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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

1876-1877.

VOLUME V.

BY

GUY A. BROWN,
OFFICIAL REPORTER.

DES MOINES, IOWA:
MILLS & COMPANY, LAW PUBLISHERS.
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By GUY A. BROWN, Reporter of the Supreme Court,

In behalf of the People of Nebraska.

STEREOTYPED AND PRINTED
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DES MOINES, IOWA.

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.

DEPUTY.

HILAND H. WHEELER.

DISTRICT COURTS

OF

NEBRASKA

JUDGES.

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

PROSECUTING ATTORNEYS.

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

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

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

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

SUPREME COURT RULES.

ADOPTED NOVEMBER, 1876.

RULE I.

The regular public sessions of this court, during each term, will open each day at nine o'clock A. M., and adjourn at six o'clock P. M.

RULE II.

All causes from the same judicial district shall be placed together on the docket, in the numerical order of the several districts, commencing with the first judicial district; and they will be taken up and heard in this order, allowing one week for hearing causes from each judicial district. Any cause may, however, be submitted, on behalf of either or both of the parties, at any time, upon filing briefs of points relied on, whatever may be its place on the docket.

RULE III.

Whenever a cause is reached in the regular order on the trial of cases, and neither party appears in person or by attorney, the cause shall be marked submitted, and shall be disposed of as the court shall deem proper, ac-

cording to the state and condition of the case, unless one or more of the justices of the court have participated in such cause in the court below, as judge or counsel.

RULE IV.

Whenever a cause is regularly reached, and the plaintiff fails to appear, the defendant may have the cause dismissed, or may submit it, either with or without argument. When the defendant makes default, and there is due proof of service of notice having been made upon him or his attorney, the plaintiff may proceed *ex parte*.

RULE V.

Whenever, in a criminal case, a writ of error shall be allowed by this court, or any judge thereof in vacation, upon a certified transcript of a record, no further transcript shall be required or allowed to be taxed in the bill of costs, but the same transcript shall be returned with the writ, and shall be deemed sufficient, unless diminution or other objection thereto be suggested.

RULE VI.

In the oral argument of a cause, the time allowed the parties on each side shall not exceed two hours, unless for special reasons the court shall extend the time.

RULE VII.

In all cases brought into the court upon error, the plaintiff in error shall, at least fifteen days prior to the first day of the term of the court to which his case shall be entered, furnish to the defendant or his attorney a printed copy of his brief of points and authorities relied on; and within ten days thereafter the defendant in error shall furnish the plaintiff with a printed copy of his brief of points and authorities relied on; and each party shall,

before the argument of the cause, file with the clerk of this court five copies of his brief aforesaid, one for each justice of the court, and the others for the reporter and clerk.

RULE VIII.

In every appeal of a case in equity from a District court, filed in this court, the clerk shall issue a notice to the appellee, notifying him of the filing of such appeal. The notice shall be served by the sheriff of the county from which the appeal is taken, and he shall make return of such notice within ten days after receiving the same, together with a certificate thereon of the manner in which he served the same, and his fees for such service shall be the same as are allowed by law in similar cases, and shall be taxed in the costs of the case, unless such notice shall be waived by the appellee.

RULE IX.

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

RULE X.

Whenever an issue of fact, which the law requires to be tried by a jury, shall be joined in proceedings in the nature of *quo warranto*, or in *mandamus*, in the supreme court, the clerk shall, at the instance of either of the parties, make out a *venire facias*, directed to the bailiff of this court, commanding him to summon from the state at large sixteen jurors having the qualifications of electors, to appear before this court on the day mentioned therein, which day shall be determined by the

court before the issuing of the venire. The venire shall be served and returned at least one week before the day named therein for the appearance of the jurors; and the bailiff shall attach to or incorporate in his return a list of the names of the jurors so summoned.

RULE XI.

Each party shall be entitled to three peremptory challenges, and challenges for cause may be made by either party, the validity of which shall be determined by the court. If, from challenges or other cause, the panel shall not be full, the court may order the bailiff to fill the same from bystanders or neighboring citizens having the qualifications of electors.

RULE XII.

The jurors summoned, or called as provided, or such of them as are not set aside or challenged, as will make up the number of twelve, shall constitute the jury for the trial of said issue of fact.

RULE XIII.

Each juror shall be entitled to the same compensation and mileage as are provided by law for jurors in civil cases in the district court.

RULE XIV.

A syllabus of the points decided, in each case, shall be stated in writing by the judge assigned to prepare the opinion of the court, which shall be confined to the points of law arising from the facts of the case, which have been determined by the court; and the syllabus shall be submitted to the judges concurring in the opinion, for revision, before the publication thereof, and the same shall then be inserted in the book of reports with-

out alteration, unless by consent of the judges concurring therein.

In addition to the rules above given, the following suggestions were presented:

I. All cases for entry on the calendar at any regular term should, in order to be arranged in the order of the districts from which they are brought, be filed in the clerk's office ten days before the first day of the term, otherwise they will be placed at the foot of the calendar.

II. The transcripts of all causes should not only contain the cost thereof, noted thereon by the clerk of the district court, but the costs as taxed in the court below and made a part of the judgment or decree, should appear therein as part of the same.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1876.

PRESENT:

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

P. H. CARROLL, ALIAS HARRY CARROLL, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Practice in Criminal Cases:** QUALIFICATION OF JURORS. It appearing that a person called as a juror had formed an opinion as to the guilt or innocence of the accused from reading reports of the testimony of witnesses, he is incompetent to sit in the case, although he might be willing to swear that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence.

2. ——: WITNESSES. When separate trials are awarded to parties jointly indicted, each is a competent witness for the state upon the trial of the other, without being first acquitted or convicted, and without a *nolle prosequi* being first entered upon the indictment.

3. ———: JURY VIEWING SCENE OF THE CRIME. Whenever the court makes an order that the jury view the place in which any material fact in relation to the trial may have occurred, such view should be made in the presence of the prisoner, unless he waive that privilege.

ERROR to the district court for Otoe county. The plaintiff in error was jointly indicted with one McElroy and several others, for burglary and larceny. He was tried separately, found guilty of grand larceny, and sentenced to five years imprisonment in the penitentiary. He then sued out a writ of error to this court.

J. C. Watson, *T. B. Stevenson*, and *Frank P. Ireland*, for the prisoner, cited *Curry v. State*, 4 Neb., 545. 3 Wharton Crim. Law, 3160. *State v. Bertin*, 24 La. An., 46. *Eastwood v. People*, 3 Park. Cr., 25. *Benton v. State*, Supreme Court Arkansas, Nov. Term, 1875. 3 Central Law Journal, April 21, 1876. *Sneed v. State*, 5 Ark., 431. General Statutes 582, Sec. 329. *Drake v. Barrymore*, 14 Johns., 166. *Van Deusen v. Van Slyck*, 15 Johns., 223. *Baron v. The People*, 1 Park. Cr. Rep., 246. *Myers v. The People*, 26 Ill., 173. *Gray v. The People*, Id., 344.

J. H. Broady, *District Attorney*, for the state, cited Secs. 468, 479 and 591 of the Criminal Code. *Brown v. The State*, 18 Ohio State, 496. Roscoe's Crim. Evidence, 128.

MAXWELL, J.

I. The first error assigned, is that the court erred in overruling the prisoner's challenge to the juror L. J. Holland. This juror on his *voir dire* testified as follows:

Q. You say you have heard the matter talked of on the streets, and around through the country?

A. No, sir, I heard it from my neighbors mostly.

Q. Did you read the reports of it as published in the Nebraska City Press and News?

A. Yes, sir.

Q. You read the evidence then?

A. Yes, sir.

Q. From what you have heard and read in these papers, have you formed an opinion as to the guilt or innocence of these parties?

A. To a certain extent, I think I did.

Q. From the opinion that you have formed from what you have heard and read in the papers, you might possibly lean a little one way or the other?

A. I don't think that I would.

Q. If you did not hear any other testimony than what you have read and heard, do you think your opinion would be changed any?

A. I don't think it would.

Q. Do you think that opinion you have formed would prevent you from rendering a fair and impartial verdict after hearing the law and the evidence?

A. I think the evidence might remove it.

Whereupon the prisoner's counsel challenged the juror for cause, which the court overruled, to which the prisoner by his counsel excepted.

Section four hundred and sixty-eight, of the criminal code, provides, 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 conversations with witnesses of the transactions, 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." This court in construing this section of the statute in the case of *Curry v. The State*, 4 Neb., 548, say: "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.'"

In *Palmer v. People*, 4 Neb., 75, it is held that 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."

Our constitution guarantees every one charged with crime a speedy trial before a fair and impartial jury. In *Curry v. The State*, *supra*, 551, the court say: "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."

In the case at bar, the juror, Holland, was clearly

incompetent to sit as a juror in the case, and for this reason the judgment of the district court must be reversed.

II. Frank McElroy was a competent witness in this case. In *Brown v. The State*, 18 Ohio State, 509, the court say: "The next question is: Was Ketchum a competent witness for the state, standing as he did jointly indicted with Brown? The authorities already cited answer this question in the affirmative. Where separate trials are awarded to parties jointly indicted, each is a competent witness for the state, upon the trial of the other without being first acquitted or convicted, and without a *nolle prosequi* being first entered upon the indictment. The objection goes to his credit, and *not to his competency*. This has been the settled law of the state for years; and surely the present is no time to change it, when the manifest tendency of our legislation is to narrow, instead of enlarging, the grounds of objection to the competency of witnesses."

III. Our statute provides that "whenever in the opinion of the court it is proper for the jury to have a view of the place in which any material fact may have occurred, it may order them to be conducted in a body, under the charge of the sheriff to the place, which shall be shown to them by some person appointed by the court." This should be done in the presence of the prisoner, unless he decline the privilege, as he is entitled to have all the evidence received by the jury taken in his presence. We see no error in the instructions of which the prisoner can complain. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SCHOOL DISTRICT NUMBER TWO OF MERRICK COUNTY, PLAINTIFF IN ERROR, V. JACOB SHOEMAKER, DEFENDANT IN ERROR.

1. **Pleading:** GENERAL RULE. Pleadings should present a certain, specific issue, and such issue is the only subject matter on which the jury have to pass.
2. ———: EFFECT OF GENERAL DENIAL. Upon a general denial the simple inquiry is, has the plaintiff proved what he has alleged in his petition; and under such issue nothing can be given in evidence which does not tend to prove or disprove the facts stated in his petition.
3. ———: IN ACTIONS OF REPLEVIN. But under the code, in an action of replevin, if the jury find in favor of the defendant, they must assess for him such damages as they shall think just and proper, whether he pleads a general denial, new matter as a defense, or a demand for damages.

ERROR to the district court of Merrick county. The cause was submitted upon the stipulation set forth in the opinion.

O. A. Abbott, for plaintiff in error.

John D. Hayes, for defendant in error.

GANTT, J.

This is an action of replevin, brought by the plaintiff against the defendant to recover the possession of certain personal property. The defendant pleaded a general denial, and upon the trial of the cause in the district court, the jury found the right of possession and the right of property in the goods and chattels, in the defendant, and assessed his damages at five dollars. Judgment was entered on the verdict for defendant. The case is brought into this court upon petition in error, and the parties, by stipulation of their respective counsel,

submit to this court for determination without argument the following questions:

1. "Is the defendant entitled to a judgment for damages, under an answer setting forth a general denial only?"

2. "Will an answer, setting forth a general denial only, sustain a verdict for damages in favor of the defendant in such action?"

The code provides that the petition must contain "a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition," and the answer shall contain: *First.* "A general or specific denial of each material allegation of the petition controverted by the defendant," or *Second.* "A statement of the new matter constituting a defense, counter claim, or set-off, in ordinary and concise language, and without repetition." This statutory definition of pleading is substantially the same as the common law definition, and hence, under the code, as well as at common law, the object to be attained in pleading, is to arrive at a certain, specific issue; and in respect of an issue of fact, it is a fundamental principle of law that such issue should present, in a precise and definite form, the subject matter of controversy between the parties, so that the jury may not misunderstand on what they have to pass. Therefore, the general rule of law is, that the issue of fact raised by the pleading, is the only subject matter on which the jury have to pass; and upon a general denial to the material allegations of the petition, the simple inquiry is,—has the plaintiff proved what he has alleged in his petition? Under such an issue nothing can be given in evidence which does not tend to prove or disprove the facts stated in the petition; every other defense, and every claim or demand of the defendant against the plaintiff must be specially pleaded as new matter.

But "Title VIII," chapter two, of the code, entitled "Replevin of Property," very clearly takes actions of replevin out of the general rule as above stated. This chapter provides that "where the jury find upon the issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only, and if they find either in his favor, *they shall assess such damages*, as they shall think just and proper for the defendant, for which with costs of suit, the court shall render judgment for the defendant." This law is mandatory, and therefore the jury are "bound to inquire into the right of property, and the right of possession of the defendant, and if they shall find him entitled to either, they shall assess such damages as are right and proper." Under the statute both these questions are in issue and are subjects of inquiry by the jury, whether the defendant pleads a general denial, or new matter as a defense, or a demand for damages. *Ferrell v. Humphrey*, 12 *Ohio*, 113. For this reason the questions propounded must be answered in the affirmative in this action.

JUDGMENT AFFIRMED.

RICHARD F. JAMES, PLAINTIFF IN ERROR, v. THE COMMISSIONERS OF LINCOLN COUNTY.

1. **Sheriff:** COMPENSATION FOR KEEPING PRISONERS. Where a sheriff has the custody of two prisoners from different counties for safe keeping, the compensation is no greater than if they belonged to the same county.
2. ——: ——. The expense in such case should be borne by the two counties in equal proportions.
3. ——: ——. In a suit by the sheriff against one of the counties to recover for such services, he is only entitled to one-half the whole amount.

ERROR from the district court of Lincoln county.

John De Laney, for plaintiff in error.

Hinman & Gantt, for the commissioners.

LAKE, CH. J.

This is a petition in error, from Lincoln county, and presents but a single question for our decision.

The facts of the case are all agreed upon. It appears that the plaintiff as sheriff and jailer of Dawson county was intrusted with the custody of a prisoner sent from Lincoln county for safe keeping, and that he so held him for the period of fifty-four days, during all of which time, however, he was also keeping in the same jail a prisoner for Buffalo county. It further appears that the condition of the Dawson county jail was such as to require the employment of a guard to prevent the escape of these prisoners, and that one was employed for that purpose by the plaintiff during all of said time. The sole controversy is as to the amount of the compensation to which the plaintiff is entitled from Lincoln county for services as jailer, and for furnishing said guard.

It is contended for the plaintiff that as jailer, and for guarding the prisoner from Lincoln county, he is entitled to the same compensation as he would have been if the prisoner from Buffalo county had not been in his custody during the same time, while on the other hand it is insisted, that there being no necessity for but one guard for both prisoners, and but one being actually employed, the sheriff is only entitled to compensation accordingly, and that the expense should be borne equally by the two counties from whence the prisoners came.

The question thus raised calls for a construction of the several statutes relating to the compensation of a sheriff or jailer in such cases.

I. Section eleven, of chapter twenty-nine of the Revised Statutes, (General Statutes, 454,) provides among other things that "when the condition of the jails of this state requires a constant guard to be kept to prevent the escape of prisoners confined therein, the sheriff shall be allowed the sum of three dollars per day and night for guarding, or procuring guard for such prisoners." It is only when the condition of the jail is such that a guard is *necessary* to prevent an escape, that one is permitted at the public expense.

Now it seems very clear that, no matter how great the number of prisoners in the custody of the jailer may be, if they are all from a single county, and only one guard is necessary, or actually employed for their security, he is only entitled to receive three dollars per day and night for such service. And why should a different rule obtain where the prisoners are brought from different counties, but only the same service performed? Surely there is nothing in the statute which contemplates any difference in the compensation, whether the same service be performed for a single one, or for several counties. The "three dollars per day and night," is not for guarding each prisoner confined in the jail, nor for the prisoners from each county, but it is "for guarding, or procuring guard for *such prisoners*," that is, such as are confined in the jail at the public expense, whether they be few or many.

This being our view of this section of the statute, we have no doubt whatever that the expense of guarding these two prisoners should be borne by the two counties in equal proportions, and that all the plaintiff should recover from the defendant is one-half of the whole amount.

II. As to the compensation claimed as jailer the same rule must be applied. In section one of an act to amend

section five of chapter twenty-two of the Revised Statutes, approved February 25, 1875, it is provided that, "where there are prisoners confined in the county jail, the sheriff shall be allowed the sum of one dollar and fifty cents per day as compensation of jailer." Laws 1875, 83.

The compensation here given to the sheriff was not intended to be multiplied by the number of prisoners actually under his charge, but it is the entire allowance to which he is entitled whatever may happen to be the number confined in the jail at any one time.

It is not intended by this opinion to convey the idea that, where there is a necessity for more than a single guard, the sheriff would not be permitted to provide the requisite number at the expense of the public. That question is not presented in this record, for it is agreed that but a single one was employed to watch over both prisoners.

For these reasons the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

HIBBARD AND SPENCER, PLAINTIFFS IN ERROR, v. WEIL AND KAHN, DEFENDANTS IN ERROR.

1. **Execution:** SALE: DISPOSAL OF PROCEEDS. Under the statute (civil code, Sec. 484) the money raised on an execution sale of a debtor's land can be apportioned *pro rata* only to judgment creditors of such debtor, who have executions issued during the term at which the judgments were rendered or within ten days thereafter, or where two or more executions are issued and placed in the hands of the officer on the same day, and in the latter case preferable liens shall not be affected by such apportionment.

2. ——: ——: STATUTORY CONSTRUCTION. The clause in the statute, "In all other cases, the writ of execution first delivered to the officer shall be first satisfied," must be construed as relating

to executions in the hands of the officer at the time of the sale, and not to any executions returned by the officer with or without a levy thereon.

3. ———: ———: RIGHTS OF PURCHASER. A sale upon execution vests in the purchaser all the rights of the judgment debtor to the property, but that right is subject to all liens prior to the lien of the judgment on which the execution sale is made.

4. ———: LIEN OF JUDGMENT. Under the act of February 27, 1873, (Gen. Stat., 613), the lien of a judgment, whether rendered prior or subsequent to its passage, is preserved for the period of five years after its rendition, and it is sufficient if the execution is taken out and levied at any time before the expiration of five years next after the rendition of the judgment.

ERROR from the district court for Cass county.

Wheeler, Stinchcomb & Sprague, for plaintiffs in error.

GANTT, J.

The facts admitted in the record of this case are, that at the April term, 1872, of the district court, the plaintiffs in error, the defendants in error and W. M. Wyeth & Co., and the St. Joseph Manufacturing Company, severally, recovered judgments against Horton and Jenks, the judgment of Weil and Kahn being also against James Clizley; that in each case the action was commenced by petition prior to said term of court; that on the second day of October, 1872, Hibbard and Spencer and the St. Joseph Manufacturing Company, severally, caused executions to be issued on their respective judgments, which were placed in the hands of the sheriff on the same day and were levied on the lands and tenements of the defendants, Horton and Jenks. These two executions were returned, and no further proceedings were had thereon. On the thirteenth day of May, 1873, Weil and Kahn and Wyeth and Co., severally, caused executions to be issued on their respective judgments, which were levied on the same lands and tenements of defendants, Horton

and Jenks, and on the thirtieth day of June, 1873, the property was sold on these two executions. The sale was confirmed without objections; but Hibbard and Spencer and the St. Joseph Manufacturing Company filed motions in the district court to have the proceeds of the sale apportioned to the four judgments of these four judgment creditors in proportion to the amount of their several judgments. The motions were overruled by the district court, and the money arising from a sale of the property was ordered to be paid to Weil and Kahn and Wyeth and Co., in proportion to the amount of their respective judgments. To this final order the other two judgment creditors excepted, and the case is now brought into this court upon petition in error.

It is contended on the part of the plaintiffs in error that the proceeds of the sale should have been apportioned to the judgments of the four judgment creditors *pro rata*, and that the district court erred in ordering the money to be paid on the judgments of Weil and Kahn and Wyeth and Co. By section four hundred and seventy-seven of the civil code, it is provided that "the lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which the judgment is rendered," except that judgments by confession and judgments rendered at the term at which the action is commenced, shall bind such lands from the day on which such judgments are rendered; and section four hundred and eighty-four provides that "when two or more writs of execution against the same debtor shall be sued out during the term in which judgment was rendered, or within ten days thereafter, and when two or more writs of execution against the same debtor shall be delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum of money be not made to satisfy all exe-

cutions, the amount made shall be distributed to the several creditors in proportion to the amount of their respective demands. In all other cases, the writ of execution first delivered to the officer shall be first satisfied." The above seem to be the only cases in which the statute authorizes the apportionment of money arising from the sale of a debtor's land on execution, *pro rata* to judgment creditors. The one is where two or more executions against the same debtor shall be issued during the term at which the judgments were rendered, or within ten days thereafter; the other when two or more executions against the same debtor are issued and placed in the hands of the officer on the same day. However, in the latter case it is provided that the law shall not be so construed as to affect any preferable lien which one or more of the judgments on which execution issued, may have on the lands of the judgment debtor.

In the case at bar, no one of the executions was issued during the term at which the judgments were rendered, nor within ten days thereafter; and therefore, the questions raised by the contest in this case do not come within the above provisions of the statute. The clause, "in all other cases, the writ of execution first delivered to the officer shall be first satisfied,"—must, in order to harmonize it with other parts of the statute, be construed as relating to executions in the hands of the officer at the time of the sale of the lands of the judgment debtor. Such seems clearly to be the legislative intent, as well as the only reasonable construction of the statute; for, by section five hundred and eleven, the officer to whom the writ of execution is directed, is required to return the same to the court to which it is returnable within sixty days from the date thereof; and the proposition will not be questioned, that when the officer makes return of a writ of execution, with or without a levy thereon, it passes from his hands, and he has no author-

ity to apply in satisfaction or in part payment of such execution, any money made by him on the sale of property upon executions subsequently placed in his hands against the same debtor. Instead of so applying any money made by sale of property, upon such subsequent executions, section five hundred and seven provides, that "if there shall be in the hands of the sheriff or other officer more money than is sufficient to satisfy the writs of execution with interest and costs, such officer shall on demand pay the balance to the defendant in execution, or to his legal representatives;" and section five hundred and thirteen provides, that if such officer "shall neglect or refuse on demand made by the defendant, his agent, or attorney of record, to pay over all moneys by him received for any sale made, beyond what is sufficient to satisfy the writ or writs of execution," he shall be liable to be amerced in a certain amount for the use of the defendant.

The distribution and payment of money raised on the sale of a debtor's property upon execution, is strictly a legal proceeding and, under our code, there is no authority in the court to appropriate such money to any judgment or judgments other than those on which executions are in the hands of the officer at the time of such sale. The sale vests in the purchaser all the right of the judgment debtor to the property, but that right is subject to all existing liens which in their order of date are prior to the lien of the judgment or judgments on which the execution sale is made.

It is true the records show that Hibbard and Spencer and the St. Joseph Manufacturing Company caused executions on their respective judgments to be taken out and levied on the lands of the defendants Horton and Jenks, within one year next after the rendition of their several judgments, and that Weil and Kahn and Wyeth and Co., did not issue executions on their several judg-

ments until after the expiration of one year next after the rendition of their several judgments; but it is not necessary to consider the point made under this state of facts, for by act of February 27, 1873, it is provided, that "no judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of five years next after its rendition, shall operate as a lien upon the estate of any debtor, to the preference of any other *bona fide* judgment creditor." General Statutes, 613. This act includes all judgments, whether prior or subsequent to its passage; it preserves the lien of a judgment for the period of five years from the time of its rendition without any regard whatever to the issuance and levy of an execution. Hence it is sufficient if the execution is taken out and levied at any time before the expiration of five years next after the rendition of the judgment. The case at bar comes within the operation of this amended law, and therefore the fact that in the one case the executions were issued within one year, and in the other they were not issued until after the expiration of one year next after the rendition of the several judgments, does not in any way affect the rights of the parties in this case.

In any view of the case, under our statutory laws relating to judgments and executions, I am of opinion that there is no error in the final order made in the case by the district court, and therefore the same is

AFFIRMED.

GEORGE P. EATON, AND FREDERICK FUNKE, PLAINTIFFS IN ERROR, v. CATHARINE RYAN, DEFENDANT IN ERROR.

1. **Homestead.** The judgment of a probate court becomes a lien upon the homestead of the debtor by filing a transcript in the office of the clerk of the district court, and entering the same upon the judgment record.

2. ———. But such lien cannot be enforced by execution while the homestead is *owned* and *occupied* by the judgment debtor.

3. ———. A sale of such homestead by the debtor is a relinquishment of the protection afforded by the homestead act, and renders the lien capable of immediate enforcement by execution.

4. ———: SALE OF, UPON EXECUTION A homestead although composed of different parcels taken from distinct lots, but adjoining each other, may be sold as one tract.

ERROR to the district court for Lancaster county, argued upon the following stipulation of facts:

On the eleventh day of December, 1874, the defendant in error recovered a judgment, in the probate court in Lancaster county, for the sum of two hundred and sixty-one dollars and thirty-five cents, against Eaton and others. On the eighth day of December, 1874, the defendant in error caused a transcript of the judgment to be filed in the office of the clerk of the district court of said county. At the date of the filing of this transcript Eaton was the owner of two feet off the east side of lot ten, and twenty feet off the west side of lot eleven, in block one hundred and twenty-one, in the city of Lincoln, in said county, and was at said time occupying said premises as a homestead. On the fifth day of January, 1875, Eaton while occupying said premises as a homestead, sold said premises for full value, to the said Funke and continued to occupy until Funke moved in.

On the twentieth day of March, 1875, the defendant

in error caused an execution to be issued and the premises above described were sold by the sheriff.

The sheriff's return does not show that the two pieces of property were appraised and sold separately. It is also agreed that the premises sold were appraised and advertised and sold for two-thirds their appraised value.

Defendant in error filed a motion for confirmation of sale and Funke filed exceptions showing the above facts. Sale was confirmed and Funke and Eaton excepted.

Mason & Whedon, for plaintiffs in error, cited *Green v. Marks*, 25 Ill., 221. *McDonald v. Crandall*, 43 Ill., 231. *Lamb v. Shays*, 14 Iowa, 567. *Cummins v. Long*, 16 Iowa, 41. *Morris v. Ward*, 5 Kan., 239. *Ackley v. Chamberlain*, 16 Cal., 181. *Laughlin v. Schuyler*, 1 Neb., 409.

Brown, England & Brown, for defendant in error, cited *State Bank v. Carson*, 4 Neb., 498. *Hoyt v. Howe*, 3 Wis., 752. General Statutes, 616. *Kiser v. Ruddick*, 8 Blackf., 382. *Wright v. Yetts*, 30 Ind., 185. *Lessee of Stall v. Macalester*, 9 Ohio, 19. *Reed v. Diven*, 7 Ind., 189. *Tillman v. Jackson*, 1 Minn., 183.

LAKE, CH. J.

I. Upon the filing of the transcript of the judgment rendered by the probate court, in the office of the clerk of the district court, and its entry upon the judgment record, it became a lien upon the premises in question, notwithstanding they were then occupied by the judgment debtor as his homestead. A judgment so entered has precisely the same effect, and creates the same lien upon the real estate of the judgment debtor, as a judgment of the district court would have. General Statutes, 267, section 18. But this lien could not have been enforced by a sale of the premises under execution, so

long as they were "*owned and occupied by the debtor*" as his homestead. *State Bank v. Carson*, 4 Neb., 498.

When, however, on the fifth day of January, 1875, Eaton sold and conveyed the premises to Funke he thereby voluntarily relinquished the protection afforded him by the homestead act, and rendered the lien of the judgment capable of immediate enforcement by execution. *Hoyt v. Howe*, 3 Wis., 752.

II. As to the remaining objection taken to the confirmation of this sale, but little need be said. The fact that the tract of land as sold in one body was composed of what was formerly distinct parts of separate city lots, is of no consequence, nor does it bring the case within the rule laid down in *Laughlin v. Schuyler*, 1 Neb., 409, where it was held that two city lots, entirely distinct from each other, should be appraised and sold separately.

It appears from the stipulation of facts in this case that when the judgment became a lien upon these premises the two parcels taken together constituted the homestead of the judgment debtor, and were occupied and used by him as such. The premises, therefore, were a single piece of ground, although taken from different lots, and were properly sold as one tract. Indeed, under the circumstances, the sheriff would not have been justified in selling the two feet separately.

The order of the district court confirming the sale must be

AFFIRMED.

HENRY LIVESEY, PLAINTIFF IN ERROR, V. THE OMAHA HOTEL COMPANY, DEFENDANT IN ERROR.

1. **Pleading:** CONTRACT: AVERMENTS OF PETITION. In an action upon a contract containing a condition precedent, the plaintiff must aver performance to show a cause of action against the defendant.

2. ———: ———: ———. To maintain an action upon such contract without performance, the plaintiff must aver all the facts necessary to show a waiver of the condition precedent and fix the defendant's liability without such performance.

3. **Corporation:** SUBSCRIPTION TO STOCK: CONDITION PRECEDENT. When the subscription contract or charter of a corporation specifically fixes the capital stock at a certain amount, divided into shares of a certain amount each, the capital so fixed must be fully subscribed before an action will lie against a subscriber to recover assessments levied on the shares of stock, unless there is a clear provision in the contract to proceed with the accomplishment of the main design, with a less subscription than the whole amount of capital specified, or there is a waiver of the condition precedent.

4. ———: ———: ———: WAIVER is an intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it.

5. ———: CONSTRUCTION OF GENERAL INCORPORATION LAW. Sections 124 and 137 of the general incorporation act, were intended only to define and grant the general powers which may be exercised by a corporation when legally organized.

6. ———: ———. Sections 126 and 132 of the same act were not intended to nullify the settled rule of law in regard to the qualifications of a corporation, to enable it to commence business, and therefore do not dispense with a subscription of all the capital stock, when the charter makes such subscription a condition precedent to be performed before proceeding with the accomplishment of the main design.

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

Experience Estabrook, E. Wakeley, and G. W. Ambrose, for plaintiff in error, submitted as a part of their argument, an opinion prepared by HON. ISAAC F. REDFIELD in support of their position that the court below erred in its instructions to the jury, and in rendering judgment against the plaintiff in error for the amount of unpaid assessment levied on the shares of stock, subscribed by the plaintiff in error to the capital stock of the Omaha Hotel Company.

The opinion of Judge Redfield is as follows:

CUMULATIVE REMEDIES.

I. The question how far the mere subscription for shares in a joint stock corporation will bind the subscriber to pay assessments to the full amount of the shares where the subscription contains no promise of that kind, may possibly be regarded as an open question by some. We know there are some decisions denying that such subscription imposes any obligation to pay assessments—and these cases have held that where such a subscription contains a provision enabling the corporation to take a forfeiture of the shares for non-payment of assessments, this is the only remedy open to the corporation. But after long and full examination of both these questions, as well upon principle and reason as upon authority, I have been unable to come to any other conclusion than that the subscription for shares imports an undertaking to pay the amount of such shares in such assessments as the corporation shall make in conformity with the charter and the terms of subscription, and that the provision for forfeiture is merely cumulative as a remedy, and leaves the obligation to pay assessments good against the subscriber for any balance which may remain unpaid. The question is fully discussed and the authorities cited at length in 1 Redfield on Railways, 175, *et seq.*, 549 pl. 2, n. 2, 3, 4.

I can add nothing to what is there said, and it might not become me to contradict it unless upon some better grounds than would be possible for me to urge in this case.

ALL THE CAPITAL TO BE SUBSCRIBED.

II. The question, too, whether a corporation having a definite capital stock, can go into operation so as to organize and make assessments upon the subscriptions before the full amount of the capital stock is subscribed, there being no special provision, either in the charter or subscription to that effect, seems to be entirely well settled in the negative. There are many cases where such corporations have been allowed to go into effect upon special provisions, either in the charter or subscription, or the general laws of the state, but there is no case of authority where this has been maintained upon general principles. This rule has been held inflexible in all cases, both for the security of the public, and also of the subscribers.

The entire subscription of the capital stock by responsible persons before the corporation is allowed to come into operation, is the only guarantee to the public of the corporate responsibility; and the same condition is equally important to all the preliminary subscribers until the entire subscription is filled, as a security against being compelled to contribute to the beginning of an enterprise until some security is furnished of its ultimate completion. All the preliminary subscriptions are merely provisional and dependent upon the condition of the stock being all taken. Until that is secured the subscriptions amount to nothing more than offers to take the number of shares named provided the whole stock is taken. The whole enterprise remains a mere scheme for the creation of a corporation until the stock is all subscribed. It then first begins to assume corpor-

ate existence and to do things with binding force. Whatever is done before is merely provisional, to become binding if the stock is all taken, if not, to go for nothing. The subject is fully discussed and the cases cited in 1 Redfield on Railways, 188 *et seq.*, § 51, pl. 3, n. 3. We could add nothing more. The subject also comes under consideration in *New Haven & Derby R. R. Co. v. Chapman*, 12 Am. Law Reg., N. S. 80 and note; and we might cite any number of cases all in the same direction; and we are confident not one can be found in conflict with them. So that we need not further discuss this point.

CASE AT BAR NO EXCEPTION.

III. The only question of any doubt in this case must be whether it can be brought within any exception to the general rule. This is claimed, as we understand, solely under the provisions of section 132 of the General Statutes, entitled "Corporations," which provides: "Any corporation formed without legislative enactment may commence business as soon as its articles of incorporation are *filed* by the county clerk," etc. This, unquestionably, in a literal sense, has very much the appearance of dispensing with all other qualifications for corporations to commence business, except the mere filing of their articles of incorporation; for "commencing business" naturally imports all business and might, therefore, well embrace assessments upon subscriptions. But the very gross absurdity of supposing that the legislature could seriously have intended to make a mere filing, or recording of its articles of association, the only qualification for corporate action would naturally lead all courts to look carefully, to find out more precisely how this section comes to be in this particular phraseology. There seems to me to be many reasons why we could not, in justice, give this provision the strict and literal construction

which the plaintiffs seem to have adopted in getting up this corporation.

1. The mere recording the articles without any, or with imperfect subscriptions to stock, would be no qualification for the corporation "commencing business," but rather the contrary. When the legislature well knew that, by the general law, corporations of this character must have all their stock subscribed before they could legally begin business, we can scarcely suppose they would, purposely, throw away this public safeguard without securing some other in its place. But what possible security could it afford the public, or anybody else, to have their blank articles of association or incorporation recorded, as was done in this case on the 21st day of January, 1870, before any attempt at organization, or the obtaining of a single valid subscription? For the defendant is not claimed to have paid the first ten per cent on his subscription till the first of February; and till that payment, by the very terms of the subscription, no valid subscription could be made. And there is nothing to show that any of the other subscribers perfected their subscriptions earlier than the defendant. The language of the petition would seem to indicate that they did not—"That the total amount subscribed as aforesaid to said capital was, on said day" [the first of February, 1870] "$125,500." It would seem very obvious from the language of the petition that after those interested had obtained the pledge of $150,000 to the corporation when formed, they met and formed the scheme of a corporation, or, as it is called, "entered into articles of association and incorporation" providing for a capital stock of $200,000. This was on the 19th of January, 1870. It is not stated that any one subscribed the articles, but if they did it would amount to nothing whatever until the first ten per cent was paid. This is entirely well settled as to cases like the present under

similar statutes. *Black River & Utica R. R. Co. v. Clarke*, 25 N. Y.. 208. *Beach v. Smith*, 30 N. Y., 116. *N. Y. & Oswego M. R. R. Co. v. Van Horn*, 57 N. Y., 473. On the 21st of January these blank articles were recorded in the county clerk's office, and on the 1st of February, if ever, the ten per cent on subscriptions was paid, and on the 8th of March they "elected a board of directors." How very absurd, then, it is to suppose that any statute could seriously intend to provide such a recording as the full qualification for "commencing business."

2. But on looking carefully into the statute we shall find that section 132 was never adopted with any design of defining corporate qualification for going into business. Section 132 is obviously a mere explanation of section 126. That section (126) is prohibitory upon corporations going into business, *except to organize*, until their "articles of incorporation are recorded in the office of the county clerk." Section 132 merely amends this by providing that "*filing* its articles of incorporations by the county clerks" shall have the same effect as recording them as to commencing business. But instead of saying just what they meant to do to amend section 126, they spread it out into a new section —that corporations might "commence business" after filing their articles with the clerk, supposing, of course, that every one would understand the meaning to be, that "filing" should have the same effect as "recording," and not dreaming, probably, that any one would regard this "filing" as intended to embrace all the requisite qualifications of corporations for going into business.

ARTICLES TO BE ADOPTED AFTER ORGANIZATION.

IV. But most unquestionably, the statute fairly imports that these articles of association or incorpora-

tion for the purposes of notice to the public, shall be adopted by the corporation, after its organization, as that is specially excepted from the prohibition from going into business in section 126. Indeed, the corporation could not perform the acts required in that section, of adopting the articles and "have them recorded" until after its organization in some form. It would have no organs or agents until that event. And surely we cannot suppose, with any propriety, that this requirement of the statute would be satisfied by anything less than the full subscription of the capital stock. For if anything less will answer there is no stopping place, short of admitting that one subscription will answer, and no one, we think, will seriously claim that, unless the necessities of the plaintiffs' case should drive them to that extremity. For, as before said, it would seem that the articles in this case must have been an entire blank, in legal effect, when recorded. We cannot doubt that the statute contemplated that the corporation should conform to all the requirements of the general law, in obtaining its full subscription before organization, and then adopt the articles of incorporation and have them recorded, or "filed" in the proper office, as notice to the public, that they had conformed to all the requirements of the law. I think, therefore, that, although it is very evident the statute never intended to define the qualifications of corporations before going into business, but to leave them subject to all the requirements of established law, and only require notice to the public of their condition before actually entering upor business, still we cannot doubt that these articles of association at the time of filing for record, were to be complete, and show the possession of a capital stock, upon which the corporation could make assessments, which they could not do till all the shares were taken.

NO WAIVER.

V. It only remains to inquire whether the defendant is estopped from insisting upon these defenses. There is nothing claimed by way of acquiescence on the part of defendant, except his participation in the organization and his payment of the first ten per cent upon his subscription. The organization, whatever it was, must have been regarded by all, as merely provisional, to become binding if the stock was all subscribed; otherwise to go for nothing. This could not, in any sense, be fairly construed as an acquiescence in the corporation going into operation before its capital stock was secured. It was of course merely a provisional arrangement to secure the money accruing from the first installment and such other interests of the corporation as might require looking after, before full corporate existence was secured. Some such conventional arrangement is always convenient, and sometimes almost a necessity, and is often resorted to, either within or without the corporation, but is understood by all, as having no binding effect upon the corporation, whenever it comes into a condition to exercise corporate functions, by completing its subscription. Until then there can be no representation of all the corporate stock, when, for the first time, binding corporate action begins. No one is or can be deceived by any such provisional action, and without this element of misleading others there can be no binding estoppel, or effective acquiescence, in any course short of the full requirements of the law, to give effect to corporate existence or action. And the payment of the first ten per cent was indispensable, by the very terms of the association, to make any subscription binding, merely as such. Without this, they could not even begin to take subscriptions. To construe this as committing the party to future assessments until the full subscription was

obtained would be strange indeed. This view is fully sustained by the decisions. *S. and K. R. R. Co. v. Cushing*, 45 Me., 524.

ACTUAL NOTICE MUST BE GIVEN.

VI. As to the proper form of making the assessments there can be no question that the general rule, applicable to similar questions, would require notice to the subscribers before any default would occur, or any action could be maintained. 1 Redf. Railw., 159, 160, n 2, 3, 4. And I should regard the decisions in Illinois and Indiana, *Peake v. Wabash R. R. Co.*, 18 Ill., 88; *Ross v. Lafayette & Indiana R. R. Co.*, 6 Ind., 297; *Fisher v. Evansville & Crawfordsville R. R. Co.*, 7 Id., 407, and the case of *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y., 451, so far as it countenances a different course, as resting upon no satisfactory basis, either in authority or principle.

CONCLUSION.

1. I conclude, therefore, that the statute was not intended to dispense with the general rule of law requiring full subscriptions of the capital stock before corporate action could begin, and especially before any valid assessments could be made.

2. That if the statute could be construed as providing a basis for corporate action to begin, there has been no compliance whatever with the requirements of the statute in this case.

3. That, on both grounds, there could be no valid assessments until the subscription reached $200,000, and so far as appears it has never been carried above $125,000.

4. That if every other obstacle were removed, there has never been any valid assessment made upon the defendant's shares, for want of notice. It seems to me,

therefore, that the plaintiffs cannot recover without such a departure from all established rules of law as I am convinced the court will never countenance.

ISAAC F. REDFIELD.

Boston, November 15, 1875.

J. M. Woolworth, for defendant in error, argued this as well as the other cases against the Hotel Company upon briefs from which the following points are taken:

I. We do not dispute the principle of law upon which the plaintiffs in error seek to avoid their liability here, as laid down in the leading case of the *Salem Mill-dam Corporation v. Ropes*, 6 Pick., 23, and the many cases following it; namely, that where, by an act of incorporation, the number and par value of the shares in the corporation are fixed so as to require a certain capital, an assessment on the stock of a subscriber cannot legally be levied until the whole number of shares are subscribed. But we insist that the principle has no application here, and in the first place, because these plaintiffs in error have waived the protection of that principle.

The case of Balcombe stands thus: The second assessment was made May 24, 1870, payable June 10, and this he paid. At the meeting of January 19, he was reported as one of the many other subscribers of ten shares to the stock. In the proceedings of the meeting of the stockholders, on the 8th of April, he was present and took part, voting in the negative upon the very important question of turning over to Mr. Redick the entire enterprise with all the property, subscriptions, stock, etc. And at the meeting of the directors on the 18th of April, when the same and other important matters were under consideration, he was present and spoke quite earnestly of every one of those matters.

Frost's case stands thus: At the meeting of January 19, he was reported as a subscriber. At a meeting in February, Alvin Saunders held and voted upon his proxy, upon the very important question of the location of the hotel, as he did also at the meeting of April 8. On the 18th of April, he, as one of the stockholders, signed a paper giving consent to the diversion of two thousand dollars of the corporate funds to make up the deficiency of the subscription of the donors for the site of the hotel.

Livesey was also reported a subscriber at the meeting of January, voting as proxy for Isaac Clegg, and with Frost and others, signed the consent to the diversion of the two thousand dollars for the purchase of the site.

Sweesey was a subscriber to the fund for the purchase of the site. Boehme paid three assessments, made respectively on the 24th of May, payable on the 15th of August, 25th of July, payable on the same day, and 29th of August, payable on the 15th of September. He was present at the meeting of April 8, and with Balcombe and others, voted upon the proposition to dispose of the entire property, and on the 18th of that month, with Frost and others, in his capacity as a stockholder, signed a paper consenting to the diversion of two thousand dollars of the funds of the corporation, to answer the deficiency in the donors' subscription.

It is to be noted that the records show no meeting of stockholders after those at which these parties appear to have been present; so that the circumstance, that no further evidence of their participation in the affairs of the company is not produced, cannot be taken as indicating that they ever withdrew from the enterprise. And, besides, it was incumbent upon them after having gone along with their associates for a considerable time, to show that they withdrew from the company, if such were the fact; and no such proof having been offered,

we are entitled to assume that they did not withdraw, or notify the company of their intention so to do.

During the period in which these parties are thus shown to have participated in the proceedings of the corporation, as stockholders, the company entered upon, and prosecuted to a very considerable extent, its enterprise of building a hotel, and levied the assessments sued for. This course of conduct, on their part, was a waiver of all claim, which they otherwise might make, that they should not be held upon their subscription until the whole capital was taken. That such conduct displaces the principle of law, invoked by the plaintiffs in error, is shown by several of the best considered cases. *Cabot and West Springfield Bridge v. Chapin*, 6 Cush., 53. *N. H. Central Railroad v. Johnson*, 30 New Hamp., 390. *Trustees of Farmington Academy v. Allen*, 14 Mass., 172. *Kansas City Hotel v. Harris*, 51 Mo., 464. *Railroad v. Lacey*, 3 Y. & J., 80. *Pitchford v. Davis*, 5 M. & W., 2.

II. The doctrine of the Salem Mill-dam case, is inapplicable here, for another and independent reason, viz: that the charter of this company expressly authorizes it to commence business before its whole capital stock is subscribed.

1. The charter of this company is the general incorporation law and its articles of association taken together, and the liability of the subscribers for their stock is to be determined by their provisions. *Salem Mill-dam Co., v. Ropes, supra. Van Etten v. Eaton*, 19 Mich., 187. *Mann v. Cooke*, 20 Conn., 185. *Hughes v. Antietam Manuf. Co.*, 34 Md., 316.

2. Reading the general incorporation act, and the articles of incorporation together, we find the contract of subscription to be as follows, viz: The whole capital of the company shall be two hundred thousand dollars,

divided into shares of one hundred dollars, payable ten per cent at the time of the subscription, and the balance at such times as the directors shall require. (Articles of incorporation.)

But the amount may be changed. The company may effect its organization, before the record in the clerk's office of its articles, and as soon as that is effected, it may commence its business. It shall have power to sue and be sued, and hold and convey real and personal property, and render the interests of stockholders transferrable. (General incorporation law.) Taking these provisions together, it is very evident that the legislature intended to confer upon the corporation the power to enter upon the main and ultimate object of its organization, not at such indefinite and possibly remote time as when all its capital shall be subscribed, but before that is accomplished, and as soon as its articles are recorded. *New Haven, etc., R. R. v. Chapman*, 38 Conn., 56. *Hamilton, etc., Plank Road v. Rice*, 7 Barb., 157. *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 11 New York, 102. *Lake Ontario, etc., R. R. Co. v. Mason*, 16 New York, 451.

GANTT, J.

The defendant in error claims to be a corporation incorporated under the general incorporation laws of the state, and brought this action to recover assessments levied on shares of stock subscribed by plaintiff in error to the capital stock of the company. It is alleged that the plaintiff in error subscribed for and agreed to take ten shares of the capital stock of the company. A meeting was held on the 19th day of January, 1870, when articles of association and incorporation were adopted, which provide that the amount of the capital stock of the company shall be two hundred thousand

dollars, divided into shares of one hundred dollars each, and that an installment of ten per cent shall be paid on each share, at the time of making the subscription, and the residue thereof in such installments, at such times and places, as may be required by the directors. As shown by the evidence, an aggregate of one hundred and twenty-six thousand dollars of capital stock was subscribed, leaving a deficiency of seventy-four thousand dollars of the capital required by the charter. About the last of February, 1870, the parties voted on a location for the hotel, and elected directors, who held their first meeting on the eighth day of March, 1870, and then elected the officers of the company. The articles being filed in the office of the county clerk on the 21st day of January, 1870, the company now became organized, and notwithstanding it appears by the petition as well as by the evidence that the capital required by the charter had not been fully subscribed, yet the corporation was put into a condition to transact some business, if it were not legally authorized to proceed with the accomplishment of its main design. It seems that when the articles are agreed on and adopted and properly filed as is required by the law, the parties to the undertaking, unless prohibited by the charter or positive law, may employ agents to secure the full amount of capital required, to procure information in regard to the enterprise, and may contribute money to pay the expenses incurred in all the necessary preliminary steps in perfecting the organization of the company, without first having secured a full subscription of the capital required by the subscription contract or the charter; but all such and similar acts will afford no satisfactory proof that they intended to proceed with the main design of the corporation, until all the capital stock required shall have been fully secured by subscription to the stock. *Oldtown & Lincoln R. R. Co. v. Veazie*, 39 Maine, 571.

But the first inquiry suggested by the record is—does the petition state all the facts necessary to show a cause of action against the plaintiff in error? The defendant in error sets forth in its petition as matter of fact that the persons subscribing to the stock, on the 19th day of January, 1870, "assembled together and entered into articles of association and incorporation, and thereby agreed" among others that the capital stock should be two hundred thousand dollars, and "that the total amount subscribed to said capital stock was one hundred and twenty-five thousand and five hundred dollars, exclusive of the grounds donated," which it is alleged were of the value of fifty thousand dollars and composed a part of the capital stock. Now if the value of the ground donated to the company be considered as part of the capital, still as shown by the petition there is a large deficiency in the capital required, and therefore there is a non-compliance of the condition precedent, contained in the charter. No reason is given for the non-performance of the condition precedent, and no fact is averred to fix the liability of the plaintiff in error to pay assessments, without performance on the part of the defendant in error. Can the action be maintained on such a showing? In the case of *Fry's Ex'r v. The Lexington & Big Sandy R. R. Co.*, 2 Met. (Ky.), 323-4, it is said that "where a given amount of stock is required to be subscribed before the corporation is authorized to go into operation, this requisition must be regarded as an indispensable condition precedent. Each subscriber undertakes to pay the amount of his subscription only in the event, and upon the condition, that the whole amount of the capital stock, required by the charter to enable the company to organize and commence operation in its corporate capacity, shall be subscribed." In reference to the pleading in such case, it is said that "it is a well settled rule of pleading that the plaintiff must aver per-

formance of all the conditions precedent in the contract, when the liability of the defendant is dependent on their performance. In this case the liability of the defendant depends upon the fact whether a subscription of one hundred thousand dollars had been obtained, when his intestate was called on to make payment on his stock. Unless a subscription to that amount had been obtained, he was not, according to the implied terms upon which he became a stockholder, liable upon his subscription. As the petition must state all the facts necessary to show a cause of action against the defendant, and as the fact that stock to the amount of one hundred thousand dollars had been subscribed, is one that is *indispensable* for that purpose, the failure to aver it renders the plaintiff's petition fatally defective." The case at bar, in respect to the condition precedent, is similar to the one above cited, and involves the same principle. Therefore if the defendant in error cannot aver performance of this condition precedent, and if the action can be maintained without such averment, must not the petition contain all the necessary averments which will take the case out of the rule of pleading above stated? Must not facts be averred which will show a liability without all the capital required by the charter being first subscribed? It seems to me as the pleading now stands, it is difficult to escape the conclusion that the petition is fatally defective in this regard.

But assuming that the averments in the petition are sufficient to constitute a cause of action against the plaintiff in error, I will now consider the main grounds of defense to the action urged by the plaintiff in error, and in doing so it will be necessary to recur to some facts as shown by the record. The subscription paper fixed the cost of the hotel at not less than one hundred and fifty thousand dollars, and the articles of incorporation provide that "the capital stock of said company shall be

two hundred thousand dollars, divided into shares of one hundred dollars each." But it is stated as matter of fact in the third paragraph of the petition "that the total amount subscribed to said capital stock was $125,-500," and it is alleged that the ground on which to erect the hotel was donated to the company, and that the same is of the value of fifty thousand dollars and became a part of the capital of the company. Suppose this value of the ground should be added to the amount raised by subscription to the stock, it would still leave a deficiency in the capital required of twenty-four thousand and five hundred dollars, as shown by the petition; and if the right to proceed with the main design of the company is based on the subscription contract, it certainly excludes the ground from the capital and still leaves a deficiency of the same amount. But, however this may be, it is clear by the defendant's own showing that the assessments were made without having first secured all the capital required by the subscription contract or the charter of the corporation. Can the action be maintained for the recovery of the assessments on the shares of the capital stock before the amount of capital required is fully subscribed? When the amount of stock is subscribed and the company is authorized to proceed in the execution of its main design, it becomes a body corporate, a distinct and independent existence from all its members, and being thus in law a distinct party competent to contract, the rules of law in relation to contracts apply to the contract of these parties, and, hence, the rights of each subscriber to the contract are as fully protected by law from the corporate action as if he were a stranger. The corporation has no power to invade or impair the rights of individuals.

And now, in answer to the above question, it need only be stated that the rule seems to be well established that when the charter or subscription contract specifically

fixes the capital stock at a certain amount, divided into shares of a certain amount each, the whole amount of capital so fixed and required for the accomplishment of the main design of the company must be fully secured by a *bona fide* subscription before an action will lie upon the personal contract of subscribers to stock to recover an assessment levied on the shares of stock, unless there is some clear provision in the contract to proceed in the execution of the main design with a less subscription than the whole amount of capital specified. This rule seems to be founded on the principle that by the terms of the grant to the corporation, it is essential to the power of assessment for the general objects and purposes of the institution that the whole capital stock required by the condition precedent must be represented and acted upon by the assessment. This doctrine has underwent an exhaustive discussion in many cases, and it is not deemed necessary to bring into review the arguments in support of it. *Salem Mill-dam Co. v. Ropes*, 6 Pick., 23. *Id.*, 9 Pick., 195. *Cabot & West Springfield Bridge v. Chapin*, 6 Cush., 53. *Schurz v. The S. & T. R. R.*, 9 Mich., 269. *Topeka Bridge v. Cummings*, 3 Kan., 76. *Somerset Railroad Company v. Clarke*, 61 Me., 384. *N. H. Central Railroad v. Johnson*, 30 N. H., 404. *Peoria & Rock Island R. R. v. Preston*, 35 Iowa, 118. And the rule is the same in England. *Fox v. Clifford*, 6 Bing., 776. *Pitchford v. Davis*, 5 M. & W., 2. 4 Moody & M., 151.

The case under consideration comes within the rule above stated, and the action cannot be maintained, or the judgment of the court below be sustained, unless some fact or circumstance is shown which takes it out of the general rule.

It is however contended on the part of the defendant in error that the plaintiff in error has waived his rights under the contract, and by his own acts has become

estopped from denying his liability to pay the assessments. What are the facts in this regard? The record shows that it contains all the testimony introduced or offered to be introduced, by either plaintiff or defendant, on the trial of the cause; and upon a careful examination of this record, I find that the plaintiff in error participated in the transactions of the company as follows: He subscribed for ten shares of stock and at the same time paid ten per cent of the amount, to-wit: one hundred dollars, which the articles of incorporation required to be paid at the time of making the subscription, and without this payment the subscription would not be complete; again, his proxy was voted at a meeting of the stockholders on the .... day of February, 1870, and his name is signed to a written assent that the company may pay a deficiency in the collection of donors' subscriptions to purchase a site for the proposed hotel. This paper was presented to the directors, April 18, 1870. These acts might have occurred in the preliminary steps taken by the company, and up to this time the record shows only such preliminary action as relates to the adoption of the articles of incorporation, the procuring a site for the proposed hotel, the investigation of the title to the property, donations by individuals, and a proposition whether the company should enter upon the execution of the main design, or whether it should be passed over into the hands of a private individual. All this might have taken place as preliminary measures without intention on the part of any subscriber to the stock to proceed with the accomplishment of the main design, until all the capital stock required by the charter should first be secured by subscription.

