a partition suit, the defendant was held properly charged with rents and profits received by his son-in-law, who held title to the premises by virtue of a tax title, it appearing in evidence that the defendant was an active agent in procuring such title, bidding the premises off at private tax sale, and that the rents paid to his son-in-law were paid by defendant's direction. *Held*, also, that the defendant was properly charged with the rental value of a portion of the premises, he occupying them in person and refusing to rent them to others. *Miller v. Mills*, ... 362

PARTNERSHIP.

1. **Evidence Establishing It.** A. and B. entered into a written partnership agreement concerning a herd of cattle furnished by A., and to be cared for by B. A. also advanced money for further investment

in the enterprise, a portion only of which B. used for that purpose. A. told B. to invest the remainder in "something that would pay, and not let it be idle." B afterwards rented land in his own name, raising crops of wheat and barley, upon which a judgment creditor of B. levied. A. brought an action to enjoin a sale under the levy, setting forth his partnership with B. in the cattle venture, and claimed that the crops levied on were part of the assets raised for and on account of the partnership: *Held*, that the partnership did not extend to the crops raised by B. *Brown v. O'Brien*, ... 195

2. ———. Where the existence of a partnership is admitted, or otherwise established, the admission of one of the partners as to any matter between the firm and another party, is evidence against all. But where the partnership is denied, such admission affects him alone, and is no evidence of its existence, so as to create a liability against the others. *Converse v. Shambaugh*, ... 376

3. ———. The existence of a partnership may be proved by the separate admissions of all who are sued, or by the acts, declarations or conduct of the parties; but the simple statement of one claiming to be a partner is not sufficient to establish it. *Id.*, ... 376

PLEADING.

1. **Petition:** PARTIES. In a petition to redeem lands sold under a mortgage, it must affirmatively appear that the party claiming the equity of redemption was not made a defendant in the action foreclosing such mortgage. *Deroin v. Jennings*, ... 97

2. **Causes of Action:** MISJOINDER. A petition contained two counts, one alleging that certain shares of stock, owned by the plaintiff, were purchased at judicial sale by the defendant under a parol agreement that defendant should hold the shares in trust and re-convey the same upon payment of a debt due him from plaintiff; and the other alleging want of jurisdiction in the court making such sale, but that defendant under color thereof procured the transfer of the shares on the books of the company, and received dividends thereon in trust for plaintiff. *Held*, not bad by reason of misjoinder. *Williams v. Lowe*, 382

3. **Petition to Foreclose Tax Lien.** An act of the legislature relating to the foreclosure of tax liens, set forth the requisites of a petition to be filed by the county treasurer. *Held*, that a petition which conformed substantially to the requirements of the act was sufficient to support the judgment. *Hull v. Miller*, ... 503

4. **Answer:** DENIALS. A petition against a railroad company alleged that "defendant carelessly, negligently and wantonly ran its engine and cars over and upon the plaintiff's mare," etc. The answer denied that the "defendant carelessly, negligently and wantonly ran over said mare." *Held*, 1. That this was not a denial of the injury complained of. 2. That under these pleadings the court erred in instructing the jury that such denial "puts the plaintiff upon proof of his cause of action." *Harden v. A. & N. R. R.*, ... 521

5. ———. A denial must be direct and unambiguous, and answer the substance of each direct charge; such facts as are not denied are, for the purpose of the action, taken as true. *Id.*, ... 521

6. ———: VERIFICATION. But while denials must be positive and direct, the verification need only be that the defendant believes the facts stated in his answer to be true. *Id.*, ... 521

7. **Joinder of Action.** Under the code, a petition to obtain the correction of an official bond, and to recover a money judgment for an alleged breach thereof, is not subject to demurrer for misjoinder of causes of action. *Stewart v. Carter*, ... 564

See CONVEYANCE, 2. COVENANT, 1. FALSE IMPRISONMENT, 1. PRACTICE, 19, 20.

PRACTICE.

1. **Bills of Exceptions**—should state affirmatively that they contain "all the evidence." To state that they contain "the substance of the evidence introduced bearing upon the issues," is not sufficient. *O. & N. W. R. R., v. Menk*, ... 22
Wilcox v. Saunders, ... 569

2. **Motion for a New Trial.** All alleged errors occuring during the trial of a cause, must be excetped to, and complained of in the motion for a new trial, in order to obtain a review of the same in the supreme court; and error committed by the giving of an oral charge to the jury, instead of reducing such charge to writing, as required by *Gen. Stat.*, 262, is no exception to the rule. *Horbach v. Miller*, ... 31
See also Singleton v. Boyle, ... 414

3. **Objections to Testimony.** Where objection is made to the admission of testimony, the reason and grounds of objection should be stated. *Id*, ... 32

4. **An Attachment** cannot be maintained in an action of tort. *Handy v. Brong*, ... 60

5. **Records for Supreme Court.** Where the finding of the court below upon the facts is not disputed, and the only error complained of is one of law, the testimony taken need not be embodied in the record brought to the supreme court. *Rogers v. The Omaha Hotel Co.*, . . 54

6. **It seems** that merely allowing the jury to take with them documentary evidence during their retirement, is not sufficient of itself, to disturb their verdict, *Mercer v. Harris*, ... 77

7. **Rendition of Verdict.** During the consideration of a cause submitted to a jury, court adjourned until 9 A. M., of the following day, the judge thereof, at the same time, announcing aloud that the court would be at all times open for the purpose of receiving the verdict of the jury in the case, then being considered by them, if they should agree upon their verdict before midnight. At 11 o'clock, P. M. the

PRACTICE—CONTINUED.