It is not claimed that the plaintiff in error gave any actual assent to enter upon the main object and purpose of the company, without first securing a subscription of the amount of capital required; and surely a constructive

consent, urged from the common law principle that all the corporators are presumed to assent to what is done at regular meetings of the corporation, will not be admitted to deprive one of his rights, for the presumption is that corporations will do none but legal acts; and, hence, the doctrine of presumptive assent to corporate acts applies only to acts which are legally done in the exercise of the powers conferred by the grant; the charter creates the artificial being, invests it with its powers, is its fundamental law and prescribes its mode of operation.

Now, the corporation with full knowledge of the condition precedent, contained in the subscription contract and of that in the charter, and in violation of this condition in the contract, has proceeded to assess the shares of stock, and it is insisted that the plaintiff in error by his acts has waived his immunity from liability to pay such assessments. In other words, the proposition contended for is in effect that these acts of the plaintiff in error are equivalent to an assent by him to the unauthorized proceedings of the corporation, and therefore he is estopped from claiming the rights he had under the contract. It is said that "a waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right, and an intention to relinquish it." There is a total failure of proof showing that the plaintiff in error acted with knowledge of the fact that a deficiency remained in the capital required by the charter and the facts shown by the record are not sufficient to show an intention to waive the rights of the party. *Pitchford v. Davis*, 5 M. & W., 4. It seems clear that the proposition contended for in this case cannot be maintained either by the facts or the law, and that the authorities do not support it. *The Atlantic Cotton Mills v. Abbott*, 9 Cush., 425. *The Oldtown & Lincoln R. R. v. Veazie*, 39 Me., 571. *Macedon & Bristol Plank Road Co. v. Lapham*, 18 Barb., 313.

Of the cases cited in the argument for defendant in error, that of *Cabot & West Springfield Bridge v. Chapin*, 6 Cush., 51, perhaps approaches the nearest to his purpose. In that case it is said that "if the subscriber knowing that the requisite subscription had not been made to fill up the capital, had attended meetings of the corporation and had co-operated in the votes of *expending money* and for *making contracts*, and in other acts which could only be properly done upon the presumption that the subscribers intended to proceed with the stock partially taken up, such subscriber might be estopped from setting up the defense." The principle enunciated in this case will not be questioned although it is an *obiter dictum*, as the decision was wholly upon other grounds, and not upon the question of waiver; and the series of acts mentioned do not apply to the case at bar.

In the case of the *Trustees of Farmington Academy v. Allen*, 14 Mass., 172, the defendant and others, as subscribers, agreed to be accountable for the payment of the respective sums by each one subscribed as a fund to be applied in the establishment of an academy, as necessary to obtain assistance from the legislature; *held*, that an action would lie for money paid, laid out and expended. It was not a subscription to take shares of stock in a corporation with a fixed capital, and, therefore, the case is not analogous to the one at bar.

In *Railway v. Lacey*, 3 Younge & Jervis, 85, the defense was on the ground that a misrecital in an act of parliament rendered the act invalid, and could not be enforced. The defendant concurred in the application to the legislature, he was named as a proprietor, and paid his calls so long as the concern was prosperous; *held*, that by his conduct he held himself forth to the world as a proprietor, and by so doing he took advantage of the

act, and, therefore, could not object to the validity of the statute.

In the case of the *Kansas City Hotel v. Harris*, 51 Mo., 464, the defendant was a stockholder and a director of the company. The action was brought for the fifth and last call, and it is said by the court that "the defendant *having participated* in all the proceedings creating the corporation, and in *increasing the stock* and *making the calls* both as stock holder and director, he is now estopped from raising any question in this action as to their validity." The question of deficiency in the subscription to the stock was not raised in this case. The main defense was that there were two subscriptions, and the petition only counts for one.

Again, it is insisted that by authority of the general incorporation act, the company may "enter upon the main and ultimate object of its organization as soon as its articles are recorded" in the county clerks office, and that the provisions of the act taken together, show such to be the legislative intention, without any regard to the amount of shares subscribed. If the statute must receive such a construction, then the corporation might commence operations in the execution of its main design without a single valid subscription to the capital stock, notwithstanding a certain amount of capital, divided into shares of a certain amount, is required by the charter. Now, as all the powers and duties of a corporation result from the statute, it seems very clear that an organization of the institution, even with officers, a capital paid up and articles filed as required by law, would be powerless to do one corporate act without a legislative grant to do so; and therefore, it seems clear that sections 124 and 137 of the general statute, were intended simply to define and grant the general powers which may be exercised when the corporation is legally organized. There is no legislative intent expressed in these sections, giving a

more extended effect to them, and none can be inferred by implication from the language used or the general principles of law. 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 any invasion upon the common law, further than the case absolutely required." 1 Kent Com. 514. Section 138, I think is only declaratory of the common law rule, for in legal contemplation the corporation as a body politic, is a distinct and independent existence or party from all its members, and may contract with and sue any of its members, and any member may contract with and sue the corporation; and, hence, at common law, the corporation is vested with the right of action to recover arrears, debts and demands against any of its members, and any member has the same right of action to recover any debt, claim or demand, he may have against the corporation. This doctrine is founded on the general grant of power to the corporation to sue and be sued. Therefore, this section leaves the legal *status* of the company the same as it was at common law. In view, therefore, of the purpose for which these sections were enacted, it seems clear that there is nothing in them to justify an inference that they were intended to confer the right of any corporate action, in respect to the main enterprise of the company, before its capital stock is secured by subscription.

But it is more earnestly contended that sections 126 and 132 grant the right of proceeding with the "main and ultimate object" of the company, regardless of the fact whether all or any of the capital required by the charter has been first subscribed. Section 126 provides that "every corporation, previous to commencement of any business, * * * 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;" and section 132 provides that the corporation "may commence business as soon as its articles of incorporation are filed by the county clerk, as required by this sub-division, and shall be valid, if a copy of its articles be filed in the office of the secretary of state, and the notice required be published within four months from the time of filing such articles in the clerk's office." The latter section modifies the former by what may be considered as an explanatory clause, providing that the corporation "may commence business as soon as the articles of incorporation are filed in the county clerk's office," instead of waiting until they are recorded, and by making the validity of the corporation depend on filing a copy of the articles with the secretary of state, and upon publication of the notice required. These two sections point to the same subject matter, and must be considered together as one. It is true that the words, "may commence business," taken in a literal sense by themselves, would seem to indicate a departure from the general rule of law in regard to the necessary qualifications of a corporation to enable it to commence business in its corporate capacity. But in the interpretation of the general incorporation act, it must be borne in mind that the sole object of the statute was to provide a system for the incorporation of companies, without the granting of charters by special legislation, and not to unsettle well established principles of law in regard to the qualifications of corporations to enable them to commence business. The rule is, "*Scire leges non hoc est verba earum tenere, sed vim ac potestatem*, and the reason and intention of the law giver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction and absurdity." 1 Kent Com., 510. Now, in the organization of a company, to enter upon an enterprise involving large expense and various business transactions, it will hardly be sup-

posed that the legislature intended to make the *mere* filing of the articles of incorporation a sufficient qualification to proceed in the execution of its main design, to enter into contracts for that purpose, to create debts and transact business generally. On the contrary, the legislative intention surely must have been to simply fix the time when the company may commence business, when otherwise qualified; and this interpretation of the law, is supported by the fact that the section does not define any of the qualifications necessary to put the corporation into operation, except the filing of the articles. There is no express provision in the law authorizing it to enter upon the execution of its main object without the performance of a condition precedent contained in its charter; and no such authority is to be inferred from the words "commence business." The members of the company are not prohibited from defining what shall be the qualifications of the corporation to enable it to go into operation, and therefore, when the contract is that a fixed amount of capital, divided into shares of a certain amount each, shall be a necessary qualification, such requisite is a condition precedent, and a fundamental law of the corporation. The general statute and the articles are considered in the nature of a grant from the state and taken together constitute the charter.

Again, at the time the act was passed, it was the settled rule of law that a corporation having a fixed amount of capital, divided into shares of a certain amount each, could not proceed with the execution of its main object, until all its capital was subscribed, unless it was clearly provided that it might do so with a less subscription than the amount of capital fixed by the charter. The presumption is that the legislature had in their minds this common law doctrine then so well established and understood, and that they intended to leave the determina-

tion of all the necessary qualifications to enable the corporation to go into operation, except the filing of the articles, to be provided by the charter, and to be governed by the principles of the common law in force. The conclusion is, that the incorporation act was not intended to nullify the settled rules of law in respect to the qualifications of a corporation, to enable it to commence business, and therefore does not dispense with a subscription of all the capital stock, when the charter makes such subscription a condition precedent to be performed before proceeding with the accomplishment of its main design.

The judgment of the district court must be reversed and the cause remanded with leave to amend the petition if desired so to do.

REVERSED AND REMANDED.

WILLIAM F. SWEEZY, PLAINTIFF IN ERROR, v. THE OMAHA HOTEL COMPANY, DEFENDANT IN ERROR.

PER CURIAM. The record in this case only shows that the plaintiff in error subscribed ten shares to the capital stock of the company, and paid the first installment of ten per cent, as required by the charter to be paid at the time of making the subscription, and that he signed a paper agreeing to donate a certain amount to the enterprise of the company. Upon this state of facts it is only necessary to say that the judgment rendered in the district court in the case must be reversed and the cause remanded, with leave to amend the petition if desired, for the same reasons given in the foregoing opinion of *Livesey v. The Omaha Hotel Company*.

REVERSED AND REMANDED.

EXPERIENCE ESTABROOK, PLAINTIFF IN ERROR, V. THE OMAHA HOTEL COMPANY, DEFENDANT IN ERROR.

1. **Pleading:** CONTRACT: AVERMENTS OF PETITION. In an action upon contract the plaintiff must aver performance of all the conditions precedent in the contract to be performed on his part, in order to constitute a cause of action against the defendant, unless he states in his petition all the necessary averments which will take the case out of the general rule, and fix the defendant's liability without such full performance on his part.
2. **Contract:** CONDITIONS PRECEDENT: WAIVER. If, in such case, a condition precedent in the contract has not been fully performed on the part of the plaintiff, the question whether the defendant has or has not waived his legal rights and by his acts become estopped from denying his liability under the contract, is one of fact, which is alone within the province of the jury to determine upon the testimony, under proper instructions by the court defining what constitutes such waiver.

ERROR to the district court for Douglas county. Judgment there being entered against the plaintiff in error, he brought the cause here by petition in error. The opinion states the facts necessary to an understanding of the case.

Estabrook, *Wakeley*, and *Ambrose*, for plaintiff in error.

J. M. Woolworth, for defendant in error.

GANTT, J.

The defendant in error claims to be a corporation, organized and incorporated under the general incorporation laws of the state; and brought this action to recover assessments levied on shares of stock subscribed by the plaintiff in error to the capital stock of the company. It is alleged that the plaintiff and others signed the following paper, and that the plaintiff agreed to take ten shares

of the capital stock: "No subscription of stock exceeding ten shares to be taken. We, the undersigned, for the purpose of erecting a first class hotel in the city of Omaha to cost, exclusive of the ground, $150,000, hereby agree to take stock in said hotel, the number of shares subscribed by us hereto, said shares being each of the value of one hundred dollars, payable in installments not exceeding twenty-five per cent of the par value of each share. When the sum of $150,000 shall have been hereto subscribed, the stockholders shall by vote, each share constituting one vote, select the location of said hotel and otherwise arrange for its construction, said location being restricted between Ninth and Seventeenth streets and Howard street and Capital avenue." On the nineteenth day of January, 1870, articles of incorporation were agreed on, and the capital stock of the company was therein definitely fixed at two hundred thousand dollars, divided into shares of one hundred dollars each; and it was provided, by said articles, that an assessment of ten per cent on each share should be paid at the time of making the subscription to the stock of the company. The capital stock of the company was then definitely fixed at two hundred thousand dollars, but the defendant in error states, in his petition as subject matter of fact, "that the total amount subscribed to said capital was on said day $125,500, and ground on which to erect said hotel was, on or about the fifteenth day of March, 1870, donated to said company, and the same was of the value of $50,000 and became part of the capital."

Now, suppose the ground did become a part of the capital stock of the company, as alleged in the petition, still there is a deficiency of $24,500 in the capital stock required; and, therefore, it is clear, that there was no compliance, on the part of the company, with the condition precedent contained in the charter, which required a subscribed capital of two hundred thousand dollars to

authorize the corporate body to proceed with its main design. The petition gives no explanation in regard to this important matter; no reason is given for the non-performance of the condition precedent; and no fact is averred, to fix the liability of the plaintiff, without performance on the part of the defendant. Can the action be maintained upon the showing made by the petition?

It is a well settled rule of pleading, that the petition must state all the facts necessary to show a cause of action against the defendant; and the fact that stock was subscribed to the amount of two hundred thousand dollars, is indispensable for that purpose; for it is a condition precedent, and must be performed to secure the right of action; unless the plaintiff states in his petition all the essential averments, which will except the case from the rule, and fix the plaintiff's liability, without all the capital required by the charter being first subscribed.

In the case of *Fry's Ex'r v. The Lexington and Big Sandy R. R. Co.*, 2 Met. (Ky.), 323–4, it is said, that, "where a given amount of stock is required to be subscribed before the corporation is authorized to go into operation, this requisition must be regarded as an indispensable condition precedent. Each subscriber undertakes to pay the amount of his subscription only in the event and upon the condition that the whole amount of the capital stock required by the charter to enable the company to organize and commence operations in its corporate capacity, shall be subscribed." In reference to the pleadings in such case, it is said, that, "it is a well settled rule of pleading, that the plaintiff must aver performance of all the conditions precedent in the contract, when the liability of the defendant is dependent on their performance. Without such an averment, no cause of action is shown to exist. In this case the liability of the defendant depends upon the fact, whether a subscription of one hundred thousand dollars had been obtained

when his intestate was called on to make the payment on his stock. Unless a subscription to that amount had been obtained, he was not, according to the implied terms upon which he became a stockholder, liable upon his subscription. As the petition must state all the facts necessary to show a cause of action against the defendant, and as the fact that stock to the amount of one hundred thousand dollars had been subscribed, is one that is indispensable for that purpose, the failure to aver it renders the plaintiff's petition fatally defective." The rule so clearly expressed in this case, applies with equal force to the case at bar, for, in respect to the condition precedent in the contract, the two cases seem to be precisely similar; and, therefore, it seems to me, as the pleadings now stand, it is difficult to escape the conclusion, that the petition is fatally defective in that regard.

It is, however, contended, that the plaintiff waived his legal rights under the contract; and by his own acts has become estopped from denying his liability to pay the assessments. Now, assuming that the petition sufficiently states a cause of action, then, the question is, has the plaintiff waived his rights under the contract?

This question presents an inquiry of fact, which is alone within the province of the jury to determine upon the testimony in the case, under proper instructions by the court, defining what constitutes such waiver. But, on the trial of the cause in the court below, after passing on a number of instructions, requested by the plaintiff in error to be given in charge to the jury, the court instructed the jury as follows: "Nothing remains for you but to return a verdict for the plaintiff. Give the plaintiff what is claimed in the petition. Take the case, gentlemen of the jury, and go to the room, and compute the interest at ten per cent per annum, from the time of the call of the first assessment." To this instruction the plaintiff in error, at the time, excepted. This instruc-

tion left nothing for the jury to do, but to compute the interest. The determination of the question of fact, whether the plaintiff in error had, or had not, by his own acts, waived his rights under the contract, was entirely taken from the jury. It is, indeed, unnecessary to refer to authority in support of the proposition that this question of fact should have been submitted to the determination of the jury, upon the testimony, under the instructions of the court given to them upon the questions of law in the case.

The judgment of the district court must be reversed, and the cause be remanded for further proceedings, with leave to amend the petition.

JUDGMENT REVERSED.

ALFRED W. BOEHME, PLAINTIFF IN ERROR, v. THE OMAHA HOTEL COMPANY, DEFENDANT IN ERROR.

1. **Pleading:** CONTRACT: AVERMENTS OF PETITION. In actions on contract, the plaintiff must aver performance of the conditions precedent to be performed on his part to constitute a cause of action against the defendant; unless the necessary averments are made which will take the case out of the general rule, and fix the defendant's liability without such performance.

2. **Contract:** CONDITIONS PRECEDENT: WAIVER. If waiver of the condition precedent by defendant is pleaded, then the question whether the defendant has or has not waived his legal rights, and by his own acts become estopped from denying his liability under the contract, is a question of fact, which is alone within the province of the jury to determine upon the testimony in the case, under proper instructions by the court, defining what constitutes such waiver.

ERROR to the district court for Douglas county.

Estabrook, *Wakeley*, and *Ambrose*, for plaintiff in error.

J. M. Woolworth, for defendant in error.

GANTT, J.

The defendant in error claims to be a corporation under the provisions of the general incorporation laws of the state, and brought this action to recover assessments, alleged to have been levied on the shares of stock subscribed by plaintiff in error to the capital stock of the company. The articles of incorporation definitely fix the amount of the capital at two hundred thousand dollars, divided into shares of one hundred dollars each. The third paragraph of the petition states, as matter of fact, that the "total amount subscribed to said capital was, on said day, (about February 1, 1870,) $125,500, and ground, on which to erect said hotel, was, on or about the 15th day of May, 1870, donated to said company, and the same was of the value of $50,000, and became part of its capital."

Now, suppose the ground, which is alleged to have been donated to the company, be considered as part of the capital of the company, still, as shown by the petition, there is a large deficiency in the capital required; and, therefore, there is a non-compliance of the condition precedent contained in the charter, on the part of the defendant, and no reason is given for this non-performance; and no fact is averred to fix the liability of the plaintiff to pay the assessments, without all the capital required by the charter being first subscribed.

It is a settled rule of pleading, that the petition must state all the facts necessary to show a cause of action against the plaintiff; and, to do so, it is necessary to aver in the petition a performance of the condition precedent, or, in other words, that the capital stock required by the contract was all subscribed; or, if such full performance cannot be averred, then, the petition must contain all the

necessary averments which will take the case out of the general rule of pleading, and fix the plaintiff's liability to pay the assessments, without a full subscription of the capital required by the charter. It seems clear, that one or the other of these averments, must be made in the petition to show a cause of action against the plaintiff in error; but neither the one or the other is alleged, and hence, as the pleading now stands, it seems to be fatally defective in this regard. See *Estabrook v. The Omaha Hotel Company*, decided at this term of court.

But assuming that the petition sufficiently states a cause of action against the plaintiff in error, the question is, has he waived his legal rights under the contract. It is contended that by his own acts, in participating in the affairs of the company, he has waived his legal rights in this respect; and that he is therefore, estopped from denying his liability to pay the assessments. The question is one of fact, which the jury alone must determine upon the testimony in the case, under proper instructions of the court, defining what constitutes such waiver. But on the trial of this cause in the court below, the plaintiff in error requested the court to instruct the jury, "that if they believed, from the evidence, that, at the time this suit was brought, the full amount of $200,000, had not been subscribed, their finding must be for the defendant, unless they also find that the defendant waived his rights to insist upon such subscription." This instruction was refused by the court, to which ruling the plaintiff in error, at the time, excepted. This instruction should have been given; for it is a clear principle of law, that the question of fact, whether the plaintiff had or had not, by his own acts, waived his legal rights under the contract, should have been submitted to the determination of the jury upon the testimony in the case, under proper instructions of the court. By refusing to give the

instruction, this question of fact was taken from the jury; and this is error.

The judgment of the court below must be reversed, and the cause be remanded for further proceedings, with leave to amend petition.

JUDGMENT REVERSED.

GEORGE W. FROST, PLAINTIFF IN ERROR, v. THE OMAHA HOTEL COMPANY, DEFENDANT IN ERROR.

ST. A. D. BALCOMBE, PLAINTIFF IN ERROR, v. THE OMAHA HOTEL COMPANY, DEFENDANT IN ERROR.

PER CURIAM.—The above cases being, in all respects, similar to the case of *Boehme v. The Omaha Hotel Company*, it is only necessary to remark in regard to them that, for the reasons given in the opinion in the case referred to, the judgment rendered in each case in the court below must be reversed, and each cause must be remanded for further proceedings, with leave to amend the petition

JUDGMENT REVERSED.

BRUNER & NELIGH, PLAINTIFFS IN ERROR, v. DONA FOLK, DEFENDANT IN ERROR.

1. **Appeal from Probate Judge.** A party appealing from a judgment of a probate judge has ten days within which to give the undertaking in appeal; and until the second day of the term next thereafter to deliver the transcript to the clerk of the appellate court.

2. ———. The case of *Smails v. White*, 4 Neb., 353, cited with approval.

ERROR to the district court for Cuming county.

Uriah Bruner, for plaintiff in error.

LAKE, CH. J.

The only error complained of is in the order of the court below dismissing the appeal from the judgment of the probate judge.

It appears that the judgment from which the appeal was taken was rendered on the fourth day of October, 1875. The undertaking in appeal was filed and approved within eight days thereafter, and the transcript, in due form, was filed in the district court on the eighteenth day of October, some two weeks before the term next following the rendition of the judgment appealed from.

The order dismissing this appeal was doubtless based upon the act "regulating the taking of appeals from the judgments of probate judges and justices of the peace," approved February 24, 1875, which, in effect, limited the time for perfecting such appeals to ten days from their rendition. But that act having been declared to be unconstitutional (*Smails v. White*, 4 Neb., 353), and all the requisite steps to a valid appeal under the law as it stood at the time of its passage having been duly taken,

it follows that the motion to dismiss should have been overruled.

The judgment of the court below is, therefore, reversed, and the appeal reinstated.

JUDGMENT ACCORDINGLY.

CHARLES W. SEYMOUR, CHARLES F. HOLLY, AND OTHERS, PLAINTIFFS IN ERROR, v. ALEXANDER STREET, DEFENDANT IN ERROR.

1. **Statute of Limitations:** MORTGAGE. A mortgage is not a "specialty" within the meaning of our statute of limitations.

2. ———. It was the intention of the legislature to give a creditor five full years in which 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 is not to be computed as any part of the time within which an action may be brought. *Blodgett v. Utley*, 4 Neb., 26, cited and approved.

3. ———. The words "usual place of residence" mean the place of abode at the time of service.

4. ———: ABSENCE. Where a man, having a wife and family, went to Colorado in the spring of 1861, and was elected and served as a member of the territorial legislature in the years 1862 and 1863, and in the years 1865 and 1866 held the office of judge of the district and supreme courts of that territory, his wife and a portion of his family continuing to reside at Nebraska City in this state; *held*, that the place of residence of his wife was not his usual place of residence during such absence.

5. THE FINDINGS OF A COURT, when substituted for a jury, are entitled to the same weight as the verdict of the latter.

6. WHERE A VERDICT OR finding is *clearly wrong*, it should be set aside; but if there is only doubt as to its correctness it will not be disturbed.

7. **Action:** THE TRUSTEE OF AN EXPRESS TRUST may bring an action in his own name without joining the name of the assignor.

8. **Bankruptcy:** A DISCHARGE in bankruptcy has the same effect in law as payment of the debts, and such discharge cannot be assailed for fraud in a collateral proceeding.

9. **Practice:** TAKING STAY OF EXECUTION prior to the act of February 23, 1875, is not a waiver of the right to prosecute proceedings in error. *White v. Blum*, 4 Neb., 558, cited and approved.

THIS was a petition in error to reverse a judgment of the district court for Otoe county. It was an action brought to foreclose a mortgage given by Holly and wife to Alexander Majors on real property in Nebraska City, dated May 30, 1860, to secure a note for $4,000, given by Holly to Majors, and payable on or before the first day of August, 1861. The note and mortgage were given to secure the payment of freight for transporting a quartz mill and machinery from Nebraska City to Colorado Territory. Afterwards, on the 12th of June, 1860, Holly executed and delivered to Majors a chattel mortgage on the mill and machinery, as additional security for the payment of the note. On the 25th of January, 1861, Majors made an assignment of his property to Alexander Street for the benefit of his creditors, and Street brought this action to foreclose said mortgage, and against Seymour and others who claimed title to portions of the property mentioned therein. The Hollys answered admitting the execution of the note and mortgage sued on. They set up, however, that by agreement between Holly and Majors, the latter was to transport the mill and machinery not exceeding forty thousand pounds in weight, to such locality in Colorado as Holly should direct, not exceeding the distance from Nebraska City to Denver; that Holly should pay therefor at the rate of nine and one-half cents per pound; that when the actual weight of said machinery and the cost of transportation thereof, according to the price

stipulated, should be ascertained, if the amount should be less than the face of the note the deficiency should be credited as a payment thereon: that under this agreement the actual cost for transporting said mill and machinery was three thousand dollars and no more. They also allege that by delays and breakages Holly was damaged to the extent of fifteen hundred dollars; that Majors afterwards took possession of said mill and machinery under said chattel mortgage, and converted the same to his own use; and that by reason of the premises said note was fully paid off and discharged, surrendered and given up to be cancelled to the attorney Seymour. They also plead the statute of limitations, and that Majors had obtained a discharge in bankruptcy under the United States law of 1867. The district court found the issues in favor of Street and entered a decree accordingly. Further facts appear in the opinion.

C. W. Seymour, for plaintiffs in error.

Shambaugh & Richardson, for defendant in error.

MAXWELL, J.

Is a mortgage a specialty within the meaning of our statute of limitations?

A specialty is defined to be, "a writing *sealed* and delivered which is given as a security for the payment of a debt in which such debt is particularly specified." Bacon's Abr., *Obligation*, *A*. And, although in the body of the writing it is said that the parties have set their hands and seals, yet if the instrument be really sealed it is a specialty; and if it be not sealed it is not a specialty, although the parties in the body of the writing make mention of a seal. *Taylor v. Glaser*, 2 Sergt. & Rawle, 504. 2 Bouvier's Law Dic., 537. 2 Coke, 5, *a*. In *Stockwell v. Coleman*, 10 Ohio State, 40, it is held,

"that while the term specialty, in the strict use of the word, was regarded as only applicable to bonds, deeds or other instruments under seal, it afterward came to be used in a much more comprehensive sense. The term specialty has long been used both in England and America in this more comprehensive sense as embracing debts upon recognizances, judgments, and decrees, and (in England certainly) debts upon statute."

No case has been referred to by the plaintiff in error holding that a note secured by a mortgage is a specialty, and I think no such case can be found In *Jackson v. Sackett*, 7 Wend., 94, and *Clark v. Figes*, 2 Starkie, 234, it was held, that although a promissory note was secured by mortgage, it remained a simple contract.

But it is urged that Holly's usual place of residence continued to be at Nebraska City. The evidence clearly shows that he was a non-resident of this state from the year 1861 until the commencement of this action in September, 1869; he was twice elected a member of the territorial legislature of Colorado, and in the years 1865 and 1866 held the office of judge of the district and supreme court of that territory. The fact that his wife remained in Nebraska City did not, under the circumstances in this case, make that place his *usual place of residence*. In *Blodgett v. Utley*, 4 Neb., 29, this court held that "it was the intention of the legislature to give the creditor five full years in which 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 shall not be computed as any part of the time within which an action may be brought." It is also held that the words *usual place of residence* mean the place of abode at the time of service of a summons. Section 17 of the code of civil procedure, Revised Statutes of 1866, which took effect September 1, 1866,

provides that, "the absence from the territory, death, or other disability of a non-resident, save the cases mentioned in this section, shall not operate to extend the period within which actions *in rem* shall be commenced by and against such non-resident or his representative." This provision was evidently intended by the legislature to include mortgages. But it can only operate prospectively, and but little more than four years had elapsed from the time this provision took effect until this action was commenced. It is evident, therefore, that the action is not barred by the statute of limitations.

A more serious objection, however, arises on the sufficiency of the evidence to sustain the judgment of the court below. The rule is well settled that the findings of a court when substituted for a jury are entitled to the same weight as the verdict of the latter; and a verdict will not be set aside on the ground of an erroneous finding, unless it is clear that such is the case. *Merrick v. Boury*, 4 Ohio State, 60. And a mere difference of opinion between the court and jury will not warrant the former in setting aside the finding of the latter. *McGatrick v. Wason*, 4 Ohio State, 566. The correct rule appears to be that if the verdict or finding is clearly wrong, it should be set aside; but if we only doubt its correctness it will not be disturbed.

In this case it appears that in addition to the mortgage on the real estate in controversy, Holly executed a chattel mortgage on the mill and machinery as additional security on the note in question. It also appears that in April, 1862, an action was commenced by the plaintiff in the court below in the district court of Boulder county, Colorado, to foreclose the chattel mortgage, and that under the proceedings in the case Street obtained possession of the mortgaged property, which is shown to have been of the value of $9,500.00. The plaintiff in the court below contends that this suit was compromised on the

payment by Holly of the sum of $1,250.00, and the mortgage released; and one Litchfield testified that he acted as the agent of Street in the transaction, and that such disposition was made of the case. Holly testified postively that he knew nothing about the suit; that no compromise was ever made; and that Street, through Litchfield, sold the mortgaged property to one Rounds, of Black Hawk Point, and retained the entire proceeds. There is nothing in the record, except the naked, unsupported statement of Litchfield, to show that the mortgage was released, while it is clearly shown that the suit was not dismissed. And there is nothing in the records of the district court, so far as appears, to show that service was had on Holly, or that a compromise was effected; nor is any reason given why the records of the district court fail to show that the case has been compromised or dismissed.

It being conceded that the plaintiff in the court below obtained possession of the property under the mortgage, it devolves on him to show by a preponderance of testimony that the property in question was returned to Holly and the mortgage released. But the proof entirely fails, in my opinion, to establish the fact that the mortgage was released and the mortgaged property returned to Holly. It is somewhat remarkable that if the sum of $1,250.00 was actually paid, it was not indorsed on the note, or at least a receipt given for it; but nothing of the kind is claimed. The evidence as to the loss of the note is not sufficient, in a case of this kind, to permit evidence of its contents to be given on the trial. For these reasons the judgment of the district court must be reversed.

But, while the statute of limitations of this state has not run against the claim, it is a very suspicious circumstance, that no action was brought to foreclose the mortgage, which is the foundation of this suit, for more than eight years after the note became due. This is not the

case of a creditor extending the time of payment to a debtor. Street was appointed trustee, in January, 1861, for the express purpose of *collecting the debts* and converting the property placed in his hands into money, for the purpose of paying debts owing by Majors. The trust deed contains the following provisions: "This conveyance and transfer, however, is made in trust for the following purposes, to-wit: Whereas, the said Majors of the first part, is indebted and bound in his own individual rights, and as a member of the firm of Russell, Majors and Waddell, to divers and sundry persons, and co-partnership of persons, and corporations, in divers and sundry sums of money; said indebtedness and obligations being and arising upon accounts, notes, bills, etc., upon which said Majors is bound as maker, drawer, indorser, acceptor, or otherwise, a full list of said indebtedness and obligations being hereto annexed and hereby referred to and made a part of this conveyance, as showing the debts and liabilities intended hereby to be secured. Now, if the said Majors shall pay, or cause to be paid, each and all of the aforesaid debts and obligations, and every part thereof, together with all interest thereon, on or before the first day of November next, then this conveyance shall be void, and the property hereby conveyed shall be released at the cost of the said party of the first part and re-delivered and re-transferred to said Majors, his assigns or legal representatives. But, if the said Majors shall not well and truly pay, or cause to be paid, each and all of the aforesaid debts, and every part thereof, together with all interest thereon, on or before the first day of November, 1861, then this conveyance shall remain in full force and effect; and, in the event of such default, the said Street, trustee as aforesaid, may proceed to sell, either at public or private sale, for cash or on reasonable credit, any, and all, or so much as may be necessary, of the property hereinbefore

described and conveyed, at such place and places, and at such time and times, as said trustee may deem best; and, if sold publicly, he shall give such notice of the time, and place, and terms of sale as he may deem reasonable under the circumstances. And it is further provided, that said Street of the second part, shall, at once, after the execution and delivery hereof, proceed to take possession of all the property and debts hereby conveyed, and to collect the debts hereby transferred, with as little delay as practicable. * * * And, after paying the expenses for the creation and execution of this trust, he shall pay off whatever shall remain in arrears, unpaid on the debts and liabilities herein secured, provided the funds arising from this trust be sufficient therefor; and, if not sufficient, then *pro rata* on said debts; and the remainder, if anything, whether of money, property, or choses in action, shall be returned to said Majors, his assigns or legal representatives."

In the year 1867, Alexander Majors filed his petition in the United States district court for the state of Nebraska, praying that he might be adjudged a bankrupt within the provisions of the act of March 2, 1867. In the schedule of assets, no mention is made of any indebtedness from Holly to Majors. On the twenty-fifth day of May, 1868, he received a certificate of final discharge from all debts provable under the act, which existed on the thirteenth day of September, 1867. Section 19, of the act of March 2, 1867, requires the petitioner to annex a schedule, verified by oath, to his petition, which shall contain: "a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and if not known, the fact to be so stated, and the sum due each creditor; also the nature of each debt or demand, whether founded on written security, obligation or otherwise, and also, the true cause and con-

sideration of such indebtedness in each case, and the place where such indebtedness accrued; and a statement of any existing mortgage, pledge, lien, judgment, or other collateral, or other security, given for the payment of the same; and shall also annex to his petition an accurate inventory, verified in like manner, of all his estate, both real and personal, assignable under this act, describing the same, and stating where it is situated, and whether there are any, and if so, what, incumbrances thereon."

The trustee of an express trust may bring an action in his own name, without joining the name of the assignor; but the trust in this case was to apply the property of Majors to the payment of his debts. On payment of the debts the trust should cease and determine; and the property remaining in the hands of the trustee should be re-assigned to Majors. A discharge under the bankrupt law operates in discharging the bankrupt from all debts provable against his estate, which existed at the time of filing the petition. The discharge, therefore, has the same effect as payment of the debts; and the trusteeship of Street ceased at that time. The law requires actions to be prosecuted in the name of the real party in interest. It is clear, that whatever property, or choses in action, remained in the hands of Street at the time of the discharge belonged to Majors. If he has made a fraudulent concealment of his property, it may afford grounds to impeach and set aside the discharge; but it cannot be assailed in a collateral proceeding. It is apparent, therefore, that the action should be brought in the name of Majors, unless it should be made to appear, that these debts survived the discharge, and are to be paid out of the property conveyed to Street in trust, of which there is no proof.

Objection is made by the defendant in error, that the plaintiff in error, having taken a stay of execution, has

waived the errors, if any existed; and is thereby precluded from prosecuting a petition in error in this court. This question arose in *White v. Blum*, 4 Neb., 558, and the court held, that 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.

It is unnecessary to review the case farther. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

GANTT, J., having been of counsel in the court below, did not sit.

THE STATE OF NEBRASKA, EX REL. FRANK W. BARNES, v. SAMUEL H. THATCH AND OTHERS.

1 **Removal of County Seat:** PRACTICE: AFFIDAVIT FOR CONTINUANCE. A party who charges that an election for the re-location of the county seat of M. county was carried in favor of M. by fraudulent means, must state the facts on which he bases his charge; and an affidavit for a continuance of an application for a peremptory writ of mandamus to compel the removal of the county records and offices to M., the place declared by the county commissioners to be the county seat, is not sufficient where it merely states that the affiant is informed and *believes* that a greater number of fraudulent votes were cast in one of the precincts of said county in favor of M. than the entire majority in favor of that place, and that certain votes were cast in favor of B. that were not counted.

2. ———: ———: ———. If it should be clearly made to appear that the number of fraudulent votes cast in favor of M. were sufficient to give that place a majority, it would be sufficient grounds to refuse relief.

ORIGINAL application for mandamus.

W. M. Robertson, for the relator.

J. K. P. McCallum, for respondents.

MAXWELL, J.

The petition alleges that at a meeting of the board of county commissioners of the county of Madison, held at Norfolk, in said county, on the fifteenth day of October, 1875, the following proceedings were had, viz.:

"Whereas, it appears from said election returns, and from the result of the count, that due and legal notice has been given of said election; and whereas, it further appears that at said election the question of the relocation of the county seat of Madison county was duly and legally submitted to the voters of said county; and whereas, it further appears from said returns that the town of Madison, Madison county, Nebraska, received at said election three hundred and sixty-eight votes for county seat, and the same being a majority of all the votes cast at said election on the question of the re-location of the county seat of said county, it is found that the county seat of Madison county is re-located and removed from the town of Norfolk, in said county and state, to the town of Madison, in Madison county, Nebraska. And it is hereby ordered that on the first day of January, 1876, the records, books, papers and archives of the different county officers of said county be removed to said town of Madison, by the officers having the same in charge; and that from and after the first day of January, 1876, all county officers shall hold their offices at said town of Madison, and shall transact all county and public business at said town of Madison." It is also alleged "that Samuel H. Thatch is the county

clerk of said county; that Andrew J. Thatch is the treasurer thereof; that John D. Hale is the sheriff, and J. K. P. McCallum is the county judge of said county. * * That it became the duty of the county officers aforesaid, on the first day of January, 1876, to remove their respective offices, and all county records, papers and property in their offices, to the town of Madison aforesaid. On the contrary, however, the officers aforesaid have utterly neglected, failed and refused, and they still fail, neglect and refuse to remove their respective offices, and all county records, papers and property in their possession, and to comply with the order of the commissioners aforesaid; and that they still hold all county records, papers and property in their offices and charge at the town of Norfolk, in said county; and they perform all of the duties pertaining to their said offices at the town of Norfolk aforesaid contrary to the order of the commissioners aforesaid, and contrary to the provisions of Sec. 9 of the act approved February 24, 1875. Wherefore, petitioner prays that writs of mandamus may issue against said defendants," etc.

The application for the writ was made on notice to the defendants, who appeared and moved for a continuance of the cause; and in support of the motion filed an affidavit of one of the defendants, wherein the affiant states they "are unable at this time to state whether said elections were legally called and conducted or not; or whether the meetings and doings of the commissioners were valid, as set forth in the affidavit; and affiant further states that from information the said elections were not legally conducted, and says that the town of Madison did not receive a majority of the votes at the last election, nor a greater number than the town of Battle Creek, in said county; but that, on the contrary, the town of Battle Creek received the larger number of votes; and this affiant says a suit in equity is now pend-

ing to determine all the questions involved in the said elections, and that proceedings to contest said election have been commenced and are now staid by this injunction; that there is a good and sufficient defense to said petition of the relator; and upon information and belief states that in the precinct of Union, the precinct in which the town of Madison is situated, there were fraudulent votes polled and counted for Madison, as the county seat, to the number of at least eight or ten; and that a number of *bona fide* votes, at least four or five, in said precinct were cast for the town of Battle Creek as the county seat, and were not returned by the precinct board and counted for Battle Creek."

The contest in this case was betweeen Battle Creek and Madison. If it was made to appear clearly that a sufficient number of illegal votes had been cast in favor of Madison to give that place a majority of all the votes cast at the election, on the question of the re-location of the county seat, it would be sufficient cause for this court to refuse its aid to enforce the removal of the county records and officers to such place. But a party who charges that an election has been carried by fraudulent means must state the facts on which he basis his charge. This election took place in October last. The defendants have had ample time to ascertain the names of the illegal voters who voted at the election, if any such there were; but it is apparent that they know of none.

The motion for a continuance is, therefore, overruled, and no defense having been shown to the action a peremptory writ of mandamus is awarded.

WRIT AWARDED.

CHAMBERS B. BEACH, PLAINTIFF IN ERROR, v. J. M. CRAMER, DEFENDANT IN ERROR.

1. **Jurisdiction of Probate Court.** The probate court, under the provisions of sections 7–11 of the act approved March 3, 1873, in relation to powers and jurisdiction of probate courts, has a distinct jurisdiction, as to the amounts authorized to be recovered, from that of a justice of the peace; its jurisdiction extends to cases where the amount *claimed* in the petition or bill of particulars exceeds one hundred dollars.

2. ———: HOW DETERMINED: COSTS. The amount claimed in the petition or bill of particulars determines the jurisdiction, yet if the verdict is for less than one hundred dollars the plaintiff is entitled to judgment thereon, but the court can render no judgment for costs in his favor. *Geere v. Sweet*, 2 Neb., 77, cited and approved.

ERROR from the district court of Lancaster county. Tried below before POUND, J. The opinion states the case.

Lamb, Billingsley & Lambertson, for plaintiff in error.

C. C. Burr and *M. H. Sessions*, for defendant in error.

MAXWELL, J.

This action was commenced by the plaintiff against the defendant in the probate court of Lancaster county to recover the sum of $250. The case was tried at the July term, 1875, of said court, and judgment rendered against the defendant for the sum of $100. The defendant appealed the case to the district court of Lancaster county. On the trial of the cause in the district court the plaintiff recovered the sum of $20; the court thereupon rendered judgment that the plaintiff pay his own costs in the case. The case is brought into this court by petition in error.

The only question that it is necessary to consider is, whether the increased jurisdiction of the probate court, giving it concurrent jurisdiction with the district court in sums exceeding $100 and not exceeding $500, constitutes it as to that class of cases a distinct court from that merely exercising the ordinary powers and jurisdiction of a justice of the peace. Section seven of the act approved March 3, 1873, in relation to the powers and jurisdiction of probate courts, requires the probate judge in each county to hold a regular term of the probate court at his office at the county seat, commencing at 9 o'clock A. M., on the first Monday of each calendar month, for the trial of such civil actions brought before such court as are not cognizable before a justice of the peace. Section eight provides that in all civil actions commenced in said court, wherein the sum exceeds $100, it shall be the duty of the probate judge to issue a summons returnable on the first day of the next term of said court, if there be ten days intervening between the issuance of the summons and the first day of the term, and if not, then to be made returnable on the first day of the term thereafter. Section ten provides that in all civil actions where the amount claimed exceeds one hundred dollars, the plaintiff, his agent or attorney shall, before the summons is issued therein, file in such court a bill of particulars, setting forth in ordinary and concise language his demands; which bill of particulars shall be verified in like manner as a petition in the district court. Section eleven provides for filing motions and demurrers. Section seventeen provides for stay of execution on judgments exceeding $100 in like manner as upon judgments rendered in the district court.

It is apparent that the court referred to in these sections has a distinct jurisdiction, as to the amounts authorized to be recovered, from that of a justice of the peace; and that its jurisdiction extends to cases where

the amount *claimed* exceeds $100. But while the amount claimed in the petition or bill of particulars determines the jurisdiction, yet the court having acquired jurisdiction of the subject matter and the parties, if the verdict is less than $100 the plaintiff is entitled to judgment thereon, but the court can render no judgment for costs. Section 621 of the code of civil procedure provides that if it shall appear that a justice of the peace has jurisdiction of an action, and the same has been brought in any other court, the plaintiff shall not recover costs. This question was before this court in *Geere v. Sweet*, 2 Neb., 77, and the decision in that case meets our approval. See, also, *Brunaugh v. Worley*, 6 Ohio State, 598; *Butler v. Kneeland*, 23 Ohio State, 196. The design of the law is to abolish not only fictitious issues, but fictitious claims. And if a party under the pretext of having sustained heavy damages, brings his action in the district or probate (county) court claiming more than $100, and on the trial recovers less than $100, he is not entitled to costs. The judgment of the district court is right, and must be affirmed.

JUDGMENT AFFIRMED.

JOHN A. CREIGHTON, ADMINISTRATOR OF THE ESTATE OF EDWARD CREIGHTON, PLAINTIFF IN ERROR, v. J. L. NEWTON, G. W. FORBES, AND OTHERS, DEFENDANTS IN ERROR.

1. **Practice:** MOTION FOR NEW TRIAL. To obtain the review of a case in the supreme court, a party dissatisfied with either the verdict or judgment in such case, must file the proper motion and in this way present the questions of law fairly and fully to the court below.

2. **Pleading:** REPLEVIN. Under the statute, upon a plea of general denial, in actions of replevin, the defendant may have affirmative relief in damages.

ERROR from the district court of Douglas county. Tried below before LAKE, CH. J.

C. A. Baldwin and *E. Wakeley*, for plaintiff in error.

George W. Doane, for defendants in error.

GANTT, J.

This is an action of replevin, brought by plaintiff in error against the defendants. Defendant Forbes, pleaded a general denial, and defendant J. L. Newton pleaded specially. The verdict of the jury is, substantially, that the plaintiff was entitled to the property, subject, however, to a lien thereon by defendant Forbes, and the jury found the amount of the lien to be $546.35. No motion was filed by the plaintiff in respect to the verdict or judgment, in the court below; but, after judgment was rendered, he excepted to the judgment in favor of defendant Forbes, for the amount of his lien on the property. This exception certainly goes to the finding of the jury as being either irregular or void, or as not being supported by the evidence; but the record contains no evidence in the case, preserved by a bill of exceptions. In *Singleton v. Boyle*, 4 Neb., 415, it is said that "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."

The rule is well settled that "before a party is entitled to be heard in this court, he must have exhausted his remedy in the court below." If he is dissatisfied with the verdict or judgment, he must by motion present the questions of law fairly and fully to the court below, and as no such course has been taken by the plaintiff in the court below, the judgment must be affirmed. *The Midland Pacific R. R. Co. v. McCartney*, 1 Neb., 404. *Mills*

v. Miller, 2 Neb., 299. *Cropsey v. Wiggenhorn*, 3 Neb., 108.

It may, however, in answer to the main question raised in the case, be observed, that under the statute upon the plea of a general denial, in an action of replevin, the defendant may have such affirmative relief in damages as may be right and proper under the evidence, and therefore it is unnecessary to amend the answer of defendant Forbes. *School District v. Shoemaker*, *ante*, p. 36.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. J. M. MCKENZIE, V. J. C. MCBRIDE, STATE TREASURER.

School Fund: CONSTITUTIONAL LAW. Sections three and four, Article VIII, of the Constitution, must be construed so as to apply the rents of unsold school lands to the support and maintenance of common schools throughout the state, and not to be vested in the permanent school fund.

APPLICATION for mandamus.

George H. Roberts, *Attorney-General*, for the relator.

J. C. McBride, in person.

GANTT, J.

This is an original application for a writ of mandamus against the defendant, as state treasurer. The relator states that there is now in the state treasury a certain amount of money, accrued from leasehold of school lands of the state, subject to apportionment and division among the several counties of the state; and that the defendant refuses to pay out the said money

upon the apportionment made by the relator, according to the enumeration of the youth of the said several counties.

The refusal of the defendant to credit this money as demanded, for the support and maintenance of the common schools throughout the state, and pay over the same upon the apportionment made by the relator as superintendent of public instruction, is grounded on the second subdivision of section three, article VIII, of the new constitution. This section provides, that "the following are hereby declared to be perpetual funds for common school purposes, of which the annual interest or income only can be appropriated, to wit: * * * *Second*—All moneys arising from the sale *or leasing* of sections number sixteen and thirty-six in each township in the state, and the lands selected, or that may be selected in lieu thereof." But section four of this article declares, that "all other grants, gifts and devises that have been, or may hereafter be made to this state, and not otherwise appropriated by the terms of the grant, gift, or devise, the interest arising from all the funds mentioned in the preceding section, *together with all the rents of the unsold school lands*, and such other means as the legislature may provide, shall be *exclusively* applied to the support and maintenance of schools in each school district in the state."

Now, when these sections are considered in connection with the former legislation in relation to the school funds, it seems clear, that the word "leasing" in the third section, and the word "rents" in the fourth section, are used as synonymous terms; and, therefore, in respect to the objects to which the money arising from the leasing or renting of the unsold school lands shall be applied, there is a clear, direct conflict in the sections. The one places the money in the permanent school fund of the state; and the other declares that it shall be

exclusively applied to the support and maintenance of common schools throughout the state.

What was the intent of the law-makers in respect to the use to which this money should be applied? Section seven of the article of the constitution referred to, provides, that "provision shall be made by general law for an equitable distribution of the *income* of the fund set apart for the support of common schools, among the several districts of the state." Again, section seventeen of the legislative act relative to school funds, approved June 24, 1867, authorizes the county commissioners of the several organized counties to lease school lands upon certain conditions, one of which is, that the lessee pay for the use of the land the annual rate of six per cent upon the appraised value thereof; and it is provided, that, at the expiration of every five years, the land shall be appraised, and the "valuation made by the appraisers shall (provided it be not less than the former appraisement), be the basis of the *rental* for the five years succeeding." It seems that this section was intended to secure an annual rent or income from the unsold school lands and thereby increase the means applied to the support and maintenance of common schools of the state; and these rents have heretofore been uniformly so applied and used. And this source of support to the schools does not, in any way, affect the grant of lands to the state for school purposes; it does not diminish the proceeds arising from the sale of these lands, nor in any manner impair the fund, which is by the constitution declared to remain forever inviolate, as a perpetual fund for school purposes.

Rent is said to be a certain yearly profit arising out of lands and tenements as a compensation for the use thereof, and therefore is properly termed an *income;* hence, it may be included in the distribution of school money authorized by section seven above referred to.

Upon an examination of the constitution in respect to the question propounded, and in view of the condition of things existing at the time the constitution was framed and adopted, as well as in accordance with the rule of construction of statutory law, we must conclude that section four, article VIII, clearly expresses the intent of the law-makers as to the specific objects to which the money arising from the rental of school lands must be applied, and this section must prevail.

PEREMPTORY WRIT GRANTED.

THOMAS KANE, TREASURER OF CHEYENNE COUNTY, AND OTHERS, PLAINTIFFS IN ERROR, v. THE UNION PACIFIC RAILROAD, DEFENDANT IN ERROR.

1. **Practice:** APPEARANCE OF DEFENDANT. In an action against a public officer, brought in a different county from that in which he resides and holds his office, for a wrongful act done by him under color of his office, if he voluntarily appears and pleads to the merits of the case he thereby waives all objections to the jurisdiction of the court.
2. **Official Bonds:** LIABILITY OF PRINCIPAL AND SURETIES. In such case the liability of both principal and sureties in his bond, is original and primary; and the action lies against both without having first sued the officer for the tort.
3. ———: ———. The exaction of illegal fees by an officer, under color of his office, is a breach of a condition in his bond providing that he shall faithfully and impartially, without fear, favor or oppression, discharge the duties required of his office by law.
4. **Fees of County Treasurer.** Under the revenue laws, a collector of taxes has not the right to demand and receive from the taxpayer the commissions and five per cent penalties, unless he has made a "distress and sale" of the taxpayer's property in payment of his taxes. A mere levy and payment without sale do not entitle the officer to these penalties.

ERROR to the district court for Douglas county. Tried below before LAKE, CH. J. The case is stated in the opinion.

J. L. Webster and *George W. Doane*, for plaintiffs in error, cited the various sections of the revenue law bearing upon the duty of the county treasurer in the collection of taxes, and *Thomas v. Auditor of Hamilton County*, 6 Ohio State, 113.

E. Wakeley and *Leavitt Burnham*, for defendant in error, cited *The People v. Schuyler*, 4 New York, 173. *Harris v. Hanson*, 11 Me., 241. *Ohio v. Jennings*, 4 Ohio St., 418. *Skinner v. Phillips*, 4 Mass., 69. *State v. Shacklett*, 37 Mo., 280. *Strunk v. Ocheltree*, 11 Iowa, 158. *Briley v. Copeland*, 14 Ill., 38. *Van Pelt v. Littler*, 14 Cal., 194. *Bartlett v. Hunt*, 17 Wis., 214.

GANTT, J.

On the first day of May, 1874, the taxes of the defendant in error became delinquent in Cheyenne county, and on the second day of the same month and year, the plaintiff in error, Thomas Kane, the treasurer of said county, and collector of taxes therein, seized and levied on four locomotives of the defendant for the payment of said tax, and for his fees in collecting the same. On the sixth day of the same month the defendant offered to pay all the said tax; but the plaintiff refused to receive the same and release the property so levied, unless it also paid certain fees and penalties charged against it, which the defendant alleges were illegal and unauthorized by law; and on the day last mentioned, the defendant paid said tax, and also, under written protest, paid all the fees and penalties exacted by the plaintiff, in order to redeem its property from the levy thereon. This action was brought to recover the fees and penalties so paid under

protest. In the answer to the petition it is alleged that the fees and penalties exacted by plaintiff were, and are, legal and authorized by law; that the parties, who are the sureties of Kane are not liable in this action; and the district court of Douglas county, in which the cause was pending, had not jurisdiction of the case.

The record shows that the plaintiffs in error voluntarily appeared in the case and demurred to the amended petition, on the ground that the same did not state facts sufficient to constitute a cause of action against them; and this demurrer being overruled, they filed their answer to the petition. This appearance and pleading to the merits of the case, constitutes a clear and absolute waiver of all objections to the jurisdiction of the court. *Fee v. Big Sand Iron Co.*, 13 Ohio State, 563. *Harrington v. Heath*, 15 Ohio, 483.

The next question is: are the sureties in the bond of Kane as treasurer liable for his official misconduct in the exercise of his official duties? The latter clause in the bond provides, that "he shall faithfully and impartially, without fear, favor, fraud, or oppression, discharge all the other duties, now or hereafter, required of his office by law." Cooley, in his Treatise on Taxation, 500, says that the liability on the bond must be governed by its conditions. 2 Bouvier Institutes, 57–8. But section nine, of chapter VI, of the General Statutes, provides, that "all official bonds shall be obligatory upon the principal and *sureties*, for the faithful discharge of all duties required by law of such principal, for the use of any person injured by a breach of the conditions of such bond." And this liability is original and primary, and, therefore, the action may be brought against both the principal and sureties, without having first sued the officer for the tort. *Briley v. Copeland*, 14 Ill., 38. *Van Pelt v. Littler*, 14 Cal., 194. *Bartlett v. Hunt*, 17 Wis., 214. And, again, the rule seems to be well

settled, and is certainly sound in principle, that the exaction of illegal fees under color of office is a breach of such condition as that contained in the bond offered in evidence in this case. *People v. Schuyler*, 4 N. Y., 173. *Charles v. Haskins*, 11 Iowa, 329. *Harris v. Hanson*. 11 Me., 241. *Ohio v. Jennings*, 4 Ohio State, 418. *Skinner v. Phillips*, 4 Mass., 69. *State v. Shacklett*, 37 Mo., 280.

But, are the fees and penalties exacted by Kane, and paid to him by defendant in error under protest, illegal and unauthorized by law? The plaintiffs' answer shows that these fees and penalties are composed of the following items: five per cent penalty, under section fifty of the revenue laws, $953.50; under section five, chapter XXII, of the General Statutes, entitled "Fees," $204.70; for seizure and levy, $1.00; and for expenses in keeping the property, $50.00; making a total of $1209.20. Section forty-nine of the revenue laws (Genl. Stat., 916), provides, that if any person neglect to 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 service as are allowed by law to sheriffs for selling property under execution." Section fifty-two of the same act provides, that the treasurer must give notice of the sale "within five days after the taking, in the manner that constables are required to give notice of the time of sale of personal property in execution: * * * any surplus remaining above the taxes, charges for keeping, and *fees for sale*, shall be returned to the owner;" and section fifty provides, that "the treasurer shall proceed as soon after the first day of May as practicable to make such

delinquent tax out of the personal property of such delinquent," 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." These provisions in regard to the fees and penalties are penal in their nature, and the rule is that penal statutes must be construed strictly; yet, courts must not narrow the construction in such cases, so as to prevent the plain and obvious meaning of the law, or subvert the true intent of the law-giver. *Rex v. Inhabitants of Hodnett*, 1 D. & E., 101. *United States v. Winn*, 3 Sumner, 209. *Pike v. Jenkins*, 12 N. H., 255.

Now, it seems clear, according to the provisions of the statute, that the legal right to exact the commissions and penalties therein mentioned, depends entirely upon the performance of the services required by sections forty-nine and fifty-two. The service, the performance of which entitles the officer to these penalties, is the collection by "*distress and sale*" of personal property belonging to the delinquent taxpayer, first giving the proper notice of such sale. This is the plain, obvious meaning of the language used in these sections; and as there is no provision made for the payment of either commissions or penalty upon a mere levy being made and the payment of the tax money without a sale, there can be no doubt as to the intent of the law-makers. *Vance v. Bank of Columbus*, 2 Ohio, 214. *Converse v Jennings*, 13 Gray, 77. *Wynne v. Miss. and Tenn. R. R. Co.*, 45 Miss., 569. Courts cannot extend the operation of such statutes, or allow compensatory fees in such case, without direct statutory authority.

Therefore, we are clearly of opinion, that the commissions and five per cent penalties, exacted by Kane and paid by defendant to him, were illegal and unauthorized

by law; and that, as the record shows that judgment was rendered only for these commissions and penalty, there is no ground for the reversal of it. As the rulings of the court, in giving some and refusing other instructions prayed, are consistent with the law as we have interpreted it, they afford no ground for disturbing the judgment.

JUDGMENT AFFIRMED.

JOHN HOEHNE, APPELLEE, v. LUDWIG BREITKREITZ, APPELLANT.

1. **Trusts.** B. was authorized by H. to obtain a loan of a certain sum of money on his credit, and with it purchase land for him. B. obtained the loan as authorized and with it purchased the land—taking the title in his own name. H. repaid the loan so obtained on his credit. *Held*, that B. held the title to the land in trust for H., and must convey it to him.

APPEAL from a decree rendered by GRIFFEY, J., sitting in the district court for Cuming county. The case is stated in the opinion.

Crawford & McLaughlin, for the appellant, Breitkreitz.

Under the provisions of our law no trust can be created, nor will any trust be implied, or result, unless the same be made in writing and signed by the party declaring the same, unless by some act or acts of the *cestui que trust*, and the trustee, they bring themselves within the exception named in the statute, to-wit: "unless by act or operation of law." Gen. Stat., 392, Sec. 3.

It is well settled in this country, as in England, that if a person purchasing an estate with his own money,

and the deed is taken in the name of another, the trust of the land results, by presumption, or implication of law to him who advances the money. In short, a trust will result to him who has paid the purchase money. See *Dyer v. Dyer*, 1 Leading Cases in Equity, 138. And this is what is meant in law by a trust created by operation of law, and comes within the exception to the statute, and need not be in writing.

It is also just as well settled in this country, that such a trust, known as a resulting trust, may be established by parol testimony, but such evidence must be of such a character as to scarcely leave a reasonable doubt in the mind of the court, before it will be at liberty to declare a resulting trust upon parol evidence. Such evidence must, in the language of the learned judge delivering the opinion in the case of *Dyer v. Dyer*, above referred to, be full, clear and satisfactory. *Noel v. Noel*, 1 Iowa, 423. *Corbit v. Smith*, 7 Id., 60. *Cooper v. Skeel*, 14 Id., 578. *Childs v. Griswold*, 19 Id., 362. *Monroe v. Graves*, 23 Id., 597. Notwithstanding it is conceded by the weight of authority, both English and American, that such trusts may be shown and established by parol evidence, yet it is admitted by the same weight of authority that the doctrine of resulting trusts from the payment of the purchase money is a very questionable one, and should be acted upon with great caution; and the circumstances from which such a trust is to be raised must be clearly proved. 1 Leading Cases in Equity, 273, and cases there cited.

The whole foundation of a resulting trust from having paid the purchase money, is the payment of the money by the *cestui que trust* or by the trustee, with funds which are, in equity, the funds of the *cestui que trust.* A parol agreement that another shall be interested in the purchase of lands, or a parol declaration by the purchaser that he buys for another, will not create a result-

ing trust. So, if a man takes a conveyance of land in his own name and pays for it with his own money, parol evidence, that he was employed to do this as an agent for another, will not create a resulting trust; and if the party who sets up the trust made no payment he cannot show by parol evidence that the purchase was made for his benefit; for, unless there is something more in the transaction than what is implied from the violation of a parol agreement, there is no resulting trust.

Payment of the purchase money must be made at or before the time of purchase; a subsequent payment will not do. The trust must have been coeval with the deeds, or it cannot exist at all. After a party has made a purchase with his own money, or credit, a subsequent tender, or even reimbursement, may be evidence of some other contract, but it cannot by any retrospective effect produce the trust of which we are speaking. There never was an instance of such a trust so created, and there never ought to be. Such trust results only when the purchase is made with the proper monies of the *cestui que trust* and the deed not taken in his name, and the resulting trust must arise, if at all, at the time of the execution of the conveyance. Am. Law Reg., 327. Under the law thus laid down we contend that the evidence does not warrant the court in granting the relief prayed for.

Uriah Bruner, argued the cause for appellee, upon a brief prepared by *Stevenson and Valentine.*

Where upon a purchase of property the conveyance of the legal estate is taken in the name of one person, while the *consideration is given or paid by another*, the parties being strangers to each other, a *resulting* or *presumptive* trust immediately arises by virtue of the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration

proceeds. *Baker v. Vining*, 30 Me., 126. *Livermore v. Aldrich* 5 Cush., 435. *Partridge v. Havens*, 10 Paige, 618. *Depeyster v. Gould*, 2 Green's Ch. 480. *Strimpfler v. Roberts*, 18 Penn. State., 283. *Bank v. Carrington* 7 Leigh., 566. *Creed v. Lancaster Bank*, 1 Ohio State, 1.

So if a trustee buy lands with trust-money in his own name, a trust will arise in favor of him for whom he held the trust fund, at his election, and *parol evidence is competent* to show the fact that the purchase was made with trust-money. And this extends to all cases where one purchases lands with another's money and takes the deed himself. There is in such case a trust in favor of the owner of the money. Wash. Real. Prop., 449, note 7, and cases there cited.

GANTT, J.

The plaintiff avers in his petition, substantially, that the defendant agreed to purchase for him and in his name a tract of timber land in Nebraska; that he furnished the defendant with the money to pay for said land; that the defendant with the same money purchased from the United States the northwest quarter of the southwest quarter of section twenty-seven, in township twenty-three, range five east, in Cuming county, and fraudulently took the title of the same in his own name instead of that of the plaintiff; that he is the owner of the said land, and that the defendant holds the legal title thereof in trust for him, and refuses to convey the same to him as he ought to do. The defendant by his answer denies the material allegations of the petition. The court below found for the plaintiff, and rendered a decree accordingly; and the case is now brought into this court upon appeal.

It appears, that prior to the purchase of the land, the

plaintiff resided in the state of Wisconsin, and the defendant resided in Cuming county, Nebraska. The plaintiff testified that by a correspondence between him and the defendant, the defendant agreed to purchase for him the land in question; that he authorized him to obtain a loan of the money to pay for the land from an acquaintance in Cuming county on his credit, which he would repay when he arrived in said county; that the defendant obtained the loan from one John Melcher on his credit as requested, and with it purchased the land, but took the title in his own name, and on demand refuses to convey the same to him; that on his arrival in Cuming county, he repaid to said Melcher the money so borrowed on his credit. He also testified that the letters he received from the defendant, in respect to the matter, were burnt. This is the substance of the plaintiff's testimony, in relation to the purchase of the land, the borrowing of the money, and his repayment of the same; and his testimony is strongly corroborated by other witnesses. The defendant, however, testifies positively, that he had no such correspondence with the plaintiff, in relation to the purchase of the land, and the borrowing of the money on his credit; and says that he borrowed the money from Melcher on his own credit and for his own use, and with it purchased the land for himself; but his testimony in this regard is in conflict with most of the proofs in the case, and to some extent contradictory to his own. Upon being recalled, he testified that since the commencement of this suit he asked one Wilde if he had read a letter sent by him to the plaintiff, and gives his reason for asking the question as follows: "I wanted to find out whether Wilde knew about the letter I had written to Mr. Hoehne; Mr. Hoehne had sued me, and I wanted to know if he, Wilde, knew anything about the letter I wrote to Hoehne about the timber land." He contradicts himself in regard to his

correspondence with the plaintiff respecting the land. In relation to the borrowing of the money for himself and on his own credit, he is directly contradicted by Melcher, the lender, who testifies the loan was made to and upon the credit of the plaintiff alone, and was repaid to him by the plaintiff. Upon these matters the defendant's testimony stands uncorroborated, and to it, perhaps, the maxim, *Falsus in uno, falsus in omnibus*, might be justly applied.

The defendant's testimony in regard to a book account which he claimed to have against the plaintiff (in order to show that the repayment by plaintiff to Melcher was simply the payment of the debt he owed defendant), when examined in connection with the book account presented, will not stand the test of honest criticism, and must defeat the very purpose for which it was fabricated and intended. His own testimony shows the account to have been very recently made up, though it purports to run from 1862 down to 1868, inclusive. The testimony also shows that the loan was obtained from Melcher about the last of December, 1866, and soon thereafter the money was sent to the U. S. land office, at Omaha, but the land then being withheld from sale, the certificate of entry was not issued until the following June; that when it was issued, the defendant delivered it to the plaintiff, who after holding it some time returned it to the defendant upon his promise to execute a deed conveying the title to plaintiff; and that defendant has ever since refused to do so. If the defendant was the owner of the land, or had any interest in it, why did he deliver the certificate of entry to the plaintiff? Why, on return of it to him, did he promise to execute the deed to the plaintiff?

We are satisfied that the proofs in the case very clearly and satisfactorily show that the correspondence was had between the parties in respect to the land; and the de-

fendant was authorized by the plaintiff to obtain from an acquaintance residing in Cuming county, on the credit of plaintiff, the loan of money to pay for the land; that the money was so obtained by defendant from J. Melcher, for and upon the credit of the plaintiff alone; that with the same money the defendant purchased the land in question for the plaintiff, but fraudulently took the title to the same in his own name; and that the plaintiff repaid Melcher the money so loaned to him. It was the plaintiff's money that paid for the land; the land was purchased for him, but the title was fraudulently taken in the name of defendant. It must be borne in mind that the gist of the plaintiff's action is, not that of a verbal agreement creating a trust, but that of a resulting trust by operation of law only. The rule is not questioned that such resulting trust by operation of law may be established by parol proof; but such proof should be received and examined with great caution; it should be sufficiently clear, satisfactory, and conclusive, to establish the trust. We think the proofs bring this case within the rule, and clearly establish a resulting trust in favor of the plaintiff; and therefore, the finding and decree must be for the plaintiff.

DECREE ACCORDINGLY.

THE ATCHISON & NEBRASKA RAILROAD COMPANY, PLAINTIFF IN ERROR, v. HENRY WASHBURN AND G. W. LEIHY, DEFENDANTS IN ERROR.

1. **Common Carriers.** An incorporated railroad company is a common carrier as to all property within the scope of its chartered powers, and it cannot by special agreement divest itself of such character, and therefore it is liable for the negligence of its servants.

2. ———. When such company undertakes to carry live stock for hire, the fact that it does so establishes its relation as a common carrier, with the duties and obligations which grow out of it.

3. **Practice:** NEW MATTER IN DEFENSE. All new matter, constituting an entire or partial defense to a cause of action, must be concisely and distinctly set up in the answer, and is not admissible under a general denial.

4. ———: EVIDENCE. A mere difference of opinion as to the weight of evidence between a reviewing court and the court which tried the cause, is not sufficient to reverse a judgment. To do so, the preponderance of evidence must be clear, obvious, and decided, or so great as to indicate prejudice, partiality, or corruption.

5. ———: REVERSAL OF JUDGMENT. A judgment will not be reversed on the ground that the finding or verdict is contrary to the evidence, unless it manifestly is so; and the reviewing court will always hesitate to reverse when doubts as to its propriety arise out of a conflict in oral evidence.

6. ———: OATH OF REFEREE. If the contrary does not appear, it will be presumed that a referee who tried the cause was properly sworn. If a party appears before a referee and proceeds with the reference to a final conclusion of the case, he waives all right to object to the report on the ground that the referee was not sworn.

ERROR from the district court of Lancaster county.

IT was an action brought by Washburn and Leihy against The Atchison & Nebraska Railroad to recover damages for injury to certain horses and mules received from them by said railroad company as common carriers

to carry over its railroad. The railroad answered denying that it received said stock from said Washburn and Leihy, but averred that it received the same from the Atlantic and Pacific Railroad under a special written contract made by that company with said Washburn and Leihy, of which the following is a copy:

"This agreement, made this 3d day of April, A. D. 1873, between the Atlantic and Pacific Railroad Company, party of the first part, and Washburn and Leihy, parties of the second part, witnesseth:

"That the party of the first part will forward for the party of the second part the following freight, to wit:

"(3) Three cars mules—(58) Mar. L, from St. Louis stock yards to Atchison, at the rate of $40—forty dollars per car. Through to Omaha for $80, and which is a special rate made expressly in consideration of this agreement, in consideration of which, the party of the second part agrees to take care of said freight while on the trip, and load and unload the same at his or their own risk and expense, and that the party of the first part and connecting lines over which such freight may pass shall not be responsible for any loss, damage, or injury, which may happen to said freight in loading, forwarding, or unloading, by suffocation or other injury caused by overloading cars, by escapes from any cause whatever, by accident in operating the road, or delay caused by storm, fire, failure of machinery or cars, or obstruction of the track from any cause, or by fire from any cause whatever, or by any other cause except gross negligence, and that said party of the first part and such connecting lines shall be deemed merely forwarders, and not common carriers, and only liable for such loss, damage, injury, or destruction of such freight as may be caused by gross negligence and not otherwise. And said party of the second part agrees to assume all risk of damage or injury to, or escape of, the live stock

which may happen to them while in the stock yards awaiting shipment."

The cause was referred to George H. Roberts, referee, to determine all the issues between the parties. It is unnecessary to set forth the evidence in detail. There was testimony tending to show that the damage was caused by one of the cars being thrown from the track near Doniphan, Kansas, and in consequence thereof several of the animals afterwards died. The referee found for the plaintiffs below, and assessed their damages at $1900. Judgment was rendered on his report by POUND, J., and the cause was brought here by the railroad upon petition in error.

S. B. Galey, with whom was *R. E. Knight* and *James E. Philpott*, for plaintiff in error, cited *Davidson v. Graham*, 2 Ohio State, 131. 1 Greenleaf Evidence, Secs. 66, 68. 3 Id., Sec. 11. Wharton on Neg., Sec. 421, and notes. *French v. Buffalo*, 4 Keyes, 108. *Squire v. Hollenbeck*, 9 Pick., 551. *City of Lowell v. Parker*, 10 Metcalf, 309. *Baltimore and Ohio Railroad v. Rathbone*, 1 West Virginia, 87. *Smith v. N. Y. C. R. R. Co.*, 29 Barb., 132. *Knell v. United States and Brazil Steamship Co.*, 33 New York Superior Court, 423. *Graham v. Davis*, 4 Ohio State, 362. ***Yates v. Shepardson*, 27 Wis., 239.**

George E. Pritchett, for defendant in error, cited *Wolfe v. Supervisors*, 19 How., Pr., 370. *Richards v. Westcott*, 2 Bosw., 602. *Johnson v. Hudson R. R. Co.*, 5 Duer, 21. *Durant v. Palmer*, 29 New Jersey Law, 544. *Pennsylvania R. R. v. McTighe*, 46 Penn. State, 316. *Same v. Weber*, 76 Id., 157. *Milwaukee and Chicago R. R. v. Hunter*, 11 Wis., 160. *McKyring v. Bull*, 16 New York, 297. *Glazer v. Clift*, 10 Cal., 303. *Brazill v. Isham*, 12 New York, 9.

GANTT, J.

The plaintiff in error, alleged in its answer, filed in the court below, that it received the stock from the Atlantic and Pacific R. R. Co., with whom the defendants in error had agreed that the said company, and all connecting lines over which the stock should be transported, should be deemed merely forwarders and not common carriers, and only liable for such damage or injury of such freight as may be caused by gross negligence only, and not otherwise; and the plaintiff in error also plead some denials, which will hereinafter be noticed.

The two main questions raised by the pleadings and the record are:

I. Whether, under the agreement set up in the answer, the plaintiff is released from the responsibility of a common carrier, in transporting the defendants' property over its railroad, and not answerable for damages to such property, occasioned by its negligence; and,

II. Whether certain testimony, offered by plaintiff on the trial, was improperly rejected by the referee, before whom the cause was tried.

In support of the agreement referred to in the first proposition, it is claimed, that there is a legal distinction between gross and ordinary negligence; and this view has the support of some authorities. But we think, that "strictly speaking, these expressions are indicative, rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, and stupidity which he exhibits;" and, therefore, by whatever name it may be called, it is under every such name a "failure to bestow the care and skill which the situation demands; and, hence, it is more strictly accurate perhaps to call it simply negligence." It is in its proper philological meaning, simply

negligence of a greater or less degree, nothing more and nothing less.

The common law fixed the degree of care and diligence due from railroad companies as common carriers; and a failure to exercise this care and diligence is negligence, without any legal distinction as being gross or ordinary; and the better rule of law, sustained by the weight of authority, is, that "it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty."

In *Farnham v. Camden and Amboy R. R. Co.*, 55 Pa. St., 62, it is said, "that a common carrier cannot limit his liability so as to cover his own, or his servant's negligence." *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St., 315; and the same general rule is held in Ohio. *Davidson v. Graham*, 2 Ohio St., 139. *Welsh v. Pittsburg, Fort Wayne, and Chicago R. R. Co.*, 10 Ohio St., 75, 76. *Cleveland R. R. Co. v. Curran*, 19 Ohio St., 1, 12, 13.

When a carrier has an established business for carrying articles or property, and "especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the property is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." It cannot put off the essential duties of its employment. In some cases decided more recently in the state of New York, the courts have departed from the common law rule in respect to the liability of common carriers, and their power to make special contracts exonerating themselves from negligence; and some other state courts have followed, more or less closely, these decisions; and we are now asked to follow these authorities. On the contrary, we think the

weight of authority so clearly sustains the view we have taken of the law, and the doctrine is so well established, that it is unnecessary now to enter upon an extensive discussion of the question We shall conform our decision in this case to that of the supreme court of the United States, in the case of *Railroad Company v. Lockwood*, 17 Wallace, 357, where will be found an elaborate and able review and discussion of the whole subject.

As the agreement set up in the answer is in violation of law and against public policy, it does not change the character of the plaintiff from that of a common carrier to that of a bailee for hire. Hence, such agreement does not lessen the plaintiff's responsibility as such common carrier, nor remove its liability for negligence of its servants.

In regard to the transportation of live stock by a railroad company, we approve and adopt the rule stated in the case of *Kimball v. Rutland and Burlington R. R. Co.*, 26 Vt., 247, 254, in which it is said, that "it is immaterial, whether the transportation of cattle is regarded as their principal employment, or whether it is incidental and subordinate; the fact that they have undertaken such transportation for hire, and for such persons as choose to employ them, establishes their relation as common carriers, and with it the duties and obligations which grow out of it." The same doctrine is held in: *Kansas Pacific Railway Co. v. Reynolds*, 8 Kan., 634. *Same v. Nichols, Kennedy & Co.*, 9 Kan., 248. *Wilson v. Hamilton*, 4 Ohio St., 722. *Palmer v. Grand Junction Railway Co.*, 4 M. & W., 749.

The second proposition is, whether the testimony offered by the plaintiff was improperly rejected by the referee. On the trial of the cause before the referee, the plaintiff in error called two witnesses; and "offered to prove by them, that the injury to the mules and horses, which defendants in error claimed were injured, was

due to the fault and neglect of said defendants to feed and water and take proper care of the mules." To this testimony the defendants objected, the objection was sustained and the plaintiff in error excepted. It seems clear, that this offer contains new matter, which, if true, would constitute a complete defense to the action. It admits the injury complained of, and seeks to avoid all liability by proof of new matter which would defeat the cause of action. In *Piercy v. Sabin*, 10 Cal., 27, it is said, that "new matter is that which would defeat the cause of action." In *Stoddard v. Onondaga Annual Conference*, 12 Barb., 576, it is said, that "new matter constituting a defense, under the code, must be taken to mean, some fact, which the plaintiff is not bound to prove, in order to make out his cause of action, and which goes in avoidance or discharge of the cause of action alleged in the complaint." No doubt the rule is correctly stated in the above cases, and is consistent with the general principles of pleading; and the above offer is clearly within the rule.

Now the first and second counts in the answer set up new matter in respect to the manner and terms upon which the stock was received to be carried over its road, and deny that the defendant in error sustained any damages or suffered any loss or injury to said mules through the fault or negligence of the plaintiff in error, and the third count denies that the mules and horses were injured and damaged as alleged in the petition, and that defendant in error sustained any damage by reason of injuries received by said mules or horses on the line of its road. It is contended that these denials are tantamount to a general denial; and that, under such plea, the testimony offered is admissible: 1. To negative the averment in the petition that the stock was injured by the negligence of the plaintiff in error, and, 2. To affect and mitigate the damages.

Suppose the pleading be taken as amounting to a general denial, then, is the new matter contained in the offer admissible, under such plea, for the purposes contended for? Now, I apprehend that, under the code, a general denial goes only to every fact stated in the petition, which the plaintiff is under the necessity of proving in order to sustain his cause of action; that such denial is intended only to controvert every material fact alleged in a good petition and no more; and, therefore, that all new matter must be set up affirmatively in the answer.

The code provides that: "The answer *shall* contain:

"*First.* A general or specific denial of each material allegation of the petition controverted by the defendant.

"*Second.* A statement of any new matter constituting a defense, counter-claim, or set-off."

This language is not merely directory; it is imperative, and does not leave it optional with defendant to plead new matter or not; hence, if he would avail himself of new matter as evidence in his defense, he must set it up affirmatively in his answer. It seems clear, that the statute is intended to require each party to make a plain, concise and distinct statement of the facts he intends to prove in order to maintain his cause of action, or his defense to the action, and thereby inform the adverse party of the precise grounds upon which he intends to rely. It is, however, true, that both in England and this country, there was a gradual departure from the earlier doctrine in the science of pleading, and evidence in defense of an action was admitted, under a general *issue*, without much regard to the pleading of facts which constituted new matter of defense. It was an unsafe and unjust departure, giving the defendant undue advantages, which the other party could not foresee and provide against; but the courts of England, it seems, have returned from this departure, and again require new matter, which goes in avoidance or discharge of the

cause of action, to be set up affirmatively. The statute is designed to accomplish the same purpose; and in this regard, it is restrictive in its operation in the admission of evidence. But, under the statute, there is no *general issue*, according to the meaning as applied to it by the rulings under the departure referred to above; it is simply a general denial of all the material allegations stated in the petition, which the plaintiff would be required to prove to make out his cause of action. In *McKyring v. Bull*, 16 N. Y., 308, this question is very elaborately and ably discussed; and it is held that "the word defense, as used in the code, must include partial as well as complete defenses;" and that the law should "be construed so as to require the defendants, in all cases, to plead any new matter constituting either an entire or partial defense, and prohibit them from giving such matter in evidence upon an assessment of damages when not set up in the answer." In *Piercy v. Sabin*, *supra*, after stating that *all* new matter of defense must be pleaded, the court say that "this feature of the code is one of the most beneficial and obvious improvements upon the former system. This classification of defenses is simple, logical, and just. Each party is distinctly apprised of all the allegations to be proven by the other, and each is therefore prepared to meet the proofs of his adversary." *Pier v. Finch*, 29 Barb., 170. *Walton v. Minturn*, 1 Cal., 362.

The testimony offered by the plaintiff in error is not admissible, under a general denial, for the purposes contended for, because it would be evidence of new matter, which admits the injury complained of and goes in avoidance or discharge of the cause of action, and is not set up affirmatively in the answer; and, therefore, it is not deemed necessary now to determine what would be proper evidence in mitigation of damages in this case.

Again, it is contended that the findings of the referee

are against the weight of, and contrary to, the evidence. We have carefully examined the evidence, which seems to be fully set forth in the bill of exceptions, and while we find some conflict in it, we are by no means prepared to say that the findings are contrary to law and the evidence. A reviewing court will not disturb a verdict on the alleged ground that it is contrary to evidence, unless it manifestly is so; and will always hesitate to do so, where doubts as to its propriety arise out of a conflict in oral evidence, and the mere difference of opinion between a reviewing court and the court which tried the cause as to the weight of evidence, is not sufficient to reverse a judgment. To justify such reversal, the preponderance of evidence against the findings must be clear, obvious, and decided, or so great as to indicate prejudice, partiality, or corruption on the part of the referee. Edwards on Referees, 150. *Ide v. Churchill*, 14 Ohio St., 377. *Vansteenburgh v. Hoffman*, 15 Barb., 28.

It is said that the referee was not sworn, and, therefore, the proceedings before him in the case are not valid, and should be set aside. But in regard to this question the record is silent, and hence the presumption is that he was properly sworn, unless the contrary clearly appears. The record, however, clearly shows that the parties appeared before the referee, and proceeded with the reference to a final conclusion in the case; and having done so, without objection on the ground that the referee was not sworn, it must be held that the right to object was waived. *Reed v. Tulford*, 10 Verm., 568. *Putnam v. Dutton*, 8 Id., 396. *Keator v. Ulster and Delaware Plank Road Co.*, 7 How. Pr., 41.

JUDGMENT AFFIRMED.

THE COMMISSIONERS OF JEFFERSON COUNTY, PLAINTIFFS IN ERROR, v. THE PEOPLE EX REL. N. K. GRIGGS, DEFENDANT IN ERROR.

1. **County Bonds:** CONSTITUTIONAL LAW: SPECIAL LEGISLATION. The legislature of 1875 passed an act "authorizing the county commissioners of Jefferson county to provide funds for the payment of certain outstanding warrants of said county," by issuing bonds, selling the same, and using the proceeds in payment of warrants issued to contractors for the erection of a court house and jail: *Held*, that the commissioners having express authority, under the statutes then in force, to contract for the erection of said buildings, and the county being justly indebted therefor, the legislature had full constitutional power to pass the act in question.

ERROR to the district court for Jefferson county. The commissioners of that county in May, 1872, entered into a contract with certain parties for the erection of a court house and jail. In part payment thereof they issued warrants to the contractors upon the court house fund levy of that year. In April, 1873, this levy was stricken from the assessment roll by order of the commissioners, and the county treasurer instructed to return all moneys collected by virtue of said tax to the persons having paid the same. In 1875, the legislature passed the special act set forth in the opinion. Prior thereto the warrants referred to had been assigned to N. K. Griggs, and the commissioners refusing to issue the bonds required by the act, he brought an action of mandamus against them. Judgment below was rendered in his favor, to reverse which the commissioners came here on petition in error.

Brown, England & Brown, for the commissioners.

I. The legislature, in passing the law under which this proceeding is brought, and particularly that portion of the

act which declares the warrants therein mentioned to be valid and binding upon the said county, and finds specifically the amount due upon them, and the manner in which they should be paid, exercised judicial power. It is a usurpation of judicial authority incompatible with the spirit of our government. To adjudicate upon and protect the rights and interests of individuals, to compare the claims of contending parties, and to decide private disputes between them according to the established rules of law, is the peculiar and exclusive province of the judicial department. *Cincinnati etc. R. R. Co. v. Com'rs Clinton Co.*, 1 O. S., 81. *People v. Supervisors of New York*, 16 N. Y., 432. *State v. Adams*, 44 Mo., 570. *Ervine's Appeal*, 16 Penn. State, 266. *Greenough v. Greenough*, 11 Penn. State, 494.

If the act to be performed is the settlement of a claim between contending parties, if it determines or tends to determine disputes between individuals, it is necessary, in order to make such settlement or determination understandingly, to give the parties a chance to be heard, and this can be done only in the courts. The act in question is in the nature of a judicial decree. It finds: *first*, that certain warrants are valid and binding upon said county; *second*, the amount due upon each of said warrants; and *third*, it authorizes and requires the commissioners to bond the county of Jefferson, and dispose of the bonds at ninety cents on the dollar, and with the money thus realized pay these warrants and interest in full. Whether these warrants were "*valid and binding*" on said county depends upon the *construction* of the law as it stood when the act was passed. The amount due upon each of these warrants could only be ascertained by an inquiry into, and a determination of facts between debtor and creditor. As to the bonding that can only be compelled by an absolute despotism, and justified only on the ground that might makes right.

II. We are aware that by virtue of the authority which the legislature has over municipal corporations, it may compel them to raise the necessary means by tax to meet and discharge the obligations properly resting upon them as such, whether they be legal or merely equitable or moral. But we submit that when a demand is asserted against a municipality, though of a nature that the legislature would have a right to require it to incur and discharge, yet if its legal and equitable obligation is disputed, the corporation has the right to have the dispute settled by the courts and cannot be bound by a legislative allowance of the claim. *People v. Haws*, 37 Barb., 440. *Sanborn v. Rice County*, 9 Minn., 273. *Commonwealth v. Pittsburg*, 34 Penn. St., 496. *Plimpton v. Somerset*, 33 Vt., 283. Cooley's Constitutional Limitations, 232-3.

III. The act in question does not purport to legalize the acts of commissioners in issuing these warrants. It simply declares that the warrants are valid and binding upon said county. It cures no defects, dispenses with no formalities, takes away no defenses however technical. It is simply the opinion of the legislature that the warrants are valid and binding upon said county. And it is now insisted that this opinion is conclusive on this court. But we submit that such is not the case. We say that the legislature cannot compel the courts to adopt a particular construction of a law which it permits to remain in force. *Postmaster-General v. Early*, 12 Wheat., 148. *Haley v. Philadelphia*, 68 Pa. St., 45. *Salters v. Tobias*, 3 Paige, Ch., 338. *People v. Supervisors of New York*, 16 N. Y., 424. Cooley's Const. Lim., 94.

E. Wakeley and *N. K. Griggs*, for defendant in error.

I. By the statutes in force in 1872 (revised statutes of 1867, page 42, Sec. 28), the commissioners had express

power to provide for the erection of county buildings and enter into contract therefor.

There being no limitation either express or implied, upon the amount which they might contract to pay for such buildings, and no restriction upon their power to enter into contract therefor, the contract with Dort & Watson was valid. *Kinsey v. Pulaski County*, 2 Dillon C. C., 253. "When power is given to a corporation to do an act, it has a right to do whatever is necessary to accomplish the act." *Ketchum v. City of Buffalo*, 14 N. Y., 356. *Douglass v. Mayor, etc., of Virginia City*, 5 Nev., 147. *People v. The Supervisors of Albany*, 28 Howard's Prac., 22. *First Municipality of New Orleans v. McDonough*, 2 Rob. (La.), 244. *Bank of Chillicothe v. The Town of Chillicothe*, 7 Ohio, 354. *Curtis v. Leavitt*, 15 N. Y., 9. *Mills v. Gleason*, 11 Wis., 470. *State v. Milwaukee*, 25 Wis., 122. Dillon Munic. Cor., 92, 407 (n), 685 (n).

II. The commissioners were expressly authorized by statute to consider, determine and allow claims against the county, for, or growing out of, matters within their jurisdiction (Revised Statutes, 1867, page 37); and persons having claims against the county, should present them to the commissioners for allowance before suit should be brought to recover thereon. *Luzerne v. Day*, 23 Penn. St., 141. *Love v. Commissioners*, 64 N. C., 706.

That the commissioners had power to determine and adjust the claims of the contractors for work, and allow a claim or account therefor, and were the special tribunal empowered by law so to do, seems very clear. If errors were committed by them, so long as they acted within their jurisdiction, they could be corrected only by appeal, or at the most by some direct proceeding. Their action cannot be attacked or inquired into collaterally. In this

case they had power to modify the contract—to enlarge the time of completion—to vary the time or terms of payment with the consent of the contractors—to pay a given amount for the work already done—or pay in advance of the time fixed by the contract for some portion of the work. Hence, the action of the board in November, 1872, was a determination that the amount then allowed, and for which warrants were issued, was due and payable to the contractors. This was a judicial determination and is binding upon the county. *Brewer v. Otoe County*, 1 Neb., 373. *Chase v. Saratoga county*, 33 Barb., 603.

III. The plaintiff in error claims that the act of February 2, 1875, is unconstitutional. It is for the person making the charge to show where the act violates the provisions of the constitution. An act will not be held unconstitutional unless it clearly appears to be so. Dillon's Mun. Cor., Sec. 38. Cooley's Con. Lim., 173. *The People v. Denniston*, 23 N. Y., 247, 251.

IV. Whether or not the commissioners had the authority to issue the warrants, still the legislature had the power to, and did legalize them by retroactive act. The legislature might have authorized the levy of the tax and the issue of the warrants in the first instance; if so, it may legalize them after they are issued. Any act which the legislature may authorize it may by retroactive legislation legalize. Cooley's Con. Lim., Secs. 372–382. *Satterlee v. Mathewson*, 2 Peters, 380. *Bissell v. City of Jeffersonville*, 24 Howard, 287. *Thomson v. Lee County*, 3 Wall., 327. *The City v. Lamson*, 9 Wall., 477. *St. Joseph Township v. Rogers*, 16 Wall., 644. *McMillen v. County Judge*, 6 Iowa, 304. *The State v. Squires*, 26 Iowa, 34.

MAXWELL, J.

Under the issue presented by the pleadings, it is only necessary for us to determine, whether the legislature had authority to pass the special act, approved February 2, 1875, or not.

The act in question provides: "That the county commissioners of the county of Jefferson are hereby authorized and required, on or before the first day of April, 1875, to prepare in due form, and cause to be printed in proper style, a sufficient amount of bonds of said county, which, when sold as hereinafter mentioned, will realize a sufficient amount to pay off the outstanding 'Court-House Fund' warrants, with the interest thereon, mentioned in section four of this act.

"Such bonds shall be for the payment, by the county of Jefferson, of the sums specified therein, and shall be each in amount not to exceed five hundred dollars; shall run not more than five years from the first day of April, 1875, and shall draw interest at the rate of ten per cent per annum, payable annually; said bonds together with the interest due thereon, shall be made payable in the city of New York. Said bonds shall be signed by the chairman of the board of county commissioners, and countersigned by the county clerk of said county.

"The county commissioners of said county of Jefferson shall levy a tax at the time other taxes are levied in the year A. D. 1875, and annually thereafter, sufficient to pay the interest on said bonds when the same becomes due, and they shall also make provision by the levying of taxes for the payment of the principal of said bonds, on or before maturity thereof.

"Said bonds shall be issued by the said board of county commissioners, and shall be sold under their direction, at not less than ninety cents on the dollar. The money arising from the sale of said bonds shall constitute a

fund for the payment of the following county warrants and interest thereon, issued by said county of Jefferson upon the 'Court-House Fund' of said county, which said warrants are hereby declared to be valid and binding upon said county."

In *Darlington v. The Mayor, etc.*, 31 N. Y., 164, the court say: "Let us suppose the city to be the owner of a parcel of land, not adapted to any municipal use; but valuable only for sale to private persons for building purposes, and the like. No one, I think, can doubt but what it would be competent for the legislature to direct it to be sold, and the proceeds devoted to some municipal or other public purpose within the city, as a court-house, a hospital, or the like."

In *Brewster v. The City of Syracuse*, 19 N. Y., 116, the parties had contracted to construct a sewer for the city for an agreed price, which had been fully paid. The city charter prohibited the payment of extra compensation to contractors in any case. The legislature afterwards passed an act authorizing the city council to collect, and pay to the contractor, the further sum of $600.00, in addition to the contract price. The court held the act constitutional.

In *Thomas v. Leland*, 24 Wend., 65, where certain parties had given a bond to the state conditioned to pay the difference in the cost of constructing the Chenango canal, in making connection with the Erie canal at the city of Utica, instead of Whitestown, as originally intended, afterwards the legislature passed an act requiring the sum due to be levied on the real estate of the city of Utica; the court *held:* "The general purpose of raising the money by tax was to construct a canal, a public highway, which the legislature believed would be a benefit to the city of Utica as such; and, independently of the bond, the case is the ordinary one of local taxation to make or improve a highway. If such an act be otherwise constitutional,

we do not see how the circumstance that a bond had been given, securing the same money, can detract from its validity. Should an individual volunteer to secure a sum of money in itself properly leviable by way of tax on a town or county, there would be nothing in the nature of such an arrangement which would preclude the legislature from resorting, by way of tax, to those who are primarily, and more justly liable."

In *Kirby v. Shaw*, 19 Penn. State, 258, where, under an act of the legislature, approved April 3, 1848, the commissioners of Bradford county were required to add $500.00 annually, until 1857, to the ordinary taxes of the borough of Towanda, for the purpose of erecting a court-house and jail in that borough, the act was held to be constitutional.

In the case of *Miller and Swan v. Graham and Smith*, 17 Ohio State, 1, where, under the act of March 24, 1859, "To provide for locating, establishing, and constructing ditches, drains, and water-courses," the defects and errors in the proceedings were fatal to their validity; but, after the taking effect of the act of March 24, 1864, supplementary to the act of March 24, 1859, the court refused to enjoin the collection of an assessment to pay for making a ditch, but remanded the cause to the district court, with instructions to permit the parties to show wherein they had been injured by the failure of the commissioners to comply with the law.

The answer in the case states:

1st. That the writ does not state facts sufficient to authorize a recovery.

2d. That the act of February 2, 1875, is unconstitutional and void.

3d. That the warrants in question were issued without authority of law, and without any consideration, and are fraudulent and void.

4th. That, on the twelfth day of May, 1873, the

relator commenced an action on the warrants in question in the district court of Jefferson county, to which the defendants filed an answer, setting up a perfect defense.

The action referred to was dismissed without prejudice, on the twelfth day of May, 1875.

Section 28, chapter 9, revised statutes of 1866, in force at the time this contract was entered into, provides that "said commissioners shall have authority and power to provide for the erection and repairing of court-houses and jails, and other necessary buildings for the use of the county; and to carry out the provisions of this section, they shall have power to make contracts, on behalf of the county, for the building and repairing of the same." The authority to make the contract in question is here explicitly given, and, so far as the record discloses, there has been no abuse of that authority. There is nothing in the record to show the valuation of the real and personal property of Jefferson county, for the year 1872; nor are we informed of the amount required to be raised by taxation for "ordinary county revenue," for that year; although there was levied for "county general fund" six mills on the dollar, for "court-house fund" five mills on the dollar, etc. There is no such fund known to the law as the "court-house fund." Buildings of this kind should be paid for out of the fund derived from "ordinary county revenue," and, so far as the record discloses, warrants could have been drawn on that fund for the amount due.

If any valid defense existed against the payment of these warrants, it should have been set up by a statement of the facts constituting the alleged defense in the answer in this action; but nothing of the kind is attempted. No issue is raised as to the amount due the contractors. The commissioners issued warrants for the amount they considered to be due, and no foundation is laid to disturb their finding.

That Jefferson county is justly indebted to the relator for the amount of the warrants in question, will not be controverted; and, where such is the case, there is no doubt of the power of the legislature to require the county to issue its bonds for the amount of its indebtedness.

The provisions of the law, that the bonds shall not be sold for less than ninety cents on the dollar, are for the protection of the county; but it is the duty of the commissioners to sell the bonds for the highest price that can be obtained.

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

JUDGMENT AFFIRMED.

A. L. PALMER, PLAINTIFF IN ERROR, v. THE CITY OF LINCOLN, DEFENDANT IN ERROR.

Master and Servant: LIABILITY OF MASTER FOR NEGLIGENT ACTS OF SERVANT. Where an obstruction in a street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results *directly* from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do the work is equally liable to the injured party.

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

M. H. Sessions, for plaintiff in error.

I. The doctrine as finally settled in this country by the clear weight of authority is, that when one person contracts with another, who is a skillful, competent, and

reliable person, for the doing of a piece of work or job, the performance of which is not in itself a nuisance, and the contractor has the entire control and management of doing said work or job to the exclusion of the employer, he in no wise interfering in the execution of the same, or in the employment of the men in the performance of the same, is not liable to third parties for injuries to such parties by the contractor's negligence. The true test in determining the question is, did the relation of contractor and contractee exist between the employer and the employe? and did the employer retain the power of controlling the work? If the relation of contractor and contractee did exist, and the employer did not retain the power of controlling the work, then he is not liable for such injuries. The principle of *respondeat superior* has no application. Wharton on Negligence, section 181 and 817. *Hilliard v. Richardson*, 3 Gray, 349. *Brackett v. Lubke*, 4 Allen, 139. *DeForrest v. Wright*, 2 Mich., 368. *Cincinnati v. Stone*, 5 O. S., 38. *Cuff, Admr., v. R. R. Co.*, 35 N. J. Law, 17. *Boswell v. Laird*, 8 Cal., 469. *Meyer v. R. R. Co.*, 2 Neb., 319. *Van Wert v. City of Brooklyn*, 28 How. Prac., 451. *Eaton v. R. R. Co.*, 59 Me., 521. *Callahan v. B. & M. R. R. Co.*, 23 Iowa, 562. *Kellogg v. Payne*, 21 Iowa, 575.

II. But it is contended that when the contract between the contractor and contractee contains a stipulation for the performing of the work, which was the cause of the injury complained of, that then the contractee does become liable, and the rule of *respondeat superior* obtains. In other words if the contract be for the entire erection of the building, and that involves the digging of an excavation in the proper erection of the same, and the contractor negligently and carelessly leaves the same unguarded so that a stranger falls into the same and

receives injuries, that in that case the rule of *respondeat superior* obtains, and the employer is liable.

That there are cases that make this distinction and so hold is not disputed; but that such is the weight of authority, or that it is sound in principle, is denied. *Blake v. Ferris*, 5 N. Y., 48. *Pack v. The Mayor, etc.*, 8 N. Y., 222. *Kelly v. The Mayor, etc.*, 11 N. Y., 432. *Scammon v. Chicago*, 25 Ill., 424. *Painter v. Pittsburg*, 46 Penn. State, 213. *Blackwell v. Wiswall*, 24 Barb., 355. *Barry v. St. Louis*, 17 Mo., 121. *Du Pratt v. Lick*, 38 Cal., 691. *Overton v. Freeman*, 73 E. C. L., 866. *Williard v. Tatham*, 57 Penn. State, 374.

Cobb, Marquett & Moore, for defendant in error.

I. The liability of Palmer arises, *first*, from the fact that he is the *author* of the excavation that caused the injury; *second*, that the law imposes on every one who causes a hole to be made in a sidewalk to see that it is made safe for the public. Palmer being the owner of the adjacent lot is the *ultimate superior;* he alone can determine that the excavation shall be made, and by causing the same to be made he incurs the obligation to the public to see that the same is so guarded or fenced that persons will not be injured.

II. The party that causes the injury ought to be the person who responds in damages for the injury so caused. Shearman & Redfield on Negligence, 84, p. 107. Wharton on Negligence, 186. Dillon's Mun. Corp., 793, 794, 795. *Chicago v. Robbins*, 2 Black, 418. *Id.*, 4 Wall., 657. *Detroit v. Corey*, 9 Mich., 165. *Storrs v. Utica*, 17 N. Y., 104. *Congreve v. Smith*, 18 Id., 83. *Milford v. Holbrook*, 9 Allen, 17. *Littleton v. Richardson*, 32 N. H., 59. *City of Brooklyn v. City R. R. Co.*, 47 N. Y., 475. *Wood v. Mears*, 12 Ind., 515. *Rowell v. Williams*, 29 Iowa, 212. *Portland v. Richardson*, 54 Maine, 46.

The obligation of Palmer is one created by *law*. No man can authorize a hole to be dug in the ground, which is dangerous in itself, on his own land or land which he controls without incurring an obligation to see that the hole is so guarded as not to be dangerous to those who may pass near the same. Shearman & Redfield on Negligence, 107.

Or, in other words, the right Palmer had to make the excavation in the side-walk opposite his lot was a right qualified by the duty he owed to all persons who might pass the same while the excavation remained open, to see that it was so guarded and lighted in the night time that it would be safe for passers by.

Palmer could not absolve himself from this duty he owed to all by making a contract with one, perhaps irresponsible, person. This would be to allow him to get rid of the duty he owed to A, B, and C, and the public, by making a contract with D.

No one can contract away the duty he owes to the public. Shearman & Redfield on Negligence, 83. *Inhabitants of Stoughton v. Porter*, 13 Allen, 191, 193. *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y., 484.

MAXWELL, J.

The city of Lincoln brought its action in the district court of Lancaster county, against A. L. Palmer, to recover of him the amount of a judgment, interest, and costs, recovered by Humphrey D. Gilbert against said city. The petition alleges that "the plaintiff is a city of the second class; that Alfred L. Palmer was, on or about the first day of October, 1873, and at the time the injuries received by Humphrey D. Gilbert hereinafter stated, the owner of lot seven in block fifty-six in the city of Lincoln; that said lot is situated on and fronts on O street, one of the public streets of said city; that

said defendant prior to that time had wrongfully excavated in the side-walk next to and adjoining his said lot, an area of great length, width and depth to-wit: twenty-five feet long, fifteen feet wide, and nine feet deep, and wrongfully suffered the same to remain uncovered and unguarded, so that one Humphrey D. Gilbert on or about the night of the eleventh of October, 1873, while exercising reasonable care and prudence in passing along the street or sidewalk fell into it and was greatly injured; that said Gilbert brought suit against said city in the district court of Lancaster county, and at the April term, 1875, recovered a judgment for one thousand dollars and costs amounting to three hundred dollars, which sum the said city paid on the twelfth day of October, 1875, amounting in all to the sum of $1,350.43; that although said city is primarily liable, yet the said Alfred L. Palmer is responsible over to the said city for the amount of the judgment, interest, and costs, so recovered and paid by said city; that after the commencement of said suit by said Gilbert against said city, the said Palmer, defendant herein, had due notice that said suit was pending against said city of Lincoln, and employed counsel to defend the same; wherefore plaintiff prays judgment, etc."

The plaintiff in error (defendant in the court below) admits in his answer to the petition that the defendant in error is a corporation; "that he was the owner of lot seven in block fifty-six at the time alleged in the petition; admits there was an excavation on O street in front of said lot, but denies that he had wrongfully made said excavation, or that he wrongfully suffered said excavation to remain uncovered or unguarded, or that he had in any way or manner suffered said excavation to remain uncovered or unguarded; and he denies that he had any control over or about said excavation at the time said Gilbert fell into the same, or that he ever had any control over or about the same; admits that said Gilbert fell into said excava-

tion as alleged; admits that said Gilbert recovered judgment against the city for the amount set forth in the petition, and that the city has paid the same; admits that he had notice of the pendency of said suit and the trial thereof; but the defendant denies that he is responsible over, or that he is in any way or manner liable to this plaintiff for the amount of said judgment for damages and costs so recovered, for the reason that this defendant on the twenty-third day of September, 1873, being desirous of erecting a brick building on said lot did upon that day make and enter into a written contract with Denny and Doolittle, skillful, reliable and competent builders in said city, for the erection of said building upon said lot for the gross sum of $6,760.00 (a copy of the contract and exhibits are set out in the answer), that on the twenty-third day of September, 1873, defendant surrendered the possession of said lot to said builders for the purpose of thus erecting and building thereon under said contract; that said Denny and Doolittle, contractors as aforesaid, entered upon and into the possession of the same for the purpose of erecting said building thereon under said contract; and that the entire work in the erection of said building upon said lot was done under their management and control; * * * that at the time when this defendant had no possession of or management of or control of said lot, or of the work in erecting said building thereon, the said Gilbert fell into said excavation, and received the injuries complained of; the defendant denies every allegation in the petition not heretofore admitted or denied."

To this answer a demurrer was filed on the ground that the facts stated therein were not sufficient to constitute a defense to the action. The court sustained the demurrer and rendered judgment for the plaintiff. The defendant, Palmer, brings the case into this court by petition in error. The errors assigned are:

First. That the court erred in sustaining the demurrer of the defendant in error to the answer of the plaintiff in error.

Second. That the court erred in rendering judgment for the defendant in error against the plaintiff in error, upon the pleadings, for the sum of $1,388.40 damages and costs of suit.

The plaintiff in error insists that having let the contract to make the necessary excavation, and for the erection of a building on the lot in question, to competent and skillful contractors, such contractors not being under his direction or control, he is, therefore, not liable to third persons for injuries sustained by them in consequence of the negligence of the contractors in the prosecution of the work. All the cases to which our attention has been called hold the principal liable where the relation of principal and agent or master and servant exists; but there is a direct conflict of authority, particularly in the earlier cases, as to such responsibility where an independent contractor intervenes. In *Clark v. Frye*, 8 Ohio State, 379, a case somewhat similar to this, the court held that the rule of *respondeat superior* could arise only out of the relation of superior and subordinate, and that the reason of the rule is to be traced to the power of control and direction which the superior has a right to exercise, and which for the safety of others he is bound to exercise, over the acts of his subordinates; but the court held that this rule of liability did not apply in case of injury sustained by reason of negligence in the manner of conducting the execution of a job of work in building a house, where the builder by the contract had taken upon himself the responsibility of the employment of his own hands, and the control and direction of the work, in conformity with the terms of the contract. The reasoning by which this able court reached this conclusion appears to have been this: That as Clark

had let the entire contract to Freeman, a contractor, he could not, therefore, be liable for the *carelessness* of the workmen in doing the work. That is undoubtedly true as to the manner in which the work is performed; but where the injury results from an excavation having been made in the street at the direct instance of the lot owner, and in pursuance of a contract entered into, even with an independent contractor, for that purpose, the lot owner is the ultimate superior and is liable. And this principle is recognized in *Clark v. Frye.* The court say: "If the owner of real estate should willfully allow a nuisance to be created, or to be continued by another on or adjacent to his premises, in the prosecution of a business for his benefit and under his authority, when he had full power to prevent or abate the nuisance, he would be justly liable for any injury which might result therefrom to another person."

In *Scammon v. Chicago*, 25 Ill., 424, the court held that if the nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or owner is liable; but if it is from the negligence of the contractor or his servants then he alone should be responsible. The court in that case assumed that the contractor or his servants were negligent, and therefore there could be no recovery.

In *Hilliard v. Richardson*, 3 Gray, 349, the owner of a building contracted with a carpenter at an agreed price to furnish the material and repair it. The carpenter employed a teamster to haul lumber, who left it in the middle of the street in front of the lot, and in consequence thereof an accident occurred. The court held that it was not a nuisance erected by the owner of the land or by his license to the injury of another.

In *Storrs v. Utica*, 17 New York, 108, the court say: 'The cause of the accident therefore was not in the manner in which the work was carried on by the laborers; if it had been, their immediate employer, and he

only, was liable for the injury. But in a sense strictly logical, as it seems to me, the accident was the result of the work itself, however skillfully performed. A ditch cannot be dug in a public street and left open and unguarded at night without imminent danger of such casualties. If they do occur, who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers or lets it out by contract? If by contract, then I admit that the contractor must respond to third parties, if his servants or laborers are negligent in the immediate execution of the work. But the ultimate superior or proprietor first determines that the excavation shall be made, and then he selects his own contractor. Can he escape responsibility for putting a public street in a condition dangerous for travel at night by interposing the contract which he himself has made for the very thing which creates the danger? I should answer this question in the negative."

The law on this subject is thus summed up in *Robbins v. Chicago*, 4 Wall., 679: "Where the obstruction or defect caused or erected in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results *directly* from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party." See, also, *Chicago v. Robbins*, 2 Black, 418.

The plaintiff in error endeavors to shield himself from liability by setting up the contract with Denny and Doolittle for the erection of a building on the lot in question, claiming that they had exclusive control of the premises at the time; so far as appears from the

answer the injuries complained of were the direct result of making the necessary excavation for the erection of the building, such excavation having been made in pursuance of the contract. The plaintiff in error is therefore the ultimate superior, and is liable equally with the contractors. The question of notice does not arise in the case.

It is objected that the court erred in rendering judgment for costs. The answer admits that "Gilbert recovered judgment against said city for $1000.00 and for his costs."

We see no error in the ruling of the court. The judgment is affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. ORLO W. BIRMINGHAM, v. JOHN B. DINSMORE, COUNTY CLERK OF CLAY COUNTY.

1. **County Seat:** ELECTION: DESIGNATION ON BALLOTS. In an election for the relocation of a county seat, where three points only can be voted for, designated as "Fairfield, Sutton, or Harvard," and ballots voted for the first are entitled "Fairfield ticket," describing accurately a sub-division of land within the limits of the town site of Fairfield: *Held*, that such ballots must be counted for Fairfield.

2. ———: ———: INTENTION OF VOTER. Where the intention of the voter is clearly ascertainable from the ballot, with the aid of extrinsic facts of a public nature connected with the election, the law will require his vote to be counted.

3. ———: ———: MANDAMUS. If the canvassers of the vote of an election neglect or refuse to count all the votes and fully perform their duty, they may be compelled by mandamus to discharge that duty.

THIS was an application for a mandamus requiring John B. Dinsmore, county clerk of Clay county, to call

to his assistance two disinterested electors in said county and proceed to re-canvass the votes cast at an election held in said county on the twentieth day of September, 1875, for the relocation of the county seat. At that time one F. M. Brown was the clerk of that county and a member of the canvassing board, a majority of whom rejected thirty-three votes cast in Edgar precinct, whereby, under the law in reference to the removal of county seats, Sutton would remain the county seat of that county. If, however, the thirty-three votes had been counted, then under the law another election would be held. This application was brought for that purpose. An alternative writ issued against Dinsmore, and upon the coming in of the answer the cause was heard upon the pleadings and proofs.

James Laird and *John C. Cowin*, for the relator.

Mason & Whedon, for the respondent.

GANTT, J.

This cause is heard upon an alternative writ of mandamus, and the answer thereto, and proofs. It appears that an election was held in Clay county upon the question of the relocation of the county seat, which resulted in no choice of a place; and therefore, under proclamation duly made, a second election was ordered to be held on the twentieth day of September, 1875, designating "Fairfield, Sutton, or Harvard," as the eligible places or candidates for the location of the county seat.