judge went to the court room, and in the absence of all the officers of the court except the bailiff in charge of said jury, and in the absence of the parties to the suit and their counsel, received the verdict of the jury, discharged them from further consideration of the case, kept the verdict until the opening of court on the following morning, and, after having read it aloud in open court, handed it to the clerk for entry upon the records; *Held*, a privy verdict, and of no force and validity, not having been affirmed by the jury in open court. *Young v. Seymour*, ... 86

8. **Error**: BILL OF EXCEPTIONS. Exceptions to the opinion of the probate judge upon questions of law arising during the trial, cannot be reviewed upon petition in error, unless the cause is tried by a jury. *Taylor v. Tilden*, 3 *Neb.*, 339, cited and followed. *Kellogg v. Huntington*, ... 96

9. **Pleading**: PETITION: PARTIES. In a petition to redeem lands sold under a mortgage, it must appear affirmatively that the party claiming the equity of redemption was not made a defendant in the action foreclosing such mortgage. *Deroin v. Jennings*, ... 97

10. **Process in Police Courts.** A prosecution for the violation of a city ordinance should run in the name of "*The People of the State of Nebraska*," and not in the name of the city. *City of Brownville v. Cook*, ... 101

11. **Appeal.** An appeal taken on the 22d of August, from a judgment rendered February 21st, is not within the six months prescribed by the act of March 3, 1873. *Gen. Stat.*, 716. *Glore v. Hare*, ... 131

12. **Authentication of Depositions.** Depositions taken in Illinois by a notary public, certified to under his hand and official seal, may be read in evidence here without further authentication. *Martin v. Coppock*, ... 173

13. **Amendment of Summons.** The amendment of a summons, made after notice to the defendant by the correction of a mistake in the name of the plaintiff, relates back to the time of service. *Id.*, . . . 173

14. **Appeal**: DEFAULT. A defendant appealing from a judgment of the probate court is not in default, in the district court, until after the rule day for filing his answer has elapsed. *Rich v. Stretch*, ... 186

15. **Judgment**: ATTORNEY'S FEES. Where an allowance is made for an attorney's fee, as provided by Sec. [23], p. 98, Gen. Stat., the amount thereof should be specifically stated and kept distinct from the amount of the judgment proper. *Per* LAKE, CH. J. *Id.*, ... 186

16. **Report of Referee.** The report of a referee upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence. *Brown v. O'Brien*, ... 195

17. **Mandamus.** Application for the writ should be made by motion, accompanied by an affidavit setting forth the facts upon which it is

based. A petition, verified in the same manner as a pleading in an ordinary civil action, is insufficient. *State, ex rel., Roberts v. The Mayor*, ... 260

18. **Waiver of Error.** Error alleged to have been committed by the district court, in the reversal of a judgment rendered in favor of the plaintiff before a justice of the peace, *held* to be waived, no exception being taken, and plaintiff filing a petition as provided by the code. *Gen. Stat.*, 632, 687. *Lash v. Christie*, ... 262

19. **Defects in Petition.** Alleged defects in a petition that "a copy of the note sued on is not attached to or filed with" it, and that "the names of parties are not properly entitled," can only be reached by motion. They are not grounds for demurrer. *Id.*, ... 262

20. **Misjoinder of Causes of Action.** A petition in an action upon a promissory note reciting the consideration of the note, and disposition of property for which it was given, but not alleging that there was a "wrongful conversion" of the property, is not subject to objection by demurrer, on the ground that "an action on a promissory note and an action of trover are improperly joined. *Id.*, ... 262

21. **Taking Depositions.** Unless authorized by special commission, the clerk of a court out of the state has no authority to take depositions. *Starring v. Mason*, ... 367

22. **Objections to Depositions.** Although a court may commit error in refusing to suppress a deposition, yet if the moving party fail to object to its being read to the jury at the trial, he cannot complain of such error in the appellate court. *Id.*, ... 367

23. **Exceptions to Judgment.** To obtain a review of a judgment of the district court, dismissing an appeal taken from a justice of the peace, no exception need be taken or made part of the record by a formal bill of exceptions. *Morrow v. Sullender*, ... 374

24. **Dissolving Attachment.** A petition headed "Supreme Court of the State of New York," and filed in a district court of this state, is not sufficiently defective to warrant the dissolution of an attachment issued in the cause. *Livingston v. Coe*, ... 379

25. **Attachment:** CAPTION OF THE WRIT. A writ of attachment which does not run in the name of "The People of the State of Nebraska," as required by the constitution, is voidable only; the defect is curable by amendment. *Id.*, ... 379

26. **Demurrer.** The demurrer to an answer should state the grounds therefor; but where a defendant proceeds to argument without objection, the demurrer will be regarded as general that the answer constitutes no valid defense. *Colby v. Lyman*, ... 429

27. **Appearance:** SUMMONS. The appearance of a defendant for any other purpose than to challenge the jurisdiction of the court, is a waiver of all defects in the summons. *Kane v. The People*, ... 509

28. **Stay of Execution.** The taking of a stay of execution, prior to the act of February 23, 1875, is not a waiver of the right to prosecute proceedings in error in the supreme court. *White v. Blum*, . . . 555

29. **Appeals.** An appeal from a judgment sustaining a demurrer to a petition, on the ground of a misjoinder of causes of action, does not lie to the supreme court. The remedy is by petition in error. LAKE, CH. J., *dissenting*. *Stewart v. Carter*, ... 564

30. ———. The motion to dismiss the appeal was sustained, but as the transcript was on file, leave was granted to the plaintiff to file a petition in error. *Id.*, ... 564

31. **Qualification of Jurors.** An objection that a juror was disqualified by reason of his non-residence within the county for a sufficient length of time, should be made by way of challenge before the trial. Or if the disqualification were not known then, the record should show that an effort was made to ascertain the fact by an examination of the juror on his *voir dire;* otherwise, a new trial will not be granted. *Wilcox v. Saunders*, ... 569

See BOUNDARIES, 1. COVENANT, 1. FALSE IMPRISONMENT, 1. MORTGAGES. NEW TRIAL, 1, 2. PROMISSORY NOTES. RAILROADS, 1. REMOVAL OF CAUSES, 1, 2. WITNESSES.