Upon a canvass of the votes cast at this election, the board of canvassers rejected thirty-three votes cast in Edgar precinct, which it is alleged were cast for Fairfield. The alternative writ commanded the county clerk to make a canvass of all the votes cast at this second election, and especially to count the thirty-three votes cast in Edgar precinct, and that a complete abstract be made of

all the returns of votes cast at said election, or show cause why he has not done so. The answer denies that the thirty-three votes cast in Edgar precinct were for the town of Fairfield; but avers that they were cast for the north half of the northwest quarter of section three, in township five, north of range seven west, and ought not to be counted or canvassed for the town of Fairfield; and denies that said description of land is a part of the town site of Fairfield. The proofs in the case clearly show that the land described on the ballots, is within the limits of and constitutes a part of the town site of Fairfield. And all the ballots cast in the several precincts of the county were preserved in the mode required by law, and were offered in evidence on the trial of the cause; and, upon a careful inspection of them, it clearly appears that all the ballots voted for Fairfield, in the several precincts of the county, are in the same form, in all respects, as those voted in Edgar precinct, and all of them were counted by the canvassers, except those of said precinct. And furthermore the proofs show that at the first election on the question of a relocation of the county seat, the ballots voted for Fairfield were in the same form. It is therefore clear without doubt, that it was universally understood and known throughout the county that these ballots voted in Edgar precinct were intended and were cast for the town of Fairfield; and, besides, these ballots correctly describe a part of the town site of Fairfield as the point for the relocation of the county seat, and from the designation of place on the ballots, the intention of the voter may be plainly ascertained. Upon the facts in this case, there can be no doubt that the votes cast in Edgar precinct must be counted. The doctrine is well established that extrinsic evidence of a public nature connected with the election, is admissible to ascertain the intention of the voter from the ballot. And the rule is well settled that when the canvassers neglect or refuse

to perform their duty, they may be compelled to discharge that duty by writ of mandamus.

PEREMPTORY WRIT GRANTED.

JOSEPH E. LAMASTER, PLAINTIFF IN ERROR, V. GILBERT B. SCOFIELD AND ALLEN A. COWPERTHWAIT, EXECUTORS OF THE ESTATE OF WILLIAM FINDLEY, DECEASED, DEFENDANT IN ERROR.

1. **Jurisdiction of Courts of Equity:** MUTUAL ACCOUNTS. Under the code, discovery has ceased to be one of the objects sought in a court of equity. Jurisdiction, therefore, in cases of mutual accounts between the parties, cannot be maintained on that ground, and is restricted to cases which have their origin in intimate or confidential relations of the parties, and does not extend to ordinary cases of mutual accounts between creditor and debtor.

2. **Practice:** REFERENCE OF CAUSES. A purely legal action cannot be referred, except by consent of the parties, as neither party can be deprived of the right to a trial by jury in such cases. *Mills v. Miller*, 3 Neb., 94., cited and approved.

3. ———: OATH OF REFEREE. The failure of a referee to take the oath required by law is a mere irregularity, that is waived by the parties proceeding to trial without objection on that ground.

ERROR from the district court of Otoe county.

IT was an action upon an account, a copy of which annexed to the petition, contains one hundred and thirty items, under one hundred and twelve different dates, from November, 1866, to December 31, 1872, and amounting to $10,960.65; and has twenty-six different credits, amounting to $8,332.26.

The sections of the civil code providing for the reference of causes are as follows:

SEC. 298. All or any of the issues in the action, whether of fact or law, or both, may be referred, upon the written consent of the parties, or upon their oral consent in court, entered upon the journal.

SEC. 299. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in either of the following cases:

First. Where the trial of an issue of fact shall require the examination of mutual accounts, or where the account is on one side only, and it shall be made to appear to the court that it is necessary that the party on the other side should be examined as a witness to prove the account; in which cases the referees may be directed to hear and report upon the whole issue, or upon any specific question of fact involved therein.

Second. Where the taking of an account shall be necessary for the information of the court before judgment, in cases which may be determined by the court, or for carrying a judgment into effect.

Third. Where a question of fact, other than upon the pleadings, shall arise upon motion or otherwise, in any stage of an action.

Under this latter section the cause was sent to a referee, and upon his report and finding judgment was rendered against Lamaster, who brought the cause to this court by petition in error. Pending the argument here Findley died, and the cause was revived in the name of the administrators of his estate.

Mason & Lehmann (with whom was *J. L. Mitchell*), for plaintiff in error.

I. The first constitution of Nebraska, and the one under which this controversy arose, provides that "the right of trial by jury shall remain inviolate." An attempt of the legislature to abridge or impair it would

be nugatory. But the matter we have to determine is, what the constitution contemplates by "the right of trial by jury," inasmuch as this right is more comprehensive in some states than in others. As this is a state constitution, intended to prescribe the mode of government within the limits of certain territorial boundaries, we are bound to presume that it meant to maintain inviolate the trial by jury as it had obtained within those limits. In short, that the right of trial by jury, as it was in the territory of Nebraska, should be continued inviolate in the newly formed state. The very phrase in which this provision of the constitution is embodied renders such a construction absolutely necessary. It proposes no change; in fact, it provides against any and all change, so that we must presume this right to have had existence in like manner as its continuance was stipulated for. It could not remain inviolate unless it had previously been so. From whence was this inviolate right obtained? Where are we to look to determine what it is? Certainly not to the legislative enactments of the territory, for inviolability is repugnant to their very nature; they are

> "Variable as the shade
> By the light quivering aspen made."

Each session brings with it innumerable amendments and repeals, everything within legislative limits is subject to alteration and even total abolition, and for whatever is inviolable, we must look beyond legislative control, to the paramount authority of the territory, the constitution of the United States. It may be objected that this is a mere quibble with forms, but forms are indicative of the nature of the substances. Moreover, our position is supported by authority. *Isom v. The Mississippi R. R. Co.*, 36 Miss., 300. *Work v. The State*, 2 Ohio State, 296.

Like considerations are suggested by the very nature

and necessity of the case. Certainly the territorial government was not an absolute one; some limits there were which it could not transcend. The territories were the wards, and were, under the tutelage of the general government, entitled to its protection and subject to its dominion. To it they owed their existence, and to it they must render allegiance. The organic act defined alike their powers and duties. See section 6, Organic Act. This act, by express terms, confined the legislative power within the bounds of the federal constitution. Whatever rights the citizen possessed under the constitution of the United States, could not be impaired by any act of the territorial government, and any act of that government having such a tendency would be null and void. It follows, then, that the right of trial by jury, as defined in the federal constitution, was a right enjoyed by every citizen in the territory, and was *the right* which the constitution of the state preserved inviolate. In respect to all the constitutional provisions and statutory enactments applicable to this case, the history of Minnesota is identical with that of Nebraska. In each, the territorial legislature enacted this statute authorizing references, and in each was the provision preserving inviolate the right of trial by jury embodied in the first constitution of the state, and any authoritative expression of judicial opinion upon the subject under discussion in that state is, by every rule of judicial construction, entitled to great weight in this. *Whallon v. Bancroft*, 4 Minn., 109. *The Saint Paul and Sioux City R. R. Co. v. Gardner*, 19 Minn., 132. See, also, *Averill Coal and Oil Co. v. Verner*, 22 Ohio State, 378. *Johnson. v. Wallace*, 7 Ohio, 392. *Grim v. Norris*, 19 Cal., 140. *Williams v. Benton*, 24 Cal., 424. *Board of Education v. Scoville*, 13 Kan., 32. *McMartin v. Bingham*, 27 Iowa, 234. *United States v. Rathbone*, 2 Paine C. C., 579. *Plimpton v. Somerset*, 33 Vermont, 283.

II. Another error assigned is the neglect of the referee to take the oath prescribed by law. The provision of the statute upon this point is: "The referees *must* be sworn or affirmed well and faithfully to hear and examine the cause and to make a just and true report therein according to the best of their understanding." Chap. 57, Sec. 305, p. 576, Gen. Stat. of 1873.

That the referee was not sworn is admitted, but it will be urged that the plaintiff in error, by proceeding, waived his right to object to the omission; and in support of this position will be cited the authority of the New York practice reports. That the cases in those reports are not in point must be admitted on comparison of the codes of New York and Nebraska. The 2 R. S. of N. Y., 384, § 45, was a provision similar to the one quoted above from the code of Nebraska; but says a distinguished law writer of the former state, "It may be doubted whether this provision applies to any reference under the code, particularly to a reference to hear and determine." Hoffman on Referees, p. 24. The cases relied on are not at all analogous to the one at bar. See *Howard v. Sexton*, 1 Denio, 440. *Whalen v. Supervisors*, 6 How. Pr., 278. *Keator v. Ulster*, 7 How. Pr., 41. But whoso has followed the current of New York authorities upon any question whatsoever in all its devious windings has learned that it goes—

> "Winding in and winding out,
> As still to leave a man in doubt
> Whether the snake that made the track
> Was going south or coming back."

The dubious compliment that Senator Carpenter paid to New York reports, that they were so convenient, for in them could be found decisions on every side of every question, admits of but few exceptions, and the question under consideration is not one of them. The authority of the cases already cited is considerably shaken by *Bon-*

ner v. McPhail, 31 Barb., 106, and the case nearest in point that we have been able to find is *The People, ex rel. The Commissioners, v. Connor*, 46 Barb., 333, and this is diametrically opposed to them. See, also, *Kinney v. Adams*, 2 Harr. (Del.), 357. *Toler v. Hayden*, 18 Mo., 399. *Fassett v. Fassett*, 41 Mo., 516.

Scofield & Ireland, for defendant in error, to the point that the court had no authority to refer the cause, cited Edwards on Referees, section 1. *Lee v. Tillotson*, 24 Wend., 338. *Scott v. M'Intosh*, 2 Campbell, 238. *Elmore v. Thomas*, 7 Abb. Pr., 70. *McCullough v. Brodie*, 13 How. Pr., 346. *De Hart v. Corvenhaven*, 2 J. C., 402. *Kitchum v. Clark*, 22 Barb., 319. It has been repeatedly held that when a referee has not been sworn in a cause sent to him, it will not affect his finding where parties appear before him and try the cause without objection. *Whalen v. Board of Supervisors*, 6 How. Pr., 278. *Keator v. Ulster*, 7 Id., 41. Edwards on Referees, 107.

MAXWELL, J.

This action was brought by Findley against Lamaster for work, labor and services performed by him for the defendant, and for money loaned and advanced at his instance and request. The plaintiff claims a balance due him of $2,628.19. Lamaster in his answer to the petition claims a balance due him of the sum of $4,620.08. Findley in his reply denies all the facts stated in the answer.

At the September term, A. D. 1874, of the district court the following order was made in the cause:

"And now on this day this cause came on for hearing, and it was ordered by the court that G. W. Covell be, and he is hereby appointed referee to take the proofs, find the facts and the law, and report the same to this

court; to all of which the defendant by his attorney excepted."

The testimony was taken before the referee who found in favor of Findley, and that there was due him from Lamaster the sum of $1,799.50. Exceptions were filed to the report by the defendant which were overruled, and judgment rendered on the report. The case is brought into this court by petition in error.

The first question presented is the authority of the court to refer a case of this kind without the consent of the parties. This court in *Mills v. Miller*, 3 Neb., 94, held that a purely legal action could not be referred, except by consent of parties, as neither party can be deprived of the right of trial by jury in such cases.

While courts of equity entertain concurrent jurisdiction with courts of law in matters of account, yet if the account can be fairly taken in a court of law, equity will not interfere. *Daithy v. Clemens*, 6 Beavan, 165.

In *Fowle v. Lawrason's Exr.*, 5 Peters, 495, the supreme court of the United States held: "that a court of chancery has jurisdiction in matters of account cannot be questioned; nor can it be doubted that this jurisdiction is often beneficially exercised; but it cannot be admitted that a court of equity may take cognizance of every action for goods, wares and merchandise, sold and delivered, or of money advanced, when partial payments have been made, or of every contract express or implied, consisting of various items on which sums of money have become due, and different payments have been made. Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a court of chancery cannot draw to itself every transaction between individuals, in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted.

It is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction."

Some of the reasons why resort was had to a court of equity are thus stated by a learned author. "If the demand be of consequence, and the matter of an intricate nature * * * it is more advisable to resort to a court of equity, where matters of account are more commodiously adjusted, and determined more advantageously for both parties; the plaintiff being entitled to a discovery of the books, papers, and the defendant's oath, and on the other hand the defendant being allowed to discount the sums paid or expended by him." Bacon's Abr. Accompt.

Judge Story says: "In cases of account, there seems a distinct ground upon which the jurisdiction for discovery should incidentally carry the jurisdiction for relief. In the first place the remedy at law in most cases of this sort is imperfect or inadequate. In the next place where this objection does not occur, the discovery sought must often be obtained through the instrumentality of a master, or of some interlocutory order of the court; in which case it would seem strange that a court should grant some and not proceed to full relief. In the next place, in cases not falling under either of these predicaments, the compelling of the production of vouchers and documents would seem to belong peculiarly to a court of equity, and be a species of relief." Story's Equity Jurs., section 67.

Under the code, discovery has ceased to be one of the objects sought in a court of equity; jurisdiction, therefore, in cases involving the examination of mutual accounts, cannot be maintained on that ground. The parties to the suit may be examined as witnesses in the

case; and a court of law has authority, equal to that possessed by a court of equity, to compel the production of books, vouchers, or other documentary evidence. The jurisdiction of courts of equity is therefore restricted to those cases which have their origin in intimate or confidential relations of the parties, and does not extend to ordinary actions involving mutual accounts between creditor and debtor. In all such cases either party has a right to demand a jury; and a court cannot refer such a cause except by consent of the parties. This right is guaranteed by the constitution and its application should not be restricted by the courts.

It is conceded that the referee was not sworn. And it is urged that as the law requires he should take an oath, that the failure to do so renders the entire proceedings void. The referee derives his authority from the order of the court and not from the oath. The failure to take the oath required by law, therefore, is a mere irregularity that the parties waived by proceeding to trial without objection on that ground. *Keator v. Ulster Plank Road Co.*, 7 How. Pr., 41.

This is an action at law. The court, therefore, erred in appointing a referee to determine the issues. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MR. JUSTICE GANTT, before whom the cause was argued below, did not sit.

GEORGE P. UHL, PLAINTIFF IN ERROR, v. JOHN MAY, DEFENDANT IN ERROR.

1. **Execution Sale.** A purchaser at a sale under an execution is protected to the same extent as a purchaser at private sale, from claims of third persons previously acquired from the debtor, of which he had no notice.
2. **Real Estate.** *Possession* of land is notice to all the world, not only of the possession itself, but of the right, title, and interest, whatever it may be, of the possessor.
3. **Judgment:** LIEN. Where the legal title to real estate is in the name of the judgment debtor, and such real estate is in the possession of another party, the lien of the judgment attaches only to the interest of the debtor therein.
4. **Enjoining Sale.** Where a conveyance would pass no title, but would result only in casting a cloud on the title of the plaintiff, the sale will be restrained.

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

George P. Uhl, pro se.

I. A judgment lien is superior to an unrecorded deed, and, therefore, stronger than a mere verbal sale, as set up in plaintiff's petition. Freeman on Judgments, Sec. 366. *Gower v. Doheney*, 33 Iowa, 36. *McFadden v. Worthington*, 45 Ill., 362. *Bennet v. Fooks*, 1 Neb., 465.

II. The holder of a judgment has a lien on all the land that the records show in the judgment debtor. *Martin v. Dryden*, 7 Ill., 187. *Massey v. Westcott*, 40 Ill., 160.

III. Possession under a parol contract of sale or unrecorded deed is not such notice as will bar a judgment creditor's lien. *Rogers v. Hussey*, 36 Iowa, 664. *Hop-*

ping v. Burnam, 2 G. Greene, 39. *Pomroy v. Stevens*, 11 Met., 244. *Breed v. Conley*, 14 Iowa, 269. These authorities above cited are all in point, and establish the defendant's lien (plaintiff in error) on the land. *M'Mechan v. Griffing*, 3 Pick., 149. *Leach v. Ansbacher*, 55 Penn. St., 89. *Plumer v. Robertson*, 6 S. & R., 184.

E. W. Thomas, for defendant in error, cited High on Injunctions, 91. *Key City Co. v. Munsell*, 19 Iowa, 305. *Norton v. Beaver*, 5 Ohio, 178. *Fonda v. Sage*, 46 Barb., 109. *Moyer v. Hinman*, 13 New York, 180. 3 Washburn on Real Prop., 283. *Rupert v. Mark*, 15 Ill., 540. *Morrison v. Kelly*, 22 Ill., 610. *McKinzie v. Perrill*, 15 Ohio State, 162.

MAXWELL, J.

On the 29th day of June, 1874, John May filed his petition in the district court of Richardson county against George P. Uhl, Elizabeth Montcravie and N. C. Cunningham, alleging that "in the year 1866 he purchased from Elizabeth Montcravie, for the agreed price of two hundred dollars, which he then paid to her, the following tract of land situated in the county of Richardson, in the state of Nebraska, to-wit: The northwest quarter of the southwest quarter of section twelve, in township three, north of range sixteen east, containing forty acres. The said Elizabeth Montcravie was then the owner and in possession of said land, and at the time of said sale delivered the possession thereof to the plaintiff; and ever since that time the plaintiff has been in the actual and exclusive possession and occupancy of the same. The said Elizabeth Montcravie, at the time plaintiff so paid the consideration money as aforesaid, agreed with plaintiff to deliver to him on demand a deed in fee simple for said land, with the usual covenants of warranty, but though requested she has failed so to deliver the same.

Ever since the time above stated, to-wit: the year 1866, the said Elizabeth Montcravie has had no title or interest in said land, and has been the holder of the naked legal title in trust for the plaintiff. Sometime in the year 1873, and while the plaintiff was in the actual and exclusive possession and occupation of said land, claiming title thereto, the defendant George P. Uhl caused an action to be commenced in this court, wherein he was plaintiff and Elizabeth Montcravie was defendant, to recover a sum of money, and in said action caused an attachment to be issued and levied upon the land above described, as the property of the said Elizabeth Montcravie. The said Uhl claims to have recovered a judgment in said action, and has caused the said land to be seized on execution therein by the sheriff of said county, and has had the same advertised for sale on the 30th day of June, 1874, at the court house in Falls City, in said county. The said Elizabeth Montcravie had no interest or title to said land which could have been seized in attachment or execution, of which said Uhl then and there had constructive notice.

The claim set up by said Uhl to said land, under and by virtue of said attachment and execution, is illegal and without foundation in law; but the same casts a cloud upon the title of plaintiff, and if a sale should be made by the sheriff under said execution or order of sale, the same would tend further to embarrass and cast a cloud upon plaintiff's title," wherefore plaintiff prayed for an injunction, etc. Uhl demurred to the petition on the ground that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was overruled, to which exceptions were taken. The injunction was made perpetual. The case is brought into this court by petition in error.

The demurrer admits that the plaintiff in the court below purchased and paid for the tract of land in con-

troversy, and was in actual possession thereof as such purchaser before and at the time of the levy of the attachment. Section sixteen of chapter sixty-one of the General Statutes provides that "all deeds, mortgages, and other instruments of writing, which are required to be recorded, shall take effect and be in force from and after the time of the delivery of the same to the clerk for record, and not before, as to all creditors and subsequent purchasers in good faith and without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, or other instruments shall be first recorded; *provided*, that such deeds, mortgages, or other instruments shall be valid between the parties."

The plaintiff in error insists that, as the statute 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 the judgment is rendered, etc., therefore, a judgment creditor has a lien on all the lands that the record of deeds shows to be in the name of the judgment debtor, and that the same rule applies in favor of an attaching creditor.

A purchaser at a sale under an execution is protected to the same extent as a purchaser at private sale from claims of third persons previously acquired from the debtor, of which he had no notice actual or constructive; but he must have acted in entire good faith throughout in order to claim the protection of the law. The maxim of the law is that "where the right is equal, the claim of the party in actual possession shall prevail." In *Parks v. Jackson*, 11 Wend., 464, the supreme court of New York say: "It is a well settled principle of law that possession of land is notice to all the world, requiring those that would concern themselves in it, or

litigate for it. to take notice not only of the possession itself but of the right, title, and interest, whatever it may be, of the possessor." That is undoubtedly the law. And where the legal title to real estate is in the name of the judgment debtor, and such real estate is in the possession of another party, the lien of the judgment attaches only to the interest of the debtor therein. If the entire amount of the purchase money has been paid, there is nothing on which the lien can attach, and the same rules apply to an attachment against real estate.

This court in *Johnson v. Hahn*, 4 Neb., 139, held, that where a conveyance would pass no title, but would result only in casting a cloud on the title of the plaintiff, the sale would be restrained by an injunction.

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

JUDGMENT AFFIRMED.

STATE OF NEBRASKA, EX REL. E. K. VALENTINE, V. THOMAS L. GRIFFEY.

1. **Election**: DESIGNATION OF OFFICE ON BALLOTS. A ballot voted at a legal election without any designation of an office, and also a ballot voted with two or more names on it, when the tenure of the office is limited to one person only, are illegal and void.

2. ———: EVIDENCE TO CORRECT MISTAKE IN CANVASS OF VOTE. Extrinsic evidence of a public nature, including the circumstances surrounding an election, may be received in evidence to correct a mistake in the return of the canvassers of the vote, in respect to the designation of an office voted for at such election; and such evidence is applied according to the rules of law in relation to mistakes in other writings.

3. ———: ILLEGAL VOTES. Under the facts stated in this case, *held* that certain persons residing in unorganized counties, illegally voted in adjoining organized counties.

4. ———: U. S. MILITARY POST. The military post in Valley county is not a military reservation reserved by the United States on the admission of Nebraska as a state, nor as land ceded by the state to the United States since its admission, but is a part of and subject to the operation of the laws of the state; and persons who with their families removed to the post *sine animo revertendi*, became residents of the county, and were entitled to the right of suffrage therein.

THIS was an information in the nature of a *quo warranto*, brought in this court in the exercise of its original jurisdiction. Apart from the facts necessary to an understanding of the case, which are stated in the opinion, it may be added that the district in which this contest arose comprises fourteen counties, lying in the northern and northeastern portion of the state, adjacent to which on the west lies the county of Holt, as yet unorganized, and a portion of territory familiarly known as Taylor county, but not yet so designated by the legislature. Holt county lies adjacent to Knox, and at the election held in October, 1875, twenty-five residents thereof voted in various precincts of the latter county; and in precinct No. 5 of Valley county nine persons voted who were residents of the territory known as Taylor county. Including these nine votes, there were cast sixty votes in that precinct, fifty-one of which were for Valentine and nine for Griffey, all of which were omitted in the return of the county clerk to the state canvassing board. Fort Hartsuff is a military post of the United States situated in that precinct, and eleven persons living there voted at the election. A stipulation was filed setting forth the names of these persons; and the facts relative to the votes from Holt county which were polled in Knox, and those from Taylor county which were polled in Valley, were agreed upon as above stated. These being held illegal, as well as three of the votes from Fort Hartsuff, and a deduction being made from the vote of each party *pro rata*, according to the general result in each precinct

where the votes were cast, the general result was reached as follows:

VALENTINE.

Vote omitted in return of precinct No. 5, Valley county		51
Deductions:		
Pro rata of illegal vote from Taylor county	7.65	
Pro rata of illegal vote from military post	2.55	
Pro rata of illegal vote from Holt county	4.00	—14.20
Total		36.80

GRIFFEY.

Majority as returned by state board		61
Additions:		
Votes omitted in precinct No. 2, Cedar county,		9
" " " " " 5, Valley "		9
" not counted in precinct No. 6, Cedar "		20
		99
Deductions:		
Illegal votes in Cedar county	63	
Pro rata of illegal vote from Taylor county	1.35	
Pro rata of illegal vote from military post	.45	—64.80
Total		34.20
Majority for Valentine		2.60

John C. Cowin, for the relator.

E. Wakeley and *George W. Doane*, for the respondent, cited *People v. Ferguson*, 8 Cow., 102. *People v. Cook*,

4 Seld., 67. *People v. Eastman*, 5 Den., 409. *People v. McManus*, 34 Barb., 620. *Carpenter v. Ely*, 4 Wis., 420. *State v. Cogswell*, 8 Ohio State, 620. *People v. Matteson*, 17 Ill., 167. *State v. Elwood*, 12 Wis., 551. *State v. Cavers*, 22 Iowa, 343. American Law of Elections, 207.

GANTT, J.

The relator has filed in this court an information in the nature of a *quo warranto* (the district attorney and attorney general having refused to do so), and he alleges that the defendant hath held, used and exercised, and doth still hold, use and exercise, the office of judge of the sixth judicial district, without any legal election, appointment, warrant or authority whatever, therefor, and that he is unlawfully holding and exercising the said office, and has usurped and invaded the same. Specific allegations in regard to the conduct of the election, and the canvass of the vote, in the said district, are set forth in the information, but it is not deemed necessary to notice them here in detail. The defendant denies the material allegations in the information, and also sets forth in his answer specific allegations in regard to the conduct and canvass of the election in said district. It appears that at an election held on the 12th day of October, 1875, for judges of the supreme court, and district courts of the state, the relator and defendant were opposing candidates, and the only candidates for election to the office of judge, for the sixth judicial district of the state; and the main question raised by the pleadings in this action is, which one, if either, of these two parties was legally elected to the office of judge of the said judicial district?

By the stipulations and agreement of the parties, the points of controversy between them have been narrowed down to a few questions only, for the court to determine,

and we will at once proceed to the examination of these questions.

I. In Cedar county, it being one of the counties composing the sixth judicial district, sixty-three tickets were voted in the form following:

"District Ticket of the Sixth Judicial District.
T. L. GRIFFEY, of Dakota County.
GEORGE B. FLETCHER, of Madison County."

These tickets were counted by the board of canvassers, as votes cast for the defendant, and were so returned for him. The relator insists that all these ballots are defective, illegal and void, and should not have been received and counted for the defendant for the reasons:

First. That there is no designation of any office on the ballots, and

Second. That they contain the names of two persons, whereas, the tenure of office is limited to one person, only.

The defendant, however, contends that as he was a candidate for the office of judge, and G. B. Fletcher was a candidate for the office of district attorney for the sixth judicial district, and as the ballots are designated: "District ticket of the sixth judicial district," and as there was no other candidate for the same office, of a name similar to his, the ballots sufficiently indicate that the electors intended to and did vote for him for the office of judge of the said judicial district, and, therefore, he is entitled to the benefit of all these sixty-three votes.

The facts in proof show that there was no other candidate for the office, of the same name of the defendant; that it was generally understood in the district that the defendant was a candidate for this office, and also that G. B. Fletcher was a candidate for the office of district attorney for the same judicial district.

But, whatever may be the proof in relation to candi-

dates for one or another office in the judicial district, we think the position taken by the defendant in respect to these ballots, cannot be sustained upon either law or sound policy. Upon inspection it is very evident that no office whatever is designated on the face of these ballots, and the proposition will hardly be questioned, that some designation of office stated on the ballot, is one of the essential properties to constitute it a legal ballot. Without some designation of office the ballot would be meaningless, and it would be impossible for the officers of the election to determine for what office the persons named on it were intended. But it is not essential that the ballot should with technical accuracy designate the office. This is not an indispensable requirement of the law, and, therefore, in case the office should be imperfectly or in part mistakenly designated, then, under the application of the common sense rules which are applied in other cases of defective writings, if the proofs of circumstances surrounding the election will reasonably explain the ballot and correct the mistake or defect, it may be sustained and effect be given to the intention of the voter. But in the case under consideration, as no office at all is designated, there is nothing to explain, and no defect or mistake to correct.

Again, each one of these ballots contains the names of two persons, and as this is a greater number than is required to fill the office, it is fatal to the validity of the ballots. The act entitled "an act to provide a general election law," in section thirteen, provides that "whenever a ballot shall contain a greater number of names for any one office than the number of persons required to fill that office, it shall be deemed fraudulent as to the whole of the names for that office."

This statutory law seems to be conclusive in regard to such a ballot. It *shall* be deemed fraudulent as to all the names on it. The law is mandatory. But it seems

only to be declaratory of the common law rule in respect to such ballots. In Cooley on Const. Lim., 607, it is said that "the ballot in no case should contain more names than are authorized to be voted for, for any particular office at that election, and if it should, it must be rejected," and then gives the reasons for its rejection. *Carpenter v. Ely*, 4 Wis., 426.

We have not been able to find one authority which sustains the position taken by the defendant in regard to these sixty-three ballots; hence, both upon the common law rule and the statutory requirement these votes must be rejected.

II. In the election returns from precinct No. 6, in Cedar county, twenty ballots voted for the defendant, being the whole number of votes cast in that precinct, are returned as follows: "County Judge, T. L. Griffey, of Dakota county, 11111111111111111111—20," and the county board of canvassers excluded all these votes from the count of votes for him for judge of the judicial district.

He claims that he is legally entitled to the benefit of these votes, and of right they ought to be counted for him for judge of the district court. It appears from the evidence that the ballots of this precinct as well as of all the other precincts in the county were not deposited in the office of the county clerk, and that some time after the election the ballots of precinct No. 6 were destroyed.

The defendant, therefore, introduced evidence, substantially, showing that no other person of his name was a candidate for the same office or for the office of county judge in Cedar county; that he was generally known in Cedar county, and that it was generally understood in said county that he was a candidate for the office of judge of the district court; that he was known by and was acquainted with a large number of the people of said county, and that he was not a resident of Cedar county,

and that at the time of the election and for many years prior thereto, he was a resident of Dakota county, one of the counties composing the said 6th judicial district. And A. Buchelman testified, substantially, that he is a resident of the said precinct No. 6; that he was at the election in said precinct, on the 12th day of October last; that he knew Griffey and Valentine were candidates for the office of district judge; that before they commenced voting, he and some others found some of the tickets were not right, and they laid them aside; that before they commenced voting, it was generally understood and discussed by the voters there, that Griffey and Valentine were the candidates for the office of judge of the 6th judicial district. The return above quoted shows that an office is designated, but it is not that of district judge. Hence, the question is: Is it the particular office of judge the defendant was voted for by the electors of this precinct? If it is not, and a mistake has occurred in the title in the return itself, can such mistake be corrected by extrinsic evidence of a public nature, including the circumstances surrounding the election?

It seems to be generally held that an elector cannot be received as a witness to make good an ambiguous ballot by testifying for whom and for what office he intended to vote; but in the case at bar the evidence is not offered to make good an ambiguous ballot, or even to explain an imperfect one, but it is for the purpose of explaining and correcting a mistake in the title of office in the returns of the election officers, and to give effect to the intention of the elector as manifested by the ballot. The doctrine seems to be well settled that extrinsic evidence may be received to help out the imperfections of a ballot. Why should it not, with greater propriety and justice, be received for the purpose of correcting a mistake in the return of the election officers, which, if not corrected, would thwart the will and nullify all the votes

of the voters of an election? We think the evidence is properly admissible, and may be applied according to the rules of law in relation to the correction of mistakes in other writings. In *The State, ex rel. Spaulding, v. Elwood*, 12 Wis., 557, it is said to be a well settled doctrine of the court that "in a contest between individuals as to the right to an office, it will go back and rectify any omission or mistake of the canvassing board and give effect to the real will of the elector as expressed through his ballot;" and it is further held, as a doctrine not to be controverted, that in such cases, facts and circumstances of a public nature, connected with the election may be resorted to for the purpose of ascertaining the intention of the elector, and the question must be determined in the light of such surrounding circumstances. Cooley on Con. Lim., 611. *Carpenter v. Ely*, 4 Wis., 426.

The evidence shows that the defendant was generally known in the county, that it was generally understood he was the only candidate of his name for the office of district judge, that he was not a resident of the county, but was a resident of Dakota county, and, therefore, was not eligible for the office of county judge of Cedar county, and that before the voting commenced in precinct No. 6, it was generally understood and discussed by the voters that defendant and relator were the opposing candidates for judge of the judicial district. And upon inspection of the poll books, it is proved that one list contains the "title of office" and "names of persons voted for," for the several county offices, and in this list is the office of probate judge, to which E. E. Otis was elected; another list, which evidently was prepared by some other person for the board, contains, conveniently arranged, the title of office for "judge of supreme court," "judge of the 6th judicial district," "prosecuting attorney, 6th judicial district," and "county judge." The title "judge of 6th judicial district," has an ink

line drawn over it, and without any other title named the names of the candidates for university regents are inserted immediately under this title, and the name of "T. L. Griffey, of Dakota county," is inserted under the title of "county judge." The conclusion is reasonable, and seems evident on inspection, that the person who prepared the list overlooked the office of university regents, and that the election officers having inserted the names of candidates for this office under that of judge of the 6th judicial district, erased the latter without naming that of the former, and then inserted the name of defendant under the title of county judge without changing it to district judge. From the evidence and inspection of the poll books, we think that the twenty votes were cast for defendant for the office of judge of the judicial district, and, therefore, they should be counted for him for that office. *State ex rel. Phelps v. Goldthwaite*, 16 Wis., 149. *People v. McManus*, 34 Barb., 626. *People ex rel. Aikin v. Matteson*, 17 Ill., 163.

III. It is admitted that a number of persons residing in unorganized counties, voted, some in Knox and some in Valley county. The legality of these votes is submitted to the court, and if it shall be determined they are illegal votes, then it is agreed that these votes shall be proportionately deducted from the vote of each party, according to the general result in each precinct where the votes were cast. The statement of facts in respect to these votes is very meagre, and from what is stated, without intimating any opinion in regard to the proper mode and place of voting by persons residing in unorganized counties, attached to organized counties for election, judicial and revenue purposes, we must conclude that these votes were illegally cast, nine in Valley county

and twenty-five in Knox county, and must be deducted in the manner suggested.

It is also admitted that eleven persons, employed at the military post in precinct No. 5, in Valley county, voted at the election in said precinct. The post is located on two sections of land in the precinct, which were withdrawn from sale by the government. From the facts stated it seems to be simply a post for temporary purposes, and not a military reservation, reserved by the United States on the admission of Nebraska as a state, or land ceded by Nebraska to the United States since the state was admitted, and, therefore, it is a part of and subject generally to the operation of the laws of the state. Again, it will not be contended that persons in the employ of the general government, and not in the regular army, shall for that reason be deprived of their votes, if they otherwise possess the statutory qualifications of electors. Then, were these persons, or any of them, such residents of the precinct as would give them the legal right of voting at the election? It is only upon the law and the facts as stated in the stipulation of the parties that the question must be determined. The statement of facts shows that E. S. Pierson came to the post in September, 1874, and brought his wife in the following spring; they resided all the time at the post, and he "did not change his residence for four or five months after he quit work." If his domicil was not at the post, how could he change his residence? But where did he go? It is not stated that he left the precinct.

H. F. Morton came to the post in the fall of 1874 with his family, and resided at the post; he "was a *resident* six or seven months after he quit work on the post," and did other work in the precinct and remained until late in the summer of 1876. Did he leave the precinct? It is not so stated.

C. C. Cheesebro was a resident of the precinct before

work was commenced on the post, and moved his family to the post in the spring of 1875; he worked there until the work was done in the spring of 1876, and, from all that appears, he still resides there.

F. O. Graham was superintendent of the works at the post; he came with his family, who still reside at the post; he has a "claim" in the precinct, which he has improved, but never lived on the same; he remained until the work was finished, and he is now supposed to be in the Black Hills. There is no fact stated tending to show that his residence has been changed since he settled with his family at the post.

John Peterson came some months after the work commenced, and was foreman of the carpenters till four or five months ago, when he left. It is not stated that he left the precinct.

James Jansen was an employe at the post all the time, and left when the work was finished. It is not said that he left the precinct.

John Greenfield worked all the time, commenced with the building of the post, and left when done; had his family. It does not appear that he left the precinct.

N. C. Barlow commenced in February, 1875, to work; left when work was done; went to Howard county and took up a claim; had no family. Was he a resident of the precinct before he worked at the post? It cannot be presumed he was not.

It may be noticed as a fact patent to all that in a new country, a man who depends upon his work as a laborer or mechanic often changes his residence *sine animo revertendi*, in order to live at the place of his employment. But, however this may be, there is no fact stated tending to show that the removal of any one of these persons, with his family, to the post, in the precinct, was with the intention to return to the place whence he came. And it is said that a man can only have one domicil at the same

time, and every man must have a domicil somewhere. "A person being at a place is *prima facie* evidence that he is domiciled there, but it may be explained and the presumption may be rebutted." 2 Kent Com., 430, note. *Putnam v. Johnson*, 10 Mass., 501. It seems clear from the facts stated, and the law, that the above named persons were entitled to the right of suffrage at the election in the precinct, being residents therein.

But we are of the opinion that the three remaining persons, named in the stipulation, did not possess the statutory qualifications of electors in the precinct, and their votes must be rejected.

It is admitted that relator received fifty-one votes, and that defendant received nine votes in precinct No. 5, in Valley county, which were omitted in the canvass and return of the votes, including the vote of persons at the post, and that they ought to be counted, except such as may be, if any, adjudged illegal of those who were at the post; and it is further admitted that in precinct No. 2, in Cedar county, "in carrying out the number of votes for T. L. Griffey of votes cast for him as shown by the tallies on the poll books as sixty-seven votes, there was a mistake as the same makes seventy-six votes for him," and therefore nine votes should be added to those of defendant in the count.

In conclusion it only remains to say that upon a count of the votes of the judicial district, according to the law as held in this opinion, we find that the relator had a majority of all the legal votes cast in the sixth judicial district, and is therefore entitled to the office of judge of said judicial district, and therefore judgment of ouster must be rendered against the defendant.

JUDGMENT ACCORDINGLY.

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

1. **Deeds**: EXECUTION AND ACKNOWLEDGMENT. A deed of conveyance of land must be executed and acknowledged as directed by the statutes of the state in which the land is situated; if the deed is executed in another state and the statute provides that it shall be executed and acknowledged according to the laws of such state, it must be so executed.

2. ———: OF FEME COVERT. An instrument, purporting to be the deed of a feme covert, without her acknowledgment, is void as to her. It is no deed.

3. ———: FORGERY. If an instrument does not purport on the face of it to be good and valid for the purpose for which it was created, it cannot legally be the subject of forgery, if not genuine.

INDICTMENT for forgery found in the district court of Jefferson county. Defendant found guilty, sentenced to the penitentiary for eighteen months, and sued out this writ of error. The cause was tried below before WEAVER, J.

E. E. Brown, for plaintiff in error.

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

GANTT, J.

The indictment charges the plaintiff in error with forging and counterfeiting a certain deed, purporting to convey the title of certain lots of ground in the village of Nashville, in the state of Michigan. The deed is set forth *in extenso* in the body of the indictment, and by it John K. Roode doth grant, bargain, sell and convey to one J. E. Davis, the lots described therein, with full covenants of warranty, and then follows this language: "The said John K. Roode and Maggie Roode relinquish

all claims in and to the above described premises." The names of both John K. and Maggie Roode are signed to the deed: it is regularly executed and acknowledged by John K. but is not acknowledged by Maggie Roode, and the gist of the offense is, that the name of Maggie Roode was forged and counterfeited to the instrument with intent to damage and defraud said Maggie Roode, who is the wife of the plaintiff in error. The accused demurred to the indictment on the ground that the facts stated therein are not sufficient in law to constitute an offense punishable by the laws of this state. The demurrer was overruled by the court, and exceptions duly taken. After the trial the accused filed a motion in arrest of judgment for the same reasons stated in his demurrer, which motion was overruled, and exception was taken. The only questions raised in the case are, whether the deed set forth in the indictment is, upon its face, void as to Maggie Roode, and whether an indictment for the forgery of such an instrument can, in law, be sustained.

It is well understood that, under the strict rules of the common law, the transfer of real estate was by livery of seizin, and, therefore, the validity of the transfer of such estate by deed of conveyance depends wholly upon statutory authority. It seems that the registration of such deeds of conveyance was intended to stand in the place of livery of seizin; and the validity of registration depends upon the instrument having been first properly acknowledged as required by the statute. Hence, the life and legal effect which such deed acquired is wholly derived from and given to it by the statute, and the execution acknowledgment, and registration of the deed must be strictly within the province of the law, for in these respects the statute cannot be taken as merely directory, but must be considered as matter of substance, and must be strictly pursued. 1 Burr, 447. 3 Yeates, 186. And in

Clark v. Graham, 6 Wheat., 577, it is said that "it is perfectly clear that no title to lands can be acquired or passed, unless according to the laws of the state in which they are situate." 3 Wash. on Real Prop., 216. *Lies v. De Diablar*, 12 Cal., 330.

The registry laws of Michigan require deeds of conveyance of lands to be acknowledged or proved and recorded; and provide that "if any such deed shall be executed in any other state, territory, or district of the United States, such deed may be executed according to the laws of such state, territory, or district, and the execution thereof be acknowledged before any judge of a court of record, notary public, justice of the peace or other officer" authorized by law to take such acknowledgment; and in all cases of such acknowledgment there must be attached to the deed "a certificate of the clerk or other proper certifying officer of a court of record of the county or district within which such acknowledgment was taken, under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment was such officer as he is therein represented to be, that he believes the signature of such person subscribed thereto to be genuine, and that the deed is executed and acknowledged according to the laws of such state, territory, or district."

Now the instrument set forth in the indictment is not acknowledged by Maggie Roode, and it is not certified as required by the laws of Michigan; nor is it executed and acknowledged by her according to the laws of Nebraska. Therefore, it need only be observed, that as to Maggie Roode the instrument as a deed does not come within the purview of the laws relating to the transfer of lands by deed of conveyance, either in Michigan, or Nebraska. Hence, it is clear, as to Maggie Roode, the instrument is no deed, and is void upon its face. In *People v. Galloway*, 17 Wend., 541, it is said that "an

instrument purporting to be the deed of a *feme covert* is, before acknowledgment utterly void. It is not her deed." *Smith v. Hunt*, 13 Ohio, 260, 268. *Carney v. Hopple's Heirs*, 17 Ohio State, 39. *Perdue v. Aldridge*, 19 Ind., 290.

The next question is, can such an instrument legally be the subject of forgery, if not genuine? I think the doctrine cannot be maintained upon principle or law that an instrument absolutely void on its face, and which could work no injury to the person for whom it was obtained, can legally be made the subject of forgery if not genuine. In the case of *The People v. Galloway*, *supra*, it is said of the statute in relation to forgery that "it was made to protect men in the enjoyment of their property, and if the instrument can by no possibility prejudice any one in relation to his estate, it will not be an offense within the statute. * * * In prosecuting for forgery it is material that the instrument should not upon its face appear to be illegal and void." *King v. Moffat*, 2 Leach, 483. And Baron Eyre said in *Jones & Palmer's Case*, 1 Leach, 405, that the instrument to be the subject of forgery must "purport on the face of it to be good and valid for the purpose for which it was created." 2 Bish. Crim. Law, Sec. 506.

The demurrer to the indictment should have been sustained.

JUDGMENT REVERSED.

AULTMAN, MILLER & CO., PLAINTIFFS IN ERROR, v. R. H. MALLORY, DEFENDANT IN ERROR.

1. **Conditional Sale.** A sale and delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee until the condition is performed.
2. ———. No one can sell a greater interest in property than he possesses, unless the real owner so far encourages and sanctions the sale as to be estopped from asserting title to the property sold.

ERROR to the district court for Saline county. The case was thus:

Plaintiffs sold to one Johnson a Buckeye mower and reaper, receiving from him two notes payable to them. Afterward, Thomas B. Parker recovered a judgment against Johnson, issued execution thereon, which was placed in the hands of defendant, who was at the time a constable, who levied on the machine and took the same into his possession for the purpose of satisfying the debt of Johnson, and plaintiff replevied the machine from defendant.

The court below rendered judgment in favor of Mallory, and Aultman, Miller & Co. brought the cause here by petition in error.

From a stipulation on file it appears that neither the defendant in error nor the judgment creditors had any notice whatever of the contract between the plaintiffs and Johnson, nor that the machine was bought on credit by Johnson, nor were said notes recorded; and that the only claim that plaintiffs make to the machine is by virtue of a clause contained in the notes, given for the purchase price of the machine, that the title was not to pass until the notes were paid in full.

M. B. C. True and *W. H. Morris*, for plaintiffs in error, cited decisions by the courts of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, New York, Ohio, Michigan, Wisconsin, Iowa, Indiana, and Kansas, in support of the point that chattels may be contracted for sale, and possession given under such contract; in which case the purchaser acquires no title before performance of the condition.

Hastings & McGintie, for defendant in error, contended that where there is a sale and nothing remains to be done by the vendor, as between him and the vendee, the property in the thing sold vests in the vendee. Benjamin on Sales, 2d ed., 233. And in this case, it seems there was a sale of the machine and nothing remained to be done by the seller except to receive the money on the notes when they became due. Is a sale of property, upon the terms and conditions contained in the notes, intended by the parties as mortgage or security? If so, then clearly the same was fraudulent and void as to creditors or subsequent purchasers in good faith, by our statute of frauds. General Statutes, 393.

The selling and delivery of personal property to another, upon condition that the title does not pass from the vendee until the purchase price is paid, while between the original parties it may be good and the condition sustained, yet as between creditors of the vendee and innocent purchasers the same is fraudulent and contrary to public policy, and will not be enforced. *Davis v. Bigler*, 62 Penn. State, 242. *Ketchum v. Watson*, 24 Ill., 591. *Webster v. Peck*, 31 Conn., 495. *Steelyards v. Singer*, 2 Hilton, 96. *Western Transportation Co. v. Marshall*, 37 Barb., 509. *Haak v. Linderman*, 64 Penn. State, 499. *Morris v. Grover*, 3 Ill., 529. *Smith v. Lynes*, 5 New York, 41.

MAXWELL, J.

A sale and delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee until the condition is performed; and a vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee and against his creditors. Story on Sales, Sec. 313. *Hussey v. Thornton*, 4 Mass., 405. *Marston v. Baldwin*, 17 Mass., 606. *Barrett v. Pritchard*, 2 Pick., 512. *Hill v. Freeman*, 3 Cush., 257. *Gambling v. Read*, 1 Meigs, 281. *Bigelow v. Huntley*, 8 Vt., 151. *Smith v. Foster*, 18 Vt., 182. *Brewster v. Baker*, 20 Barb., 364. *George v. Stubbs*, 26 Maine, 243. *Sewall v. Henry*, 9 Ala., 24.

No one can sell a greater interest in property than he possesses, unless the real owner so far encourages and sanctions the sale as to be estopped from asserting title to the property sold. Where goods are delivered to the vendee, the intention of the parties determines the interpretation to be given to the delivery. If the vendor, or his authorized agent, delivers goods unconditionally, he cannot afterward assert a claim of title thereto; or if, having delivered the property to the vendee conditionally, he afterward in any manner waives his right to the *title* of the property sold, he cannot afterward maintain an action of replevin to recover possession thereof. But the question of waiver, when put in issue, is a question of fact that should be submitted to the jury. See *Estabrook v. Omaha Hotel Co.*, *ante*, p. 76.

In this case, the court instructed the jury to return a verdict for the defendant; in this there was error. The judgment of the district court is, therefore, reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

JORDAN P. SMITH, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Practice in Criminal Cases:** QUALIFICATION OF JURORS. Where it appears that a person called as a juror has formed an opinion as to the guilt or innocence of the accused from reading reports of the testimony of witnesses of the transaction, he is incompetent to sit as a juror in the case. *Carroll v. The State*, *ante* page 31.
2. ———: EXAMINATION OF WITNESSES. A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony.
3. ———: INSTRUCTIONS TO JURY should be given with reference to the evidence in each particular case.

ERROR from the district court of Kearney county. Tried below before POST, J.

IT was an indictment for murder and came before this court in 1876, being reported in 4 Neb., 277. The accused being then awarded a new trial procured a change of venue to Kearney county, where he was found guilty of murder in the second degree and sentenced to imprisonment in the penitentiary for thirty years. He again brought the cause here upon writ of error. The facts necessary to an understanding of the points passed upon by the court appear in the opinion.

E. F. Gray, for plaintiff in error.

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

MAXWELL, J.

While the jury were being impaneled in the case, John Bartlett was called as a juror, who, being examined on his *voir dire*, testified as follows: "I live at

Lowell; have been here about three years; came from Kearney Junction; have lived here ever since I came here; have formed and expressed an opinion as to the guilt or innocence of the accused; I have read the papers, and have been at the Junction, and had conversation with parties there; I know nothing about the facts in the case, except what I have heard and read; my opinion is formed from reading evidence published in the papers; as far as I recollect, it was published in full; notwithstanding that opinion, I think I could render a fair and impartial verdict upon the evidence introduced here; I think the opinion I have formed would have no effect whatever, upon my judgment; the opinion I had, I have now." Whereupon the counsel for the prisoner challenged said juror for cause; which challenge was overruled by the court, to which the prisoner's counsel excepted.

In *Curry v. The State*, 4 Neb., 548, this court, in construing section 468 of the criminal code, say: "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" (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); "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.'" It is clear, therefore, that, when a person called as a juror has formed an opinion as to the guilt or innocence of the accused from reading reports of the *testimony of witnesses of the transaction*, he is incompetent to sit in the case, although

he might swear, unequivocally, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence. See *Carroll v. The State—ante* page 31. The court, therefore, erred in overruling the challenge to the juror in question.

Other jurors challenged for cause appear to have formed their opinions from hearsay; the challenges as to them were, therefore, properly overruled.

Daniel A. Crowell, a witness for the state, on cross-examination, testified as follows:

"Q. Didn't you testify, on the former trial, that at the time of the shooting, you were only ten or fifteen rods, at the most, from the parties?

"A. No! I didn't testify to that; I testified this way: 'It may be ten, fifteen, twenty, or it may be thirty rods.' I have since stepped it. I was asked the question whether it was ten rods; and I said it was ten, fifteen, twenty, or may be thirty rods."

The defense called Thomas J. Hewitt, one of the attorneys for the prisoner, who testified that he was present during the former trial, and heard the testimony of Daniel A. Crowell, and took notes thereof. He was then asked: "What did Crowell testify was the distance from where he stood, at the time of the shooting, to Collins' house?" Which was objected to by the state as incompetent, and immaterial; which objection was sustained; to which counsel for the prisoner excepted. It is claimed, on the argument, by the counsel for the prisoner, that, if Hewitt had been permitted to answer the question, he would have testified that Crowell, on the former trial, testified he was distant ten or fifteen rods from the parties, at the time of the shooting; and it is claimed that this testimony is proper, as tending to impeach and discredit the witness Crowell.

The rule is thus stated by Greenleaf: "A witness *cannot be cross-examined as to any fact, which is collat-*

eral and irrelevant to the issue merely for the purpose of *contradicting him* by other evidence, if he should deny it, thereby to discredit his testimony. And, if a question is put to a witness which is collateral and irrelevant to the issue, his answer cannot be contradicted by the party who asked the question; but it is conclusive against him." (See *Stokes v. The People*, 53 N. Y., 176.) "But it is *not irrelevant* to inquire of the witness, whether he has not on some former occasion given a *different account* of the matter of fact, to which he has already testified, in order to lay a foundation for impeaching his testimony by contradicting him. The inquiry, however, in such cases, must be confined to matters of *fact only;* mere opinions which the witness may have formerly expressed being inadmissible, unless the case is such as to render evidence of opinions admissible and material." 1 Greenleaf on Evidence, Sec. 449. So far as appears from the record, Crowell could see what transpired, and hear the conversation of the parties, as well at thirty, as at ten or fifteen rods. The question of the distance, at which the witness stood, is not a material inquiry in the case; at the most it is a mere expression of opinion. The objection, therefore, was properly sustained.

The objections to certain questions, propounded to Copeland and Brown, by the prisoner's counsel, were properly sustained.

There is not a particle of testimony tending to show that Collins made threats against the prisoner; yet several questions objected to were so framed as to convey the impression that he had made such threats; nor is there any testimony tending to show that Smith acted in self-defense. Counsel for the prisoner asked the court to instruct the jury:

"If you believe, from the evidence, the killing was in self-defense, you must acquit."

"If the defendant committed the act in the reasonable fear of his own life from the deceased, then he is not guilty, and you should acquit him."

"If a man, though in no danger, through fear, alarm, or cowardice, kill another, under the impression that great bodily harm is about to be inflicted on him,—if the facts and circumstances excited a reasonable belief, reasonable in proportion to his mental condition,—it is neither murder nor manslaughter, but self-defense."

Which instructions were properly refused by the court. Instructions should be given with reference to the evidence in each particular case. *Dodge v. The People*, 4 Neb., 231.

We see nothing in the instructions given by the court, of which the prisoner can complain; nor is there error in the refusal to give the instructions asked. Many of the questions, raised by the assignment of errors, have already been decided by this court. *Smith v. The State*, 4 Neb., 277. It is, therefore, unnecessary to review them here.

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

REVERSED AND REMANDED.

THOMAS GIBSON, PLAINTIFF IN ERROR, v. RICE ARNOLD, DEFENDANT IN ERROR.

1. **Practice.** AN EXCEPTION taken in the court below must not be so indefinite as to leave it uncertain as to what it is intended to apply.

2. ———: MOTION FOR NEW TRIAL. To obtain a review of a case in this court, the party must first have fully and fairly presented, in the proper mode, the questions of law to the court below.

ERROR from the district court of Washington county.

E. Estabrook, for plaintiff in error.

Carrigan & Osborn, for defendant in error.

GANTT, J.

The plaintiff in error was plaintiff in the court below, and brought this action to recover damages for an alleged conversion of property. It appears that upon a warrant of the county treasurer for that purpose, the defendant, Arnold, sheriff of the county, distrained and sold at public auction the property in question for the payment of unpaid delinquent taxes of the plaintiff. The board of county commissioners were made a party defendant, and interposed a general demurrer to the plaintiff's petition. The demurrer was sustained. It is very clear that if property seized by distress for the payment of delinquent tax is wrongfully taken by the officer charged with the collection of such tax, the county cannot be made liable in damages for such unlawful seizure, and hence there being no cause of action against the county, the demurrer was properly sustained.

The defendant, Rice Arnold, filed his second amended answer, to the second count of which the plaintiff demurred. The demurrer was overruled, and no exception was taken. The plaintiff filed a reply, to which

defendant, Arnold, demurred, and the demurrer was sustained, and no exception was taken. Judgment of dismissal of the cause was entered, and also judgment in favor of defendant for costs. The record shows that the plaintiff did not appear in court at this time, but that afterwards and during the same term he "appeared by attorney in open court and excepted to the *order of the court* herein." This exception is so indefinite that from an inspection of the record it is impossible to ascertain with certainty to what it was intended to apply. If the plaintiff, when he appeared in court, which it is admitted he was in time to do, had filed the proper motion and had obtained the ruling of the court upon such motion, he might have put his case in shape to obtain a review of it in this court. But for some reason he did not do so, and as there is no error in the judgment itself, the record does not present any subject matter upon which this court can properly pass and the petition in error must be dismissed and the cause remanded to the district court.

PETITION DISMISSED.

JAMES BILLINGS, PLAINTIFF IN ERROR, v. MCCOY BROTHERS, DEFENDANTS IN ERROR.

1. **Payment.** A voluntary payment made under a mistake as to facts may be recovered back; and it is not necessary to authorize a recovery in such a case that the mistake should have been caused by the wrongful act of the defendant.

2. **Practice:** CONTINUANCE. An application for a continuance is addressed to the sound discretion of the court, and its action will not be reversed, unless there has been such an abuse of discretion as has operated to the prejudice of the party in the final determination of the case.

3. ———: INSTRUCTIONS should be given with direct reference to the testimony in each particular case, and the attention of the jury directed to the questions at issue.

4. ———: ———. Where instructions are asked by either party before the jury retire, which are unobjectionable, pertinent to the issue, and necessary for the jury to consider in making up their verdict, they should be given by the court, notwithstanding a rule requiring *all* instructions to be submitted before the commencement of the argument.

ERROR from the district court of Richardson county. Tried below before WEAVER, J.

Billings was defendant in the court below, and judgment being rendered against him, he brought the cause here by petition in error. The opinion states the case.

Isham Reavis and *J. H. Broady*, for plaintiff in error.

Schoenheit & Towle, for defendants in error.

MAXWELL, J.

The defendants in error filed their petition in the district court of Richardson county, alleging, that, "about the first day of March, 1873, the plaintiffs, as said firm, contracted with, and purchased of the defendant, James Billings, twenty-five head of native, and one hundred and fifty-seven head of Texas cattle; for which the said plaintiffs were to pay said defendant four and one-half cents per pound for the native, and four cents per pound for the actual gross weight of said Texas cattle. That, by agreement of said plaintiffs and defendant, John Holt of the town of Salem, in said state, as a disinterested party was chosen to weigh said cattle upon the scales of said defendant, and keep an account of the actual gross weight of said cattle. That, pursuant to said agreement, said John Holt did weigh seventeen head of said native cattle, which, as said Holt in a mistake supposed, and as

he in a mistake kept account, weighed on said scales twenty-three thousand five hundred and thirty pounds; and, then and there said Holt also weighed the said one hundred and fifty-seven head of Texas cattle; and, as said Holt then in a mistake supposed, and in a mistake he kept account, said one hundred and fifty-seven head of Texas cattle weighed one hundred and ninety-four thousand four hundred and five pounds; when, in truth and in fact, said native cattle only actually weighed twenty-two thousand and thirty pounds, and said Texas cattle only one hundred and eighty thousand seven hundred and seventy pounds; * * * * that plaintiff paid said defendant for twenty-three thousand five hundred and thirty pounds of said native cattle four and one-half cents per pound, and also paid for one hundred and ninety-four thousand four hundred and five pounds of said Texas cattle four cents per pound, amounting in all to the sum of $——. That, after the weighing of said cattle, and the payment thereof, as aforesaid, by said plaintiffs to said defendant, the plaintiffs ascertained that they had paid to the defendant, in a mistake, for fifteen thousand pounds of weight of cattle, which they never received, amounting in all to the sum of $303.75; and for which they had received no consideration whatever," etc. Wherefore plaintiffs pray judgment, etc. The defendant answered, denying the facts stated in the petition, except as to the purchase and payment of the cattle.

On the trial of the cause, in March, 1876, the court, at plaintiffs' request, instructed the jury as follows: "If you believe from the evidence, that there was a mistake in the weighing of the cattle, and that the weight was stated at more than it actually was, and that the plaintiffs paid to defendant more than was actually due to him for the cattle sold, then the jury must find for the plaintiffs, and assess their damages at the sum so overpaid, with interest at the rate of ten per cent per annum,

from the time the same was so paid." The defendant asked the court to instruct the jury as follows: "Before they can find for the plaintiffs, they must be satisfied from the evidence, that the cattle did not weigh the amount paid for by plaintiffs, and that the discrepancy in the weight was caused by the wrongful act of the defendant," which the court refused to give; but instructed the jury, "that before they can find for the plaintiffs, they must be satisfied from the evidence, that the cattle did not weigh the amount paid for by the plaintiffs."

The rule is well settled, that money paid by one party to another, in mutual ignorance of facts which, if known, would have prevented the payment, may be recovered back. *Waite v. Leggett*, 8 Cowen, 195. *Burr v. Veeder*, 3 Wend., 412. *Franklin Bank v. Raymond*, 3 Wend., 69. *Potter v. Russell*, 2 Hall, 252. A voluntary payment (such as money paid on an incorrect computation of interest), made under a mistake as to *facts*, may be recovered back in an action for money had and received. *Boyer v. Pack*, 2 Denio, 107. *Mowatt v. Wright*, 1 Wend., 355. It is not necessary, to authorize a recovery in a case like this, that the mistake should have been caused by the wrongful act of the defendant. If the plaintiffs, under a misapprehension as to the facts in regard to the actual weight of the cattle, paid the defendant a greater sum than was due him, they are entitled to recover in this action. The court, therefore, did not err in refusing to instruct the jury as requested by the defendant.

It is objected, that the court erred in refusing to grant a continuance, on account of the inability of one of the attorneys for the defendant to attend court. An application for a continuance is addressed to the sound discretion of the court; and its action will not be reversed, unless there has been such an abuse of dis-

cretion as has operated to the prejudice of the party, in the final determination of the case. From the bill of exceptions, we are unable to say that there has been an abuse of discretion in this case; if, indeed, the absence of an attorney, unless under peculiar circumstances, which do not arise in this case, would be sufficient grounds on which to base an application for a continuance.

After the conclusion of the argument of counsel, the attorneys for the defendant presented certain instructions to the court, and requested that they be given to the jury; which the court refused to give, "because not offered before the argument." It is claimed, the rules of court require counsel to ask for instructions, if any, before the commencement of the argument. Section 283 of the code of civil procedure provides: "When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court; * * * * the parties may then submit or argue the case to the jury. In the argument, the party required first to produce his evidence shall have the opening and conclusion. If several defendants having separate defenses, appear by different counsel, the court shall arrange their relative order. The court may again charge the jury after the argument is concluded." Instructions should be given with direct reference to the testimony in each particular case, and the attention of the jury directed to the questions at issue; but, in the hurry of a trial, the most careful lawyer may overlook some question on which it is proper the jury should be instructed. If, under such circumstances, an instruction is submitted to the court at any time before the jury retire, which is otherwise unobjectionable, and is pertinent to the case, and necessary for the jury to consider in making up their verdict, it will be error for the court to refuse to give such instruction. The object of the law is to administer justice. And rules of court for

conducting trials should not be so construed as to prevent a fair submission of a case to the jury. But in this case, none of the instructions asked were pertinent to the issue, except the second; and the court had already given that in substance.

We see no error in the record of which the plaintiff in error can complain. The judgment is clearly right, and must be affirmed.

JUDGMENT AFFIRMED.

JAMES ILER, APPELLEE, v. H. CLAY DARNELL, APPELLANT.

1. **Practice:** VACATION OF JUDGMENT. The power given to courts of record by section 602 of the civil code, to vacate or modify their own judgments or orders after the term at which they are made, does not confer original jurisdiction.
2. ———: ———. The power thus conferred is only that of further proceedings, for the causes enumerated, in an action after judgment; and are therefore merely special proceedings *in* an action, and are not an original action, and therefore not appealable.
3. ———: REVIEW OF JUDGMENT. Section 584 of the civil code provides that proceedings to review a judgment of the district court, in such a case, shall be by petition in error.

MOTION to dismiss appeal.

Tuttle, Harwood & Ames, for the motion.

Lamb, Billingsley & Lambertson, contra.

MAXWELL, J.

This is a petition filed for a new trial in an action at law, under the provisions of section 602 of the code of civil procedure. The case is brought into this court by appeal. The plaintiff moves to dismiss the appeal,

"on the ground that the same is not an action, and is not a proceeding in equity; and, therefore, not appealable."

In *Coates v. Chillicothe Bank*, 23 Ohio State, 431, the court say: "The power given to courts of record, by sections 534 and 542 of the code" (602 and 610 of our code), "to vacate or modify their own judgments or orders, after the term at which they are made, does not confer original jurisdiction; for they apply to judgments rendered in the district and supreme courts in cases of which, under the constitution, they can only acquire appellate jurisdiction. The power thus conferred, then, is only that of further proceedings, for the causes enumerated, in an action after judgment; and are, therefore, merely special proceedings *in* an action, and are not an original action, or the 'civil action' provided by the code. When, therefore, the power conferred by these sections to break into an action after judgment, and obtain further proceedings therein, is all that is invoked by a proceeding, such proceeding cannot be regarded as a civil action; and, therefore, is not appealable." In *Taylor v. Fitch*, 12 Ohio State, 172, the court say: "Is this proceeding by petition to vacate a judgment and to have the case reinstated on the docket for trial, in itself a civil action, or is it merely a branch, off-shoot or incident of an action? or, in the language of section 512 of the code of civil procedure, 'a special proceeding in an action after judgment?' We are of the opinion that it is the latter, and nothing more."

Section one of the act to provide for appeals in actions in equity, provides that in *all actions in equity* either party may appeal. The Ohio law provides for appeals *in civil actions* in which the parties have not the right of trial by jury. The statute on the subject of appeals was passed long subsequent to the code. Section 581 of the code provides, that an order affecting a substantial right in a special proceeding, or upon a summary appli-

cation in an action after judgment, is a final order which may be vacated, modified or reversed. Section 584 provides, that proceedings to obtain such reversal shall be by "petition in error."

We have no doubt a case of this kind should be brought into this court by petition in error, and not by appeal. Aside from the question raised on the motion, it is apparent that the court did not abuse its discretion in granting a new trial. The motion to dismiss the appeal is sustained.

MOTION SUSTAINED.

NICHOLS, SHEPARD & CO., PLAINTIFFS IN ERROR, v. JOHN D. HAIL, DEFENDANT IN ERROR.

1. **Practice:** FINAL JUDGMENT. A judgment upon the verdict of a jury finding for defendant, for costs only, is not a final judgment.

2. ———: ———. To obtain the review of a case in this court, there must be a final judgment upon the merits of the case, in the court below.

ERROR from the district court for Cuming county. Tried below before GRIFFEY, J.

Uriah Bruner, for plaintiffs in error.

Stevenson, Carrigan & Osborn, for defendant in error.

GANTT, J.

The record in this case shows a trial by jury, a verdict of the jury finding for the defendant, a motion by plaintiffs for a new trial, and it concludes as follows:

"The court being fully advised in the premises, it is ordered and adjudged that said motion be and the same

is hereby overruled, to which ruling of the court the plaintiffs then and there excepted. It is, therefore, ordered and adjudged by the court that the defendant have and recover of plaintiffs judgment upon the verdict of the jury for his costs taxed at $67.93."

This is not a judgment upon the finding of the jury, disposing of the merits of the case. A final judgment in such case is:

"It is considered by the court that the plaintiff take nothing by his writ, and that the defendant go hence without day." The record entry is simply an assertion that the "defendant have and recover of plaintiffs a judgment for his costs."

As the record contains no final judgment upon which error will lie, the cause must be remanded to the district court, in order that it may be proceeded therein to final judgment, according to law.

JUDGMENT ACCORDINGLY.

DE WITT C. SHELLENBARGER, EXECUTOR, ETC., APPELLEE, v. FOREST K. BISER, APPELLANT.

1. **Foreclosure of Mortgage:** PARTIES. All persons materially interested in the mortgaged premises should be made parties to a suit to foreclose a mortgage, in order that a perfect title may pass by a sale under the decree, as a purchaser takes only the title of the parties to the suit; but a person claiming adversely to the title of the mortgagor and prior to the execution of the mortgage, cannot properly be made a party for the purpose of trying the validity of such adverse claim of title. But where a defendant answers claiming title to the mortgaged premises, and also that he has a mortgage thereon for a certain sum, and prays that in case the court finds his title invalid that he may have a decree for the amount due on the mortgage, it is the duty of the court to adjudicate upon the validity of such title, and if found invalid, to render a decree on the mortgage for such sum as may be equitably due.

2 ——: ——. Such defenses are inconsistent, and had objection been made at the proper time it would have been the duty of the court to require the defendant to elect on which he would rely.

APPEAL from Nemaha County.

Plaintiff, as executor of the estate of William D. Shellenbarger, brought the action to foreclose a mortgage made by Julia A. Biser to William D. Shellenbarger, February 21, 1872, on lot one, in block six, in Brown's addition to the city of Brownville, and recorded at four o'clock P. M. of the same day, and made Julia A. Biser, Forest K. Biser, and Cyrus W. Wheeler defendants. Julia A. Biser is served by publication only, and neither made any appearance nor defense in the action, and decree was taken against her by default. Defendant Wheeler answered, setting up a mortgage on same premises made by Julia A. Biser to him February 20, 1872, and recorded same day at eleven o'clock A. M. Defendant, Forest K. Biser, then an infant sixteen years old, by his guardian *ad litem* answered as set forth in the opinion. Z. B. Brockaway was afterwards made a party and the decree below, after dismissing the cause as to Forest K. Biser, finds liens upon the premises in favor of Wheeler, Shellenbarger and Brockaway in the order named. Forest K. Biser appealed.

J. H. Broady, for the appellant.

The court below should have determined Forest K. Biser's right to the premises for these reasons:

1. His title is assailed both by plaintiff and Wheeler, who not only bring him into court but challenge his title, and after they bring him into court they join issue with him on the merits as to his title, and go on, on both sides, and take all the proofs on those issues, and really try the cause on the issues they have consented to, and never up

to then objected to, and should not afterwards be heard to object to the issues joined. *Doniphan v. Street*, 17 Iowa, 320.

2. The defendant Wheeler assails appellant's title as voluntary and fraudulent, and asks the relief of a creditor's bill to have appellant's title-deed canceled, which is a purely equitable jurisdiction.

3. Because in the present status of the case, if appellant can sustain his allegations, he can restrain the sale of the premises under the decree herein because it would cast a cloud upon his title. *Johnson v. Hahn*, 4 Neb., 149. *Key City G. L. Co. v. Munsel*, 19 Iowa, 305, and cases there cited. *Pixly v. Huggins*, 15 Cal., 127. *Christie v. Hale*, 46 Ill., 117. *Englund v. Lewis*, 25 Cal., 337.

4. Because the principle on which such injunctions are maintained is to prevent a multiplicity of suits as stated in *Johnson v. Hahn* above cited, which applies with double force here as it would even prevent the very injunction suit, that would prevent in theory other suits.

5. Because if the property is sold under decree in this action it is to the interest of all parties that the whole title be sold and covered by the decree in order to bring a larger price. *K. C. G. L. Co. v. Munsel*, 19 Iowa, 305.

6. Because the authorities that would sustain the action of the court in dismissing as to appellant, if there are any such, furnish a rule without a reason, which is an injury to every party interested in the property.

7. Because the plaintiff nowhere states any defense to appellant's title to the land, except his denial that any deed was executed to appellant. He alleges no fraud as to the deed to appellant, June, 1871, but does say if there was any such deed the purchase was made with Julia A. Biser's money, but does not say that Julia A. Biser was insolvent at the time, or could not pay her debts from her other property; so under his allegations, when the

deed is proved the title is good in appellant. *Creed v. Lancaster Bank*, 1 Ohio State, 1. *Vanzant v. Davies*, 6 Id., 52.

8. Because no matter how stands the legal title, the premises were purchased in June, 1871, with appellant's money, which of itself, without any deed, gave him a resulting trust in the land, all of which was known by the other claimants before the making of their mortgages. They swear Julia A. Biser notified them of that fact, and hence if the property is to be sold in spite of appellant, he must first be paid out of the proceeds the original purchase price of the premises, with interest from the date of the purchase. *Hall v. Young*, 37 N. H., 134.

E. W. Thomas, for appellees.

It is not competent in a foreclosure suit, whatever the pleadings may be, to litigate and settle the right of parties who set up titles, which, if valid, are adverse and paramount to the title of mortgagor and mortgagee. *Corning v. Smith*, 6 N. Y., 82. *Board Supervisors v. M. P. R. R.*, 24 Wis., 121. Stor. Eq. Pl., Sec. 230. *Eagle Fire Co. v. Lent*, 6 Paige Ch., 635. *Frost v. Koon*, 30 N. Y., 446. 2 Hillard Mort., 179.

MAXWELL, J.

On the trial of the cause in the court below, it having been made to appear that Forest K. Biser, one of the defendants, was but sixteen years of age, the court appointed a guardian *ad litem*, who answered the petition of the plaintiff, denying all the facts therein stated. And, as a further answer, the defendant says: "that, before any of the transactions mentioned in the petition or in the cross petition of the defendant Wheeler, to-wit: about the fall of the year 1871, this defendant bought the property described in the petition of Fanny J.

Ebright, who was at that time the owner thereof; and at that time paid therefor, in money belonging to this defendant, the sum of $550.00; and then and there the said Fanny J. Ebright, duly executed and delivered to this defendant a good and sufficient deed of conveyance for said premises, and thereby conveyed said premises to this defendant * * . On or about the twentieth day of February, said deed to this defendant was destroyed; and said Fanny J. Ebright executed to Julia A. Biser a quit-claim deed of said premises, and said Julia A. Biser executed the mortgages, described in the petition, to Wheeler and Shellenbarger. At the same time of the making of said mortgages, the said Julia A. Biser executed and delivered to this defendant, her mortgage deed for said premises, to secure the payment of the sum of $550.00, on the twentieth day of February, 1873, with interest at ten per cent per annum; that Wheeler and Shellenbarger had full notice of the making of said mortgage, at the time it was made; and that it was made to secure the money which was paid for said premises by this defendant; that said mortgage was recorded on the twenty-first day of February, 1873, at four o'clock, P. M., of said day; that no proceedings have been had at law for the recovery of said debt, and no part of the same has been paid. Wherefore defendant prays, that he may be decreed the absolute owner of said lot, free from the incumbrances of the mortgages to Wheeler and Shellenbarger; or, in the event that the court is of opinion that the defendant is not the *owner* of said premises, that it be adjudged, that this defendant have a good and valid lien thereon for the sum of $550.00, with interest, etc." Afterwards this defendant filed a supplemental answer, claiming to be the owner of the premises in question in fee simple. On the hearing of the cause, the court found; "that the defendant, Forest K. Biser, sets up and claims legal title to the premises in controversy by adverse and paramount

title to the title of mortgagor, Julia A. Biser, who executed the mortgages to plaintiff and defendant Wheeler, and that said Forest K. Biser's title so set up and claimed, cannot be litigated or affected in this action. It is therefore adjudged and considered, that this cause and action be, and the same is hereby dismissed as to the defendant, Forest K. Biser; and that said Forest K. Biser go hence without day, and recover against the plaintiffs his costs herein taxed at $———."

The general rule in equity is, that all persons materially interested in the mortgaged premises should be made parties to the suit. This includes all incumbrancers (prior and subsequent), existing at the time of filing the petition, in order that a purchaser may take a perfect title by a sale under the decree, as he takes only the title of the parties to the suit; and also to prevent a multiplicity of suits, and in order that the proceeds of the mortgaged premises may be distributed among the lienholders according to the priority of liens. Many of the cases hold, that a prior incumbrancer is not a necessary party to the suit, as the purchaser takes the estate subject to the paramount lien; yet he is a proper party in order to obtain an adjudication as to the validity and amount of the lien.

A person claiming adversely to the title of the mortgagor, and prior to the execution of the mortgage, cannot properly be made a party, for the purpose of trying the validity of such adverse claim of title. But this rule does not exclude one who claims title, and, also, claims to hold a mortgage on the same premises, who submits his claims to the adjudication of the court, and asks, that in case the court finds his title to the premises invalid, that he may have a decree for the amount due on the mortgage. These defenses are inconsistent; and, had a motion been made at the proper time, the defendant would have been compelled to elect, on which he

would rely. But the plaintiff joined issue with the defendant, denying the facts stated in his answer; and testimony has been taken, by both plaintiff and defendants, to establish the truth or falsity of the issues thus raised. It is, therefore, the duty of the court to consider all the questions at issue.

The defendant, Forest K. Biser, states in his answer, that he paid $550.00 for the premises in controversy, and received a deed therefor. The testimony shows that $150.00 was all that was paid for the property, of which one hundred was paid in money, and fifty dollars in furniture. There is a conflict of testimony as to whom the first deed to the property was made, Julia A. and Forest K. Biser stating that the original deed from Mrs. Ebright was made and delivered to Forest K. Biser. The testimony of E. E. Ebright, a disinterested witness, who acted as agent in the sale of the property, is, in substance, as follows: That Mr. Biser came to see him about the purchase of the property, and the contract was made with him in the presence of Mrs. Biser, that the deed was to be taken in her name; that a deed was so made for the premises in question, and delivered to Mr. Biser, who thereupon paid him $50.00 in furniture, and soon thereafter $100.00 in money; that he was not sure the deed was acknowledged, but he thought it was, or Mr. Biser would not have made a payment on the property at the time he received it; that sometime afterward, perhaps an hour, or perhaps it might have been a day or two, Mrs. Biser returned with the deed, and requested him to have a deed made to Forest K. Biser, assigning various reasons therefor, one of which was that the purchase money was his. Ebright then destroyed the deed returned by Mrs. Biser, and had a deed made in the name of Forest K. Biser, and delivered the same to Mrs. Biser. That several months thereafter, Mrs. Biser returned this deed to Mr. Ebright, and requested him to

destroy it, and make a new deed for the premises to her, which he did. The mortgages in question were executed after the execution and delivery of the second deed to Mrs. Biser. She denies the testimony of Mr. Ebright as to the execution and delivery of the first deed to her. Mr. Wheeler testified that the improvements made on the premises, after the purchase, would cost about $600.00. Two of the defendants place the value of the added improvements at a little more than $50.00. It is apparent from the testimony of Ebright, that a deed for the premises in controversy was made to Mrs. Biser and delivered to Mr. Biser, her agent, and, so far as we can perceive, was accepted by her.

The fact, that afterward she returned the deed to Ebright, and requested him to make a deed to her son, can make no difference as to the title. Aside from the question of who holds the legal title, it is apparent from the testimony that this property was paid for by Mr. and Mrs. Biser. It is true, that Mrs. Biser and her son testify that such was not the case; but their evidence contains within itself sufficient improbability to cast doubt upon it. The family were evidently in embarrassed circumstances. Mrs. Biser was conducting a furniture store in her own name; and the debts these mortgages were given to secure were debts Shellenbarger and Wheeler had been compelled to pay as sureties on her notes, in the bank at Brownville, for money that had been borrowed to aid her in carrying on business. No pretense is made that the son had paid more than about $200.00 in purchasing and fixing up the premises; yet, a short time thereafter, a mortgage is given to him for the sum of $550.00; this of itself is sufficient to cast suspicion on the entire transaction.

Minors are peculiarly entitled to the favor of a court of equity; and it is the duty of the court to guard their interests with jealous care, and to enforce and secure

their rights. But transactions between parents and their child, by which the child becomes the creditor of the parents, or acquires property from them, while they are unable to pay their just debts, must be carefully scrutinized; and the court should see that the opportunity thus presented is not used as a means by which creditors are defrauded out of their just dues.

The judgment of the district court as to Shellenbarger and Wheeler is affirmed. As there is nothing in the record to show the date of the judgment in favor of Brockaway, the cause is, therefore, remanded to the district court of Nemaha county to find the amount *equitably* due on the mortgage of Forest K. Biser, and whether said mortgage is prior to the Brockaway judgment, and to render a decree according to the order of priority of those liens.

REMANDED.

THE STATE OF NEBRASKA, EX REL. GEORGE H. ROBERTS, ATTORNEY GENERAL, v. GILES R. REEDER.

1. **Escheat.** Upon the death of a tenant in fee with defect of heirs, the title and right of possession to the lands, and also to his personal estate, *eo instanti* vest in the state; and by the operation of the laws of this state all such estate, real and personal, immediately becomes and constitutes a part of the general school fund of the state.

2. ———: TITLE OF ADMINISTRATOR. The administrator of the estate of such decedent can convey no title to such lands, and has no right of possession to the same to deliver.

3. ———: SCHOOL FUND: CONSTITUTIONAL LAW. By the constitution the legislature are inhibited from diverting such school funds derived from escheats to any other special objects; and, therefore, the legislative act approved February 17, 1875, vesting in trustees the escheated estate of Henry Hooper, deceased, for a special purpose and object, is a nullity.

ORIGINAL application for mandamus.

E. W. Thomas, for the relator.

Jefferson H. Broady, for the respondent.

GANTT, J.

This case is originally brought in this court upon an application for a writ of mandamus. The application substantially states that one Henry Hooper died June 15, 1872, seized of the northeast quarter of section thirty-five, in township six north, range thirteen east, in Nemaha county, and that he was also possessed of certain personal property; that on the 11th of July, 1872, the defendant was, by the probate court of said county, duly appointed administrator of the estate of said deceased and entered upon the discharge of such trust; that afterwards he made settlement in the probate court of his administration of said estate, and that there remained in his hands a certain sum of money and some personal property belonging to said estate after payment of the debts thereof, and that after such settlement he received other sums of money belonging to said estate, which remain in his hands. It is further stated that by an act of the legislature, entitled "an act concerning the estate of Henry Hooper, of Nemaha county," approved February 17, 1875, certain persons, naming them, were appointed trustees to manage and take possession and charge of the property and assets of the said estate; and providing that the administrator of said estate deliver to the said trustees all the money and other property, and execute and deliver a deed of conveyance of the real estate of the said Hooper to the said trustees. And it is further stated that said "Hooper left no heirs, and no person or persons entitled to distributive shares of his property, and the whole thereof escheated and vested in

the state of Nebraska;" that the trustees accepted the trust conferred on them, and made demand on the defendant to deliver to them "all the money and other personal property belonging to the estate; * * and that he should execute and deliver the deed of conveyance of said real estate, as required by said act," which the defendant refused to do. The statute referred to further provides that the trustees shall sell and dispose of said real estate, and make to the purchaser a deed therefor; and that all the money received by them belonging to said estate, shall by them be expended in the erection of a school building in Nemaha county, to be known as "The Hooper Memorial School." It will be seen that the demand of defendant by the trustees is for all the personal estate and the execution and delivery of a deed conveying to them all the real estate of the said Hooper.

Now, if all this property escheated to the state, then it seems clear that both the title and the right of possession to all, real and personal, vested in the state; for there were no heirs to whom the property could be delivered by the probate court. At the common law the escheat denotes an extinction of blood of the person last seized, whereby the title of the tenant in fee fails for want of heirs and imports a determination of the tenure, and hence the land resulted back, by a kind of reversion, to the grantor or lord of the fee. But in our country no private person succeeds to the inheritance by escheat; and, therefore, in the event of such determination of tenure the reversion is to the state, by virtue of its sovereignty as the ultimate proprietor of all lands within its jurisdiction. At the time of the death of Hooper, section 3, article VI, of the constitution, declared that "all lands, the title to which shall fail from defect of heirs, shall revert or escheat to the state." Hence, there can be no doubt that upon the death of the tenant in fee

with defect of heirs, the title and right of possession to the lands *eo instanti* vest absolutely and wholly in the state. This being the law, the administrator had no title to the lands to convey and no right of possession to the same to deliver; and, therefore, a writ commanding him to make title by deed of conveyance, or to deliver possession of the land, would be ineffective for any purpose whatever.

But, if the trustees have the right of possession to the land, and the defendant illegally and wrongfully deprives them of that possession, then, in such case, they have a "plain and adequate remedy in the ordinary course of law." But have the trustees, by virtue of the act referred to, acquired any title or right whatever to the real estate of which Henry Hooper died seized, or to the money and personal property of which he was possessed at the time of his death, or which accrued to his estate afterwards? We think this question must be answered in the negative. If Henry Hooper left no heirs at his death, then all his property, real and personal, immediately vested in the state; and by section three of an act entitled "An Act to increase the school fund in Nebraska by penalties, forfeitures, fines, unclaimed fees and estates," approved February 15, 1869, all the property immediately became and constituted a part of the general school fund of the state. And by the provisions of both the old and new constitutions, all the funds belonging to the state for educational purposes shall be deemed trust funds held by the state, and shall so remain forever inviolate and undiminished, and the interest and income arising therefrom shall be exclusively applied to support and maintain the common schools throughout the state.

Therefore, if the property of Henry Hooper escheated to the state, the same by operation of law, immediately upon his death, became and constituted a part of the general school fund of the state; and, by authority of the

constitution, it must forever remain there inviolate; and the legislature cannot by legislative enactment divert this fund to any other objects. The constitution, in express terms, inhibits them from doing so; and, hence, the act of February 15, 1875, is a mere nullity, and confers upon the trustees therein named no rights to or power over the estate of Henry Hooper. The writ of mandamus must be denied.

WRIT DENIED.

WILLIAM A. ALBRIGHT, ROBERT AND JOHN DUNDAS, AND A. M. TINGLE, PLAINTIFFS IN ERROR, v. RUSSELL AND HOLMES, DEFENDANTS IN ERROR.

Promissory Notes: LIABILITY OF ASSIGNOR. A., being the payee of a promissory note, assigned the same to T., in payment for a house and lot, and to secure the payment of the note at maturity gave a mortgage on the same property, in which it was provided, that if A. should pay the note at maturity, the mortgage should be void, but "otherwise to be of full force and effect." In an action to foreclose the mortgage: *held*, that the promise of A. to pay the note was unconditional, and that he was not released by a failure to demand payment of the makers.

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

S. P. Davidson and C. Gillespie, for plaintiffs in error.

I. The petition must state all the facts necessary to constitute a cause of action. When others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties in the action, it shall be necessary to state also the kind of liability of the several parties, and the facts, as they may be, which fix their

liability. Gen. Stat., 544, Sec. 120. *Catlin v. Jones*, 1 Pinney (Wis.), 132. *Field v. Nickerson*, 13 Mass., 131. *Berry v. Robinson*, 9 Johns., 121.

If the indorsee enters into a bond for a deed agreeing to convey certain premises to the indorser on condition that the maker of a certain note, transferred by indorser to indorsee, pay the same at maturity; and in case maker does not pay same, that indorser will, and the indorsee fail to demand payment of maker and give indorser notice of non-payment so as to bind him as indorser on the note; *held*, that the indorsee by his own laches made the note his own and discharged the indorser and as to him this must be considered payment, and the indorsee was compelled to convey. *Hall v. Green*, 14 Ohio, 500.

In the petition in this case no order, judgment, or relief of any kind, is asked for against John H. and Robert Dundas, the makers of the note or either of them, and Albright cannot be subrogated to the rights of indorsees. In case this mortgage is foreclosed and the mortgaged premises are sold, as asked for, and they do not sell for the whole amount of the debt claimed to be due, no order or execution can issue against the makers for the deficit. Such order or execution must issue, if at all, against the mortgagor. General Statutes, 656, Sec. 847.

If the indorsement makes Albright the guarantor, then to fix his liability he is entitled to notice of non-payment within a reasonable time after default of payment, or if the contingency upon which the liability of the guarantor is dependent, is the result of the action of the guarantee, or depends upon his option, or where, from the nature of the case, the default must come peculiarly within his knowledge, the law imposes upon him the duty of giving reasonable notice of such default to the guarantor. and the want of such notice will dis-

charge the guarantor to the extent of the loss resulting from the want of such notice. *Bashford v. Shaw*, 4 Ohio State, 266. *Forest v. Stewart*, 14 Id., 249. *Dyer v. Gibson*, 16 Wis., 561.

T. Appleget, for defendants in error, contended that the assignment on the back of the note partakes of the nature of a guaranty; that the execution of the mortgage was a new and absolute contract, wherein Albright promises to pay the note himself, or forfeit the property mortgaged; that the absolute promise made by Albright was made for a valuable consideration, which was nothing less than the house and lot mortgaged; that where a new and absolute contract, in relation to a promissory note, is made, the party making it is not entitled to demand of the holder that he shall make demand of the maker, or give notice of non-payment. *Reed v. Evans*, 17 Ohio, 128. *Manrow v. Durham*, 3 Hill, 584. *Ketchell v. Burns*, 24 Wend., 456.

LAKE, CH. J.

There is but a single question presented in this record; and that is simply whether the petition states facts sufficient to constitute a cause of action against William A. Albright, by whom the case is brought into this court.

It appears that the defendants, Robert and John Dundas, on the 16th day of May, 1873, gave to said Albright their promissory note for $500, payable two years from date. In July of the same year, Albright purchased from Araminta M. Tingle, another of the defendants, a house and lot, and as part payment thereof, assigned to her the note in controversy; and at the same time, to secure its payment at maturity, gave back a mortgage, in the usual form, on the same property. On the 17th of July, 1873, Mrs. Tingle duly assigned both the note and mortgage to the defendants in error, who, on the

4th of September, 1875, brought their action thereon, in due form, to obtain a foreclosure. The assignment, by which Russell and Holmes took this note and mortgage, was in these words, viz:

"For value received I hereby assign, sell and set over the foregoing mortgage, and the note therein mentioned, to Russell & Holmes, bankers. Tecumseh, July 14th, A. D. 1873.

(Signed,) A. M. TINGLE."

It is very clear, that by this assignment, whatever rights were possessed by Mrs. Tingle, in respect to the note and mortgage, passed to Russell and Holmes. Whatever her equities would have been as against Albright, had she retained them and brought the foreclosure suit, belong now to the defendants in error.

It is important, therefore, to inquire as to the nature of the transaction between Albright and Tingle. What was the obligation assumed by the former, when he gave the mortgage in question? Was it simply that of an indorser of negotiable paper, by which, in order to fix his liability, a demand of payment, protest, and notice of dishonor were requisite? We think not. By the terms of this mortgage he pledged the property therein described, not merely to secure the payment of the note by him according to the liability of an indorser, but rather as an original promissor, and for a new and independent consideration. By reference to the mortgage, we find this provision: "That, whereas, the said William A. Albright is indebted to the said Araminta M. Tingle in the sum of five hundred dollars as evidenced by a certain promissory note given by Robert Dundas and John H. Dundas to said Albright, dated Sheridan, Neb., May 16th, 1873, calling for five hundred dollars, two years after date, with ten per cent interest from date, and payable to said Albright or bearer; which said

note the said Albright assigns to said Araminta M. Tingle, as a part of the purchase money of the above described premises. Now, therefore, if the said William A. Albright shall pay or cause to be paid the said sum of money with the interest thereon according to the tenor and effect of said promissory note, then these presents shall be void and of no effect, otherwise to be in full force and effect." In this assignment there is: First, an acknowledgment by said Albright of a present indebtedness, in the full amount of said note to said Tingle. There is no allusion whatever to the conditional liability of an indorser; and, Second, there is an agreement that if Albright shall fail to pay the note, or cause it to be paid, at maturity, the mortgage should be of full force and effect. There was, therefore, no necessity for any demand, notice of dishonor, and protest, in order to fix the liability of Albright to pay this note.

It is clear that the petition states a good cause of action; and the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

D. M. STEELE AND S. R. JOHNSON, PLAINTIFFS IN ERROR, v. RUSSELL AND HOLMES, DEFENDANTS IN ERROR.

1. **Banking:** LIABILITY OF BANKER. Where a banker receives a negotiable instrument for collection, it is his duty to cause it to be presented for payment at maturity, and if refused, protested, so as to charge the indorser.

2. ——: ——. The failure to perform this duty will render him liable for damages thereby occasioned.

3. ——: ——. In an action to recover for such damages the solvency of the indorser is a material inquiry.

4. ———: ———: DEFENSE. It is competent for the defendant in such action to prove that the indorser was, and continues to be insolvent, and that therefore no damages were occasioned by the failure to protest the note.

5. ———: ———: ———. But the mere fact that the indorser is in embarrassed circumstances is immaterial and constitutes no defense.

6. **Pleading:** ADMISSIONS. The plaintiff requested an instruction to the jury "that any allegation" in the petition not denied by the answer "must be taken as admitted, and true." This was refused. *Held*, error, there being material allegations in the petition not denied by the answer.

7. ———: ———. *An instruction* not warranted by the pleadings, even if it state the law correctly, will require the reversal of the judgment, if it have a tendency to mislead the jury.

ERROR to the district court of Johnson county. The opinion states the case.

T. L. Schick and *S. P. Davidson*, for plaintiffs in error, insisted that a bank failing to demand payment of a note or bill left with it for collection, becomes liable to the owner for the amount; it is bound to demand payment of the makers, and to cause notice of non-payment to be given to all the indorsers. *Smedes v. Utica Bank*, 20 Johns., 372. *Fabens v. Mercantile Bank*, 23 Pick., 330. *Ayrault v. The Pacific Bank*, 47 N. Y., 570. *Bank of Washington v. Triplett*, 1 Pet., 25. *McKinster v. Bank of Utica*, 9 Wend., 46. *Tyson v. State Bank*, 6 Blackf., 225.

A man is virtually insolvent where his liabilities exceed his means of paying if payment is pressed. But such insolvency can be no complete defense.

The insolvency of the indorser, at most, goes only in mitigation of damages to the extent of the insolvency, and the jury should have been so instructed.

The court erred in refusing to instruct the jury "that any allegation in the plaintiffs' petition which is not

denied in the defendants' answer must be taken as admitted and true." *Cheever v. Mirrick*, 2 N. H., 376. *Briggs v. Dorr*, 19 Johns., 95.

T. Appleget, for defendant in error, cited *Brown v. Hurst*, 3 Neb., 353. Sedgwick on Damages, 2d ed., 338, 340. *Brantingham v. Fay*, 1 Johns. Cases, 255. *Billings v. Vanderbeck*, 23 Barb., 555. *Moulton v. Witherell*, 52 Me., 237. *Western Stage Co. v. Walker*, 2 Iowa, 504. *Johnson v. Weedman*, 4 Scam., 497.

LAKE, CH. J.

The action in the court below was brought to recover the amount of a negotiable promissory note, executed by J. H. and A. W. Conlee to one John D. Hetzel, and by him duly indorsed, before maturity, to the plaintiffs. This note was afterwards delivered by the plaintiffs to the defendants, as bankers, for collection, and, in case of non-payment at maturity, to have the same duly protested so as to hold the indorser. These are facts set out at length in the petition, and concerning which there is no dispute. It is further averred in the petition, that the defendants wholly failed and neglected to present said note to the makers for payment at its maturity; and that it was not paid by them. And further, that they also neglected to give notice of the non-payment thereof to the indorser; and that, by reason of the negligence of the said defendants, in their omission to present said note for payment, and to give notice of the non-payment thereof, they have lost the whole amount named in said promissory note. In their answer the defendants deny the whole of the negligence imputed to them concerning said note. They also aver, that at the maturity of the note, the indorser was, and ever since has been, wholly insolvent; "and that the

amount, in said note mentioned, could not at any time have been collected from him by law."

The main points of the defense seem to have been: first, that the defendants were not negligent, in respect to their duty, as bankers, in their efforts to collect and protest said note for non-payment; and, second, that, even if they were guilty of negligence in these respects, the plaintiffs have suffered no loss in consequence thereof, because of Hetzel's insolvency.

The case was tried to a jury, and resulted in a verdict and judgment against the plaintiffs, who bring the case here for the correction of certain errors, alleged to have occurred on the trial.

The first of the alleged errors, that we will notice, consists in the admission of certain testimony, given by Hetzel as to his alleged insolvency. In the course of the examination of this witness, on behalf of the defendants, this question was put to him: "What was your financial condition at the time this note became due and payable?" An objection was interposed, on the ground of immateriality and irrelevancy, which was overruled; and the witness answered, that he "was very much embarrassed." We think, that under the issues joined, this question was proper. It was competent for the defendants to show, if they could, that the indorser of the note was insolvent at the time it matured, and that he continued to be so up to the time of trial. Such testimony would tend to prove, that no substantial damage was occasioned by the alleged negligence of the defendants.

This witness was then asked this question: "State whether or not your financial condition was such that you could meet your liabilities, either at the time of the transfer of this note, or at the time it became due?" This question was objected to, on the ground of its being leading and immaterial. But the court overruled the

objection; and the witness answered, that he "could not." We are of opinion that both of these objections are valid, and ought to have been sustained. It is true, that the answer given by the witness, if properly considered by the jury, could not have prejudiced the plaintiffs; for the mere fact that the indorser was in embarrassed circumstances and unable to meet all his liabilities, falls far short of establishing the insolvent condition required to constitute a defense to the action. But the jury, very likely, would not regard it in this light, unless specially directed by the court. We think it had a tendency to mislead, and should have been rejected.

It is also assigned for error, that the court refused to give the following instruction, tendered on behalf of the plaintiffs, viz: "The jury are instructed that any allegation in the plaintiffs' petition, which is not denied in the defendants' answer, must be taken as admitted and true." It is contended on the part of the defendants, that this instruction was properly refused; that it states the statutory rule of implied admissions much too broadly. In other words, that it is only the material allegations of a pleading that are admitted by the failure to deny them. But we do not think that this technical criticism of the language of the request is justifiable; it is altogether too narrow and arbitrary a construction to satisfy the requirements of the code. It requires us to presume that the petition contains an immaterial allegation, while the presumption really is, that it does not. And, even if there were an immaterial averment, the admission of its truth could neither benefit the plaintiffs nor prejudice the defense. An examination of the pleadings discloses the fact that there were several very material allegations in the petition not denied by the answer, and which should have been taken as true for all the purposes of the action. Probably it would have been better for the instruction to have specified the par-

ticular averments that were not denied, and asked a specific instruction that the jury take them as absolutely true. But, while we regard this as the better practice in such cases, there can be no doubt that the plaintiffs were entitled to have the jury instructed upon that point substantially as requested, and in the very language employed, unless the court saw fit to substitute its own, conveying the same idea.

Again, the court, at the request of the defendants, instructed the jury, "that, if the evidence shows that plaintiffs have not used due diligence in trying to collect the note from the makers, they are not entitled to recover." This instruction, even if it stated the law correctly, was not warranted by the pleadings in the case. There was no issue raised to which it was at all applicable. The plaintiffs were not required, in this action, to show that they had used any degree of diligence whatever, in endeavoring to collect the note from the makers. In a suit against the indorser of a note, where the question of due diligence is raised, such an instruction might be very proper; but here it doubtless had a direct tendency to mislead the jury, and prejudice the plaintiffs' case.

The judgment of the district court is reversed, and a new trial awarded.

JUDGMENT REVERSED.

C. F. MEWIS, PLAINTIFF IN ERROR, v. JOHNSON HARVESTER COMPANY, DEFENDANT IN ERROR.

1. **Practice in Supreme Court:** BILL OF EXCEPTIONS. A motion to strike a petition in error from the files on the ground that what purports to be a bill of exceptions cannot be so considered, will not be entertained. This objection must be taken either by a motion to quash the exceptions, or on the final hearing.
2. BILL OF EXCEPTIONS. In vacation a judge has no authority to allow a bill of exceptions. And if the record disclose that it was so allowed, it will not be considered.

ERROR from the district court of Cuming county.

Crawford & McLaughlin and *E. P. Weatherby*, for plaintiff in error.

R. F. Stevenson and *E. K. Valentine*, for defendant in error.

LAKE, CH. J.

The question first presented for our consideration relates to the bill of exceptions, and is decisive of the case.

I. The record discloses the fact, that on the 21st day of January, 1876, on the overruling of the motion for a new trial, the defendant below asked and obtained leave to prepare his bill of exceptions for allowance in vacation, and have it filed as of that term. Thirty days were given; but the bill was not actually allowed and filed until the 11th day of March, nearly a month after the time fixed by the court for it to be done, and during vacation.

A motion has been made to strike the petition in error from the files, for the reason that said bill of exceptions was allowed and filed in vacation. This motion must be denied. The fact, that what purports to be a bill of

exceptions cannot be so considered, or shows no error calling for a reversal of the judgment, is no ground for striking the petition in error from the files. The office of a bill of exceptions is to bring into the record of a case those material matters which otherwise would not appear. It is not unfrequently the case, however, that very grave errors are shown, independently of the bill of exceptions. The correct practice undoubtedly is, either to raise this question by a motion to quash the bill of exceptions, or, on the final trial, by a suggestion to the court that it was not allowed within the time limited by the statute, and, therefore, not properly a part of the record of the case.

But while we cannot strike the petition from the files, the undisputed fact, that the bill of exceptions was allowed and filed in vacation, compels us to disregard it entirely in the consideration of the alleged errors. The code of civil procedure, section 308, would seem to be decisive of the matter. It provides, that "time may be given to reduce the exceptions to writing, but not beyond the term."

If authorities were needed to show that a bill of exceptions allowed by a judge in vacation constitutes no part of the record of a case, they are found in the rulings of the supreme court of Ohio, the state from whence our code was borrowed. *Doe ex dem. Irvine v. Brown*, 6 Ohio State., 12.

II. Referring to the petition in error, we find but a single objection to the proceedings below which did not originate on the trial. This is, that the facts stated in the petition were not sufficient to constitute a cause of action; and this is the only one of the alleged errors that we can consider.

This petition, however, we find to be in the usual form followed in an action on a promissory note, and undoubt-

edly states a good cause of action. It contains all, and even more than is really necessary, under the rules of pleading given in the code.

This objection, therefore, must be overruled, and the judgment of the district court affirmed.

JUDGMENT AFFIRMED.

JOHN BLACKBURN AND OTHERS, PLAINTIFFS IN ERROR, V. EMILY OSTRANDER, DEFENDANT IN ERROR.

1. **Practice**: VERDICT. An order of the court below overruling a motion for a new trial for the reason that the verdict of the jury was against the weight of evidence, will not be disturbed, unless it be very clearly so.

2. ———: PREPONDERANCE OF EVIDENCE. Mere preponderance of testimony against the verdict is not enough to warrant the court in disturbing it.

3. ———: ———. It is not the number of witnesses produced by a party, nor their language alone, that should be looked to in determining whether a new trial should be granted, but all the surrounding circumstances should be taken into the account and given due weight.

ERROR from the district court of Saline county.

McKillip & Page, for plaintiffs in error.

Hastings & McGintie, for defendant in error.

LAKE, CH. J.

There are several errors formally assigned, but in substance they amount simply to this, that the verdict is not sustained by sufficient evidence. The action in the court below was on a promissory note, given by the plaintiffs

in error, on the sale of a horse, November 26, 1868. The answer alleges, as ground of defense, that at the time of said sale the horse, for which the note was given, was diseased of the glanders, which the plaintiff well knew but fraudulently represented the animal to be sound. Issue being joined on this defense, the case was tried to a jury and a verdict returned in favor of the plaintiff for the full amount of the note.

An examination of the record reveals considerable conflict in the testimony. Several witnesses called by the defense testified, that in their opinion the horse was diseased as charged. William Houck was the first witness who swore that the disease was glanders; but he did not see the horse until the spring of 1870, more than a year after the sale took place. Ezekiel Pettit saw the horse in Camden a day or so after the sale; and he swears that he then noticed a discharge from the nostrils and "remarked that the horse had the glanders." Isaac Vose, who is a brother in-law of Blackburn, saw the horse about the same time he was noticed by Pettit in 1868, and he, too, was of opinion that the disease was glanders. Another witness, by the name of Adams, called for the defense, was of the opinion that the horse was afflicted with the glanders. This constituted the material testimony adduced on the part of the defendants. On the other hand, the plaintiff testified on her own behalf, giving an account of the transaction by which she sold the horse to Blackburn. She denies that she had any knowledge of the horse being unsound at the time, or that she made any recommendation concerning him. She also testifies that no claim was ever made to her by the defendants that the horse was diseased in any manner whatever. Moses Wilson, a witness called on behalf of the plaintiff, swore that he knew the horse at the time of the sale, and afterwards frequently saw Blackburn breaking prairie with him. He says that

during all the time that he knew the horse, up to the middle of 1869–70, "the appearance of the horse was good." This witness testified also, that at one time Blackburn told him that the horse had what was known as the "nasal gleet." The deposition of Thomas J. Hudson was next read. This witness testified, among other things, that he knew the horse in controversy; he had him in his possession about three months before the sale to Blackburn; the animal was then sound and in good condition. He "was a hearty horse, and ate and drank well." He noticed that there was at one time a slight discharge from the nose, but considered that it was caused by an "attack of horse distemper." This horse was kept with his own horses, and drank out of the same pail; and yet no disease was communicated to them in consequence thereof. This witness testified further, that he had two conversations with Blackburn about the note in question. He says: "The first conversation took place in Lincoln, I think in Brock's bank, about eleven months after the note was given, and while it was in my possession. At that time he spoke favorably about paying the note. He said he was hard up, had met with some losses, and didn't want the note pushed. * * * The substance of the conversation was that he would pay the note as soon as he could get the money. The second conversation I had with Mr. Blackburn was in Lincoln, three or four months after the note became due. I think he asked me if I still had the note. I think I told him I had delivered it to Mrs. Ostrander; I cannot remember the language used, but the substance of it was that he would not pay the whole note; that he wanted fifty or seventy-five dollars thrown off; that his mules and his horse had died from the disease they had taken from this horse." In answer to the question, whether during the first conversation Black-

burn made any complaint that the horse was unsound, this witness answered, "*He did not.*"

If we look alone to the language used by the several witnesses as to whether the horse actually had the glanders, there would seem to be a pretty clear preponderance in favor of the defendants (plaintiffs in error). But there are several circumstances entitled to considerable weight in the decision of this case. The fact that this horse was taken by Blackburn, and worked by him continuously on his farm for considerably over a year without any complaint, or so much as even a suggestion to Mrs. Ostrander that anything was wrong with him, is a very strong circumstance against the theory of the defense. It seems very strange, indeed, that if Blackburn had supposed, or had reason to believe, that the horse was affected with so fatal a malady as that of glanders is well known to be, he would have kept on using him for so long a time without so much as complaining even to his vendor. Under such circumstances, this sort of defense should be closely criticised by a court and jury; and unless established very clearly, it ought not to be permitted to prevail. When the purchaser of an article ascertains, or has reason to believe, that he has been deceived by the fraudulent representations of his vendor, common prudence would seem to dictate that he make it known, and notify the seller either of his desire to rescind the contract, or that he will claim compensation for his loss. Indeed, it is but just to the vendor that this course be pursued. But where, as in the case before us, the property is purchased on a credit, and no word of complaint is heard for more than a year after the sale, while at the same time the property is kept in constant use, this sort of defense ought to be closely scrutinized.

This is a case of very conflicting testimony, one wherein all the surrounding circumstances are hostile

to the claim of the defendants, and also to the testimony of a majority of the witnesses. It is a case peculiarly suited to a jury trial, wherein the character and appearance of the witnesses, as well as the words they utter, can be considered and weighed by twelve of their fellow-citizens, who, from their knowledge of human nature and of the motives by which men in such transactions are commonly actuated, are so much better qualified than is a single judge or a court to decide the questions of fact correctly. We are of opinion, therefore, that the judgment should be affirmed.

JUDGMENT AFFIRMED.

PALMER AND ORTON, PLAINTIFFS IN ERROR v. J. F. LARGENT, DEFENDANT IN ERROR.

1. **Alteration of Negotiable Instrument.** A memorandum written under a negotiable instrument and qualifying it, is to be taken as a part of the contract.

2. ———. The fraudulent removal of such a memorandum vitiates the instrument, even in the hands of a *bona fide* holder.

3. ———. But where the words alleged to have been removed were, "this note is given upon condition," and there being nothing to show what the condition was; *held*, that it did not vitiate the instrument inasmuch as they were entirely immaterial.

4. ———. Evidence of the removal of these words was entirely immaterial, and on the motion of the plaintiff should have been excluded from the jury.

5. ———. Where the defense, in an action upon a promissory note is based upon an alleged alteration of the instrument, it is the duty of the court to determine whether such alteration is material.

6. ———. It is error to submit the question of materiality to the jury.

7. ———. The court should have instructed the jury, upon the request of the plaintiff, that said words were immaterial, and that their removal did not vitiate the note.

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

Schoenheit & Reavis, for plaintiffs in error, cited *Herrick v. Baldwin*, 17 Minn., 209. *McCramer v. Thompson*, 21 Iowa, 244, 249. *Murray v. Graham*, 29 Id., 520. *Rainbolt v. Eddy*, 34 Id., 440.

Frank Martin and *E. S. Towle*, for defendant in error.

LAKE, CH. J.

I. The action in the court below was brought by the plaintiffs, as indorsers of two promissory notes executed by the defendant, for $167.50 each, negotiable and payable in twelve and eighteen months respectively. By the bill of exceptions it appears, that the plaintiffs received said notes in the ordinary course of business before maturity, paying therefor a valuable consideration, so that they are to be regarded in the light of innocent holders of commercial paper. The defense, which seems to have been relied upon on the trial, and in respect to which the alleged errors occurred, consisted of an alteration of these notes by the payee, before they were transferred to the plaintiffs. This alteration was effected by detaching from each of the notes the words, "this note is given upon condition," which had been appended thereto by the maker, after he had signed them, but before their delivery to the payee.

Of themselves, these words were wholly ineffectual to vary or modify the terms of the notes to which they were attached, even as between the maker and payee.

What the nature of the condition was, or whether it had the effect, in a certain contingency, to change the liability of the maker, nowhere appears. Surely it cannot be legitimately inferred from them, that the payment of the notes was made conditional upon the happening of any event whatever; nor do we see how the removal of these words could have prejudiced the defendant in the least possible degree. It is doubtless the law, as adjudged in numerous cases, that a memorandum written under a promissory note, and qualifying it, is to be taken as a part of the contract, and given due weight in its construction. So, too, the fraudulent removal of such a memorandum vitiates the note, and avoids the obligation of the maker, even in the hands of a *bona fide* holder. *Wait v. Pomeroy*, 20 Mich., 425 (4 Am. Reports, 395). *Benedict v. Cowden*, 49 N. Y., 396 (10 Am. Reports, 382). These were cases where the alteration was of a material part of the contract, by which the liability of the maker was altogether different from that which he originally assumed. But in the case before us, for aught that appears, the alteration was of an immaterial part, and furnishes us no ground whatever to defeat a recovery on the notes.

We hold, that, when the plaintiffs had established the fact of their being *bona fide* holders of these notes, for value, they were entitled to a verdict in their favor, notwithstanding the alleged alteration. It follows, therefore, that the testimony of the two witnesses, Riggs and McPherson, as to the alteration, and to which the plaintiffs objected, on the ground of its immateriality, should have been excluded from the jury. Its admission gave the jury to understand that it was material to the issue, and proper to defeat a recovery on the notes. In this, we think, there was error, which calls for a reversal of the judgment.

II. The court was requested, on behalf of the plaintiffs, to charge the jury, that, if they found from the evidence, "that the plaintiffs were *bona fide* holders of the notes, and received them in good faith, indorsed to them by L. S. Riggs, the payee, before due, and for a valid consideration paid by them, the jury should find for the plaintiffs." This was refused, and the following instruction substituted and given, viz: "If the jury find from the evidence, that the plaintiffs are *bona fide* holders of the notes in controversy, and received them in good faith, properly indorsed before due, and for a valuable consideration, *and that said notes have not been materially changed*, then, in that event, you must find for the plaintiffs." The first of these instructions was based upon the idea, that the alleged alterations of these notes was entirely immaterial, furnishing no reason whatever why their payment should not be coerced. In it we think the law of the case was stated correctly, and it ought to have been given as requested, and without modification.