PRACTICE IN CRIMINAL CASES.

1. **Challenge of Jurors.** Under the Provisions of the criminal code of 1873, it is not error to permit a juror to sit in a cause, who, although on oath says "he had an opinion and expressed an opinion," also says, he "could render an impartial verdict upon the law and the evidence." The record disclosing no basis for the opinion, it will be presumed that the court was satisfied that it was merely hypothetical, and not one calculated to bias the juror. *Palmer v. The People*, ... 68

2. **Exhausting Peremptory Challenges.** A party waiving his right of peremptory challenge, cannot complain of the disqualification of a juror, known to exist at the time of the empaneling. *Id.*, . . . 68

3. **Setting Aside Verdict.** A verdict without evidence to support it, should be set aside; but if the evidence is conflicting, and the issues fairly submitted to the jury the verdict should not be disturbed. *Id.*, 68

4. **Arguments of Counsel.** If an attorney for a prisoner voluntarily waives his right to argue the case to the jury he cannot, after they have retired to consider their virdict, insist as a matter of right to have the jury recalled for the purpose of hearing such argument. *Id.*, . . 68

5. **Jurisdiction of District Court.** The district court of any county designated to try a felony committed in an unorganized county, has jurisdiction thereof under the act of 1875 (Laws, 31). *Dodge v. The People*, ... 220

6 ———: AVERMENTS OF INDICTMENT. If the indictment contain an

averment of designation under the above act, sufficient appears of record to show that the court had jurisdiction, though no distinct copy of the order of the judge be set forth therein. *Id.*, ... 220

7. **Motion for a New Trial.** In criminal, as well as in civil cases, all the reasons known to exist for setting aside the verdict, and granting a new trial, should be set forth in the motion therefor. *Id.*, ... 220

8. **Intendments of the Record.** Where the record in a capital case shows the arraignment and plea of the prisoner, his presence during the impaneling of the jury, his filing of instructions with the clerk, and his exceptions to the charge given to the jury, the presumption is that he was present during the trial, and at the return of the verdict, there being no allegation or complaint to the contrary in the motion for a new trial. *Id.*, ... 220

9. **Excusing Jurors.** Where there is no abuse of the discretion vested in the district court, in excusing persons from serving on juries, its action in that regard will not be reviewed in the supreme court. *Id.*, 220

10. **Summoning Juries.** The summoning of juries for the trial of criminal cases is regulated by Secs. 660, 661 of the civil code, but the number of jurors is not limited to those summoned on the regular panel. The court may direct the sheriff to summon talesmen, and no special venire therefor is necessary. *Id.*, ... 220

11. **Arrest of Judgment.** Want of jurisdiction and insufficiency of the indictment, are the only grounds for arrest of judgment, under the criminal code. *Id.*, ... 220

12. **Evidence:** CONFESSIONS. Instructions asked for by a prisoner with reference to an alleged confession, made by him and admitted in evidence, *held*, properly refused, there being nothing in the record showing the nature of the confession, to whom made, its extent, or whether corroborated or not. *Dodge v. The People*, ... 221

13. **Exceptions to Charge.** Each specific portion of a charge, deemed erroneous, must be pointed out and excepted to. A general exception is unavailing, although the rule will not be as rigidly adhered to in criminal, as in civil cases, where it is apparent that the charge given was not applicable, and tended to mislead the jury. *Id.*, ... 221

14. ——: SENTENCE. At common law courts had no power to grant new trials in cases of felony, and it was held that they had no power to revise or correct their judgments in such cases. Consequently if the sentence of a prisoner was so defective as to invalidate the judgment, he was discharged. But this doctrine is now overruled. *King v. Kenworthy*, 1 *Barn. and Cress.*, 711. *Regina v. Holloway*, 5 *Eng. Law and Equity*, 360. *Id.*, ... 221

15. ——: ——. Where a prisoner has been found guilty of murder in the first degree, and the only error that appears on the record is the failure of the court, before pronouncing sentence, to inform the prisoner of the verdict, and ask him whether he had anything to say

PRACTICE IN CRIMINAL CASES—CONTINUED.

why judgment should not be pronounced against him, the judgment will be set aside and the cause remanded to the court below, with instructions to render judgment on the verdict in the manner prescribed by law. *Id.*, ... 221

16. **Change of Venue**: CONTINUANCE. Applications for change of venue, and continuance, are addressed to the sound discretion of the court, and its ruling thereon will not be disturbed, where there is no abuse of that discretion. *Smith v. The State*, ... 277

17. ———. Counter affidavits may be filed on application for a change of venue. *Id.*, ... 277

18. **Impaneling Jury.** Upon a trial for murder, the court ordered the sheriff to summon a special panel of 96 men from a particular portion of the county, which, on defendant's challenge to the array, was quashed, and a direction given to the sheriff to summon jurors from the "body of the county." In the execution of this order, the sheriff summoned 47 of those who had been on the special panel, so quashed, and after all the regular panel and defendant's peremptory challenges had been exhausted, it appeared that the 12 trial jurors were of the original special panel, and each had been challenged for cause on that ground, which challenge had been overruled by the court. *Held*, that the jury were legally impaneled. *Id.*, ... 277

19. **Oath to Jury**: INTENDMENTS OF THE RECORD. Where the record states that the jury were sworn "to well and truly try and true deliverance make upon the issues joined between the parties," it will be presumed that the oath was administered according to the statutory form. *Id.*, ... 278