In the instruction which the court substituted for this one, there is error in the portion which we have italicised, by which the jury were intrusted with the duty of deciding upon the materiality of the alteration. This duty rests upon the judge presiding at the trial, and could not be shifted upon the jury. Further, we are of opinion, that the instruction given by the court, on its own motion, was well calculated to mislead the jury, for while abstractly considered, it states the law respecting the alteration of commercial paper correctly, it was inapplicable to the case as made both by the pleadings and the evidence. The jury were given to understand, by the silence of the court on that point, that the alleged alteration, if established, was fatal to the plaintiffs' case. They should have been told that it was of no conse-

quence whatever, and could not relieve the defendant of the obligation which he had assumed.

For these reasons the judgment of the court below is reversed, and a new trial awarded.

JUDGMENT ACCORDINGLY.

COMMISSIONERS OF KEARNEY COUNTY, PLAINTIFFS IN ERROR, v. LEWIS A. KENT, DEFENDANT IN ERROR.

1. **County Commissioners:** SPECIAL MEETINGS. In calling special meetings of the board of county commissioners, the county clerk is required to state in the notice the "object of calling the commissioners together."
2. ——: ——. But when so assembled they are not confined strictly to the business specified in the notice, but may make orders respecting the property of the county.
3. **Practice:** REJECTION OF EVIDENCE. To obtain a review of the action of the court in excluding evidence from the jury, the testimony offered, and the ground of its exclusion, should be preserved by bill of exceptions.

ERROR from the district court of Kearney county. It was an action of replevin brought by the commissioners of Kearney county, against Kent to recover the possession of a certain fire proof iron safe. The plaintiffs gave a delivery bond and took possession of the safe. The safe had been, up to the 29th day of November, 1873, in possession of the plaintiffs. On that day the board of commissioners had a settlement with one Valentine for certain extra work done by him on the court house of said county, and ordered two county warrants to be drawn therefor in favor of the said Valentine, one for five hundred dollars, and one for seven hundred and four dollars and thirty-six cents. Afterward by agreement between

the board and Valentine, the safe in question was sold to the latter in consideration of the non-issuance of the warrant for five hundred dollars. Kent who was county clerk, set up in his answer that the property in said safe was in Valentine, and not in plaintiffs; and that he, as agent for Valentine, was entitled to the possession of said property. Trial had at the May term 1875, verdict and judgment for defendant for one dollar damages, return of the safe and costs of suit, and the plaintiffs bring the case here on error.

M. V. Moudy, for plaintiffs in error, cited *Barrett v. Turner*, 2 Neb., 174. *Farley v. Lincoln*, 51 N. H., 577. Gen. Stat., 234. Dillon Mun. Corp., sec's 204–206, 224, 225, and notes. Cooley on Taxation, 246. *Wightman v. Karsner*, 20 Ala., 446. *Potts v. Henderson*, 2 Ind., 327. *Commissioners v. Keller*, 6 Kan., 518. High on Ex. Legal Remedies, 255. *Sprick v. Washington County*, 3 Neb., 253. *Linden v. Case*, 46 Cal., 171. *Cumberland County v. Edwards*, 76 Ill., 544. *Supervisors v. Ellis*, 59 N. Y., 620.

The statute points out the mode and manner in which the county shall settle and pay its debts, and it can pursue no other. Where claims against the county have been allowed, warrants must be drawn on the proper fund for their payment. The commissioners cannot turn over to the claimant the personal property of the county in discharge of such claim. 1 Dillon Mun. Corp., 465. *People v. Commissioners of Buffalo County*, 4 Neb., 150.

Cobb, Marquett & Moore, for defendant in error, cited *Oliver v. Keightley*, 24 Ind., 514. Gen. Statutes, Chap. 13, section 11. *Indianapolis R. R. Co. v. Irish*, 26 Ind., 268. *Stewart v. Rankin*, 39 Ind., 161. *Miller v. Voss*, 40 Ind., 307. *Watson v. Mathews*, 36 Texas, 278.

LAKE, CH. J.

This was an action for the recovery of the possession of an iron safe, brought by the plaintiffs in error. There is no question concerning the pleadings raised. These are in the usual form: the defendant pleading the general issue of *non detinet*, and also property in another. The alleged errors all occurred during the trial of the case.

I. The first error of the assignment is, that certain testimony offered by the defendant was erroneously admitted to the jury. This testimony consisted of the record of the proceedings of the board of county commissioners of said county, at a special meeting held on the twenty-ninth day of November, 1873, called, as specified in the notice, "for the purpose of approving official bonds and auditing accounts." The chief objection urged against the admissibility of this record is, that the objects of the meeting, as set out in the notice, did not include the sale or disposal of the safe, and that for this reason, the action of the board in that behalf was wholly unauthorized and void.

To this proposition, however, we cannot give our assent. It is true, that the statute requires the county clerk, in calling a special meeting of the board, to state in the notice the "object of calling the commissioners together." Sec. 11, Chap. 13, General Statutes. But we do not think that, when so assembled, the board is, in all respects, confined strictly to the objects specified in the notice. By section fourteen of the same chapter, it is expressly provided, that, "The board of county commissioners, *at any meeting*, shall have power: 1. To make all orders respecting the property of the county, to sell the public grounds of the county, and to purchase other grounds in lieu thereof," etc., etc. This, we think, makes it quite clear, that, in making sale of the safe to Valen-

tine at this special meeting, the commissioners did not transcend their authority. In the admission of this record, therefore, there was no error.

II. It is next objected, that the court erred in ruling from the jury certain evidence offered in rebuttal by the plaintiffs.

On this point the bill of exceptions merely states, that "the plaintiff offered in evidence the record of the proceedings of the county commissioners contained in book number one," to prove certain facts particularly set forth. But the record is silent as to what this book contained. We are not advised, as to what the evidence offered was, nor of the reason for not permitting it to go to the jury. It is impossible, therefore, for us to determine whether the testimony rejected was material or not. Unless the error complained of be affirmatively shown, it will be presumed that the ruling of the court was correct. In such case the bill of exceptions ought to contain the rejected testimony as offered, together with the grounds of objection which the court sustained, so that the identical question can be presented in this court for review. By no other course can it be ascertained whether the testimony ought to have gone to the jury or not.

III. The next error complained of was in giving the following instruction, viz: "That the board of county commissioners, at their meeting on November 29, 1873, had authority to audit and adjust the claim of Thomas W. Valentine for extra work, etc., and render final decision in respect to said claim, and to sell and dispose of the safe, the chattel in controversy; and the acts and orders of said board, at that time, are valid and binding on the plaintiff in this action." This instruction was based upon, and fully authorized by, the undisputed evidence of what was done at the special meeting of the

commissioners on the 29th of November, at which the claim of Valentine for extra work was allowed, and the safe in question turned over to him in part payment.

We discover no error in this record; and the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

NELSON C. BROCK, PLAINTIFF IN ERROR, v. THOMAS H. HOPKINS, DEFENDANT IN ERROR.

1. **Ministerial Officer.** The clerk of a district court is a ministerial officer, and is liable for damages occasioned by his "negligently and carelessly" taking insufficient security.

2. ———. But if he exercise a reasonable degree of care in the performance of his duty, he is not liable, even if the security should prove insufficient.

ERROR from the district court of Otoe county. It was an action brought by Brock against Hopkins, and the petition alleges that in May, 1872, the latter was county clerk and *ex officio* clerk of the district court for Otoe county; that at said term the plaintiff, Brock, recovered a judgment against one John Reed for the sum of $544 damages and $13.60 costs of suit; that on the 29th of May, 1872, Brock caused an execution to be issued against said Reed on said judgment and placed in the hands of the sheriff of said Otoe county for service and collection; that the said Reed, judgment debtor, had at this time sufficient personal property not exempt by law to have satisfied said execution; that on the 15th of June following said Reed applied to said Hopkins, as clerk, for a stay of execution, under the provisions of section 480 of the code of civil procedure, which stay the said Hop-

kins, as clerk, *wrongfully*, *negligently* and *carelessly* granted, and on the 29th day of June, 1872, wholly disregarding the plaintiff's rights in the premises, issued an order to the sheriff of said county to return unsatisfied the execution issued as aforesaid; that at the time Reed made his application for a stay, as above set forth, he was not the owner of sufficient real estate in the county of Otoe to pay said judgment, as required by statute, nor in fact was he the owner of any real estate; that in obedience to the order wrongfully issued by the clerk, Hopkins, plaintiff's execution was returned unsatisfied; that before the expiration of the stay allowed by the clerk, said Reed became wholly insolvent and absconded, and that by reason of the wrongful act and negligence and carelessness of said Hopkins, the said judgment became uncollectible and worthless, and the plaintiff thereby damaged in the sum of $560.50.

The defendant, Hopkins, demurred generally, and judgment being rendered sustaining the demurrer, the plaintiff brought the cause here by petition in error. Section 480 of the civil code is as follows:

"SEC. 480. Executions on all judgments hereafter rendered in said courts, shall be stayed for the period of one year from and after rendition thereof: *Provided*, The defendant shall within twenty days after the judgment is obtained show to the satisfaction of the clerk of such court that he or she is the owner of real estate in the county, of sufficient value, over and above incumbrances, to pay such judgment."

D. G. Hull, for plaintiff in error.

I. A clerk of the district court has no judicial power and exercises none. He is a mere ministerial officer, whose action is entirely under the control and supervision of the court. *Robbins v. Durell*, 1 Idaho, 50.

Under section one, article four of the constitution, no judicial power could be vested in the clerk. The office is purely ministerial in its character, and is recognized as such by the whole course of legislation. General Statutes, 661, 662, 762. *Waldo v. Wallace*, 12 Ind., 572.

II. Clerks of courts are liable in damages to any one who is specially injured by their negligent performance of a duty imposed. Shearman & Redfield on Negligence, sections 286, 287, and cases cited. They have been held liable for accepting a bond with insufficient sureties, and for approving an appeal bond which provided an insufficient penalty. *Snedicer v. Davis*, 17 Ala. (N. S.), 472. *Govener v. Wiley*, 14 Ala. (N. S.), 172. *Tompkins v. Sands*, 8 Wend., 462. *Amy v. Supervisors*, 11 Wall., 138. *Billings v. Lafferty*, 31 Ill., 318. *Wasson v. Mitchell*, 18 Iowa, 153.

In determining the liability of non-judicial public officers, all of the cases make a distinction between those officers whose duties are of a general public nature, and who act for the profit of the public at large, and that other class of officers, who are appointed to act, not for the public in general, but for such individuals as may have occasion to employ them, for a specific fee paid.

The clerk is of the latter class and holds himself out to the public, as being ready and willing to perform certain duties upon the payment to him of his fees therefor, and he is bound to exercise care, and not act negligently and carelessly, to the damage of those who employ him.

As to the latter class there has never been any question that officers belonging thereto were liable in damages for any act of negligence or abuse of office, to any individual specially injured thereby. Shearman & Redfield on Negligence, Secs. 166, 167.

When an individual sustains an injury by the misfeasance or non-feasance of a public officer who acts or omits to act, contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case.

A. S. Cole, for defendant in error.

The position assumed by the defendant in error in this case is that a clerk of the court when called upon to act under that section of the statute just cited, ceases for the time to act in his usual ministerial capacity, and acts in a *quasi* judicial one. S. &. R. on Negligence, Sec. 156.

The act requires a showing to be made to the satisfaction of the clerk, and this involves the production of evidence, of some kind which the record in this case shows was produced, and upon this evidence the clerk must and did determine the question of allowance of the stay of execution. It must be evidence which satisfies the clerk that the person making the showing is the owner of real estate of sufficient value, over incumbrances, to pay the judgment—all of which was done in this case.

It seems very clear to us that in the determination of such a question, involving the necessity of introducing evidence, the clerk performs judicial duties. He exercises a right of judgment and a discretion in determining the facts on which that judgment is based, and hence he is the exclusive judge of the evidence on which the stay is allowed or refused. This is certainly the exercise of judicial authority. Shearman & Redfield on Negligence, Sec. 163. *Vanderheyden v. Young*, 11 Johns., 158. *Martin v. Mott*, 12 Wheat., 31. *Wilson v. Mayor*, 1 Denio, 599. *Weaver v. Devendorf*, 3 Id., 119. *Chickering v. Robinson*, 3 Cush., 545. *Howe v. Mason*, 14 Iowa, 514.

LAKE, CH. J.

This is a petition in error from Otoe county, and presents but a single question for our decision. It is simply whether a clerk of a district court, who "negligently and carelessly" takes insufficient security for stay of execution, is liable, at the suit of the judgment creditor, for the damages thereby occasioned.

The learned judge in the court below held, that in such case, the clerk was not liable. This decision was based on the ground that in taking such security he acts judicially; and that judicial officers are not liable for acts negligently or carelessly performed, whereby an injury is occasioned to another person. It is true that in the performance of his duty, under the statute providing for stay of execution, the clerk is required to exercise his judgment to a certain extent. He is to be satisfied that the security which he accepts is such as the statute requires to be given. And doubtless, if he act with caution in what he is called upon to do, and in all respects as a reasonably prudent person would be likely to do in transacting the same business, if it concerned his own interests, this is all that should be required of him. But he should be held to at least that degree of care, in the performance of so important a duty as that of taking bail for stay of execution, where the whole amount of the judgment might be lost to the creditor, through the incompetency or negligence of the clerk, if a less stringent rule were to govern. We are of opinion that it would be carrying the rule of non-liability altogether too far, to hold that a clerk, in the performance of this duty, comes within the class of judicial officers, who are exempt from liability for damages occasioned by their wrongful, negligent, or careless acts.

We hold that the clerk of a court in this state is a

ministerial officer merely; and the fact that he is required to take and approve security in certain cases, does not invest him with a judicial character. And the legislature seems to have been very careful, notwithstanding the imposition of these peculiar duties upon clerks of courts, to have it understood that they do not thereby lose their ministerial character, or become absolved from liability for damages occasioned by their official neglect. Section 897, of the code of civil procedure, provides that "The ministerial officer, whose duty it is to take security in any undertaking provided for by this code, shall have the right to require the person offered as surety to make an affidavit of his qualifications, which affidavit may be made before such officer. *The taking of such an affidavit shall not exempt the officer from any liability to which he might be otherwise subject for taking insufficient security.*" It is true that this statute does not mention the cases in which such liability would exist. It is wholly silent on that point. But surely we can conceive of no case wherein it would be proper, except wherein the clerk has willfully, or carelessly and negligently caused the damage. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

RICHARD D. SIMPSON, PLAINTIFF IN ERROR, v. J. H. GREGG AND OTHERS, DEFENDANTS IN ERROR.

1. **Practice:** REFEREE: NEW TRIAL. To obtain a review of the decision of a referee, a motion for a new trial is necessary.
2. ———: ———: EXCEPTIONS. Where the motion for a new trial is based upon errors in the admission or rejection of testimony, or the ruling of the referee upon other questions of law arising before him, it should appear that exceptions were taken at the time the errors occurred.
3. ———: ———: ———. When, in such case, no motion for a new trial is made, the alleged errors will not be considered, but the judgment will be affirmed.

ERROR from the district court of Otoe county.

G. B. Scofield, for plaintiff in error.

S. H. Calhoun, for defendants in error.

LAKE, CH. J.

Judgment was rendered in this case in the court below, as is admitted, although it does not affirmatively appear from the record, upon the report of a referee, to whom the cause was referred generally. To the report of the referee several exceptions were filed, but what disposition was made of them by the court does not appear. Neither does the record show that any exceptions were taken to any action of the court, save the final judgment.

In order to have a review of the decisions of a referee under the code, a motion for a new trial must be filed, precisely the same as where the trial is to the court. And if the motion be based on the improper admission or rejection of testimony, or the ruling of the referee upon questions of law arising before him, it should appear affirmatively that exceptions were taken at the

time the alleged errors occurred. In other words, it should appear, from an inspection of the record, that the alleged errors were in fact committed by the referee, and that exceptions were taken thereto at the proper time.

For the reason, therefore, that no motion for a new trial was made, we cannot consider the alleged errors, and the judgment is affirmed.

JUDGMENT AFFIRMED.

MRS. JAMES VAUGHN, PLAINTIFF IN ERROR, v. CLARK AND FRENCH, DEFENDANTS IN ERROR.

1. **Judicial Sale.** A purchaser at judicial sale, under a decree of foreclosure, takes the property subject to whatever liens may exist thereon at that time.
2. ———: TAXES. And if such purchaser, after the sale, pay delinquent taxes that have accumulated thereon, he is not entitled to be reimbursed out of the purchase money as against the lien of a junior mortgagee.

ERROR to the district court of Merrick county.

J. M. Woolworth and *W. H. Webster*, for plaintiff in error.

A. Ewing, for defendants in error.

LAKE, CH. J.

This case, although entitled as one in error, was really brought into this court by appeal. However, the case being one in equity is properly before us, and it will be considered the same as if this technical irregularity did not exist.

The action below was brought by Clark and French as junior mortgagees, for the purpose of enforcing their equitable lien against certain surplus moneys in the

hands of the sheriff of Merrick county, realized by that officer on the sale of the mortgaged premises under a judgment of foreclosure, rendered on a prior mortgage on the same premises. The petition contains all the necessary averments to entitle the plaintiffs to the relief they ask; to which Mrs. Vaughn, who was made a defendant, answered, demanding that said funds be awarded to her in satisfaction of certain tax liens, which she, as the purchaser at said foreclosure sale, had been compelled to pay, in order to perfect her title to the premises. Mrs. Vaughn shows by her answer that these taxes had become delinquent during the pendency of the suit upon her own mortgage; and that she satisfied them by a purchase of the property from the county treasurer at private tax sale, on the same day that she made her purchase under the judgment of foreclosure. To this answer, the plaintiffs filed a general demurrer, which was sustained; and the question thus raised is brought before us for review.

It does not appear that any provision was made, in the decree under the senior mortgage, for the payment of any taxes whatever. Indeed, no mention of them in the pleadings seems to have been made in that case. The sale of the mortgaged premises appears to have been decreed, without reference to any tax lien that existed thereon. In such case, the rule seems to be that the purchaser takes the property subject to the lien, and cannot resort to the purchase money to reimburse himself for the expense of removing the incumbrance.

We are of opinion, therefore, that Mrs. Vaughn, by her purchase at the sheriff's sale, took the premises subject to whatever tax liens existed thereon at the time. She has no valid claim to the money in question; and the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

MOSES BANKS, PLAINTIFF IN ERROR, v. GEORGE P. UHL, DEFENDANT IN ERROR.

1. **Practice**: ERROR. Where the judgment of a justice of the peace is taken on error to the district court and reversed, and the original case retained for trial in that court, such judgment of reversal is a final judgment, and may be reviewed by the supreme court without waiting for the final disposition of the original case in the supreme court.

2. ——: WAIVER OF ERROR. The failure to except to such judgment of reversal, and to take steps to set it aside until after the original case has proceeded to final judgment, will be deemed a waiver of all errors committed in its rendition.

ERROR from the district court of Nemaha county. Motion made by defendant in error to dismiss proceedings.

George P. Uhl, for the motion.

J. H. Broady, contra.

LAKE, CH. J.

This is a motion to quash the proceedings in error, and to strike the case from the docket for the reason, as is alleged, that a final judgment has not yet been rendered in the district court.

In making this motion, the defendant in error proceeds upon the theory that where the judgment of a justice of the peace is taken on error to the district court, and reversed, and the original cause is retained and set down for trial in that court, as the statute directs, the judgment of reversal cannot be reviewed by this court until after a final trial and judgment is had on the original cause of action. In this, however, he labors under a mistake. A proceeding in error, whereby a judgment of a justice of the peace is taken to the dis-

trict court and reversed, is an independent action, the sole object of which is to vacate or modify the judgment against which it is directed. It is commenced by filing a petition, and causing a summons to issue thereon, and is in no sense a continuance of the action in which the erroneous judgment was rendered. And the judgment of reversal is a *final* judgment in that action, which can be reviewed only by a petition in error prosecuted in this court.

In such case, where the judgment of reversal is submitted to, no exception being taken, nor steps pursued to set it aside, and the original cause of action is proceeded with to final judgment, without objection, it is too late to complain, as we held in the case of *Lash v. Christie*, 4 Neb., 262. Such an acquiescence will be deemed a waiver of any error committed by the district court in its judgment of reversal.

We conclude, therefore, that this proceeding in error was properly brought, and the defendant's motion must be denied.

MOTION DENIED.

The motion to dismiss being denied, the cause was set down for argument at the next term of the court.

ELIZABETH DAVIS, PLAINTIFF IN ERROR, v. THE FIRST NATIONAL BANK OF CHEYENNE, DEFENDANT IN ERROR.

1. **Married Women.** By our statute relating to the rights of married women, the common law doctrine relative to a *feme covert* is materially changed. The statute *legalizes* her contracts, and enables her to *legally* contract and deal in reference to her separate property as she pleases, and to bind it by general engagements; and further, it enables her legally to sue, and makes her liable to be sued "in the same manner as if she were unmarried"—as though she were a *feme sole*.

2. ———. All such contracts and general engagements of a married woman should, however, be with reference to and upon the faith and credit of her separate property.

ERROR from the district court of Douglas county. Tried below before LAKE, CH. J. The opinion states the facts necessary to an understanding of the case.

G. W. Ambrose (with whom was *J. C. Cowin*), for plaintiff in error.

This is simply an action upon a promissory note, not a bill in equity to establish and enforce a lien upon specific real estate of a married woman, by reason of the fact that the debt was contracted upon the faith of her separate estate, or that the money was used in the improvement of the particular property sought to be charged. If such was the fact there might be some propriety in the argument of counsel for defendant in error.

Such was the case in the 20th Ohio State, and other authorities cited by him.

There is no such issue here. A judgment at law simply, is sought against a married woman, upon her promissory note, to be collected in the ordinary manner by execution at law, and not by reason of any decree declaring the lien and ordering the specific piece of property sold.

When was the contract made, which is now sought to be enforced? The counsel would seem to claim that the date of the note is the evidence of the inception of the contract, and that the fact of the money being obtained long prior, can have no effect upon the consideration. Suppose the consideration of the note sued upon was usury in a prior transaction, or a gambling debt, or some fraudulent transaction in the sale of property, which were made legal by statute at the date of the note, but which were illegal at the time of the transaction out of which the note grew? Could it not be inquired of, and the illegality of the consideration of the debt shown in a suit upon the note?

If the defendant in error can obtain any relief at all in this form of action, it would be simply a modified judgment directing its satisfaction out of the property mentioned in the proof as the lots in Kountz & Ruth's addition, but I contend that even such a judgment would be improper, for two reasons:

1. It could only be done in a case addressed to the conscience of the court, sustained by proofs, and praying such relief. Nothing of the kind occurs here.

2. The money which went into this property, notwithstanding the gift to the wife, belonged to the husband, the debt was the husband's by the very force of the statute invoked by counsel, and the suit should have been constructed so as to have reached its equities in the property.

That this suit cannot be maintained seems to me very conclusive. *Smith v. Greer*, 31 Cal., 476. *Armstrong v. Ross*, 20 N. J. Eq., 112. *Hudson v. Davis*, 43 Mo., 258. *Brick v. Scott*, 47 Mo., 299. *Kimme v. Weippert*, 46 Mo., 534, 343. *Bailey v. Pearson*, 29 N. H., 77. *Carpenter v. Mitchell*, 50 Ill., 470. *Howe v. Wildes*, 34 Maine, 566. *Smith v. Luce*, 27 Maine, 285. *Jones v. Crosthwaite*, 17 Iowa, 397. *Watkins v. Abrahams*, 24 N. Y., 72.

George I. Gilbert, for defendant in error, cited 1 Bishop on Married Women, Sec., 848, 858. *Deering v. Boyle*, 8 Kan., 525. *Goulding v. Davidson*, 26 New York, 604. *Murray v. Barlee*, 4 Simons, 82. Willard's Equity Jurisprudence, 651. *Burch v. Breckinridge*, 16 B. Mon., 482. *Todd v. Lee*, 15 Wis., 365. *Phillips v. Graves*, 20 Ohio State, 371. *Dobbin v. Hubbard*, 17 Ark., 189. *Garrett v. Dabney*, 27 Miss., 335. *Fears v. Brooks*, 12 Ga., 195. *Metropolitan Bank v. Taylor*, 53 Mo., 444. *Wicks v. Mitchell*, 9 Kan., 80. *Larimer v. Kelley*, 10 Kan., 298.

GANTT, J.

The plaintiff in error was sued upon a promissory note, dated June 26, 1871. The main facts disclosed by the testimony substantially show, that the plaintiff had deposits of money in her own name, and to her own account and credit, with J. H. Rogers & Co., bankers of Cheyenne, W. T. The note was given to settle the amount overdrawn on this account by plaintiff; and J. H. Rogers indorsed, sold, and delivered, the note to the defendant in error before it became due. A large portion of these deposits were made by the husband of the plaintiff; but he says, that they were made for her separate use, on her account, and to her credit. J. H. Rogers & Co. made some collections for the plaintiff, issuing out of her separate property, and placed the same to her credit in the bank account, and, also, paid some taxes for her, and charged the same to her account with the bank. The plaintiff owned, in her own right as her separate property, considerable estate in Cheyenne, W. T., and also in Omaha, and Douglas county, Nebraska. The money drawn from the bank upon her checks was mostly, if not all, expended by her in building a house on her lands, costing six thousand dollars, in improving her property,

and some "was used for living of family, clothing, and household expenses."

Now, the main question, presented for consideration by the pleadings and exceptions taken in the case, is, that the plaintiff is a married woman, and, therefore, under the facts in the case, a personal judgment at law cannot be sustained against her upon the note. It seems very clear from the testimony in the case, that the deposits made by the husband were for the separate use of the plaintiff, and became her separate property, and were controlled, drawn out of the bank, and disposed of by her for her own use. No other person claimed any right to, or ownership over the fund; and, therefore, the bank held the money in trust for the plaintiff, and subject to be paid out only upon her orders. The bank account was, therefore, exclusively her own separate business; and by overdrawing her account she incurred a debt, which it seems was with reference to, and upon the faith and credit of, her separate estate, and the rule of the common law is, that, in regard to such separate property, she is considered as a *feme sole*. Perry on Trusts, Sec., 32. Hill on Trusts, 421.

But the settled doctrine of the common law is, that the general engagements of a married woman, in respect to her separate property, could only be enforced in equity; and this, not upon the ground that she could make valid contracts in law or equity, but because her honest engagements ought to be answered; and, hence it is said, that "intimately connected with the right of a married woman to dispose of her separate property, is the right or power of such *feme covert* to contract debts and charge her separate estate, either by specific agreements in relation to it, or by general engagements; * * * and her separate estate will be bound to make good her contracts, and it may be reached by proper proceedings, though she is not personally liable." Perry on Trusts,

Secs. 596, 657, 662. *Penty v. Simonson*, 2 Beas., 232. *Glass v. Warwick*, 40 Penn. State, 140. But in more recent times, many of the states have, by statutory law, made radical and thorough changes in the condition of a *feme covert*, and incompatible with that simplicity from which many of the common law rules have been derived. These statutes have *legalized* the contracts of married women; and so far as her separate property is concerned, she is a *feme sole*, and can legally contract and deal with her property as she pleases. She can bind it by general engagements; but "it should appear that the engagement is made with reference to, and upon the faith and credit of her estate; and the question, whether it is so or not, is to be judged by the court." Perry on Trusts, Sec. 659. *Frary v. Booth*, 37 Vt., 78. *Todd v. Lee*, 15 Wis., 365. *Same v. Same*, 16 Id., 480. In regard to her property it is said, that this change made by statutory law "in the relative rights and powers of husband and wife, must of necessity, give a different operation to the rules of law by which they are to be governed. The right being vested in the wife by statute, it must, if the act is to be enforced, remain intact until she consents to dispose of the property, for the right includes *full dominion over it;*" and, therefore, her property, both real and personal, is to be under her sole control, and to be held, owned, and possessed by her the same as though she were unmarried; and in respect to it, she alone has the *jus disponendi*. *Emerson v. Clayton*, 32 Ill., 496. *Jones v. Crosthwaite*, 17 Iowa, 402. *Todd v. Lee*, 15 Wis., 380.

Our legislative act, "relating to the rights of married women," approved, March 1, 1871, provides that, "a married woman, while the marriage relation exists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent, and with like effect, as a married man may, in relation to his real and

personal property;" and that "a woman may, while married, sue and be sued in the same manner as if she were unmarried." It is not necessary now, to inquire into the wisdom of the act in regard to the extent it goes in legalizing the contracts of a married woman, or in regard to the right of action by or against her, as though she were a *feme sole*. The statute confers on her the right and power to make legal and binding contracts; it gives her the legal right to sue, and makes her legally liable to be sued on her contracts, in the same manner as if she were unmarried, and the court must expound the law as it finds it made by the constitutional law making power. But the rule must be observed, that all such contracts of a *feme covert* must be with reference to, and upon the faith and credit of, her separate estate. We think the case at bar comes within this rule; and, therefore, the judgment of the court below should be affirmed.

JUDGMENT AFFIRMED.

FIRST NATIONAL BANK OF OMAHA, PLAINTIFF IN ERROR, v. WILLIAM LIERMAN, DEFENDANT IN ERROR.

1 **Evidence:** PROOF OF HANDWRITING. A witness who is acquainted with the handwriting of a person whose signature is in dispute, although not an expert in judging of handwriting, is competent to give his opinion as to its genuineness.

2. ——: ——. But a witness who is not an expert, and who has no knowledge either of the handwriting, or the signature, is not competent to give such an opinion from a comparison of hands.

3. ——: ——: SIGNATURE FALSELY OBTAINED. If the signature of an illiterate person be obtained to a promissory note by fraudulently inducing him to believe that he is signing a different instrument, with no fault on his part, such note will be void even in the hands of a *bona fide* holder.

4. ———: ———: EVIDENCE IN SUCH CASE. In determining whether the signature was so obtained it is proper for the jury to take into consideration all the facts and circumstances attending the transaction, in which the signature was obtained.

ERROR from the district court of Cuming county. The facts necessary to an understanding of the case are stated in the opinion.

Uriah Bruner, for plaintiff in error, cited Story on Bills, 14, 189, 191, 193, 417. *Shirts v. Overjohn*, 60 Mo., 305. *Chapman v. Rose*, 56 New York, 137. *Putnam v. Sullivan*, 4 Mass., 45. *Douglass v. Matting*, 29 Iowa, 498. *Zimmerman v. Rote*, 75 Penn. State, 188. *Reed v. Arnold*, 10 Kan., 102. *Whitaker v. Parker*, 42 Iowa, 585. *King v. Donahue*, 110 Mass., 155. *Ellingwood v. Bragg*, 52 New Hamp., 488.

Crawford & McLaughlin, for defendant in error, cited *Briggs v. Ewart*, 51 Mo., 245. *Gibbs v. Linabury*, 22 Mich., 479. *Kellogg v. Steiner*, 29 Wis., 626. *Chapman v. Rose*, 44 How. Pr., 364. *Schuylkill County v. Copley*, 67 Penn. St., 386. *Detwiler v. Bish*, 44 Ind., 70. *Taylor v. Atchison*, 54 Ill., 196.

LAKE, CH. J.

The action in the district court was brought by the plaintiff in error, as the indorsee of a promissory note, purporting to have been given on the sale of certain personal property by the payee to the defendant. In his amended answer, the defendant denies the execution of the note; and, in addition thereto, alleges, that if his genuine signature is in fact attached to the note, it was, in some manner unknown to him, fraudulently obtained by one John King during certain negotiations concerning a patent hay fork, which he had undertaken to sell on commission.

The errors assigned, and relied on in the argument, occurred during the trial of the cause: *first*, in the admission of certain testimony on behalf of the defendant; and, *second*, in one of the instructions given to the jury, and also in the refusal of the court to give several instructions tendered on behalf of the defendant. It will be most convenient to notice these points in the order of their occurrence on the trial.

It appears, that one D. S. Crawford was called as a witness to prove that the signature to the note was not made by the defendant. On behalf of the plaintiff it was objected to the competency of this witness, that it had not been shown, that he was acquainted with the handwriting of the defendant. The witness then answered, that he was acquainted with his handwriting "to a considerable extent." That he had "been more particularly acquainted with his handwriting about a year." He was not cross-examined as to the means of his knowledge. Thereupon he was asked, as to his belief of the genuineness of the signature in question; and answered, under a similar objection to his competency, that, "There is some similarity to the signature on this note, and other signatures that I have examined, but I do not think from my knowledge of his handwriting, that the signature on this note is genuine." There was no error in the admission of this testimony. The witness, although not an expert, was, nevertheless, acquainted with the defendant's handwriting, which made him competent to give his opinion as to the genuineness of the disputed signature.

The defendant next produced E. K. Valentine on the same point; who, after testifying that he was an attorney at law, and for several years before entering the profession had been in the employ of the general government, in the quartermaster's department, and in a land office, but showing no knowledge whatever of either the handwriting, or the signature of the defendant, was asked

this question: "Have you compared the signature to the note sued upon to the one in exhibit A, and the ones to the pleadings in this case, and, if you have, what is your opinion as to the genuineness of the signature to the note sued upon?" It was objected to this interrogatory, that the competency of the witness to answer it had not been shown. This objection was overruled, and an exception duly taken. The witness then answered, that "the signatures to the pleadings are very uniform, but they do not agree in formation of the letters, either to those to the note, or to that in exhibit A. The signature to the note and that to exhibit A are more nearly alike as to formation of letters," etc. "From the signatures I have before me, the signatures to the note and pleadings were not written by the same hand." This testimony should have been excluded. The objection to the competency of the witness was well taken, and should have been sustained. The witness was not shown to have been an expert in judging of handwriting, nor in the comparison of hands; nor had he any knowledge whatever of either the handwriting or signature of the defendant, and yet he was permitted to give his opinion, as to the genuineness of the signature in question by comparing it with the signatures of the defendant attached to pleadings in the case. Under the most liberal rule, adopted by the courts of any of the states of the Union, this testimony could not have been received. In *Strother v. Lucas*, 6 Peters, 763, the court lay it down as a general rule, "that evidence by comparison of hands is not admissible when the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from comparison of hands."

Of the several instructions given to the jury, exception was taken to but a single one. This was in these words: "If the jury are of the opinion that the signature to the note is genuine, it devolves upon the defend-

ant to prove that it was obtained by fraud, and for this purpose, the testimony in reference to the contract with King can be used." One of the defenses, set out in the amended answer and relied upon at the trial, was, that if the signature to the note is genuine, then it "was procured through the fraud and circumvention of the said John King, in some way or manner unknown to the defendant, in the transaction above set forth." This transaction was, as claimed by the defendant, and as there was testimony tending somewhat to prove, concerning a certain patent hay fork, which he had agreed to sell for a commission of two dollars per fork. This arrangement was made with said King; and a contract, or what the defendant supposed was a contract, embodying the terms of the agreement, was presented by King for his signature. This, he says, was the only paper which he ever signed in connection with said business. The defendant is an illiterate person, but little acquainted with the English language, and relied entirely upon the assurances of King, as to what the contract which he signed contained. There was considerable testimony bearing upon this arrangement between King and the defendant, and on the theory, that the signature to the note was genuine, a recovery thereon could be prevented only by satisfying the jury, that he had been induced to sign the note solely through the fraud and deception of this man King, in leading him to suppose that he was signing an instrument of a character altogether different. On this theory, we think the testimony concerning the fork transaction was proper to be considered, and that the instruction complained of was substantially correct.

Judgment reversed, and a new trial awarded.

JUDGMENT REVERSED.

JAMES B. ROBINSON, PLAINTIFF IN ERROR, V. CHRISTIAN MATHWICK, DEFENDANT IN ERROR.

1. **County Road:** LOCATION OF. In the location of a county road the first steps to be taken are the giving of notice, and filing a petition therefor, as provided in section 19, Chap. 47, R. S. 1866.
2. ———: JURISDICTION OF COUNTY COMMISSIONERS. Unless such petition be presented to the county commissioners, after due notice has been given, they have no jurisdiction in the location of a county road.
3. ———: ———. If the county commissioners act without such notice being given, and petition filed, signed by at least ten resident land owners of the county, the location would be void.
4. ———: TRESPASS. Where the location of a county road over the *locus in quo* is plead in justification of an alleged trespass, it is necessary that these preliminary jurisdictional steps be established, or the defense will fail.
5. ———: ———: EVIDENCE. Testimony showing a survey, and plat of a road, is immaterial, unless it be shown that the requisite notice had been given, and petition for the road filed.

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

W. H. Munger, for plaintiff in error, cited *Ferris v. Bramble*, 5 Ohio State, 109. *State v. Berry*, 12 Iowa, 58. *Williams v. Holmes*, 2 Wis., 129. *Thatcher v. Powell*, 6 Wheat., 119. *Dolphin v. Pedley*, 27 Wis., 469.

No appearance for defendant in error.

LAKE, CH. J.

This is a proceeding in error to reverse the judgment of the district court for Dodge county, affirming a judgment rendered by a justice of the peace, in an action for

damages occasioned by a trespass upon the plaintiff's land.

The defendant, on a trial to a jury, justified the alleged trespass on the ground, that at the place where committed there was a public highway, duly laid out and established, along which he was traveling as he lawfully might do. In support of this defense, the defendant offered in evidence what purported to be the report of a survey, and a plat of a county road running from Fremont in Dodge county to West Point in Cuming county, and passing in its course over the plaintiff's land. These were objected to on the behalf of the plaintiff for the following, among other reasons, viz: *First.* That it did not appear to be "the report of a commissioner duly appointed to locate the road; and that it did not appear that a petition, signed by ten freeholders of Dodge county, had ever been presented to the commissioners of the county, asking for the location of the road." In short, that it had not been shown that a single step had been taken, which the statute requires before the location of a county road is authorized to be made. These objections were overruled, and the record admitted, to which exceptions were duly taken. There was no testimony whatever offered tending to show that a notice of an application to the board of county commissioners for the location of the road was ever given, nor that any petition for such purpose was ever presented. There was nothing offered tending in the slightest degree to show that said board ever had the subject of this road under consideration, nor that any commissioner was appointed to view and lay out the proposed road. Had such testimony been given, even after the irregular admission of said record, that would have obviated the objections interposed by the plaintiff. But the total failure to produce, at any time, any evidence whatever to show that the preliminary steps, which the statute requires to authorize the com-

missioners to take action in the matter, were taken, leaves the objection to operate with full force, and renders the error a fatal one.

The following questions are, therefore, squarely presented: *First.* What steps are necessary in the location of a county road? And, *Second.* When such location is alleged, what testimony is necessary to establish the fact that it was legally done? These questions must be answered by reference to the statute, which points out distinctly the course to be pursued.

The first step in the location of a county road, is the giving of the notice required by Sec. 19, Chap. 47, of the Revised Statutes. This section provides that "whenever the inhabitants in any county desire the opening of a new road, * * * * they shall give at least twenty days notice, by posting a notice on the court house door, and at three other public places in the vicinity of the road sought to be located, * * * * setting forth the time when they will apply by petition to the board of county commissioners, giving a particular statement of the location, * * * sought to be effected." This being done, a petition, signed by at least ten freeholders, may be presented to the commissioners, at the time mentioned in said notice, who shall proceed to hear the parties interested in the case. If, upon such hearing, the board shall consider that the proposed road will advance the interests of the county, "they shall appoint a competent and disinterested person a commissioner, who, after being duly sworn to faithfully discharge his duties without fear, favor, or hope of reward, shall proceed to view the road proposed, and report to the county board; and if, in the opinion of the county board, the public good requires the proposed new road, * * * the said board shall direct the commissioner to lay out, mark, and plat the same according to law," etc.

Now, in the case before us, it does not appear that any one of these steps were taken by the inhabitants of the county, or by the county commissioners; and until they are taken, no road can be legally established under this statute. The board of county commissioners is a tribunal possessed of but a very limited jurisdiction, which is clearly defined by the statutes; and it is essential that all the facts necessary under the statute to authorize their action in any given case, be affirmatively shown. In the location of a county road, the commissioners have no jurisdiction, unless the petition mentioned above be presented after due notice thereof has been given. If they presume to act without an observance of these plain statutory requirements, it would be without authority; and whatever they might do would be merely void. Independently of the desires of at least ten resident land-owners of the county expressed by petition, they are utterly powerless to open a new road.

In this case, the location of this road is plead as a justification for the entry upon the plaintiff's land; and no claim of user by the public for any considerable time is made. It was essential to this defense that the preliminary jurisdictional steps be established, or the defense must fail.

For these reasons the judgment of the district court, and also the judgment of the justice of the peace, are reversed, and the cause remanded to the district court for a new trial.

REVERSED AND REMANDED.

N. LA FLUME, PLAINTIFF IN ERROR, V. J. S. JONES, DEFENDANT IN ERROR.

1. **Judicial Sale.** Under the act of 1875, providing "for the more equitable appraisement of real property under judicial sale," it is not error for the sheriff to neglect to take steps to ascertain what liens, prior to the order of sale, there were upon the land, it not being shown that any such liens in fact existed.

2. ———: OATH OF APPRAISERS. In such case, where the oath of the appraisers was "impartially to appraise the property to be sold" instead of the "interest" of the defendant therein, inasmuch as there could be no interest greater than the entire value of the land, it was not an error for which the sale should be set aside.

3. ———: COPY OF APPRAISEMENT DEPOSITED. When the record is silent as to when the copy of the appraisement was deposited, it will be presumed that the sheriff did his duty and deposited it in due time. It may be deposited any time before sale.

4. ———: CONSPIRACY TO PREVENT COMPETITION: PROOF OF. Affidavits containing merely hearsay statements, are not sufficient to establish the charge of conspiracy to prevent competition in bidding at judicial sale.

ERROR from the district court of Richardson county. The facts necessary to an understanding of the case are stated in the opinion.

Schoenheit & Cotton, for plaintiff in error.

T. C. Hoyt, for defendant in error.

LAKE, CH. J.

This case is brought here to obtain a review of an order of the district court for Richardson county, confirming a sale of real estate under execution. The order for the sale of the premises was issued on a judgment, rendered on the 28th day of September, and the sale took

place the 24th of December, 1875. A motion was made to set this sale aside for several reasons, all of which were overruled, and an order of confirmation entered, to all of which exceptions were duly taken. We will dispose of these objections in the order observed in the motion.

I. This sale was made since the passage of the act providing "For the more equitable appraisement of real property under judicial sale." Session Laws, 1875, page 60. The first section of this act provides that the interest merely of the judgment debtor in lands taken on execution shall be appraised and sold. Subsequent sections provide how that interest shall be ascertained, etc.

The first objection specified in the motion is, that the sheriff failed and neglected to take any steps whatever, as the law requires, to ascertain what prior liens there were upon the property. The act directs that the sheriff and appraisers in making the appraisal are to appraise the interest of the judgment debtor in the land, after deducting the amount of all liens and incumbrances of record existing thereon. But in this case it nowhere appears that there were any liens or incumbrances whatever upon the property. And the presumption is that there were none. And, even if it be conceded that there were, we do not see how the failure to notice them could have prejudiced the defendant. Indeed, if such were the fact, it would, as it seems to us, rather have inured to his benefit; for the valuation was thereby increased beyond what it ought to have been just the amount of such liens, and the purchaser, nevertheless, was compelled to pay at least two-thirds of the appraised value. No sale could have been made unless at least that amount were bid. This objection to the sale was not well taken.

II. The second objection is, that the appraisers "were not sworn as the statute directs." It appears that the

oath, which the sheriff administered, conformed precisely to our former appraisement law. It required them "impartially to appraise the property to be sold," whereas the new statute requires the oath to be "impartially to appraise the interest" of the defendant therein, by deducting "from the real value of the land and tenements levied on, the amount of all liens and incumbrances for taxes or otherwise, prior to the lien of the judgment under which execution is levied."

Therefore, in proceeding strictly in conformity to the letter of our present law, the cash value of the land, without regard to prior incumbrances, must be first ascertained, from which "all liens and incumbrances" prior to the judgment under which the sale is about to be made, must be deducted, and the residue, if any, returned, as the appraised value of the interest to be sold. If there be no such liens or incumbrances, then, of course, the full cash value of the land should be returned by the appraisers; and this is precisely what they were sworn to do, and what they, in fact, did in this case. In view of the fact, that there were no liens or incumbrances upon the land, we do not think this technical deviation from the language of the statute, in administering the oath, should be held to vitiate the sale. Even if it be conceded that there was a technical error in this respect, it is error without prejudice, for which the order confirming the sale ought not to be disturbed.

III. The next objection is, that "the sheriff and appraisers did not appraise the interest of the defendant at its real value in cash, as required by law."

In addition to what has already been said, which is entirely applicable to this objection, it may not be amiss to add, that it is impossible to conceive, or for the defendant in execution to have, an interest greater than the

full value of the fee. The full cash value having been ascertained, that would cover any possible interest that he could have had.

IV. The fourth objection is, that "the appraisers did not deduct from the real value of the lands and tenements levied on, the amount of all liens and encumbrances," etc. The short and satisfactory answer to this objection is, that it nowhere appears, that there were any to deduct; and *second*, that even if there were, no person other than the purchaser at the execution sale could have been injured, or have the least interest in their being deducted.

V. The next point relied on is, that the "sheriff failed to deposit a copy of the appraisement * * * with the clerk." In answer to this objection, it may be said, that the record is silent as to when such copy was in fact deposited. It shows simply, that a copy of the appraisment was in fact deposited. It will, in such case, be presumed, that the sheriff did his duty, and made the deposit before the publication of the notice of the sale. But, even if the sheriff had neglected his duty in this respect, it would not be ground for setting the sale aside, if it were in fact deposited before the sale took place. *Merritt v. Borden*, 2 Disn., 503.

VI. The sixth objection is a general charge, that there was no valid appraisement of the property. This, after what has already been said, may be passed without further comment.

VII. It is also objected, that there was no notice of the sale given as required by the law. The sheriff's return shows affirmatively, that he gave notice of the sale in the usual form, and for more than thirty days

immediately preceding the day of sale, "in the Globe Journal," a newspaper printed, and of general circulation, in said county. No specific defect in the notice is pointed out; and we have failed to discover any reason for this objection.

VIII. The only remaining objection is, that "a combination was entered into on the day of sale * * * between one John Randolph, the purchaser, * * * and one G. C. Holt, a party who came to bid on said property, to the effect, that the said Randolph would pay to said Holt "the sum of ten dollars to abstain from bidding against him." In support of this objection certain affidavits were filed, but they fall very far short of establishing the truth of the charge. They are merely hearsay statements of what Holt had said took place between him and Randolph, respecting the bidding at the sale. But this man Holt was one of the appraisers of the land, and could not properly have been a purchaser of the property at said sale.

These are the only errors complained of, and they furnish no sufficient reason for setting the sale aside. The order of the district court is therefore affirmed.

AFFIRMED.

PRENTISS D. CHENEY, APPELLANT, v. SAMUEL A. WHITE, MARY A. WHITE, AND THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE, APPELLEES.

1. **Usury.** If a person employ another as his agent to loan money, and puts the funds in his hands for that purpose, if the agent charge unlawful interest, or even receives from the borrower a bonus for such loan the transaction is usurious.

2. ——. In such case the usury may be plead in an action by the principal although he had no knowledge of the unlawful agreement, and derived no advantage therefrom. The case of *Philo v. Butterfield*, 3 Neb., 256 cited with appoval.

3. **United States Homestead Act.** Where a claimant of land under the United States homestead act has made proof at the proper land office of having done everything required to entitle him to a patent, he can execute a valid mortgage of the land although the patent be not issued.

APPEAL from the district court of Johnson county. The opinion states the case.

B. F. Perkins and *J. H. Broady*, for appellant, cited *Nycum v. McAllister*, 33 Iowa, 375. *Watson v. Voorhees*, 14 Kan., 328. *Frisbie v. Whitney*, 9 Wall., 187. *Myers v. Croft*, 13 Id., 291. *Robbins v. Bunn*, 54 Ill., 48. *In Re Cross*, 2 Dillon Circuit, 320. *Rector v. Rotten*, 3 Neb., 172. *Ewing v. Howard*, 7 Wall., 499.

S. P. Davidson, for appellees, cited *Baggs v. Loudenback*, 12 Ohio, 156. *Rains v. Scott*, 13 Ohio, 115. *Corcoran v. Powers*, 6 Ohio State, 37. *Morton v. Rutherford*, 18 Wis., 298. *McFarland v. Carr*, 16 Id., 259. *Kyger v. Ryley*, 2 Neb., 25. *Miller v. Little*, 47 Cal., 348. *Dawson v. Merrill*, 2 Neb., 124. *Dittingham v. Fisher*, 5 Wis., 480. *Webb v. Hoselton*, 4 Neb., 308.

LAKE, CH. J.

This case is brought into this court by appeal. It was commenced originally to obtain the foreclosure of a mortgage, given to secure the payment of five promissory notes for $25 each, to the plaintiff. Two defenses are interposed: *first*, usury; and, *second*, that at the time of the execution of the mortgage the premises therein described were occupied and claimed as a homestead, under the act of congress approved May 20, 1862, entitled, "an act to secure homesteads to actual settlers on the public domain," and for which the patent had not then been issued.

In the court below there was a general finding in favor of the defendants, and the case dismissed; from which the plaintiff appealed.

I. As to the defense of usury, we think it is made abundantly good by the evidence, and that the case is brought fairly within the rule heretofore announced by this court in the case of *Philo v. Butterfield*, 3 Neb., 256.

There is really but very little conflict in the testimony. It establishes conclusively, that the defendant, being in need of money, applied first to the witness Perkins to procure a loan for him. Perkins at this time was the agent and attorney of the plaintiff, as Cheney himself testifies. In answer to this application for money, Perkins informed White, that he could obtain $500 for him, on five years time, *at seventeen per cent interest per annum*, together with an additional charge of $15 as his commission for doing the business, making the entire cost of the money to White for the first year, twenty per centum of the amount received. Perkins, as it appears, applied to Cheney, who resided in Jerseyville, Ills., for the money, which was sent, to be delivered to White when the necessary papers were executed. This

business was all attended to by Perkins acting as Cheney's agent all the while. White was required to execute and deliver: *first*, a note for $500, payable in five years, and five interest notes for $60 each, payable in one, two, three, four and five years respectively. These notes were all made payable to one Byron Murray, Jr., whose place of residence is not disclosed; and, *second*, in addition thereto, he was required to execute five notes for $25 each, in one, two, three, four, and five years, together with a mortgage to secure the same to the plaintiff, the latter being the notes in controversy.

It is claimed, on the part of the plaintiff, that the last five notes were given to him as a commission for procuring the loan of the $500 from Murray. But we do not think that the testimony justifies this conclusion. Cheney, it is true, testifies, that: "In February, 1872, B. F. Perkins, then my attorney in my transactions with S. A. White, made known to me, that White wished to procure a loan of $500 on the security of one hundred and sixty acres of land in Johnson county, Nebraska. As an inducement, White promised to pay me $125 if I would obtain a loan for his use for the term of five years. The preliminary talk and arrangements were made between B. F. Perkins on my behalf, and Mr. White, as I believe." He says further: "In consideration of the $125 to be paid me by White I did borrow the money for him. I investigated the value of the land. I approved and recommended it as good security." But Cheney fails entirely to tell us from whom he borrowed the money. He does not say that he made any application to Murray therefor, or had any communication with him respecting it. The only way that Murray figures in this transaction, and all we can ascertain respecting him is, that the $500 note, together with the five $60 notes and mortgage to secure them, were made to him. Besides it appears that Cheney sent the money to his agent Per-

kins for the use of White by his own individual bank check. But even if the money actually belonged to Murray, its investment was intrusted entirely to Cheney, who employed Perkins to do the business.

In *Philo v. Butterfield*, before cited, this court said: "It is a settled rule of law, which will not be questioned, that in all cases where a person employ another as his agent to loan money for him, and places the funds in the hands of the agent for such purpose, the principal is bound by the acts of his agent; and if the agent charges the borrower of such money unlawful interest, or *even demands and receives from the borrower a bonus for* such loan, and appropriates it to his own individual use, either with or without the knowledge of his principal, the principal is affected by the act of his agent." We think that the application of this wholesome rule to the facts proven by the testimony is decisive of the case. This business was all intrusted to, and transacted by Perkins, while acting confessedly as Cheney's agent, and it is clearly proved that he contracted for an usurious rate of interest.

II. As to the second defense, all that we deem it necessary to say is, that White was not prohibited by the homestead act from executing this mortgage. He had lived upon the land the requisite length of time, and made his proof at the proper land office of having done everything that is required to entitle him to a patent. The mere delay of the officers of the government, in such case, in issuing the evidence of his title, the patent, could not be held to deprive him of the right to make such disposition of the land, either by deed or mortgage as he might desire. On this point we must hold with the plaintiff.

For the reason, therefore, that the transaction was tainted with usury, and that the particular notes here in

controversy were based entirely upon an usurious consideration, the judgment must be in favor of the defendants, dismissing the case at the costs of the plaintiff.

JUDGMENT ACCORDINGLY.

JAMES E. JONES, APPELLANT, v. MICHAEL YOAKAM AND OTHERS, APPELLEES.

1. **United States Homestead Act.** A mortgage executed by a settler upon public lands under the homestead act, after making his proof of compliance with all the requirements of the law, so as to entitle him to a patent, is valid, notwithstanding the patent has not been issued.

2. ———. It is no objection to the validity of such mortgage that it was given to secure a debt contracted before such proof was made.

3. ———. Section four of said act does not prohibit the owner of the homestead from pledging the same voluntarily to secure a pre-existing debt. Its only effect is to protect him against a compulsory payment of such demand out of the land.

APPEAL from the district court of Saline county.

There was a stipulation in the cause as follows:

"It is stipulated and agreed by the parties hereto, that the following are facts in this cause:

"1. That defendants, Michael Yoakam and Mary E. Yoakam, made and delivered to plaintiff, James E. Jones, a mortgage to secure payment of a certain note, on the premises described in petition, said note dated April 21, 1873.

"2. That said mortgage was recorded on the 23d of April, A. D. 1873, in county clerk's office.

"3. That balance due and unpaid is the sum of $462.00

and interest from March 10, 1874, at the rate of ten per cent per annum.

"4. That the lands in question were acquired by defendant under homestead laws of the United States.

"5. That the debt for which the note and mortgage was given was a debt contracted prior to the date of said note.

"6. That final proof was made before U. S. land officers on the 21st day of April, A. D. 1873.

"7. That the patent to said land was issued by the United States, and bears date as of the first day of July, 1873.

"8. That the patent so issued was not on record at the commencement of this action."

There was also an additional stipulation as to the amounts due other of the defendants from the defendant Yoakam. The court below held the mortgage referred to in the above stipulation to be void, and Jones appealed.