20. **Charge to Jury**: ACT OF FEBRUARY 25, 1875. The provisions of the act of 1875 (Laws, p. 76), directing the charge of the court to the jury to be written in consecutively numbered paragraphs, is a right which the supreme court will regard as waived, when the charge is not excepted to, or where exception is taken to a particular clause only. *Id.*, ... 278

21. ———. A correct instruction of the law, applicable in a trial for murder, is not objectionable because it contains the words, "you will allow no false sympathy to sway you from a proper discharge of your duty. *Id.*, ... 278

22. **Objections to Indictment.** If a party fails to object in the court below, to an indictment containing two counts for larceny, and two counts for receiving stolen property, on the ground that they refer to separate and distinct offenses, such objection, after a verdict of guilty on the larceny counts, will not be considered in the appellate court. *Thompson v. The People*, ... 524

23. ———: VERDICT. Upon the trial of such indictment the jury returned a verdict of guilty on the larceny counts, and not guilty on

the others, and also found "the property described in the indictment to be of the value of one hundred and fifteen dollars." *Held*, in the absence of any evidence upon the counts for receiving stolen property, that the valuation would apply to the property mentioned in the larceny counts. *Id.*, ... 524

24. **Larceny:** INSTRUCTIONS TO JURY. Upon the trial of an indictment for larceny, the court instructed the jury that "larceny is defined to be the taking and carrying, or leading away, the personal property of another, without his consent, and against his will, with intent to appropriate the same to the use of the taker. Hence, if the taking of the property was with the intent to convert the same to the use of the taker the offense is complete." *Held*, erroneous, in this, that it omits to charge that the taking must be with a felonious intent. *Id.*, 524

25. ———: POSSESSION: BURDEN OF PROOF. In a prosecution for larceny it is error to instruct the jury, that "if the stolen property was in the possession of the accused, it is incumbent upon him to *prove how that* possession was obtained." Possession *soon after* the theft, is, however, *prima facie* evidence of guilt, proper to be left to the jury, who are the sole judges of its effect, and if there be a reasonable doubt of guilt, the accused is entitled to an acquittal. *Id.*, 524

26. **Objections to Instructions.** Since by statute in this state (Laws 1875, p. 76), the charge of the court to the jury is required to be in writing, filed with the clerk and made a part of the record, if it appears that a charge given in a case of felony had a tendency to prejudice the accused, under any state of facts, the appellate court will correct the error by granting a new trial even though no objection was taken to such charge in the court below. *Id.*, ... 524

27. **Challenge of Jurors.** A juror challenged for cause, after stating that he had formed and expressed an opinion, added, "I talked pretty loud when I heard of the assault. My opinion is based upon general rumor, and newspaper reports. *Think* I could return a fair and impartial verdict. I think I could now, *but I might possibly lean a little the other way.*" *Held*, incompetent. *Curry v. The State*, . 545

28. ———. The scope and effect of section 468, of the criminal code, relating to the causes for challenge of jurors—stated. *Id.*, ... 545

29. **Instructions to Jury.** It is not error to refuse to give correct instructions, if the court has already charged the jury substantially as asked. *Id.*, ... 545

30. **Averments of Indictment.** Where in an indictment for an assault with intent to commit murder it was averred, that the assault was made with "deliberate and premeditated malice," *held*, that a conviction might be had, where the assault was committed purposely and maliciously, but without deliberation and premeditation. *Id.*, 545

31. **Instructions to Jury.** On the trial of an indictment for an assault with intent to murder, the court charged the jury, that "if a person willfully does an act which has a direct tendency to destroy another's

life, the natural and *necessary* conclusion from the act is, that he intended to destroy such person's life." *Held*, erroneous, in this, that as death was not produced but only a serious bodily injury, while the intention to destroy life might have been a *reasonable* presumption, it was not necessarily the *only one*. A person is presumed to do that which he voluntarily and willfully does in fact do; but if the intent is to be carried *beyond* the result actually produced by the acts of the accused, evidence must be introduced to justify the jury in so finding. *Id.*, ... 545

32. ———. Upon the question of intent, the jury were further instructed if they found that a dangerous and deadly weapon was willfully used with a violence sufficient to produce death, they would have the right to infer from that fact the intention to produce death. *Held*, error, not being warranted by the facts of the case. *Id.*, ... 545

33. ———. Where the charge of the court is wholly unsupported by the evidence, and calculated to mislead the jury, the judgment will be reversed. *Id.*, ... 545

See CRIMINAL LAW. HOMICIDE. INDICTMENT.

PRACTICE IN SUPREME COURT.

1. **Filing Papers.** The date of filing indorsed on a transcript by the clerk in a cause brought to the supreme court, is merely *prima facie* evidence of the time at which it was received by him. The court will correct a mistake, made in the date to the prejudice of either party, and affidavits will be received for the purpose of determining when the transcript was delivered to the clerk. *Tootle v. White*, . 401

2. **Removal of Causes to United States Court.** Upon suggestion of diminution of record, certificates of the clerk of the United States circuit court were produced to show that before judgment was rendered, the case had been removed to that court. *Held*, that the question of removal could only be reviewed upon a bill of exceptions showing the course taken to obtain it, and the action of the district court thereon. *Singleton v. Boyle*, ... 414

PRINCIPAL AND AGENT.

1. **Evidence Establishing Agency.** The mere fact that the agent of plaintiffs suing upon a note payable to them, received it from a person selling a machine, in consideration of which the note was given, will not of itself estop the plaintiff from denying that such person was their agent in the sale, but it should be left to the jury to say that if the machine was the property of plaintiffs at the time of its sale, they would be justified in finding agency from the fact that the note was made payable to them. *Nichols v. Hail*, ... 211

2. ———. Where the owners of a stallion brought suit for his services to defendant's mares, and there was evidence tending to show that an employe had the management of the horse, making contracts, and collecting pay for his services; *Held*, 1. That a receipt given by

such employe in settlement of the account sued on, was improperly excluded from the jury. 2. That evidence of a note given and paid by another party to such employe, should have been admitted, as tending to establish the general agency of the employe. *Starring v. Mason*, ... 367

PROMISSORY NOTES.

1. **Defense**: EVIDENCE. The defense to an action upon a promissory note being that the note had been given to cover an overdraft by a depositor in a National Bank, *it was held:* 1. That testimony of one of the makers, as to his understanding of the purpose and object of giving the note, was inadmissible. 2. That demand for security for the overdraft of such depositor, made long after the note was given and when there was an overdraft to a large amount still due, constituted no part of the *res gestae*. *Lacey v. Central National Bank*, ... 179

2. **Action Upon.** The right to sue upon a note executed exclusively for the benefit of a banking corporation, vests in the bank, and the indorsement of its cashier, to whom as cashier, such note is made payable, is not necessary. *Id.*, ... 180

3. **Evidence**: DEFENSE. The defendant employed A., in New York, to print maps containing a lottery scheme, an act which is prohibited by the statutes of that state, and executed a promissory note in payment of the work. *Held*, that A., although having knowledge of the illegal purpose for which the maps were intended, being employed merely as an artisan to *print* the maps, and having nothing to do with their *publication and distribution*, was not *particeps criminis*, and the defendant was liable in a suit by an indorsee of the note. *Kittle v. De Lamater*, ... 426

4. **Defense.** In an action upon a promissory note, the answer alleged that plaintiff agreed to furnish and deliver to the defendant a certain bill of lumber at an agreed price; that the plaintiff did not furnish the "quality and quantity of lumber" contracted for, whereby defendant sustained damage; and that the note sued on was given "as the balance of the consideration agreed to be paid" on the contract. *Held*, on demurrer, that the defendant having received the lumber, and given the note in settlement of the balance due therefor, was estopped from claiming damages, no fraud or mistake being alleged. *Colby v. Lyman*, ... 429

5. **Consideration.** Where the statute of a state prescribes certain words to be inserted in the body of a negotiable note, given for a *patent* right, subjecting it to all the defenses as if owned by the original promisee. *Held*, that if the note is executed in the ordinary form—omitting the words prescribed—a *bona fide* purchaser of the same before maturity and without notice, takes it divested of all equities between the original parties, and may enforce the payment thereof. *Moses v. Comstock*, ... 516

See BANKS. EVIDENCE. NATIONAL BANKS. PRINCIPAL AND AGENT.

PUBLIC LANDS.

See RIPARIAN RIGHTS, 2, 3.

QUO WARRANTO.

1. **An Information** filed by consent of the district attorney, and in his name, but not officially signed by him, *held*, no error. *Kane v. The People*, ... 509

2. **Jurisdiction.** The act relative to proceedings in cases of contested elections, does not deprive the district court of jurisdiction in cases of *quo warranto*. The provisions of the statute are merely cumulative. *Id.*, ... 509

3. **Evidence:** CONTESTED ELECTION. On the trial of an information by *quo warranto* it appeared from the poll books and returns of the judges of elections, that the relator had a majority of all the votes cast, but that the board of canvassers had opened the packages of ballots, required by law to be sealed and deposited in the office of the county clerk, made a pretended re-count thereof, and declared the respondent duly elected. The respondent offered in evidence the abstract so made, and the packages of ballots so opened, and offered to produce all the individual voters of the county, for the purpose of showing that he had received a majority of the votes cast by them. *Held*, that the evidence was inadmissible, the canvassers having no authority to go behind the poll books and returns and inspect the ballots. *Id.*, ... 509

RAILROADS.

1. **Practice:** FORM OF ACTION. A party who has been damaged by the location of a railroad, through his premises, where the damages awarded have not been deposited with the probate judge, as provided by *Sec.* 97, *Gen. Stat.* 191, may bring his action for the amount of the award, to enjoin the operating of the road across his premises until payment is made, or he may sue in trespass for the unauthorized entry thereon. *O. & N. W. R. R. v. Menk*, ... 21

2. ———. And the same rule applies so far as the remedy by injunction is concerned, even where the company have appealed to the district court. *Ray v. A. & N. R. R.*, ... 439

3. **Negligence:** BURDEN OF PROOF. Where damage is caused by the escape of fire from a railway engine, the burden is upon the company to show that their engine was properly constructed, equipped and operated. And the question of the sufficiency of such construction and equipment is one of fact for the jury. *B. & M. R. R. v. Westover*, ... 268

4. ———. It is not negligence *per se*, for a railway company to permit dry grass and herbage to remain on its right of way. The fact, however, is evidence for the jury, who may find negligence from it. *Id.*, 268

5. **Remote Damages.** Where grass and herbage on the right of way of a railroad was set burning by fire from an engine, the fire spreading rapidly and burning continuously until it reached the farm of plaintiff, situated a half-mile from the railroad track, destroying straw, timber, etc.; *held*, that the damage was not too remote to be recovered. *Id.*, ... 268

6. ———: CONTRIBUTORY NEGLIGENCE. Nor is the plaintiff in such case guilty of contributory negligence in not having fire breaks plowed around his premises. *Id.*, ... 268

7. **Negligence.** A petition charged that in attempting to cross a railroad track, on depot grounds of defendant, the horse which plaintiff was driving became frightened at an "arrangement and scarecrow, caused by the placing of cars and other implements" near the crossing, in such a manner as to present "a horrid and frightful appearance," whereby plaintiff was thrown from his buggy and injured. *Held*, that the facts stated were insufficient to constitute a cause of action against the company. *A. & N. R. R. v. Loree*, ... 446