M. B. C. True, and *Hastings & McGintie*, for appellant.

W. H. Morris, for appellee, Yoakam.

LAKE, CH. J.

This is an appeal from the district court for Saline county, and is brought here upon a single question.

The action was instituted by Jones to obtain the foreclosure of certain mortgages, executed by Michael Yoakam, upon premises which he had acquired from the United States, under the provisions of the homestead act, and also to settle the priorities of certain liens, by judgment and otherwise, held by other of the defendants.

The correctness of the decree is not questioned, save as to the mortgage, mentioned in the first cause of action.

The mortgage was executed on the 21st day of April, 1873, and on the same day that Yoakam made his proof at the land office of having complied with all the provisions of the homestead act, so as to entitle him to a patent. The patent, however, was not actually issued to him, until the 1st day of July, 1873. The court below held this mortgage to be absolutely void for two reasons: *first*, that the debt, which it was given to secure, was contracted before Yoakam had perfected his right to the land; *second*, that the mortgage was executed before the patent actually issued.

As to the first objection to this mortgage we are of the opinion that it is not at all material when the debt was originally contracted, whether before or after the making of the final proof of settlement, etc. Section four of the homestead act, upon which this objection is based, provides that: "No lands acquired under the provisions of this act, shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuance of the patent therefor."

All that congress could have intended by this section was, that the owner of such homestead should not be deprived of the land by virtue of legal process founded on a debt contracted before the patent has issued. It was not intended to do more than protect him against the compulsory payment of such a debt. Mark the language employed. "No land * * * shall be *liable*," etc., that is, bound, or answerable, in law, or equity. It was intended simply as a protection and benefit to the owner of the homestead, and not as a prohibition upon his right of alienation, by deed or mortgage, and for any valuable consideration which he might choose to accept. It is a benefit, which he may claim or waive at his own option.

The second point was raised and decided in the case

of *Cheney v. White*, which we have just disposed of. It is not necessary to repeat what was there said.

For these reasons we hold that the mortgage in question was a valid and first lien upon the premises; and judgment will be modified, and entered accordingly.

DECREE ACCORDINGLY.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1877.

PRESENT:

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

S. B. MILES, PLAINTIFF IN ERROR, v. P. B. MILLER, DEFENDANT IN ERROR.

1. **County Treasurer:** ACTION FOR FEES. When a county treasurer sells lands for delinquent taxes, but fails to collect the amount bid from the purchaser, he cannot maintain an action against the purchaser for the additional fee, provided by the statute, of five per cent in cases of *actual sales*.

ERROR from the district court of Richardson county. Tried below before WEAVER, J. It was an action brought by Miller, as treasurer of that county, to recover of Miles the five per cent fee allowed county treasurers, by section 20 of chapter 22, General Statutes. Judgment was ren-

dered in his favor, and Miles brought the cause here by petition in error.

J. H. Broady (with whom was *Reavis* and *Schoenheit*), for plaintiff in error.

A tax warrant is altogether analogous to an execution, and the county treasurer executing a tax warrant is like a sheriff executing an execution, and no more contracts with the purchaser at sales except to pay the amount bid, than does a sheriff with purchasers at sheriff's sale, and the purchaser at tax sale has no more to do with payment of the collector's fees than the purchaser at sheriff's sale has to do with the sheriff's fees. In either case, it is the person who owes the debt, and whose property is sold, that pays the whole debt and the whole expenses of sale, and the purchaser pays his bid only and nothing else. The petition, therefore, does not state facts sufficient to constitute a cause of action, and the district court should have rendered judgment for the defendant below. *Loomis v. Spencer*, 1 Ohio State, 153. *Thompson v. Kelly*, 2 Id., 647. *Rogers v. Gwinn*, 21 Iowa, 59. *Corbin v. Hill*, Id., 71.

The statute giving an action in the *name of the county* for the *amount bid*, clearly bars such an action as this. Gen. Stat., page 919, section 58.

When the bid is made, and money bid is paid, the bidder is entitled to the certificate of purchase, without any other condition whatever, and without regard to fees of treasurer.

Section 62, page 921, General Statutes, fixes the treasurer's fee for the certificate, but no more states who shall bear the ultimate expense thereof, than does the statute fixing the fees of the sheriff for levying and making return to execution. The certificate of the treasurer is similar to a return of sale on execution, and the confirmation of the sale.

The treasurer's five per cent fee named in section 20, page 382, General Statutes, although its payment to the treasurer is made conditional on his getting it from the buyer, and very properly too, is clearly to come out of the amount bid, that is, out of the land, and the buyer no more has to pay it than the buyer of land at sheriff's sale has to pay the sheriff's commission on the money of the sale. The sales are void because credit was given. Cooley on Taxation, 344. *Cushing v. Longfellow*, 26 Me., 306. *Longfellow v. Quimby*, 29 Id., 196. *Donnel v. Bellas*, 34 Penn. State, 157.

E. W. Thomas and *Frank Martin*, for defendant in error, cited *Thomas v. Auditor of Hamilton county*, 6 Ohio State, 118, and the several sections of the statute quoted in the opinion.

MAXWELL, J.

In the conclusion at which we have arrived it is necessary to determine but one question, viz: Can a county treasurer maintain an action of this kind in his own name? Section 58, of the revenue act, Gen. Stat., 919, provides: "Should any person so bidding fail to pay the amount due, the treasurer may again offer the land for sale if the sale has not closed, and if it has closed, he may again advertise it specially and by description, by one written or printed notice, posted for two weeks on the door of the court house, or place where courts are usually held, after which it may be sold at public sale; or the treasurer may recover the amount bid, by civil action brought in the name of the county in which the sale was held."

Section 50 provides: "On the first day of May of the year after taxes shall have been assessed, all unpaid state, county, school, precinct, city and villages, 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 the 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 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."

Section 20, of the act entitled "Fees," Gen. Stat., 382, provides that: "For advertising and selling lands for delinquent tax, an additional fee of five per cent, to be collected only in case such lands are actually sold, and then in cash of the person buying the same; but for all other cases and services, the treasurer shall be paid in the same *pro rata* from the respective funds collected by him, whether the same be in money, state or county warrants."

It is contended that this section gives the treasurer authority to bring an action in his own name for his fees in cases of this kind. It is not claimed that the treasurer has collected or attempted to collect any portion of the amount of the delinquent taxes for which the several tracts of land are said to have been sold to the plaintiff in error; but this action is brought for his fees and charges. Can such an action be maintained? We think not. The fees are to be collected on such lands as are *actually sold*. When are lands actually sold at a tax

sale so as to entitle the treasurer to his fees? Clearly, when the sale is completed; when he has collected from the purchaser the amount of the bid.

The case of *Thomas v. The Auditor of Hamilton County*, 6 Ohio State, 113, is cited by defendant in error to show his right to maintain the action. That was an application for a *mandamus*, to compel the auditor of Hamilton county to draw a warrant upon the county treasury for money therein alleged to belong to the relator, being the treasurer's penalty of five per cent and compensation of five per cent on the taxes of the Ohio Life Insurance and Trust Company, for the years 1852 and 1853, the relator having been treasurer of Hamilton county during those years. The legislature of Ohio passed an act in March, 1853, providing that: "If the taxes remain unpaid until the 21st day of December of any year, the treasurer of the county wherein such taxes have been assessed shall forthwith demand payment of the amount of such taxes, and five per cent penalty thereon, which penalty shall be for the use of the treasurer."

The relator made a demand of the company for the taxes of 1852, after the 21st day of December of that year, and also made demand of the company for the taxes of 1853, after the 21st of December of that year. In the year 1853, one Foote, a citizen of Connecticut, claiming to be a stockholder and trustee of the company, filed a bill in chancery in the circuit court of the United States, to restrain the collection of the taxes due from the company, and obtained a temporary order of injunction thereon. The case was afterwards decided adversely to the company by the supreme court of the United States. The company then came forward and paid their taxes, including the amount of the penalty, H. P. Bowman at the time being treasurer of the county. The court held that the county was not liable for the

penalty, the amount thereof not having been paid into the treasury; the writ was therefore denied. The court also held that as the penalty of five per cent had accrued to the relator, by reason of his demand of the taxes at the time they became delinquent, but had been collected by Bowman and retained by him, therefore a personal action would lie against him for the recovery of the amount due.

Section 59 of our revenue law requires that: "On or before the first Monday in October, following the sale of real property, the treasurer is required to file in the office of the county clerk of his county, a return of his sale of lands (retaining a copy in his office), showing the lands sold, the names of the purchasers and the sums paid by them, and also a copy of the notice of the sale, with a certificate of the advertisement, verified by an affidavit; and such certificate shall be evidence of the regularity of the proceedings."

These several sections of the statute herein referred to, must be construed together in order to ascertain the intention of the legislature. The treasurer is required by the provisions of section 59, in his report to the clerk of the sale of delinquent lands, to give the names of the purchasers and *the sums paid by them.* This certainly includes the additional fee to which the treasurer is entitled in cases of *actual sales.* The authority given to the treasurer in section 58, to bring suit in the name of the county in which the sale was held, to recover the amount *bid*, includes the additional fee due the treasurer. This additional fee, although primarily paid by the purchaser, becomes a charge against the land, and must be paid by him who seeks to redeem, and should be added to the tax as a charge, and is included in the bid. In the case cited from Ohio the penalty became due, after demand for the taxes being made by the treasurer after the taxes became delinquent.

In this case the treasurer is not entitled to the additional fee until he has made an *actual sale.* As the so called sale has brought nothing into the treasury, it cannot be regarded as an actual sale. In the case of *Kane v. The U. P. R. R.*, decided at the last term of this court, where the treasurer had levied upon personal property for the purpose of selling the same to pay the amount of taxes due, it was held that he was not entitled to five per cent additional compensation where no sale was made.

So far as appears from the record there is nothing to prevent the treasurer from immediately selling the lands in question to another for the amount claimed to be due for delinquent taxes.

It is not the policy of the law to permit public officers to advance their own interests by neglecting their public duties. These additional fees are for services actually rendered, not simply by accepting bids, but by actual sales to collect the delinquent taxes. The sum of $289.00 is charged in the petition for five hundred and seventy-eight certificates. The law provides that "any number of parcels of land bought by any one person may be included in one deed or certificate when desired by the purchaser;" but a certificate can be issued only in cases of actual sale. And as, in our opinion, the case made by the pleadings and proof fails to show an actual sale within the meaning of the statute, there can be no recovery.

The judgment of the district court is reversed and the cause remanded, with instructions to dismiss the cause.

JUDGMENT ACCORDINGLY

L. A. RYAN, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, EX REL. J. W. ELLER, DISTRICT ATTORNEY, DEFENDANT IN ERROR.

1. **Constitutional Law:** AMENDMENTS TO STATUTES. In the legislative amendment of a former act, the constitutional provision which requires all the parts of the amended law to be contained in the new law, and the old law so amended to be repealed, should be complied with.

2. ———: PENALTY ATTACHED TO DELINQUENT TAXES. An act which provides that a penalty shall attach to and become a part of a delinquent tax, is void.

3. ———: ———. In an act providing for the appointment of a delinquent tax collector, defining his powers and duties, wherein the last section re-enacts a former law which exclusively invests the county treasurer with such office and all the powers and duties of the same; *held*, that the last section must prevail, and all of the act which relates to a delinquent tax collector is inoperative.

INFORMATION in the nature of a *quo warranto*, brought in the district court of Richardson county, before WEAVER, J., on the relation of Eller, district attorney of the first district. To the information, Ryan, the respondent, filed an answer, to which the relator demurred; and upon a hearing thereof, the demurrer was sustained, and the judgment of ouster duly entered. Ryan brought the cause here upon petition in error.

J. D. Gilman, *W. W. Wardell*, and *George P. Uhl* (with whom was *M. Montgomery & Son*, and *Brown, England & Brown*), for plaintiff in error, cited Cooley on Constitutional Limitations, 117, 144, 145, 182, 184. *The People v. McCallum*, 1 Neb., 182. *The People v. Pinckney*, 32 New York, 377. *Evans v. Sharp*, 29 Wis., 564.

This is a proceeding in the nature of a *quo warranto*, which lies only to try the right of an incumbent to the

office, and in order that the proceeding be maintained it is necessary that there be an office, and that a legal office created by a constitutional law. So, that in order for the relator to maintain this proceeding, the constitutionality of the act of February, 1875, must be admitted. A *quo warranto* will not lie to declare void an act of the legislature. *State, ex rel., v. City of Lyons*, 31 Iowa, 432. *State v. Paul*, 5 Stew. & Port. (Ala.), 40. High on Ex. Rem., Secs. 626, 635 and 689.

J. W. Eller, Aug. Schoenheit, and *Isham Reavis*, for defendant in error.

I. The act in question is in conflict with Art. 2, Sec. 19 of the constitution of the state, then in force, which provides 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."

It contains a clear delegation of legislative power to the county commissioners.

It is retroactive in its operation, and is obnoxious, being *ex post facto* in its effect.

II. It is in conflict with the latter subdivision of Sec. 24, Art. 2 of the constitution in force at the date of its approval, which provides as follows: "Nor shall the compensation of any public officer be increased or diminished during his term of office."

There are two objects aimed at in the enactment of this law: the creation of the office of delinquent tax collector, and the imposition of a penalty of ten per cent for the non-payment of taxes; and this penalty is imposed as well for past omissions as for future delinquencies, while the title expresses but a single subject, the creation of an office, and the definition of official duty.

Wilkins v. Miller, 9 Ind., 100. *People, ex rel., v. Mahaney*, 13 Mich., 481. *Smails v. White*, 4 Neb., 353.

The creation of a civil office, and the enactment of a penal statute, are matters so far incongruous as to have no necessary connection, but are wholly diverse in their nature.

III. The act in question is clearly amendatory of the general revenue laws of the state, approved February 15, 1869, yet the sections thus amended are not contained in the new law, as required by the constitution in force at that time. *Smails v. White, supra.*

Nor is the act complete in itself as an independent, self-existent statute. *People v. Mahaney, supra.*

It contains a clear delegation of legislative power, as its operative force is dependent upon the exercise of a discretionary power, by it vested in the county commissioners to appoint a delinquent tax collector or not, as they may see proper, thus conferring upon that body the power of giving the act in question the form of law by making the appointment therein permitted, or rendering it a dead letter on the statute book, by neglecting or refusing to make such appointment. A careful examination of this singular piece of legislation will serve to show that, without an appointment to the office created by it, not a single provision or section in it can, nor does, have the effect of law.

IV. The intent of the law-giver is the law. This intent is to be gathered from the words employed in the law itself, and the subject matter of the act. Plainly it was the intention of the legislature to provide for the collection of taxes already delinquent, as well as those thereafter to become delinquent. This act, so far as it relates to past omissions in the payment of taxes and the imposition of a penalty therefor not previously

imposed by the law under which the same was levied, is in the nature of a bill of pains and penalties, is retroactive in its operation and wholly void.

The imposition of a penalty for a past omission in the payment of taxes, is not taxation, but confiscation. *State v. Mayor of Jersey City*, 8 Vroom, 39.

GANTT, J.

It is alleged that the plaintiff in error assumed and usurped, and still doth usurp, intrude into, use and assume to exercise, hold and enjoy the office of delinquent tax collector, so called, in the county of Richardson, without any warrant of authority or legal right whatever; and prays that he may answer by what authority he claims to have and hold, and assume to exercise and enjoy the said franchise and office.

In the answer, the plaintiff denies the material allegations in the information, and then substantially avers, that the office of delinquent tax collector was vacant, and that on the 6th day of April, 1876, the county commissioners of the said county appointed him to fill the said office, in accordance with the act of February 24th, 1875, and that he qualified and entered upon the discharge of the duties of the office, as he lawfully might and should do. A general demurrer was interposed to this answer, which was sustained by the court below; and the plaintiff in error making no further answer, judgment was rendered against him.

The six assignments of error all go to one point only, namely: that the court below erred in sustaining the demurrer, and in rendering judgment thereon in favor of defendant in error and against plaintiff in error.

The main question, however, is whether the act referred to, and under which the plaintiff claims his right to the office, is constitutionally a valid statute.

The act attempts to amend and remodel to a considerable extent, the general revenue laws contained in the revised statutes of 1873, without inserting in the new law the sections so amended and remodeled, and without making any particular reference to them. The constitutional provision requires all the parts of an amended law to be contained in the new act, and the old law so amended to be repealed. This constitutional provision, it seems, has been wholly disregarded in the new act referred to.

Again, the new act requires the county treasurer, in each county of the state, on the first day of May, 1875, about two months after its passage, to deliver to the delinquent tax collector the tax list of all taxes which shall have been delinquent for one year and over, and to do so each year thereafter; and it further provides: "That upon all taxes remaining delinquent for the space of one year, a penalty of ten per cent shall *attach*, which shall be collected by such delinquent tax collector *as a part of the tax*." This penalty, by the express provision of the statute, becomes an inseparable portion or part of the taxes, which were delinquent at the time the act was passed; and in the collection of them, it cannot be separated from them in violation of the law. Now, it is said, that "penalties may be prescribed for future delinquencies in the payment of taxes, as part of the machinery by which government is enabled to collect them;" but such penalty is not taxation, and cannot be sustained as a tax or any part of the revenues raised by taxation. If, then, such penalty can be enforced, it must be imposed simply as a method or machinery by which the government is enabled to collect future delinquencies in the payment of taxes, and cannot be applied to or enforced in the collection of taxes previously levied or delinquent; for, in such case, the law would be retroactive in its operation, and cannot be sustained; and, therefore, to

enforce the collection of the penalty would be confiscation, and not taxation. It is said, that the "legislature can exercise no such function without conflicting with that clause of the constitution which is intended to guard private rights against oppression;" and, that "even in the absence of any fundamental guarantee, such a use of legislative authority would be considered as contrary to the great first principles of the social compact. It is opposed to all reason and justice, and the very nature and spirit of our form of government forbid us to believe that the people intended to entrust the legislature with any such power." "There would be no limitation of the time for which such laws might be made to retroact, or the sum which might be exacted under them, save only the will of the law-maker and the public exigency. Despotism itself could not employ a more arbitrary means of extortion." *State v. Mayor, etc., of Jersey City*, 8 Vroom, 43.

But, again, the act approved February 24, 1875, providing for the appointment of a delinquent tax collector is, certainly, a novel specimen of legislation. After defining the powers and duties of such delinquent tax collector, the last section of the act provides that: "This act shall not *in any way* affect sections forty-nine and fifty," of the general revenue laws as found in the revised statutes of 1873. Is not this, in effect, a re-enactment of the sections referred to, and, therefore, directly and wholly inconsistent with all those sections or portions of the act which precede it?

This seems to be a fatal objection to the new law; for, by section forty-nine of the general revenue laws, it is provided that: "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: *Provided*, That in case any person having personal property assessed, and upon which the taxes are unpaid, shall in the opinion of the *treasurer*, be about to move out of the county, or in any other manner seek to put his personal property out of the reach of the *treasurer*, *it shall be the duty of the treasurer* to collect such taxes, at any time after the tax duplicate has been placed in his hands." Section fifty directs, that in the collection of delinquent taxes upon real estate "the remedy to be pursued shall be the same as is provided in sections forty-nine and fifty-two." Section fifty-two provides the manner of procedure in the sale of personal property levied on as aforesaid for the payment of taxes.

The re-enactment, in effect, of the above parts of the general revenue laws, by the last section of the act of February 24, 1875, certainly invests the county treasurer with the office of collecting delinquent taxes, and confers on him all the powers and duties of such office. Hence, upon what principle of law can the plaintiff in error take from him the tax duplicates, or lists of taxes which have become delinquent, and assume to exercise and discharge the duties which the law expressly requires to be performed by the county treasurer? We think the well settled rule of construction of statutes applies to this new act with great force, and that the last section must prevail; and hence, all that portion of the act which precedes it, being inconsistent with the provisions of the sections re-enacted must be held as inoperative, and of no effect.

Both the old and new law cannot stand together; under the old law above quoted, the power and duties of the county treasurer are absolute and not divisible; the re-enactment of these provisions by the last section of the new statute, restores to and vests the county treasurer with all the powers and duties of the office of tax collector, and, therefore, the act of February 24, 1875 is rendered simply ineffective.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, PLAINTIFF IN ERROR, v. PALMER WAY, DEFENDANT IN ERROR.

1. **Adultery:** EVIDENCE. Upon a charge of adultery in an indictment, evidence of improper familiarities between the parties, both anterior and subsequent to the time the offense is charged, may be received as corroborating proof, after evidence has been offered tending to prove the offense charged.

2. ———: ———. The statutory offense of wantonly cohabiting with a woman in a state of adultery, is one continued offense, and may be properly charged as having been committed between certain points of time; and proof of such cohabitation during any portion of the time alleged will be sufficient to establish the commission of the offense.

3. ———: SUFFICIENCY OF INDICTMENT. If part of the time charged in such case, is prior to the passage of the act constituting and defining the offense, such prior time may be treated as surplusage, as time is not of the essence of the offense, and the indictment may be held good as charging the offense from the time of the passage of the law, until the last point of time alleged in the indictment.

THIS was a petition in error, filed by the district attorney, to take the opinion of this court upon points which arose on the trial below, before POUND, J., and ruled in favor of Way, who had been indicted in the

district court of Lancaster county for the crime of adultery.

J. H. Broady, District Attorney (with whom was *Hunter & Sawyer*), for the state.

The testimony as to subsequent improper familiarities should have been admitted. Whar. Cr. Law, 261, 599 and 2663. Bish. Stat. Crimes, Secs. 682 to 784. *Thayer v. Thayer*, 101 Mass., 111. *People v. Jenness*, 5 Mich., 305.

The act under which the second count is drawn was passed February 25, 1875. Laws of 1875, page 11, Sec. 23. But the acts had been in progress long before that act took effect, and continued until long after the same became criminal under this act, and as the rule of law would permit the whole to be given in evidence to the jury, the charge was made just according to the fact that they might not be taken by surprise by the proof. So far as the time before February 25, 1875, is alleged, that was clearly pleading evidence which was for the benefit of the defendant.

But the statute cures the allegations as to time, if there is any informality therein. Gen. Stat., 816, Sec. 412.

Now, if time had not been stated at all, the indictment would be good, and if stated imperfectly, is still just as good. This is just what counsel say, that time is stated imperfectly.

There is no statement of an impossible time, for the act may have taken place any time, any week, or any day between February 25, 1875, and July 15, 1876.

But the time is not even imperfectly stated, but stated just exactly right for these continuing offenses. *Com. v. Wood*, 4 Gray (Mass.), 11. *The State v. Glage*, 9 Ala., 283. Bish. Stat. Cr., 703.

Lamb, Billingsley & Lambertson, for defendant in error.

I. The court did not err in quashing the second count in the indictment for the following reasons:

No offense is charged in that count. The count is not good under section 208 of Procedure Criminal of the laws of Nebraska, for the reason it does not charge "notorious cohabitation" with the woman. "The *notoriety* is as material in making out the offense as is the fact of adultery committed." *People v. Gates*, 46 Cal., 53. *State v. Crowner*, 56 Mo., 147.

The count is not good under the session laws of 1875, section 23, because it alleges the pretended offense to have been committed *on a day* more than six months before the passage of any law making the * * * * act charged criminal.

The court had no right to put the prisoner upon trial for the acts complained of in the indictment, as they constituted no violation of law.

The *rules of pleading* must not be confounded with the rules of evidence. The prisoner has some constitutional rights.

Though the date of the day, month and year, on which a crime is alleged to have been committed in an indictment be not material *in evidence*, it is yet of importance, as it respects the records of the court. And by the common law it has ever been considered necessary and material to allege the day, month and year. 2 Hawkins' Pleas of the Crown, 325. *State v. G. S.*, 1 Tyler, 295. *State v. Bacon*, 7 Vt., 222. *State v. Litch*, 33 Id., 67. *State v. Temple*, 38 Id., 37. *State v. Thurstin*, 35 Me., 206.

II. The court did not err in rejecting the testimony offered for the following reasons:

The record shows only that testimony had been offered *tending* to show the commission of the act charged.

The record does not show how strongly. Would the introduction of proof that only created a slight presumption that the prisoner had committed an offense of this kind,—nay, further, would the introduction of proof that created only the slightest suspicion that the prisoner had committed the act, open the door to the introduction of proof of every subsequent act or suspicious appearance between the parties, and require the prisoner to defend and explain them, when sprung upon him unadvised on a trial? We submit the bare statement of the proposition in its own answer.

Now the record does not show how strongly the proof already introduced tended to show the commission of an offense, whether slightly or otherwise, and that being true, we insist for that reason alone the presumption is the court ruled rightly in excluding the testimony. *Again*, the proof offered was not material or relevant because it was not *confined to at or near the time* elected to be proved by the prosecution under the indictment; we are not aware it has ever been decided that subsequent acts of familiarity, no matter how recent, may be given in evidence as corroborative evidence.

On the other hand, the rule seems to have been long and well settled, that while former acts of familiarity are competent and proper to be shown, *for the purpose of showing an adulterous disposition*, and so corroborative, that subsequent like acts cannot be. 2 Greenleaf Evidence, Sec. 47. 3 Phil. Ev., page 526. *Lovell v. The State*, 12 Ind., 18. *State v. Bates*, 10 Conn., 372. *Com. v. Morris*, 1 Cush., 391. *Com. v. Horton*, 2 Gray, 354. *Com. v. Merriam*, 14 Pick., 518. *Com. v. Thrasher*, 11 Gray, 450.

GANTT, J.

Under sections 483, 515 and 516 of the criminal code, this case is brought here upon error by the plaintiff, to obtain the decision of this court upon questions of law raised by exceptions taken to the decision of the court below.

In the first count in the indictment, the defendant, a married man, is charged with the crime of adultery with a certain married woman, and the offense is stated as having taken place on the 27th day of February, 1875. From the record it appears, that testimony was given on the part of the plaintiff, tending to show that the defendant committed the adultery at the time charged in the indictment; and then for the purpose of corroborating this proof, the plaintiff offered other testimony of improper familiarities between the parties after the time the act is charged in the indictment. The defendant objected to this proof on the ground that it is immaterial and irrelevant. The objections were sustained by the court, and the plaintiff excepted. It is complained that the court erred in excluding the proof. This question is presented for the consideration of the court.

Now, it will not be controverted, that, as a general rule of law, evidence of facts tending to prove another distinct offense is inadmissible for the purpose of raising an inference of the prisoner's guilt of the particular act alleged; but we think the crime of adultery "involves different principles, in this respect, and should be governed by different rules, from those which apply to offenses generally." There is no doubt of the conflict of authorities upon the question, but upon an examination of it, we are of opinion that the better rule in prosecutions for adultery is, to admit testimony of improper familiarities between the parties, occurring both before and after the time the act is charged, as corroborating

evidence. And this principle, it seems to us, is so clearly illustrated in the case of *Thayer v. Thayer*, 101 Mass., 113, that we adopt the language of the opinion in that case as our own, and as the correct interpretation of the law in such case. In that case it is said: "The evidence by which the act of adultery is proved is seldom direct. The natural secrecy of the act makes it ordinarily impossible to prove it, except by circumstantial evidence. The circumstances must be such, indeed, 'as to lead the guarded discretion of a reasonable and just man to the conclusion of guilt.' But when adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place. The intent and disposition of the parties to each other must give character to their relations, and can only be ascertained, as all moral qualities are, from the acts and declarations of the parties. It is true, that the fact to be proved is the existence of a criminal disposition at the time the act is charged; *but the indications by which it is proved may extend, and ordinarily do extend, over a period of time both anterior and subsequent to it.* The rules which govern human conduct, and which are known to common observation and experience, are to be applied in these cases, as in all other investigations of fact. An adulterous disposition existing in two persons towards each other is commonly of gradual development; it must have some duration and does not suddenly subside. When once shown to exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties. It is this character of permanence which justifies the inference of its existence, at any particular period of time, from facts illustrating

the *preceding* and *subsequent* relations of the parties. The rule is, that a condition once proved, is presumed to have been produced by causes operating in the usual way, and to have continued until the contrary is shown. The limit, practically, to the evidence under consideration is, that it must be significant in character, and sufficiently near in point of time, to have a tendency 'to lead the guarded discretion of a reasonable and just man,' to a belief in the existence of this important element in the fact to be proved. If too remote or insignificant, it will be rejected, in the discretion of the judge who tries the case. The fact that the conduct relied on has occurred since the filing of the libel does not exclude it; and proof of the continuance of the same questionable relations during the intervening time, will add to its weight." Bish. Stat. Cr. Law, Sec., 682, *et seq.* *The People v. Jenness*, 5 Mich., 321. *State v. Wallace*, 9 N. H., 517. *Lawson et al. v. State*, 20 Ala., 65.

The second count in the indictment charges, that the defendant, a married man, did unlawfully keep a certain woman, other than his wife, and unlawfully and wantonly did cohabit with her in a state of adultery, from the 10th day of August, 1874, until the 15th day of July, 1875. It is very clear that this count in the indictment is founded on section 208 of the criminal code, as amended by section 23 of the act of February 25, 1875, and the offense is charged substantially in the words of the statute as amended. A motion filed by the defendant to quash this count was sustained by the court, and the plaintiff excepted. It is complained that the court erred in sustaining the motion.

In the argument for the defendant, it is insisted, that the motion was properly sustained, for the reasons: *first*, that "no offense is charged in the count;" *second*, "because it alleges the offense to have been committed on a day," long prior to the passage of the law making

the act criminal; and, *third*, because the indictment does not contain direct allegations of time and place of the material facts necessary to constitute the offense.

In respect to the first point made in the argument, it must be observed, that the gist of the offense is, that the defendant did wantonly cohabit with the woman in a state of adultery. To cohabit, according to the sense in which the word is used in the statute, means dwelling together as husband and wife, or in sexual intercourse, and comprises a continued period of time. Hence, the offense is not the single act of adultery; it is cohabiting in a state of adultery; and it may be a week, a month, a year, or longer, but, still, it is one offense only. The defendant is charged with the crime from August 10, 1874, until July 15, 1875. According to the import of the words used in the statute, this is a continued offense, and if it should be proved that he wantonly cohabited with the woman in a state of adultery, during any portion of this time, such proof would be sufficient to establish the crime and fix the guilt of the party. We are of opinion, that the continuing offense in this case was properly charged, and the statement of time properly alleged in the indictment.

The second point made in the argument is not tenable, because no evidence could be received of any acts prior to the passage of the law, as the statutory offense charged did not then exist, and, therefore, as time is not of the essence of the offense charged, the prior time alleged in the indictment may be treated as surplusage, and the indictment, in its legal effect, be held good as charging the offense from the passage of the law until July 15, 1875. *Nichols' and Janes' case*, 7 Gratt., 589. Bish. Stat. Cr. L., Sec. 703. *Commonwealth v. Wood*, 4 Gray, 12. 1 Chitt. Cr. L., 250.

The third point made in the argument seems to be sufficiently answered in what is said above. If the con-

tinuing offense is properly charged in the indictment, then the allegations of time and place, in respect to the material facts, which constitute the offense, are sufficiently stated.

In conclusion, we are of opinion that the court below erred in excluding the evidence offered by plaintiff, and in sustaining the motion to quash the second count in the indictment; and that the decision of this court be rendered accordingly.

JUDITH A. PERRY, PLAINTIFF IN ERROR, v. MARY ASHBY, DEFENDANT IN ERROR.

1. **United States Homestead Act.** Where a settler on the public lands under the homestead act dies before the completion of the required residence, his widow, by completing the residence and cultivation so begun, is entitled to a patent for the land in her own right to the exclusion of the heirs of such settler.

2. ———: WIDOW MAY COMMUTE. Under section eight of said act, the widow may obtain the title before the completion of such residence, by making proof of settlement and cultivation as required of pre-emptors, and paying the minimum or graduated price.

3. ———: ———: HOLDS TITLE IN HER OWN RIGHT. In obtaining title under section eight, the widow forfeits no right, but holds the land divested of all claim of the heirs of the settler.

ERROR from the district court of Franklin county. The opinion states facts sufficient to an understanding of the case.

Griggs & Ashby, for plaintiff in error.

No brief on file.

H. S. Kaley, for defendant in error.

It must be conceded that the defendant, under the act of congress, was clearly entitled to the patent for the land in controversy, and that no condition attaches to it by force of congressional legislation — and if any trust attaches, it must be outside of the statute.

The patent, when legally obtained, is conclusive evidence of title in the patentee, and no state legislation or court can in any manner change its effect or transfer the title. *Gibson v. Chouteau*, 13 Wall., 100. *Johnson v. Towsley*, 13 Wall., 88.

Courts of equity can only change the effect of a patent when it is made to appear that the same was originally obtained by fraud or other undue means, against the party who has invoked its aid. They are powerless to attach to it mere conditions and trusts that are not made so by express legislation and that inheres in the patent. *Jarvis v. Hoffman*, 43 Cal., 314.

It is one of the fundamental principles of the common law that all devisable property is also descendible. Is not the converse of this proposition also true?

The interest of Ashby in the land was an inchoate one, and conclusively terminated in his death, and only by force of additional legislation the widow may become subrogated to all his rights and take the title in the same manner as he could have taken it had he lived.

LAKE, CH. J.

The defendant in error holds the land in controversy under the provisions of the act of congress entitled "an act to secure homesteads to actual settlers on the public domain," approved May 20, 1862.

The original entry through which her title was obtained was made on the 29th day of November,

1870, by her late husband, Samuel W. Ashby, who, it appears, up to the time of his death, which occurred on or about the 8th day of June, 1872, continued to live upon and cultivate the land, as the act requires.

After the death of her husband, the defendant continued to live upon the land until the 18th day of February, 1874, when she took the requisite steps to obtain the title in her own name, under section eight of said act.

It did not seem to be urged very seriously on the argument that Mrs. Ashby would not have acquired a perfect title to the land had she continued the occupancy and cultivation, begun by her husband, for the full term of five years from the date of the settlement, and made the proofs required by section two of said act. But it was urged, with seeming confidence, that, as the widow of Samuel W. Ashby, she could not proceed under section eight, and by paying the minimum price secure the title at once without the five years occupancy. It was insisted, that pursuing the course she did was, virtually, an abandonment of the benefits of the homestead act and a resort to the existing pre-emption act for her title.

With this position of counsel, we cannot agree. We do not think that Mrs. Ashby abandoned her rights under the homestead act. Section eight, under which she secured the patent before the completion of five years residence required by section two, does not remit a homestead claimant to the pre-emption act, but it simply refers to certain provisions of that act, and permits the homestead claimant to perfect his title at once by paying the minimum or graduated price, and making proof of *settlement* and *cultivation*, as is required of pre-emptors of public lands. It is only in respect to the proof of settlement and cultivation of the land that the pre-emption law must be observed. An examination of the oath required of a pre-emptor will show that it

includes very many things besides settlement and cultivation of the land, which, if required of many authorized settlers under the homestead act, they might not be able to take it.

For instance, a pre-emptor must swear that he "has never had the benefit of any right of pre-emption" under that act; that he "is not the owner of three hundred and twenty acres of land in any state or territory of the United States." This is not required of one who seeks to avail himself of the provisions of section eight of the homestead act.

Again, we have no doubt whatever that the benefits conferred by section eight, are not confined solely to persons making original entries upon public lands, but may be enjoyed also by the widow, heirs, and personal representatives respectively, whenever they succeed to the rights of the settler.

We entertain no doubt whatever that the action of the Land Department, in permitting Mrs. Ashby to prove up, pay for the land, and thus obtain a patent in her own name, was fully justified. For these reasons the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

GEORGE THRALL, APPELLANT, v. THE OMAHA HOTEL COMPANY, AND OTHERS, APPELLEES.

1. **Landlord and Tenant.** The relation of landlord and tenant requires good faith between the parties. The policy of the law will not permit the tenant to avail himself of the advantages of his possession to purchase incumbrances on the leasehold property for the purpose of speculation.

2. ———: PURCHASING OUTSTANDING INCUMBRANCE. But, if while in possession, under the lease, the tenant purchase such incumbrance, the presumption is that he did it for the only purpose permitted by law, that is, to protect his possession; and if the tenancy is for years, the landlord must account to him for what he actually paid for such incumbrance.

3. ———: SET-OFF. The insolvency of a party against whom a set-off is claimed, is a sufficient ground for a court of chancery to decree such set-off in cases not provided for by statute.

APPEAL from the district court of Douglas county. The opinion states the case.

George W. Doane and *E. Wakeley*, for appellant.

I. The set-off, by an equitable proceeding of independent mutual claims under certain circumstances, is a right long recognized. And the insolvency of one of the parties is of itself a sufficient ground for allowing the other party to insist upon this right. *Lindsey v. Jackson*, 2 Paige, 581. *Pond v. Smith*, 4 Conn., 297. *Gay v. Gay*, 10 Paige, 369. *Simson v. Hart*, 14 John., 63. *Jeffries v. Evans*, 6 B. Mon., 119. *N. H. Copper Co. v. Brown*, 46 Me., 418. *Keighley v. Walls*, 27 Ind., 384. *Simpson v. Huston*, 14 Tex., 476. *Brazelton v. Brooks*, 2 Head., 194. *Field v. Oliver*, 43 Mo., 200.

The fact that the complainant's demand is not yet due, does not prevent a set-off. *Lindsay v. Jackson*, 2 Paige, 581.

II. The district judge very clearly erred, as we think, in limiting the plaintiff's right to a set-off to the amount he paid for the judgment.

His ruling was based on *Mattis v. Robinson*, 1 Neb., 1. That case holds, simply, that a tenant buying in an outstanding incumbrance on property, which he holds under a lease, cannot enforce a lien against the property for any greater sum than he paid to obtain it.

If Thrall was seeking to enforce the lien of his judgment against the property, this case, and the rule it recognizes, might apply. But he is not. He is collecting it in another manner, and not seeking to disturb his landlord's title.

If the rule is applicable to this case, it would follow that if Thrall had levied on personal property of the hotel company, or if he had made no levy at all, the company could have discharged the judgment by paying what Thrall had paid for it. So if he had bought a note against the company, and got judgment upon it, so that it became a lien on the property, the judgment could be discharged by paying him what the note cost.

The property, as in this case, might be encumbered far beyond its value, so that the lien would be worthless, and the tenant have no intention of trying to enforce it, yet he would forfeit all the claim above the amount he paid for it. And the result would be the same if he bought a mortgage covering the rented property. He might abandon the mortgage altogether, and seek to get a judgment on the debt secured by it. And, upon the use made of the rule in question, he could only recover what he paid for the claim, *because* he had unfortunately got, with his claim a lien on his landlord's property.

Suppose Thrall had *released his lien* on the hotel property before he brought this suit, could any body have conceived the idea that his right to a set-off was restricted to the amount he paid for the claim?

We ask the court to correct this error in amount, and affirm the judgment in the other particular.

Clinton Briggs, for appellees.

I. It is not claimed by counsel for Thrall that the set-off claimed here can be had by proceedings at law; on the contrary, it is admitted that it is "an equitable proceeding." It is then solely for a court of equity, or a court with equity powers, to deal with the case presented by the record. This being so, we are only called upon to consider the equitable circumstances and considerations in favor of granting the relief prayed.

We think the better rule in respect to this subject of set-off is laid down by the court in the case of *Greene v. Darling*, 5 Mason, 201.

II. Judge Story says that the relation of landlord and tenant is a *trust* relation. 1 Story's Eq. Jr., Secs. 322, 323. Perry on Trusts, 185.

This relation only exists in respect to the lease, and leased property. There is an implied covenant in every lease that the tenant will do nothing to prejudice his landlord's title.

Now, what does Thrall do? He buys a judgment existing against the company at the time he entered into possession, of which he had either actual, or constructive notice; a judgment that was a *specific* lien on this particular property by reason of a *levy* made a year before he took his lease; a judgment he sought to enforce against the leased property, but could not on account of prior liens. Besides, in order to invoke the equitable relief prayed he must and does allege that he has exhausted his legal remedies to enforce the collection of the judgment by causing a *vendi* to be issued, and that such remedies were ineffectual.

Now it seems to us, that the most the court can do for

Thrall is to give him relief to the extent of the amount he paid for the judgment with interest. He has voluntarily removed a lien from the leased property after he had failed to enforce it; that is, if the court allows the set-off, and it would seem that it would be simply just, to give Thrall just what it cost him to do this. Suppose, this judgment had threatened his possession, and in order to protect himself against an adverse title, he had paid off the judgment, what would be the obligation of the landlord? It would be simply to make the tenant good his outlay. If he paid $1,000 to remove a $2,000 incumbrance, he could only recover the former sum with interest. *Foote v. Burnet*, 10 Ohio, 334. Rawle on Covenants, 160, 161. *Mattis v. Robinson*, 1 Neb., 1.

GANTT, J.

It appears by the record, that the defendant hotel company is the owner of the legal title to lots one and two, in block one hundred and thirty-eight, together with the buildings and improvements thereon, situated in the city of Omaha; that on the 16th day of September, 1873, the plaintiff entered into a leasehold contract with said company, for a term of five years from the first day of October, 1873, for so much of the building on the said lots which is known and designated as the "Grand Central Hotel" for hotel use, and agreed to pay for the same a yearly rental of four thousand dollars, payable in monthly installments of $333.33⅓. On the 7th day of December, 1874, the plaintiff purchased from R. Hilliker and others a judgment which, at March term, 1873, of the district court of Douglas county, they recovered against the defendant company for the sum of $2,935.13 damages, and $52.33 costs, and caused an execution to be issued thereon and a levy to be made on the above property. On the 5th day of January, 1875, another

execution was issued, commanding the sheriff to sell the property so levied on as aforesaid. On this execution the plaintiff undertook to apply his rents, and did so to the amount of one thousand dollars; and the execution having expired, it was returned by the sheriff.

The plaintiff alleges in his petition, that the defendant company is largely in debt, and utterly insolvent; and that it refuses to credit the amount of the judgment incumbrance so purchased by him, or to permit him to set-off the said judgment against the rents as they accrued from month to month; and that the said defendant company is about to institute proceedings, by action of forcible detainer or otherwise, to regain the possession of the said hotel premises. He asks that the amount of said incumbrance may be set-off against the rents accrued and to accrue under the lease, and that the defendant company be enjoined from disturbing him in his possession of the premises under the said lease.

Now, the fact is undisputed, that long subsequent to the time the plaintiff entered into possession of the premises under the lease to him by the hotel company, he purchased the incumbrance on the property. The levy made on the property by virtue of the execution issued upon the judgment incumbrance, passed the property in the custody of the law; for, under the laws of our state, lands are made chattels for the payment of debts, and may be seized by execution for that purpose. The plaintiff afterwards caused another execution to be issued, commanding the sheriff to sell the property so levied as aforesaid, and, hence, only one step further was necessary to be taken to divest the title of his landlord to the property, namely, to effect a sale on this execution. All these steps were taken by the plaintiff long subsequent to the time the relation of landlord and tenant existed between him and the defendant company. It may be questionable whether a tenant can in such manner divest the title

of his landlord to the leased premises; but this is not a necessary inquiry at the present time, as the case presents a very different question for the consideration of the court. The plaintiff did not sell the property under his execution, but undertook by his own action to appropriate the rents in payment of the incumbrance; and the defendant company having refused its assent to this procedure, he brought this action, and asks the court to decree the incumbrance, so purchased by him as aforesaid, to be set-off against the rents accrued and to accrue, until the same is fully paid. The court below allowed the set-off for the amount actually paid by plaintiff for the incumbrance. He now complains, that the court erred in not decreeing the set-off for the whole amount of the incumbrance as shown by the record.

It is said, that "there is a tenure between lessor and lessee for years, to which fealty is incident by theory of law, as well as of privity of estate between them." Lit., 132. 1 Wash. Real Est., 413. The parties must act in good faith towards each other; and therefore, we think the policy of the law will not permit a tenant to avail himself of the advantages, given to him by his possession, to purchase incumbrances upon the premises for the purpose of speculation; and then by the aid of the court, if necessary, to secure the whole amount of such incumbrance to be set-off against the rents without regard to the actual amount paid for the same. It seems to us that such conduct would be a breach of good faith, and the law would not permit it. Certainly, the fealty incident to the leasehold tenure, as well as the privity between the parties, will not allow such advantage to be taken by the tenant in possession.

But, if while in possession under the lease, the tenant shall purchase an incumbrance on the leased premises, the presumption is, that he did it, for the only purpose permitted by law, that is, to protect his possession; and

in such case, where the tenancy is for years, the landlord must account to him for what he has paid for the incumbrance, not exceeding what was justly due thereon with interest. We think this case clearly comes within the principle enunciated in the case of *Mattis v. Robinson*, 1 Neb., 1.

The grounds upon which the set-off is urged, is the insolvency of the defendant company. We think the proofs in the case clearly establish its insolvency. And the doctrine seems to be well settled, that the insolvency of the party against whom the set-off is claimed, is a sufficient ground for a court of chancery to allow a set-off in cases not provided for by statute, and even in cases where the demands on both sides are not liquidated.

In *Lindsey v. Jackson*, 2 Paige, 582, it is said that, "where there are mutual demands between the parties which cannot be set-off under the statute, but which a court of equity may compensate or apply in satisfaction of each other without interfering with the equitable rights of any person, the fact that one of the parties is insolvent has frequently been held sufficient grounds for the exercise of the equitable jurisdiction of chancery." 1 P. Wm., 325. *Pond v. Smith*, 4 Conn., 302.

In conclusion, we are of opinion, that the plaintiff is entitled to have the amount actually paid by him for the incumbrance set-off against the rents coming to the defendant company, and that the defendant company be enjoined from disturbing him in the possession of the premises under the lease; and the findings and decree shall be in accordance with this opinion.

DECREE ACCORDINGLY.

CONES AND POLLOCK, APPELLEES, v. JOHN D. NELIGH AND OTHERS, APPELLANTS.

1. **Power of Attorney.** A power of attorney, which in terms authorised an agent simply to sign the name of his principal to a mortgage, confers no authority on such agent to execute a promissory note in the name of his principal and then to negotiate both note and mortgage as collateral security for a loan to himself.

2. ———. The power of attorney, being of record, is notice to those dealing with the agent, of the extent of his authority to bind the principal under it.

THIS was an appeal from a decree rendered by GRIFFEY, J., in the district court of Cuming county. It was an action for the foreclosure of certain mortgage deeds alleged to have been executed and delivered by the defendant, John D. Neligh and Catharine B. Neligh, to secure the payment of a certain promissory note for $4,000, payable to the order of Elizabeth H. Hall, alleged to have been made, executed, and delivered by said John D. Neligh. The plaintiffs further alleged that the said note was transferred to them by the said Elizabeth H. Hall. The said note and mortgage deeds are attached to said petition and made part thereof, which show that the same are signed for said John D. Neligh by one John H. Hall, as the attorney in fact for Neligh, and that the said indorsement in the transfer of said note to the plaintiffs, is also signed for said Elizabeth H. Hall, by said John H. Hall, as the attorney in fact for the said Mrs. Hall.

The defendant Neligh, answered, denying the execution and delivery of said note and mortgages, or that he authorized John H. Hall, or any one else, to make, execute and deliver the same for him, and alleges that at

the time said John H. Hall assumed to act as his agent, he in fact acted for and was the agent of Elizabeth H. Hall; and Mrs. Neligh answering, says: that she never delivered said mortgage or said mortgages to said Mrs. Hall, and that her signature to said mortgage deeds was procured by the said John H. Hall through fraud and misrepresentation; that said John H. Hall represented himself as being the agent of said John D. Neligh, and that he would obtain a loan from said Elizabeth H. Hall of $4,000 for Neligh upon said note and mortgages, when in fact the said John H. Hall was the agent and attorney of the said Elizabeth H. Hall, and acted for her and in her behalf and for her advantage solely, and never intended and never did obtain said loan of $4,000, or any part thereof, for Neligh from said Mrs. Hall, or from any one else; that said John H. Hall and said Elizabeth H. Hall conspired together to obtain the said note and mortgage deeds for their own advantage and benefit only, and not as agent or agents for Neligh, and that said John D. Neligh, or said Catherine B., have never received from said John H. Hall or Elizabeth H. Hall or any one else the sum of $4,000 or any part thereof; she further denies that said John H. Hall was the authorized agent of said Neligh for him and in his name to make, execute and deliver said note and mortgage deeds.

The decree below was in favor of plaintiffs and Neligh appealed.

Uriah Bruner, for appellant, cited Gen. Stat., 873. *Fish v. Davis*, 62 Barb., 122. *Berry v. Anderson*, 22 Ind., 36. Story on Agency, 51. *Ingraham v. Disborough*, 47 N. Y., 421. *Rice v. Dewey*, 54 Barb., 455. *Parmelee v. Simpson*, 5 Wall., 81.

LAKE, CH. J.

It is only necessary to notice a single one of the many questions presented by this record.

There is no pretense that John H. Hall had any authority to use Neligh's name except such as he derived from the power of attorney produced upon the trial. But this, certainly, by the most liberal construction, did not authorize him to execute, in Neligh's name, a promissory note for four thousand dollars to accompany the mortgage mentioned in the power of attorney, and then to negotiate both note and mortgage as collateral security for a loan of five hundred dollars to himself.

Not only is it impossible to give this instrument so comprehensive a meaning, but there is nothing in the testimony of Hall himself as to the object for which the power of attorney was given, which would authorize him to bind Neligh in this manner.

The language of this power of attorney is very brief, and clearly expressed. It simply authorizes Hall to sign Neligh's "name, as grantor, to a mortgage, or mort gages," on certain real estate therein particularly described, nothing more. The instrument was of record, and was notice to the plaintiffs of the extent of the authority which it gave.

This is a clear case of the agent exceeding the authority given by his principal, and in a matter to which the principal cannot be bound without his consent.

Several other questions were raised and discussed on the trial, but we deem this to be the really important one, and its determination decisive of the case.

The judgment of the court below must be reversed, and a decree entered in favor of the defendants dismissing the case.

JUDGMENT ACCORDINGLY.

CITY OF TECUMSEH, PLAINTIFF IN ERROR, v. CYRUS S. PHILLIPS, TREASURER OF JOHNSON COUNTY, DEFENDANT IN ERROR.

1. **License Moneys.** Moneys collected by the corporate authorities of towns and cities of the second class, for license to sell intoxicating liquors, belong to the school fund of the county, and when collected should be paid over to the county treasurer.
2. ———: ACTION BY COUNTY TREASURER. When such funds are not paid over to the county treasurer, voluntarily, it is his duty to enforce payment, and he may do so by an ordinary civil action.
3. ———: ———. The authority to bring such action by the treasurer, although not expressly given, is clearly implied from the obligation he is under to make the collection.
4. **Constitutional Law.** The third section of the act of the legislature, amendatory of the act to incorporate cities of the second class, approved Feb. 25, 1875, *held* to be unconstitutional and void.

ERROR from the district court of Johnson county. The city of Tecumseh and others were defendants below, and judgment being rendered against them, they brought the cause here by petition in error. The amount sued for, and recovered, was for license moneys received by the city treasurer, for licenses issued by the city council under authority given by the criminal code. The section giving this authority is as follows:

SEC. 586. All the powers and duties in this chapter devolving upon the county commissioners, shall belong to and be exercised exclusively by the proper authorities of any or all incorporated towns and cities of this state, within the incorporated limits thereof, and the authorities of such towns and cities are hereby empowered to make all needful rules, and pass all necessary ordinances, decrees, or orders to carry out the intent of this chapter. They may determine what municipal officer shall receive

the petition, file the bond, and receipt, and issue the license as in section five hundred and seventy-two required: *Provided, however*, That such incorporated cities and towns may require such additional sum to be paid for license under this chapter as to them may seem best, not to exceed one thousand dollars, which sum, together with the sum herein required to be paid to the county treasurer, may be paid to the treasurer of the town or city, who shall account for the same, and his receipt therefor shall be equivalent to the receipt of the treasurer of the county, for all the purposes named in section five hundred and seventy-two. General Statutes, 855.

T. Appleget, for plaintiff in error.

I. The county treasurer, being but a portion of the political machinery of the county, cannot claim for himself, by virtue of his office, greater latitude of construction than that applied to the county itself.

1. The statutes of Nebraska nowhere clothe the county treasurer as such, with power to sue and be sued. It, at all times, recognizes him as a ministerial officer, with special powers, such as to seize upon and sell property for the payment of taxes, etc.; and, unless the statute do so expressly authorize him, he has no such power, as is clearly shown by the authorities.

2. And, further, the code (see General Statutes, 528, sections 29 and 30), requires that all actions be brought in the name of the real party in interest, except as is provided in section 32.

It is evident from the facts stated in the petition, that the county treasurer is not the real party in interest; neither do we think that section 32, in the least, removes the disability, for he is plainly not a trustee of an express trust. 2 Bouvier's Law Dic., 615. *Hunter v. Commissioners of Mercer County*, 19 Ohio State, 515

II. It has been contended that the act of February 25, 1875, laws of 1875, page 205, is unconstitutional, for the following reasons, to-wit: The object of the act is not set forth in the title, and that the act contains more than one subject; and also, that the original act, as well as the act amended, is not properly set forth. To all of which I answer as follows:

1. That the title, although general in its terms, is sufficiently explicit to apprise all persons of its contents, in a general way, and by so doing meets the requirements of the constitution and the object of its framers. Cooley on Con. Lim., pages 143, 144, section 2. *People v. Mahaney*, 13 Mich., 495. *Whiting v. City of Mount Pleasant*, 11 Iowa, 482. *Bright v. McCullough*, 27 Ind., 223. *Mayor, etc., of Annapolis v. State*, 30 Md., 112.

2. In respect to the position that the original act, or so much thereof as is amended, being recited in the amendatory act, I need but refer the court to the case of *People v. McCallum*, 1 Neb., 182, which settles this state.

S. P. Davidson, for defendant in error.

Defendant in error contends that all moneys collected in this state for license to sell malt, spirituous and vinous liquors belong to, and are for the use of the school fund. General Statutes, 851, section 572.

It makes no difference in respect to this matter whether the license be issued by the county commissioners or the authorities of incorporated towns or cities. *Sexson v. Kelley*, 3 Neb., 104–107.

The county treasurer is required, by law, to collect the fines and all moneys for school purposes in his county, and report to the state auditor a statement, showing the whole amount of money collected from * * school tax, and from all other sources, respectively; and the

amount received on account of licenses and fines and from all other sources from which school funds are derived. General Statutes, 974, section 72.

Money received by magistrates and clerks on account of forfeited recognizances, fines, etc., shall be paid to the county treasurer. Id., 840, section 534.

The county treasurer shall credit all moneys received from fines and recognizances to the county school fund. Id., 842, section 540.

The county treasurer is required to take all proper measures to secure to each district its full share of county school funds, and report to state auditor—not only funds for school purposes received, but also amount of same paid out, and to whom paid; and is only required to pay the balance which remains in his hands unpaid, to the state treasurer. Id., 974.