8. ———. Where it appeared in evidence that the public highway was rendered unsafe for travel, by reason of a ditch dug across it by the company, and plaintiff drove up to a crossing on the depot grounds of defendant, near which lay a hand-car bottom upwards, and another car loaded with wood extended partly over the crossing, but leaving sufficient room to pass, and plaintiff's horse shied at these cars, whereby plaintiff was thrown from his buggy and injured, *it was held*, that the company was not guilty of negligence in such an arrangement of its cars, and that a motion for a non-suit should have been sustained, or the jury directed to return a verdict for the company. *Id.*, ... 446

9. **Liability of Stockholders.** In this state, where the amount due from each stockholder in a railroad corporation, on account of subscription to its capital stock, equals or exceeds the demand of a creditor of such corporation, a joint judgment therefor may be rendered against all of said stockholders. The stockholders in such case are treated as partners. *White v. Blum*, ... 555

10. **Construction of Statute.** The subdivision of the general incorporation law, entitled "Corporations" applies to railroad companies organized under said law, and a failure to comply with its provisions renders the stockholders individually liable for the corporate debts. *Per* LAKE, CH. J. *Id.*, ... 555

See CORPORATIONS. EMINENT DOMAIN.

REMOVAL OF CAUSES TO U. S. COURTS.

1. **Upon a Motion** to transfer a cause to U. S. Circuit Court, under act of March 3, 1875, second session, forty-third Congress, *held*, that the

act applies to causes brought in state courts of original jurisdiction, and not to causes pending in the state supreme court. *Williams v. Lowe*, ... 383

See PRACTICE IN SUPREME COURT, 2.

RIPARIAN RIGHTS.

1. **Accretions.** An accretion to land is the imperceptible increase thereto on the bank of a river by alluvion, occasioned by the washing up of sand or earth, or by direliction as when the river shrinks back below the usual water mark; and land so formed by addition belongs to the owner of the land immediately behind it. *Lammers v. Nissen*, . . 245

2. **Public Lands**: MEANDER LINES. Although as to public lands of the United States, a meandered line is generally considered as following the windings of a stream, yet the question whether it does so or not may be determined by evidence *aliunde*. The mere fact that it is run and designated upon the plats as a meandered line is not conclusive against the government. *Id.*, ... 245

3. ———: ———. An entry of government land, bounded by a meandered line, does not include land lying at the time between such meandered line and the bank of the river. *Id.*, ... 245

ROADS.

1. **Assessment of Road Tax.** The word "rate" in connection with the provision of the statute prescribing a land tax in any *rate* "not exceeding four dollars to the quarter section," denotes that one hundred and sixty acres being taken as the unit of quantity, whatever may be the ratio between it and the tax, the same relative proportion must be observed as to any other given quantity of land, more or less, that falls within the apportionment. *B. & M. R. R. v. Lancaster County*, 294

2. **The Failure of a Road Supervisor** to give notice of the time when, and place where, the road tax may be worked out, will not release the land from the lien of such tax; and the fact that the law requires such notice to be given to residents only, does not invalidate the tax assessed on lands of non-residents. *Id.*, ... 294

SALE.

1. **Warranty.** In an action upon a promissory note, given in part consideration for a threshing machine, the defense was warranty of the machine and a breach of its conditions. It appeared in evidence that the defendants gave one M. an order for a certain kind of thresher, on the back of which was a printed warranty. The order was sent to the agent of plaintiffs, but it was not accepted nor the machine mentioned therein furnished, and M., acting for the agents, sold defendants an old machine, they knowing it to be such, giving their note therefor, and using the machine during the following season

without objection. *Held*, that the warranty did not extend to the machine purchased, and parol evidence of its contents was inadmissible. *Nichols v. Hail*, ... 210

2. ———: CONDITIONS PRECEDENT. A reasonable compliance with conditions precedent, in a contract of warranty, is essential before it can be enforced against the warrantor. *Id.*, ... 210

See JUDICIAL SALE.

SCHOOL DISTRICTS.

1. **Contract:** LIABILITY OF DISTRICT. A contract entered into and signed by persons styling themselves as director and moderator of a school district, is their individual contract, and not binding upon the district. *The People, ex rel., Hunter v. Peters*, ... 254

2. **Meetings.** The action of a majority of a school district board will not bind the district, without notice to or participation therein of the other members. *Id.*, ... 254

3. **Division of District:** DISPOSITION OF FUNDS: MANDAMUS. Upon the division of a school district, the old district has no authority to use property or funds to which the new one is entitled. But mandamus will not lie against the treasurer of the old district, if such funds are placed beyond his control by the action of its officers. *The People, ex rel., McMillan v. Hodge*, ... 265

4. **Orders on Treasurer.** Demands upon the treasurer of a school district, should be accompanied by an order of the director, countersigned by the moderator. *Id.*, ... 265

5. ———: BONA FIDE HOLDER. School district orders drawn by its officers, accepted by its treasurer, and indorsed "not paid for want of funds," are not regarded as commercial paper in the hands of a *bona fide* holder for value, but are subject to the same defense against an indorsee, as against the payee. *School District v. Stough*, ... 357

6. ———: Where a school district board entered into a contract for the erection of a school house, and issued orders in payment thereof before any work was done, never having been authorized by a vote of the district so to do, and the school house was not erected, although the board had secured a bond from the contractors for the faithful performance of the contract, *held*, in an action by an indorsee of the orders, that the district was not liable. *Id.*, ... 357

7. **Power of District Board.** Contracts for the erection of a school house should be made with reference to the funds in the treasury for that purpose. The district board have no authority to draw orders in payment thereof, on a fund which has been proposed, but not raised by taxation. *Id.*, ... 357

8. ———. Although a school district may have voted a tax for the purpose of erecting a school house the fund when collected is beyond

the control of its officers, until its expenditure be authorized by a vote of the district. *Id.*, ... 357

See TAXES, 9.

SECRETARY OF STATE.

See OFFICERS.

SET-OFF.

See CONVEYANCE, 2.

SHERIFF.

See FEES, 1.

STATUTES.

1. **Construction.** Whenever the statute requires the performance of an act for the sake of justice or the public good, the word "may" is the same as "shall," and imposes a positive and absolute duty. *The People v. Commissioners of Buffalo County*, ... 150

2. ———. The words "usual place of residence," mean the place of abode at the time of service. *Blodgett v. Utley*, ... 25

3. **Enactment.** A bill originating in the senate was passed by the house of representatives 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*, ... 503

4. ———. If the journal of either house state that a bill, on a suspension of the rules by the required constitutional majority, was read more than once on the same day, the reasons for such suspension need not be given. What constitutes a "case of urgency," authorizing such suspension, is a matter of legislative discretion. *Id.*, . . 503

See CONSTITUTIONAL LAW. COUNTY COMMISSIONERS. ELECTIONS. LIMITATION OF ACTIONS. MUNICIPAL CORPORATIONS. RAILROADS.

STATUTES CITED AND CONSTRUED.

REVISED STATUTES, 1866.

Corporations, Secs. 112, 126, 127, 130, 131, 139, Chap. 25. *White v. Blum*, ... 559-562
Counties, Sec. 19, Chap. 9. *U. P. R. R. v. Colfax County*, ... 453
County Buildings, Sec. 9, Chap. 12. *People v. Commissioners*, ... 157
Quo Warranto, Chap. 42. *Kane v. The People*, ... 514
Roads, Sec. 15, p. 346. *People v. Commissioners*, ... 158
Laws, 1869. Tax Deeds. *Sutton v. Stone*, ... 322
Laws, 1869. Internal Improvements. *U. P. R. R. v. Colfax County*, . 454
Laws, 1870, p. 24. Militia Act. *State v. Weston*, ... 240

GENERAL STATUTES, 1873.

Act of Admission, p. 72. *Painter v. Ives*, ... 128
Arbitration, p. 658. *McDowell v. Thomas*, ... 543
Attorney Fees, Sec. [23] p. 98. *Rich v. Stretch*, ... 186
Charge to Jury, Sec. 58, p. 262. *Horbach v. Miller*, ... 53
Cities of the First-Class, Sec. 40. *Hurford v. Omaha*, ... 347
Cities of the Second-Class, Sec. 30, p. 142. *Brownville v. Cook*, . . . 103
Courts, Sec. 26, p. 256. *Smith v. The State*, ... 285
Damages, Sec. 97, p. 191. *O. & N. W. R. R. v. Menk*, ... 24
Deeds, Secs. 4, 5, p. 873. *Hoadley v. Stephens*, ... 434
Corporations, Sec. 123, p. 198. *Abbott v. Smelting Co.*, ... 421
———, Secs. 73, 74, p. 183. *Clarke v. A. & S. W. R. R.*, ... 463
Elections, Sec. 26, p. 359. *The People v. Martin*, ... 50
Fees, Sec. 10, p. 379. *Kountze v. Train*, ... 292
———, Sec. 26, p. 383. *State v. Lancaster County*, ... 538
Fraud, Sec. 20, p. 395, *Monteith v. Bax*. 171
Married Women, p. 465. *Webb v. Hoselton*, ... 314
Mechanic's Lien, Sec. 7, p. 468. *Rogers v. Omaha Hotel Co.*, ... 58
Militia, Chap. 43, p. 470. *State v. Weston*, ... 241
Quo Warranto, p. 871. *Kane v. The People*, ... 514
Roads, Sec. 15, p. 953. *People v. Commissioners*, ... 158
Schools, Secs. 54, 62, p. 970. *The People v. Peters*, ... 265
———, Sec. 41, p. 968. *The People v. Dodge*, ... 267
———, Secs. 29, 58, pp. 967-971. *School District v. Stough*, ... 361
Taxes, pp. 916-917. *Johnson v. Hahn*, ... 143
———: Road Tax, p. 908. *B. & M. R. R. v. Lancaster Co.*, ... 301
———, p. 940. *Hull v. Miller*, ... 504
Tax Deed, p. 933. *Sutton v. Stone*, ... 322

CIVIL CODE.

Appeals, Sec. 1007. *Morrow v. Sullender*, ... 374
———, Sec. [1022], p. 716. *Glore v. Hare*, ... 131
———, Sec. [1022], p. 716. *Tootle v. White*, ... 405
Arbitration, Sec. 862. *McDowell v. Thomas*, ... 543
Attachment, Sec. 198. *Handy v. Brong*, ... 62
Bonds, Sec. 643. *Stewart v. Carter*, ... 566
Depositions, Sec. 384. *Martin v. Coppock*, ... 176
———, Sec. 375. *Starring v. Mason*, ... 368
Demurrer, Sec. 109. *Colby v. Lyman*, ... 430
Forms of Actions, Sec. 2. *Wilcox v. Saunders*, ... 576
Homestead, Secs. 468, 525. *State Bank v. Carson*, ... 501
Joinder of Actions, Sec. 87. *Stewart v. Carter*, ... 565
Levy of Execution, Sec. 492. *Frasher v. Ingham*, ... 535
Limitation of Actions, Secs. 10, 20. *Blodgett v. Utley*, ... 28
———, Sec. 6. *Horbach v. Miller*, ... 45
Mandamus, Sec. 649. *State v. The Mayor*, ... 260
New Trial, Sec. 318. *Horn v. Queen*, ... 113
Parties, Secs. 30, 45. *Rogers v. Omaha Hotel*, ... 58
Pleading, Sec. 134. *Harden v. A. & N. R. R.*, ... 523

Referee, Sec. 300. *Brown v. O'Brien*, ... 199
Service of Summons, Sec. 69. *Blodgett v. Utley*, ... 28
Verdict, Secs. 290, 291. *Young v. Seymour*, ... 89

CRIMINAL CODE.

Challenge of Jurors, Sec. 408. *Palmer v. The People*, ... 74
———————. *Curry v. The State* 547
Murder, Sec. 14. *Curry v. The State*, ... 552
Sentence, Secs. 495, 509. *Dodge v. The People*, ... 221, 232

Laws, 1875, p. 31. *Dodge v. The People*, ... 225
" " p. 76. *Smith v. The State*, ... 288
" " p. 81. *Kountze v. Train*, ... 291
" " p. 58. *State v. Stropshire*, ... 411
" " p. 76. *Thompson v. The State*, ... 527

TAXES.

1. **Construction of Statutes**: DUTY OF COUNTY TREASURER. A failure on the part of the county treasurer to first exhaust the personal property of a delinquent tax payer, under the act of June 6, 1871 (Gen. Stat., 916), renders a sale of the realty illegal and void. *Johnson v. Hahn*, ... 139

2. **Enjoining Sale.** Equity will enjoin the sale of realty for taxes, under the statutes of this state, if the owner has personal property out of which such taxes can be collected. *Id.*, ... 139

3. **Statutory Construction**: CONSTITUTIONAL LAW. Legislation authorizing a land road tax of "four dollars to the quarter section, to be paid in money, or labor at the rate of two dollars per day, at the option of the person so taxed," is not repugnant to any of the provisions of the constitution of 1867. *B. & M. R. R. v. Lancaster County*, ... 293

4. **Uniformity.** Such a tax is not void for want of uniformity, because it is not assessed against lots in cities and towns, or property occupied as right of way by railroad companies, etc. *Id.*, ... 393

5 ———. Under the revenue act of 1869, the words, "land tax," were not designed to include town or city lots, right of way of railroad companies, etc., though lands lying within the limits of a town or city, and not subdivided, are subject to the tax. *Id.*, ... 293

6. **Apportionment.** There being no constitutional restraint, it is for the legislature to determine what the rule of apportionment in levying taxes should be, and not the judiciary. *Id.*, ... 293

7. **Assessment of Road Tax.** The word "rate" in connection with the provision of the statute prescribing a land tax in any *rate* "not exceeding four dollars to the quarter section," denotes that one hundred and sixty acres being taken as the unit of quantity, whatever may be the ratio between it and the tax, the same relative proportion

must be observed as to any other given quantity of land, more or less, that falls within the apportionment. *Id.*, ... 293

8. **The Failure of a Road Supervisor** to give notice of the time when, and place where, the road tax may be worked out, will not release the land from the lien of such tax; and the fact that the law requires such notice to be given to residents only, does not invalidate the tax assessed on lands of non-residents. *Id.*, ... 293

9. **Assessment of School Taxes.** *It seems* 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 the mere failure to specify on the tax duplicate of the county, all the uses to which taxes for various purposes of the district are to be applied, will not invalidate the levy. The several items may properly be included under the head of "school district tax." *Id.*, ... 293

10. **The Statute of Limitations** in the revenue act of 1869 is not retrospective in its operation. It applies only to tax deeds executed subsequent to the passage of that act. *Sutton v. Stone*, ... 319

11. **Sufficiency of Deed.** A tax deed must conform substantially to the requirements of the statute under which it is executed. If the "seal of the county" be omitted in its authentication, the deed is void. Nor is it admissible even to show color of title, under the special limitation of the revenue act. *Id.*, ... 319

12. **Commencement Fee in the Supreme Court.** The imposition of a tax upon parties, commencing suits in the supreme court, is not in violation of the constitution, providing that the mode of levying taxes shall be by valuation, and giving the legislature power to tax certain specified business classes, among which litigants are not enumerated. *State, ex rel., v. Lancaster County*, ... 537

13. **Pleading:** PETITION. An act of the legislature relating to the foreclosure of tax liens, set forth the requisites of a petition to be filed by the county treasurer. *Held*, that a petition which conformed substantially to the requirements of the act was sufficient to support the judgment. *Hull v. Miller*, ... 503

See CONSTITUTIONAL LAW. SCHOOL DISTRICTS. STATUTES.

TRUSTS.

1. **By Parol.** An alleged parol agreement whereby shares of stock in a ferry company, sold under a decretal order and purchased by the defendant, were to be held in trust to secure the payment of the purchase money and a debt due from plaintiff, and upon payment thereof to reconvey the shares to plaintiff, accounting for dividends received, *held* not established by evidence of plaintiff, consisting merely of what he had *heard* that defendant had said, and his *understanding* of what defendant would do; nor by subsequent declarations of defendant that he *expected* plaintiff would have the benefit of the

stock; nor by proof that defendant had, a number of years after the purchase, paid money to plaintiff from time to time, the plaintiff asking therefor on account of his want of pecuniary means, and never claiming the shares until he had been paid a considerable amount. *Williams v. Lowe*, 382

See MORTGAGES.

USURY.

1. **Usury.** A note drawing legal interest is not affected with usury, by an endorsement of the maker, made after maturity, wherein he promises to pay a greater rate of interest than that allowed by law. In such case, money paid in excess of lawful interest constitutes a payment, *pro tanto*, of the principal. *Richards v. Kountze*, . . 200

WITNESSES.

1. **Stating Opinions or Facts.** A witness testifying must state facts. His understanding of the purpose and object of a transaction is not evidence. *Lacey v. Central National Bank*, ... 179