In this case, suit cannot be brought in the name of the state, because it is not the party interested, nor is the county alone, nor are both together; and, hence it is made the duty of the county treasurer to collect and distribute to each fund its share.

LAKE, CH. J.

This is a petition in error from Johnson county.

The questions presented arise upon a demurrer to the petition, which being overruled, a judgment was given against the defendants for the amount claimed by the plaintiff. The action was brought by the plaintiff, Phillips, as treasurer of Johnson county, to recover a sum of money alleged to have been received by the defendants below, from several persons, from time to time, for licences to sell intoxicating liquors in the town, and city of Tecumseh.

It is contended by the plaintiff in error, that these demurrers should have been sustained, for several reasons,

which we will notice in the order in which they were presented in the argument before us.

I. That the county treasurer is not authorized to sue for these moneys, for the reason that: "The statutes of Nebraska nowhere cloth the county treasurer, as such, with power to sue and be sued."

We think there is ample authority to be found in the statutes for the treasurer to maintain this action. By section 72 of the general school law, his duty in respect to this class of funds is very clearly set forth. It is provided that: "The county treasurer shall collect, or cause to be collected, the fines, and all moneys for school purposes in his county, and take all proper measures to secure to each district its full amount of school funds," etc. Now, although he is not, in specific terms, directed to institute suits to recover these moneys when not paid over to him voluntarily, yet, inasmuch as no other means are provided, his duty to do so is very clearly implied. The duty of collection being enjoined upon him, and no particular mode of doing so having been pointed out, it must have been the intention of the legislature that he should employ the ordinary means of enforcing payment where money is wrongfully withheld by one person from another.

In respect to the ordinary taxes levied for school purposes, a specific mode of collection is provided, which must, of course, be pursued in enforcing their payment. But this is not the case with respect to funds arising from fines, forfeited recognizances, and licenses. These are collected, in the first place, by various officers, whose duty it is to hand them over at once to the county treasurer, to be credited by him to the proper fund.

Suppose, however, that these officers refuse obedience to the law in this regard, and retain the money, what is to be done? Is there no means by which they may be

compelled to disgorge? Is the county treasurer, while directed in positive language to collect these funds, powerless to do so, simply because no specific mode is pointed out? We think not. The authority to make the collection being expressly given, in the absence of any specific direction, it will be presumed that the legislature intended it should be done by a resort to the ordinary means provided for enforcing the payment of debts.

The moneys in controversy belonged to the county school fund, and it was the duty of the defendant in error, to enforce their payment promptly. If to do so, it became necessary for him to resort to an ordinary civil action, his right, nay even his duty, to do so is very clearly implied.

II. But, it is contended that the city of Tecumseh having appropriated these moneys to its own use, they fall within the operation of section three of the act of the legislature, amendatory of the act to incorporate cities of the second class, approved February 25th, 1875, and that, therefore, the treasurer is not entitled to recover, in this particular case, even if we should hold that a county treasurer is authorized to receive this class of moneys, where no such appropriation has been made.

Section three of this act provides: "That in all cases in which cities of the second class, have collected and expended for the use and benefit of such cities, either in works of internal improvement, or otherwise, moneys collected from licenses for the sale of intoxicating liquors, such expenditures are hereby declared to be legal, and the same is hereby ratified and confirmed, and such cities of the second class, are hereby exonerated from any and all liability therefor."

It will be noticed that the title to this act purports to have two objects in view: *first*, to amend the general incorporation law for cities of the second class; and

second, to legalize certain taxes. But we fail to discover wherein it is, in any particular, amendatory of the general act relating to cities of the second class. The first section is devoted entirely to the legalization of certain taxes, supposed to have been illegally levied. The second section relates to the legalization of all bonds issued by any city of the second class, etc., and the third section is devoted entirely to the exemption of any such city from liability for license moneys illegally withheld from the school fund, "and expended for the use and benefit of such cities, either in works of internal improvement or otherwise."

It would seem to need no argument to show that this third section of the act is not, even by the most liberal construction, included in the title to the act. It is in nowise amendatory of the general incorporation law for cities of the second class, nor does it make any allusion to the legalization of any taxes whatever. And it is very clear to our minds, that the section is obnoxious to that provision of the constitution, in force when the act was passed, which declares that: "No bill shall contain more than one subject, which shall be clearly expressed in its title," etc. Sec. 19, Art. 2, constitution of 1866. To hold otherwise, would be to ignore entirely the plain requirements of this wholesome provision of the fundamental law.

We must hold, therefore, that this section of the act of the legislature, upon which the chief reliance was placed to exempt the city from liability, is absolutely void, and furnishes no defense whatever to the plaintiff's cause of action. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

CYRUS S. PHILLIPS, PLAINTIFF IN ERROR, v. THE CITY OF TECUMSEH, DEFENDANT IN ERROR.

1. **License to Sell Intoxicating Liquors.** The authority of the county commissioners to license the sale of intoxicating liquors is confined to those portions of the county lying outside the limits of incorporated towns and cities.

2. ———. Within such towns and cities the proper authorities thereof are invested with exclusive authority over the whole subject, without regard to what is charged by the county commissioners for licenses issued by them.

ERROR from the district court for Johnson county.

S. P. Davidson, for plaintiff in error.

T. Appleget, for defendant in error.

LAKE, CH. J.

This action was brought in the court below by the plaintiff in error, as county treasurer, to recover damages alleged to have been occasioned by reason of the failure of the town, and city authorities of the city of Tecumseh, to charge and collect for licenses to sell intoxicating liquors, at as high a rate as that fixed by the county commissioners.

It is alleged that the board of commissioners, at their session on the 11th day of February, 1873, ordered "that each and every applicant for a license to sell malt, spirituous and vinous liquors within the county, for the period of one year, should pay * * * the sum of five hundred dollars." But the corporate authorities, in total disregard of this action of the commissioners, fixed a much lower rate, and issued licenses and made collections therefor accordingly. It is now claimed by the plaintiff that the city is liable for the difference between

the amount actually charged and collected, and that fixed by the board of commissioners.

The case calls for a construction of the act regulating the sale of malt, spirituous and vinous liquors, so far as relates to the jurisdiction of the corporate authorities of a town or city in fixing the amount to be paid for a license to sell intoxicating liquors.

Section 336 of the Revised Statutes (Sec. 572, Gen. Statutes), in general terms, confers authority upon the commissioners of the county to fix the amount to be paid before the license is issued. But, by section 350, Revised Statutes, it is provided that: "All the powers and duties in this chapter devolving upon the county commissioners, shall belong to, and be exercised exclusively by, the proper authorities of any and all incorporated towns or cities of this state, within the incorporated limits thereof, and the authorities of such towns and cities are hereby empowered to make all needful rules, and pass all necessary ordinances, decrees or orders, to carry out the intent of this chapter."

We think it is clear that by this provision the authority of the commissioners is restricted to those portions of the county lying outside the limits of the incorporated towns and cities included therein; and that within such towns and cities the proper authorities thereof are invested with exclusive authority over the whole subject, and may fix the amounts to be paid for licenses within the limits specified in the statute, regardless of what sum is charged by the county commissioners for licenses issued by them.

We are of opinion, therefore, that there is no cause of action stated in the petition, and the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

HENRY T. CLARKE, APPELLANT, V. THE OMAHA AND SOUTHWESTERN RAILROAD COMPANY, AND OTHERS, APPELLEES.

1. **Action.** If a cause of action is exclusively based upon the full performance of the terms and conditions of a prior agreement between other parties, the primary inquiry is, whether such agreement was made a contract between the parties to the action, and if so, whether it was fully executed.

2. ———: CONTRACT AGAINST PUBLIC POLICY. An action cannot be maintained for the consideration of a contract upon an alleged performance by the plaintiff, if such contract is against public policy.

3. ———: ———. If such contract is fully executed the court will not disturb it, but leave the parties to abide the consequences; if it is not executed the court will not lend its aid to carry it into effect.

4. ———: ———. A contract to sell and transfer the rights, franchises and property of a railroad company, before it has its road constructed, is against public policy, and cannot be enforced by legal proceedings.

5. **Contracts by Corporations.** Corporations manifest their assent to and make contracts by deed or vote of the company, or by the agreement of their authorized agents, and not by the unauthorized declarations or promises of its individual members.

6. **Pleading:** ALLEGATA ET PROBATA. Relief under a general prayer must be conformable to the case made by the petition, and not different or inconsistent with it. The court can only adjudge upon the issues raised by the pleading, and the *allegata et probata* must agree.

THIS was a motion for a rehearing of the cause argued at the January Term, A. D. 1876, and reported in 4 Neb., 458.

J. M. Woolworth (with whom was *Mason & Whedon*), for the motion.

Clinton Briggs, contra.

GANTT, J.

This cause was brought into this court upon appeal, and a decree was rendered therein at the last January term of this court.

The plaintiff now moves the court to "abrogate and annul" that decree, and grant a rehearing of the cause on the ground of alleged "error and misconception by the court of the issues joined between the plaintiff and the defendant."

"1. That the court, in its decision and opinion filed, manifestly considered, adjudicated upon, and treated this action as in fact an action to enforce the specific performance of the contract for the assignment of the rights, franchises, lines, and surveys of the B. & S. C. R'y Co. and the B., A. & L. R'y Co., and to recover the consideration of such contract, the same being declared by the court against public policy and not to be enforced by the court." The argument is, that the plaintiff claimed to be the owner of three hundred and twenty-five of the original shares of stock of the defendant company, one hundred of which were paid up by the execution of the said contract.

"2. That the issues joined were misconceived and overlooked by the court in this, that this action was considered, adjudicated upon, and treated by the court as an action for the recovery of one hundred shares of original stock of the defendant company under a contract between the plaintiff and the defendant, which the court declared to be against public policy." The argument is, that plaintiff claimed to be the owner of said shares through the full performance of that contract, and was in possession of said shares and recognized by the defendant to be the owner of the same, as well as the other two hundred and twenty-five shares not disputed.

"3. The court further misconceived the issue and erred in the determination of the law relative to the contract of the plaintiff termed by the court the *ante* agreement, in this, that the court finding such contract against public policy and of no binding obligation upon either of the parties, in effect held the *execution* thereof on plaintiff's part no consideration for the one hundred shares of original stock of defendant company."

I have omitted the general argument annexed to each one of these grounds of error. As all these alleged errors are substantially of the same nature and purport, they will be considered together. In the former opinion delivered in this case, it was observed that in his petition "the plaintiff bases his claim for the additional shares upon an agreement, made prior to the organization of the company defendant, between himself of the one part," and some individuals of the other part, three of whom afterward became members of the company defendant.

Now, what is the fact in this regard? The first, second, and third paragraph in the plaintiff's petition allege that the Bellevue & Sioux City Railway Company and the Bellevue, Ashland & Lincoln Railway Company were corporations, organized under the general railroad law of this state, and that they had secured the exclusive right to build a railroad on the line so by them adopted and to receive certain grants of land from the state to aid in the construction of such railroad. In the fifth paragraph of the petition it is alleged that "divers persons proposed to become incorporate under the style of the Omaha & Southwestern Railroad Company upon a line which conflicted with those of said companies, and with the aforesaid rights thereof; that in order to reconcile said interests, it was, on or about the 20th day of November, in said year, between said parties and said plaintiff agreed that they would become stockholders in said proposed railroad company, he taking four-tenths

and they six-tenths of the stock of said company; that he should be paid $10,000 for the surveys made by said companies of the route of said proposed road, and for the right of way through Sarpy county, as at that time secured by them, he agreeing to assign to said proposed company all the right south of Omaha of the first mentioned companies, and to pay $20,000 upon the first assessment to be made upon his stock, and to take and pay for at par four-tenths of so many of the county bonds to be issued to said company by Douglas county in aid of its enterprise as should not be sold for cash, and to contribute in that proportion to the expense of building ten miles of said railroad, and the other parties agreeing to pay $30,000 upon the first assessment to be made on the stock, and to take a like proportion of said Douglas county bonds, and also contribute in the same proportion to the expense of building ten miles of said railroad." In paragraph six it is alleged that "on or about the 27th day of November, 1869, certain of said parties, said plaintiff, and others, availing themselves of what had been done as above set forth, as preliminary thereto, entered into articles of association, under said railroad law, and became incorporated under the style aforesaid, with a capital stock of $100,000, divided into one thousand shares of $100 each; that objection being made to plaintiff taking so large an interest as was provided in said contract, he agreed to and did subscribe for three hundred shares only, it being then and there understood and agreed that the said $10,000 coming to him under said contract should apply on the assessment first to be made thereon." In paragraph seven it is alleged that on the 31st day of December, 1869, the company permanently organized, and the plaintiff made his subscription, one hundred shares in one parcel, and fifty in another parcel, in his own name, and that twenty-five shares were taken in the name of Caldwell and the same number in

the name of Briggs, and that "it was at and about the organization of said company expressly agreed that said plaintiff should have from said company the $10,000 stipulated for in the contract aforesaid, and it was understood that the same would be applied upon the assessment which would be made on his said shares." In paragraph ten it is alleged, "that on or about the 15th day of November, 1870, said defendant corporation watered its stock, doubling the amount thereof, and the interests of said plaintiff being made six hundred and fifty shares, and all the assessments upon which, amounting to $32,500, have been fully paid as above set forth." This last date is a mistake, as the record shows the stock was "watered" September 1, 1870. Now, it certainly appears clear, according to the above allegations in the pleading, that the plaintiff claims the additional shares of stock under the terms and conditions of the prior agreement, which he so fully sets up in his petition, and bases his claim exclusively upon the alleged performance of that agreement. If this were not so, why so fully set up that prior agreement and ground his claim upon it as a contract executed and in full payment of the shares? This is substantially and clearly the gist of the action as set up in the petition; and the same position is taken in the motion for a rehearing, and especially in the third ground of error alleged in the motion. He does not allege payment otherwise, nor does he set up a claim or cause of action by subscription contract and tender of payment for the shares; but the allegations of his petition substantially are, that the shares were his under the terms of the prior agreement. It is true a party may amend his pleading while he preserves the identity of his cause of action. It is, however, said that an amendment is the correction of a mistake or error in the pleading before the court, and that the courts never claimed the power to allow, as an

amendment, the insertion of a new cause of action; therefore the insertion of facts constituting a new and different cause of action, would be the substitution of a different pleading, and not an amendment of an existing one. The plaintiff, however, in this case chose to rest his case upon his pleading as found in the record. *Trinder v. Durant*, 5 Wend., 72. *Walter v. Bennett*, 16 N. Y., 250. *Davis v. Mayor, etc.*, 14 Id., 506. *Williams v. Cooper*, 1 Hill, 637. Therefore, under the pleading in this case, the important and primary inquiry is, was the prior agreement made a contract between the plaintiff and the corporation? And, if so, was there a full performance of it by the parties, and the amount of money applied as claimed by the plaintiff? If the contract was against public policy, and it appears that it was accepted and agreed to by the defendant company as a contract between it and the plaintiff, and also was fully performed by the parties, then, the court will leave them in that position to abide the consequences, without any aid from the court to either party; but, if it is not their contract fully executed, then, the court will not enforce it, as the law will not sustain an action founded on such illegal contract. But, if the contract was fully executed, then the plaintiff had received all he now claims, and wherefore was this action commenced?

In *McBlair v. Gibbes*, 17 How., 236, the rule is admitted that a subsequent contract, if made in aid or furtherance of the execution of one infected with illegality, partakes of the same nature and is equally in violation of law; and the rule is stated in this case that, if the party who might set up the illegality of the contract, chooses to waive it and pay the money, he cannot afterwards reclaim it. In other words, if the contract is fully executed it will not be disturbed by the court. Therefore, whether such illegal contract be executed or not, the court will leave the parties where it finds them.

Dixon v. Olmstead, 9 Vt., 310. *Inhabitants, &c., v. Eaton*, 11 Mass., 375. *Howell v. Fountain*, 3 Ga., 181. *Coulter v. Robertson*, 14 S. & M., 29. *Marshall v. Balt. & Ohio R. R. Co.*, 16 How., 334. *Hall v. Henderson*, 4 Humph., 199. *White v. Hunter*, 3 Foster, 131. *Thompson v. Davis*, 13 Jons., 112. That the contract set up in the petition is against public policy seems so clear a proposition that it will hardly be doubted. "The powers, duties, rights and liabilities of a railroad company, are very fully and clearly defined in the statute," and no power is given to such corporation to sell, convey or transfer its right of way, lines, property or franchises, unless such company shall have its railroad *constructed*. It is admitted that the companies claimed to be represented by the plaintiff had no railroad, nor any part of such road constructed. In Redf. on R'y, 587, it is said that "an agreement between railroad companies, without authority of the legislature, transferring the powers of one to another, is against public policy, and a court of equity will not lend its aid to carry any such contract into effect." This question, however, is fully discussed in the former opinion in this case, and it is unnecessary here to repeat the same. 4 Neb., 463-466, and authorities there cited.

Another well established doctrine of the law in respect to corporations is, that a contract cannot be inferred from the unauthorized declarations or promises of its members, or any of them, because corporations manifest their assent to and make contracts by deed or vote of the company as a corporate act, or by the agreement of their authorized agent. Ang. & Ames on Corp., 112. It is said that "the members of a corporation aggregate cannot separately and individually give their consent in such manner as to oblige themselves as a collective body, for in such case it would not be the body that acts. Being lawfully assembled, says Ayliffe, they represent

but one person, and may consequently make contracts, and by their collective consent oblige themselves thereunto." Ang. & Ames on Corp., Sec. 232. Members of a corporation, as individuals, cannot by covenant bind the corporate company, and the circumstance that a person is one of a corporate company, gives him no authority to release a debt due the corporation, though a good consideration is paid for such release. *Wheelock v. Moulton*, 15 Vt., 521. *Tileston v. Newell et al.*, 13 Mass., 406. *Harris v. Muskingham Manf. Co.*, 4 Blackf., 268. These rules seem to be founded on the principle that the formation of a legal body by incorporation, confers the character and properties of individuality upon a collective and changing body of men; and that, therefore, the corporation is an entity, and in respect to its appointments, contracts and business affairs, it must act in its corporate capacity as an entity. *Providence Bank v. Billings*, 4 Peters, 562. I have adverted to these rules to show more clearly that the prior negotiations and contract between plaintiff and some individuals cannot in any manner affect or bind the corporate company, unless after its incorporation, it accepted such contract, and by some corporate act made the contract its own with the plaintiff; and, also, to show that any promise, agreement, conversation or understanding of individual members, unauthorized by the corporation, can have no binding effect upon the defendant company. Therefore, inferences can only be legitimately drawn from corporate acts which tend to prove contracts or promises of the corporation, or from the acts of agents legally authorized to act for it, and not from the unauthorized admissions or promises of individual stockholders. When the plaintiff negotiated the prior agreement with some individuals, he knew that he was not negotiating with a corporate company, and that the

contract would not bind the corporation, unless, after its incorporation, it accepted the contract.

At the first meeting, on the 27th day of November, when the defendant company was organized and articles of incorporation "were adopted, signed and executed," the plaintiff was present and subscribed for shares of stock; but the record evidence of the proceedings shows no action by the company, or that of an authorized agent of it, was had in regard to the prior agreement, nor is there any evidence tending to show that the matter was discussed or even mentioned. Again, on the 31st day of December, following, pursuant to notice published as required by law, the incorporators met, and stock books being regularly opened, seventeen persons subscribed to the stock of the company, in twenty-two parcels, and one of those subscribers was the plaintiff. On the 7th day of February following, the members met and elected a board of directors, of which the plaintiff was one. The record evidence of these meetings shows no action of the company in regard to the prior agreement, or of any claim of the plaintiff by virtue of the agreement. No allusion is made to the matter in the record evidence of these meetings. If the plaintiff desired the prior agreement to be made a contract between him and the corporate company, why did he not present the matter at the meeting when the company was organized and became incorporated? Why did he, on the 31st day of December, subscribe for stock to be paid in cash to the full amount? Having signed such a subscription contract, parol evidence is not admissible to vary it, or to establish an agreement inconsistent with it. *Conn. etc. R. R. Co. v. Bailey*, 24 Vt., 465. *Blodgett v. Morrill*, 20 Vt., 509. *Congregational Soc. v. Perry*, 6 N. H., 164. *Robison v. Pittsburg etc. R. R. Co.*, 32 Penn. St., 334. But why did he not demand the acceptance of the

prior agreement by the corporate company and the application of the money claimed by him in payment of stock for him before he entered into the subscription contract? If he had done so, and his demand had been rejected, he would have been deprived of no rights or franchises which he had in the companies he claimed to control; whatever those rights and franchises were, he could have availed himself of all the advantages and authority they conferred.

Afterward the plaintiff pressed the payment of the amount claimed by him of the corporation, but upon a careful review of the case, I find no act of the corporate body, or that of any person authorized by it, whereby the prior agreement was made a contract between the plaintiff and the defendant company, or it was agreed that the amount claimed by plaintiff was or should be applied in payment of stock for him, or the agreement was an executed contract between the parties.

It is said that the prior agreement was made by promoters before the charter, and for this reason it may be enforced. It is not doubted that the majority of persons associated for a common object, intending to procure a charter, may authorize acts to be done, not contrary to public policy and sound morality, and if such acts are accepted by the corporation, they must be taken *cum onere;* but the minority of such persons cannot authorize such acts to be done. In this case, only three of the corporators participated with plaintiff in the prior negotiations, and their agreement with the plaintiff, as shown, was illegal. Again, some testimony of J. Clopper is referred to as tending to show an acceptance of the prior agreement by the corporation. This witness says: "My *impression* is, that by the terms of the writing, at the organization of the company, it was *understood* that we were to pay him ten thousand dollars. It was agreed afterwards to be paid in stock.

* * * I think no one but Mr. Caldwell and myself were present when the *understanding* was come to that we would pay Clarke ten thousand dollars in stock. It was a conversation between Mr. Caldwell and myself, in his back room." His *impression* of what was *understood*, it seems to me is entirely insufficient to establish a contract between the parties. But both Clopper and Caldwell were parties to the prior agreement with plaintiff, and the above conversation was between themselves only, in the "back room" of the latter. Now, it would, indeed, be a strange and novel rule of law, if such unauthorized conversation and understanding between these two stockholders should be held as a contract between the corporation and the plaintiff. To make a contract for the parties out of such conversation, would be a direct infringement of the established doctrine of the law, and I hardly think the court would be urged to make one for the parties upon such evidence.

Again, it is insisted that such contract was accepted and executed, or may be so implied from a resolution of the board of directors of December 6th, 1869, proposing "that the president be instructed to draw his order on the treasurer for ten thousand dollars, to be paid to Henry T. Clarke for the surveys and right of way over so much of the Bellevue & Sioux City Railroad line as lies south of Omaha, and for the surveys and right of way over the Bellevue, Ashland & Lincoln Railroad line, when he shall have made in behalf of 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 & Southwestern Railroad Company." This is not a proposition to accept and adopt the prior agreement in terms, nor to apply any money in payment of shares of stock for the plaintiff, and is inconsistent with the case stated in the plaintiff's petition. It, however, never resulted in an executed con-

tract, nor in any agreement whatever between the parties. Briggs testifies that he saw a pile of papers in the office of the company which the plaintiff left there; that afterwards he called the plaintiff's attention to them, or plaintiff called his attention to them; but "cannot say when it was, but it was sometime in the winter of 1870, perhaps the latter part, about two months after the company was organized." He says in regard to the plaintiff's claim, the question "was frequently discussed in the board room, and objections were always raised to paying Clarke the ten thousand dollars;" and further, "I may state further that this company, the defendant, has never, to my knowledge, by the board of directors, officers, or any of its stockholders individually accepted these papers of Mr. Clarke in any manner whatever, no more than that they were in the room." Clopper testifies that the "expression of the members at these meetings was universal, not to pay him (Clarke), the ten thousand dollars for the papers produced." Caldwell testifies that "Clarke was present when he asked for the ten thousand dollars. The board did not receive his claim with any favor. Mr. Clarke left his right of way papers in the office in an envelope marked 'property of Mr. Clarke,' to be taken away. He would not take them away." I have referred to this testimony simply in affirmation of the fact that no agreement between the parties resulted from the proposition contained in the resolution. But suppose it be assumed that the resolution be taken as an agreement on the part of the defendant company to pay plaintiff, will the court lend its aid to carry such agreement into effect? As a court, we must interpret the writing as we find it in the record, and the record clearly shows that its terms and conditions are as obnoxious to the law as those of the prior agreement; that they are against public policy, see authorities cited in reference to the prior agreement. In *Duncan v. Blair*, 5 Denio,

196, it is held that "full performance by the plaintiff of a contract void under the statute, and partial performance by the defendant does not take it out of the statute as to what remains."

Again, it is urged that the agreement as a contract executed may be implied from the preamble to a resolution adopted by the stockholders at their meeting of September 1, 1870, which, together with the resolution, is as follows: "Whereas, the twenty miles of railroad now constructed will cost, when all the debts are paid and the road is equipped, at least $500,000; and, whereas, it will be necessary, in order to liquidate said debt 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 with said bonds should equal the 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." Now, it is simply impossible to find any fact in this preamble from which it may be implied that the prior agreement is a contract executed between the parties; and would it not be a perversion of language to infer from it that shares of stock had been issued to the plaintiff or any other persons? The resolution negatives such theory; it speaks of $200,000 of stock to be *issued*, and it is an express contract that the company *issue* this amount of stock, to be divided among the stockholders *according to their respective interests, as shown by the amount of money paid in by each.* The members voted upon this resolution in the same manner as they formerly voted; and the plaintiff, by voting in favor of the resolution, expressly agreed to receive as his portion of the total amount of the $200,000 stock to be issued, just in proportion to the amount of money paid in by him. But suppose that under this resolution

only $100,000 were to be divided among the stockholders, according to its terms, there would still be two thousand shares; and although each share would represent one hundred dollars, yet, in fact, the actual amount paid for each share by stockholders would only be fifty dollars. The plaintiff paid in $10,000; Malloy and King paid in $12,500, which the plaintiff held by assignment, making a total of $22,500. Now, suppose three hundred and twenty-five shares had been issued to plaintiff, then, in the division, in order to make his shares equal to the amount represented by him as paid in, he must receive one hundred and twenty additional shares, making a total of four hundred and fifty shares, which equal the $22,500 actually paid in as above stated. 4 Neb., 469. At the meeting of the stockholders, September 3, two days after the resolution contract was adopted, the members voted as formerly; but after this meeting, Caldwell and Briggs did not again vote any shares in trust for plaintiff. At the next meeting, on the 30th day of September, 1870, the plaintiff voted one hundred shares, Caldwell voted seventy-five shares, twenty-five shares having been transferred to him by J. F. Young, and Briggs voted fifty shares; and thereafter all votes cast by stockholders, as shown by the record, were based on the stock as "watered," the plaintiff voting his four hundred and fifty shares without objection or protest until after he had commenced this suit. Here is a period of over fifteen months without any objection by plaintiff to the resolution contract of September 1, 1870, to which he assented by his vote, as shown by the record. Do not these facts constitute an insuperable difficulty in the way of the plaintiff availing himself of any benefit in this action, from the manner in which the shares of stock were voted? And are they not conclusive in respect to the amount of his stock in the company?

In December, 1869, and in March, 1870, some corres-

pondence by officers of the company was had with plaintiff in regard to the payment of stock, and the fact is simply referred to, to show that it was long prior to September 1, 1870, when the interests of the stockholders were determined by the actual amount of money paid in by each.

Again, it is urged that a contract executed may be implied from the report of a committee, in which it is recommended that the "franchises of the Omaha & Southwestern, the Bellevue & Sioux City, and the Bellevue, Ashland & Lincoln railroad companies heretofore organized, shall be used by this company so far as may be necessary or advisable to do so, to further the organization of this company." This occurred before the defendant company was incorporated. But no contract is referred to and no terms are expressed in this report, and after the company became incorporated and the plaintiff presented his claim, the corporate body presistingly refused to allow it. Would it not, therefore, be an unwarrantable exercise of judicial power for a court to make a contract for the parties out of such evidence, and then determine it to be a contract executed? If, however, a contract is supposed to be implied, then, it would be illegal for the reasons hereinbefore stated, and a court would not enforce it.

Again, the testimony of Malloy is urged in support of the plaintiff's theory of a contract executed. On a careful examination of this testimony, it will be found that, after stating his occupation and residence, and that he was once a member of the defendant company, his answers to questions from three to nine inclusive, relate wholly to matters connected with, and incident to the negotiations between plaintiff and individuals prior to the incorporation of the defendant company. With two exceptions, his answers to the remaining questions propounded to him, relate mainly and substantially to his

opinion in regard to the circumstances requiring the early construction of the railroad and the advantages of an agreement with the plaintiff, to the shares of stock subscribed by the plaintiff, to his opinion that "the transfer of the stocks of plaintiff's two companies," made no difference to the defendant, and that there were slight variations of the line of the company, from that of the plaintiff's companies.

The exceptions are: "Question 12. What agreement, if any, was there about the mode of paying him the $10,000 coming to him for his surveys, etc.? Ans. It was to be applied in paying his stock. Question 15. 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. Ans. 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." It seems very clear that the witness bases his testimony on an agreement between Caldwell and plaintiff, and his understanding. This understanding is not evidence. *Lacey v. Central National Bank*, 4 Neb., 183.

His understanding of matters may be very different from that of others. The witness must state facts. But Caldwell testifies positively that he said the check "must be cash to operate on," and that plaintiff said, "he would make it good in a day or two," and further says, "that check was not paid. It was not paid because there was not money to Mr. Clarke's credit to meet it." But Caldwell certainly had no power to make such an agreement with the plaintiff, unless authorized to do so by the corporation, and the record discloses no evidence of corporate action from which such authority may be inferred, and no evidence of any corporate act from which an agreement may be implied.

Malloy states no facts or circumstances in regard to

the acts of the corporation in support of his general conclusions.

It is argued that the acceptance of the agreement set up in the plaintiff's petition by the corporation may be implied from a resolution of the board of directors, adopted February 7, 1870, which is as follows:

"*Resolved*, That all the acts, contracts and obligations heretofore incurred, made or assumed by the company, be and the same are hereby adopted, ratified and confirmed." It is certainly a clear principle of law, that a contract cannot be "incurred or assumed" without the assent of two parties, and that there can be no adoption and ratification of a contract unless there be an express or implied consent to it by the parties Then, how can this resolution have any effect upon the agreement set up in the petition, which, as already shown, had not been accepted by the corporation defendant? It seems that to give the resolution the effect contended for, would be an attempt to make something out of nothing. But even if an implied acceptance and ratification of the agreement is presumed, under this resolution, such acts will not change the character of an illegal contract or give it any validity.

The fourth ground of error alleged in the motion is, that the court adjudged the plaintiff bound by his assent to, and subscription of the contract, transferring the funds and assets of defendant company to the Nebraska Land & Improvement Company. The question raised by this point, I think, is sufficiently answered in the former opinion in this case, and it is unnecessary to repeat the same here. 4 Neb., 473.

In the fifth ground of error alleged in the motion, it is stated that $28,000 of bonds were "distributed in his, (plaintiff's) wrong among certain defendants, being so much of the interests in the improvement company, not taken by bond and stockholders in the said railroad com-

pany under the contract of July 19." It may be true that there was inequality in the distribution of these bonds; but what the fact is in this regard, it is not necessary now to inquire, for the reason, that the petition sets up no such claim, and contains no allegation in regard to these bonds. The rule is well settled that relief to be given under a general prayer must be conformable to the case made by the petition, and not different from or inconsistent with it. The court can only adjudicate upon the case made by the pleading. It is said that "a party is not allowed to state one case in his bill or answer, and make out a different one by proof: the *allegata* and *probata* must agree; the latter must support the former." *Boone v. Chiles*, 10 Peters, 209. *English v. Foxall*, 2 Peters, 595. *Wilkin v. Wilkin*, 1 Johns. Ch., 111. *Chalmers v. Chalmers*, 6 Har. & J., 29. *Drenforth v. Smith*, 23 Vt., 247. *Dunnock v. Dunnock*, 3 Md. Ch., 140.

Much has been said about defendant company using some surveys made by the plaintiff's companies, in the construction of its road. If the plaintiff or the companies represented by him are entitled to compensation for the use of the surveys, the law afforded them an ample remedy for the recovery of the same; but the plaintiff sets up no such claim in his petition in this action. See authorities cited above.

Assuming that the Bellevue companies did sell to and the defendant company accepted, under such sale, the rights, franchises, etc., of those companies, upon what principle of law does the plaintiff bring this action, in his individual name, to recover the purchase price? If those companies had legal existence, would not the right of action vest exclusively in them?

I must conclude, after a careful review of the case, that the grounds stated in the motion are not sufficient to vacate the decree heretofore rendered, and to grant a

rehearing of the cause, and, therefore, the motion must be overruled.

MOTION OVERRULED.

LAKE, CH. J., CONCURS.

MAXWELL, J., *dissenting.*

If we admit, for argument's sake, that the original contract for the sale of the plaintiff's railroad lines to the defendant is against public policy and will not be specifically enforced by a court of equity, still he is entitled to relief. On the 31st day of December, 1869, the plaintiff subscribed for two hundred shares of stock in his own and others' names. The articles subscribed contained a provision that the stock so subscribed should be paid for *in money*. Whatever may have been the object of this provision no one will contend that it could not be waived by the parties. The plaintiff subscribed for the stock in question without objection, and was elected one of the directors of the company defendant, and continued to act in that capacity for a long time thereafter. There is no claim in the answer of a want of power in the corporation to permit stock to be taken in this manner, and no such issue made in the case. The answer to the seventh paragraph of the petition states that "the defendant permitted him (the plaintiff) to subscribe for one hundred shares in one parcel, and fifty in another, and also fifty shares in the names of Caldwell and Briggs, the plaintiff to pay in cash the same as other stockholders, all this being a matter of grace and favor to him, for the purpose of keeping said additional shares of stock from passing into other hands *before the plaintiff could pay for the same.*"

The answer further states that but $10,000 has been paid by the plaintiff, and that no part of that sum was applied on the fifty shares held by Caldwell and Briggs,

or on the fifty shares held by plaintiff. The question, therefore, as to whether any portion of the $10,000 paid by the plaintiff was applied to either or both of the parcels of shares above referred to, is in issue. In regard to the shares held in trust for the plaintiff by Caldwell and Briggs, the plaintiff testified (page 28, printed record): "I paid to the correspondents of Caldwell, Hamilton & Co., in Chicago, $2,500; they insisted I should make these payments. They said I could afford to carry this stock. I could afford to credit the company that amount. *I made this payment upon the stock which Caldwell and Briggs subscribed for me in trust.*" And, again, on page 31, when referring to the same shares, the plaintiff testified: "I placed this money to their credit for those shares, as directed by Mr. Caldwell when I left Chicago. *This was the agreement for the parcel of shares subscribed in trust for me.*" This testimony is not denied. The defendant evidently could have produced witnesses to disprove these statements if they were untrue; but, having failed to do so, this testimony must be taken as true. And the testimony is confirmed by the fact that the shares in question were not returned to the defendant until nearly two months after this suit was commenced. The plaintiff is, therefore, clearly entitled to a decree for this parcel of shares on the payment into court of such sum as may be found to remain unpaid thereon. The answer also admits that the plaintiff paid $1,000 on the 8th day of February, 1870, $250 on the 5th day of March, 1870, and $6,250 on the 6th day of March, 1870. There is no distinct plea that this money was to be applied on one-half of the shares subscribed for by the plaintiff; the allegation being "that the plaintiff never made any payment whatever upon the fifty shares subscribed for by him in one parcel, nor upon the fifty shares held in the names of Caldwell and Briggs, nor did plaintiff ever offer to pay for the same." As the

proof shows, there was no appropriation of the $7,500 paid on and after the 8th day of February, 1870, by the plaintiff or defendant to any particular parcel of shares subscribed for by the plaintiff. It is the duty of the court to apply it *pro rata* to all; and this is merely justice. It is apparent from the record that the $10,000 due plaintiff for the surveys and right of way was to be applied as the first payment of fifty per cent on the stock in question. The objection that the stock was to be paid for in money, can have no weight in a court of equity, where the corporation is solvent, as in this case, and the *amount is due in money.* It is clearly shown that the plaintiff was recognized by the defendant for a long period after the 31st of December, 1869, as the owner of two hundred shares of stock; and it is also shown that he loaned his credit to the company in connection with other stockholders to purchase iron for the road on that basis.

But, it is urged that the resolution of September 1, 1870, for which the plaintiff voted, formed a *new* contract, binding on the plaintiff, by which he consented to the reduction of his shares to one hundred. The preamble to that resolution recites, among other things, that "Whereas, It is desirable that the stock of said company, together with said bonds, should equal the 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."

It will be seen by a reference to this case in 4 Neb., 479, that the entire amount of stock subscribed for was $100,000, of which the plaintiff had $20,000. It will also be observed that this resolution recognizes the *entire amount* of stock as having been subscribed, but that it was desirable to water it to the extent of $100,000. On

the passage of the resolution, the plaintiff was permitted to vote two hundred shares of stock without objection.

No one, I think, from a careful reading of the resolution, would suspect that it was intended to deprive a stockholder of any portion of his shares.

Suppose the plaintiff had paid for his two hundred shares in ties for the railroad or in grading its line, will it be contended that by voting for such a resolution he forfeited his stock and is remediless? I think not. A fair construction of the resolution is, that the increased stock shall be divided among the stockholders *according to their respective interests.* And it evidently was so understood by the parties at the time.

No consideration of any kind passed from the defendant to the plaintiff on the adoption of this resolution; how, then, can its adoption form a *new* contract between the parties, by which the plaintiff is deprived of his property?

Did the adoption of such a resolution forfeit his stock or a portion of it? I think not, and no case has been referred to holding such doctrine. There is nothing in the resolution to show an intention to reduce the number of the plaintiff's shares, how then can it be said he assented? "Assent must be *to the same thing* in the *same sense.*" 1 Parsons on Cont., 475.

Up to this time, at least, the plaintiff has been permitted to vote upon all the shares of stock subscribed for by him; and has been treated as the owner thereof. Had the road proved a failure he would have been compelled to take the stock thus subscribed for, and have been required to pay the entire amount due thereon. Is the stock thus held less his, because the enterprise is successful? No one will contend that such is the case. Neither can the value of the stock after the completion of the road make any difference. The plaintiff had taken the stock at a time when, so far as appears, it had no

determinate value. When the road was an experiment; when there was at least an equal chance that it might prove a failure, financially, to its proving a success, he bore the burden of its construction, and took the chances of failure. A sale or lease of the line made the enterprise an assured success financially; and the plaintiff having hazarded his property in its construction, is entitled to reap the benefits resulting from such success.

So far as the record discloses there is nothing to show that the resolution of December 6, 1869, for the payment of the plaintiff's claim was ever rescinded; or that he had any notice whatever, that such claim would not be applied as part payment on his stock. The plaintiff was certainly entitled to such notice; and in my opinion is fairly entitled to the stock prayed for in the petition, on the payment into court of such sum, if anything, as may be found to remain unpaid.

But was the sale of plaintiff's lines against public policy? If so, why? When a statute expressly prohibits a particular thing, or affixes a penalty which implies prohibition, or where from the nature or object of a statute prohibition may be implied, then contracts made in violation thereof, will not be enforced. But nothing of the kind appears in this case. Where there is no prohibition the law permits men to contract in matters concerning their own interests as they see fit.

The following is the contract entered into by the parties, prior to the organization on the 27th day of November, 1869:

"Memorandum of agreement between Henry T. Clarke & Co. of the first part, and John McCormick, George W. Frost, Enos Lowe, S. S. Caldwell, their associates of the second part, concerning the building of ten miles of the Omaha & Southwestern Railroad by the 15th day of February, 1869, and continuing the road thereafter, as soon as practicable.

"1. The party of the first part is to have four-tenths of the stock in said railroad to start with.

"2. The party of the second part is to have six-tenths of the stock in said railroad to start with.

"3. The company made up as above by the parties of the first part and second part are to pay Henry T. Clarke, ($10,000) ten thousand dollars in consideration, 1st, of the survey of the route of said road as at this day made, and, 2nd, the right of way through Sarpy county, as secured at this date.

"4. The party of the first part agrees to assign, transfer and set over so much of the Bellevue & Sioux City railroad rights and line and privileges as lies south of Omaha, and the Bellevue, Ashland & Lincoln Railroad Company, with all their rights, property and franchises to the Omaha & Southwestern Railroad Company.

"5. The party of the first part further agrees to pay at start, as the first assessment upon their four-tenths of stock, the sum of twenty thousand dollars in cash, and to stand and hold themselves in readiness to take at par the bonds of Douglas county if issued said Omaha & Southwestern Railroad, to whatever amount may not otherwise be cashed at par, in proportion of four-tenths of the whole, and also to further pay, in same ratio, whatever is necessary to complete ten miles of road.

"6. The parties of the second part agree to pay at start, as first assessment upon their six-tenths, the sum of thirty thousand dollars in cash, and to stand and hold themselves in readiness to take at par the bonds of Douglas county, if issued said Omaha & Southwestern Railroad, to whatever amount may not otherwise be cashed at par, in proportion of six-tenths of the whole, and also to further pay in same ratio whatever is necessary to complete ten miles of the road.

"In penalty whereof, the two parties, first and second, shall forfeit to the residue of the company such stock as

the assessments necessary to build the road are not paid upon.

"It is a distinct understanding that no person shall assume more stock than he can carry, and must satisfactorily show his ability to do so at outset.

HENRY T. CLARKE,
HENRY GRAY,
S. S. CALDWELL,
JOHN Y. CLOPPER,
O. P. HURFORD."

It is contended that this agreement has no force nor effect, because it is not referred to in the proceedings of the defendant, at the time of the organization of the company on the 27th day of November, 1869. I think it is referred to and the proof clearly shows, that about the time of the organization, the surveys, plats and profiles of plaintiff's railway companies were turned over to the defendant, and that upon these surveys, plats and profiles, bids were invited for the grading of the road; the bids to be opened on the 30th day of November, 1869; and contracts for grading were let on that day.

The stockholders and directors of the defendant must have known that these contracts were being let on the surveys, maps and profiles prepared by the plaintiff. And the resolution adopted by the board of directors, six days thereafter, instructing the president to draw his order on the treasurer for $10,000, for *surveys* and *right of way*, certainly confirms the ante-organization agreement. This resolution contained the following provision: "When he shall have made in behalf of said companies a full legal transfer of the same, together with all *interests* of every name and nature in the franchises, claimed by them, to the Omaha & Southwestern Railroad Company." The objection is now made that the plaintiff has not made a *legal* transfer as required by this resolution.

Such transfer need not be in writing. It is clearly shown that the surveys, maps and profiles were turned over to the defendant; it is also shown that the line actually occupied by the defendant railway is the same, with slight exceptions, as that surveyed for plaintiff's lines; it is also shown that plaintiff gave the right of way across his own land, and procured it for the defendant across the land of others. What interests in these franchises then were not transferred? We are not informed. It is apparent that there has been an *actual* transfer to the defendant, and that is sufficient. The claim that the defendant refused to receive certain *paper assignments* about the time of the completion of the first ten miles of defendant's railroad, is not entitled to much weight. The proof shows that the railroad was constructed with slight variations on plaintiff's lines, and from his surveys, maps and profiles, all of which the defendant had possession of at that time. The Omaha & Southwestern Railroad Company, organized under the general railroad law; and after such organization possessed all the rights and privileges necessary to construct a railroad.

But the *ante agreement* was referred to, indirectly at least, at the meeting held on the 27th day of November, 1869. On page 91, of the printed record, we find the following:

At a meeting held November 27, 1869, to organize "The Omaha & Southwestern Railway Company," there were present the following gentlemen:

Smith S. Caldwell, Ezra Millard, John Y. Clopper, Henry T. Clarke, Enos Lowe, Thomas Malloy, George W. Frost, Isaac Weightman, Jonas Gise, M. W. Kennard, John F. Young, Clinton Briggs, Alvin Saunders, Henry Gray, A. S. Paddock.

On motion of Mr. Caldwell, Mr. George W. Frost was chosen temporary chairman.

On motion of Mr. Briggs, A. S. Paddock was elected temporary secretary.

On motion of Mr. Briggs it was

Resolved, That a committee of three be appointed on organization, and Mr. Briggs, Mr. Caldwell and Mr. Young were appointed such committee.

Mr. Briggs reported for the committee on organization, recommending the formation of a new company, and that the franchises of the "Omaha & Southwestern," "the Bellevue & Sioux City," and "the Bellevue, Ashland & Lincoln" Railroad Companies heretofore organized, shall be used by this company only as far as may be necessary or advisable to do so to further the object of this organization.

On motion of Mr. Saunders the report of the committee was adopted.

Articles of incorporation were then signed and executed as follows:

On motion of Mr. Caldwell it was

Resolved, That ten per centum of the capital stock be subscribed for. The subscriptions were so made, and fifty per centum of said subscriptions at once paid into the treasury of the company.

A new company was to be organized, and the franchises referred to in the *ante agreement* were to be used only so far as they would further the organization of the new company. This was at the *time*, and in the *very act* of organizing the company defendant, and is not only a recognition of the *ante agreement* but a virtual ratification thereof.

The Omaha and Southwestern R. R. Co. was organized under the general railroad law (and could have been organized under no other); and possessed all the rights and franchises necessary to construct a railroad. Under such circumstances it seems frivolous to urge the objection that the *franchises* were not transferred. The

defendant could not take such franchises unless the company organized as the *assignee* of plaintiff's companies; and it is not claimed that such action was intended. It also appears from the record that on the 29th of November, 1869, H. T. Clarke, Clinton Briggs and John Y. Clopper were appointed a committee to procure *right of way*. Had the entire right of way been purchased, it certainly would not have been deemed necessary to have done this.

It is claimed that as a condition precedent the plaintiff must show that his companies were legal organizations, and that he made a legal assignment. The proof clearly shows that the plaintiff assigned to the defendant everything pertaining to his companies that was susceptible of assignment, and the defendant received the property thus assigned and applied it to its own use, and it is now too late to object to the *form* of the assignment, or to the organization.

This is not a case where it was attempted to *consolidate* two or more lines of railroad. The plaintiff had taken the preliminary steps to organize two railroad companies, commencing at Bellevue, and had caused surveys to be made of the lines, and had caused maps and profiles of such lines to be prepared; and to some extent had secured the right of way. In the *ante* organization agreement, entered into about the 20th day of November, 1869, it was proposed to organize a new company, of which the plaintiff was to be a large stockholder, and for the new company thus organized to take his surveys, maps and profiles, and the right of way so far as obtained, and construct the road on the lines thus surveyed, and from these surveys, maps and profiles, for which the plaintiff was to be paid by the defendant the sum of $10,000. I think it will not be seriously contended that such a contract cannot be enforced, where it is accepted and practically ratified by the company.

Even contracts vitiated by fraud are *voidable*, *not* void, and the injured party may annul or enforce the sale as he sees fit; but if he wishes to rescind the contract he must act without unreasonable delay, on the discovery of the fraud, otherwise he will be held to have affirmed it. And the rule certainly applies in this case, where the defendant has retained all that it received from plaintiff, including the right of way across his own and others' lands, and insists that it is not liable on a contract made with its officers within the scope of their authority.

But if relief is denied to the plaintiff on this branch of the case, he is still entitled to a re-hearing on the second branch of the case.

The answer to the thirteenth paragraph of the petition alleges, "that on the 5th day of December, 1871, at a legal meeting of all the stockholders of said railroad company, defendant, a resolution, authorizing and directing the president of said company to execute a conveyance and assignment of the lands, bonds, money, etc., in said contract, in the name of the company, to said Nebraska Land and Improvement Company, was adopted by a vote of more than two-thirds of all the stock, and the said plaintiff did in person vote his four hundred and fifty shares in favor of said resolution; that at said meeting the whole subject embraced in said contract, and each and all of the terms thereof, were fully and thoroughly discussed, and at great length, the said plaintiff being present and participating in said discussion, after which he voted four hundred and fifty shares in favor of the resolution, not claiming that he was entitled to vote any more stock. Also at a legal meeting of the board of directors of said company, held on the seventh of said month, said board ratified and confirmed said resolution, the plaintiff being present, but did not object to such ratification, but simply declined to vote."

The record shows (page 121) that on the 5th day of

December, 1871, the stockholders of the Omaha and Southwestern Railroad Company met at the office of the company in the city of Omaha, at ten o'clock, A. M.; present, the following stockholders:

S. S. Caldwell, one hundred and fifty shares.
A. Saunders, two hundred and fifty shares.
E. Lowe, one hundred shares.
Henry Gray, fifty shares.
Frank Murphy, one hundred shares.
Clinton Briggs, one hundred shares.
A. S. Paddock, one hundred shares.
H. T. Clarke, four hundred and fifty shares.
Smith Saunders, one hundred shares.
Jonas Gise, one hundred shares.
John Y. Clopper, one hundred shares.

Represented by proxy:

George W. Smith, one hundred shares; Francis Smith, proxy.

John H. Green, one hundred shares; Clinton Briggs, proxy.

Capital stock of the company, amounting to eighteen hundred shares, represented in full personally or by proxy.

On motion of Clinton Briggs, the following resolutions were adopted by a vote of stock as given below:

Resolved, 1. That for the purpose of carrying into effect the covenants and agreements contained in a contract bearing date, July 31, 1871, made by the stockholders of the company and S. S. Caldwell, Alvin Saunders and Francis Smith, parties of the first part, and Nebraska Land and Improvement Company, party of the other part, the president of the company, Smith S. Caldwell, is hereby authorized, empowered and directed to convey in the name of this company, to said Nebraska

Land and Improvement Company, by a good and sufficient warranty deed, in fee simple all of the following described lands, situate in the state of Nebraska, to-wit: The forty thousand acres of land which this company has received from said state, under the provisions of an act of the legislature of said state, entitled, "An act to dispose of public lands granted to the state of Nebraska for works of public improvement," approved February 15, 1869, in aid of the construction of the first and second ten miles of its road, for which lands said state has executed and delivered to this company letters patent; also, all land which this company has received or may hereafter receive from said state in aid of the construction of the third, fourth and fifth ten miles of its road; the consideration for said deeds being the mutual covenants and agreements in said contract contained: That the secretary of the company is hereby directed to attest said deeds, affix the corporate seal of the company thereto, and deliver the same to the said Nebraska Land and Improvement Company.

Resolved, 2. That the president and treasurer of this company are hereby authorized and directed to receive and deliver into the possession of the said Nebraska Land and Improvement Company all county bonds, and other bonds to which this company is or may be entitled to receive in aid of the construction of the third, fourth and fifth ten miles of its road.

Resolved, 3. That the treasurer of this company be and he is hereby authorized and directed to pay over to said Nebraska Land and Improvement Company the $61,000 mentioned in said contract, according to the terms and conditions thereof.

Voted by stock:

Clinton Briggs, one hundred shares.
Henry Gray, fifty shares.

Enos Lowe, one hundred shares.
Frank Murphy, one hundred shares.
Smith S. Caldwell, one hundred and fifty shares.
A. S. Paddock, one hundred shares.
Henry T. Clarke, four hundred and fifty shares.
John Y. Clopper, one hundred shares.
John H. Green (by Clinton Briggs, proxy), one hundred shares.
George W. Smith (by Francis Smith, proxy), one hundred shares.
In all, thirteen hundred and fifty shares.

Against the resolution:
Alvin Saunders, two hundred and fifty shares.
Smith Saunders, one hundred shares.
Jonas Gise, one hundred shares.
In all, four hundred and fifty shares.

A. Saunders served the following protest on the president of the railroad company, immediately after the announcement of the vote:

OMAHA, December 4 and 5, 1871.

To S. S. CALDWELL, *President Omaha and Southwestern Railroad Company:*

Mr. President, I hereby give notice to you and all the members of the Omaha and Southwestern Railroad Company present, not to deed any of my part of the lands, lots or other property which is in your company, to the "Nebraska Land and Improvement Company," or any other party or parties, as I do not wish any of my property to go into any other company, and in the vote of the directors agreeing to the action of the stockholders, the same notice was given, with the additional clause of this: I want my part of the land of the Omaha and Southwestern Railroad deeded to me immediately.

ALVIN SAUNDERS.

On the 11th day of December, 1871, this action was commenced, at which time the dissenting stockholders had not given their assent to the proposition to convey the lands and other property of the Omaha and Southwestern Railroad Company to the Nebraska Land and Improvement Company. Can the plaintiff take advantage of such dissent? I think he can. The proposition is to convey *all* the lands and other property specified, to the Nebraska Land and Improvement Company. Until this proposition is accepted by *all* the stockholders it remains a mere *proposition*, and any shareholder before the final acceptance by all the stockholders, may withdraw his assent thereto, which he would do by commencing suit to set the proceedings aside. The rule is well settled that a suit in equity will lie against a corporation by one of its members, where the funds of the company without his consent are diverted from the purpose for which the company was incorporated, notwithstanding such misapplication is sanctioned by a majority of the stockholders. *Cunliff v. Manchester Canal Co.*, 2 Russ. and M., 480. *Mandeson v. Commercial Bank*, 28 Penn. State, 379. *Dodge v. Woolsey*, 18 How., 331.

The leading case on this subject is that of *Natusch v. Swing*, found in the appendix to Gow on Partnership, 576, where a partnership was formed for *life insurance*. Afterward, by act of Parliament, they were authorized to enter upon the business of *marine insurance*. A majority of the members decided to engage in the business of marine insurance. Lord Eldon held them bound by the contract of co-partnership, unless every partner agreed to its alteration. See also, *Livingston v. Lynch*, 4 John. Ch., 573. *Kean v. Johnson*, 1 Stockton, Ch., 401. *Stevens v. The Rutland R. R. Co.*, 29 Vt., 548.

The rule is well settled that where a number of persons become members of a corporation for definite purposes and objects specified in their articles of incorporation

which in such case is their contract, that the object and business of such corporation cannot be changed or abandoned or sold out, during the existence of such corporation, without the consent of *all* the stockholders, although a majority may manage the business against the will or interest of the minority, so long as it is within the scope of the articles of incorporation.

It will be observed, by reference to the resolution of December 5, 1871, above quoted, that it was proposed to transfer all the lands, amounting to 40,000 acres, belonging to the Omaha & Southwestern Railroad Company, together with certain bonds and $61,000 in money, to the Nebraska Land and Improvement Company. The proposition was that *all* this property should be transferred. Will it be seriously contended that one, or two or even a majority of such stockholders would be bound by their assent to such a proposition, if *all* the stockholders did not accede to it? I think not. This court has already held in the Omaha hotel cases, that the entire amount of capital stock fixed by the articles of incorporation, must have been subscribed before an action can be maintained against a subscriber on his subscription; and the same principle applies in this case. The plaintiff only assented to the transfer of the property to the new company, upon condition that all the stockholders assented. While the matter was pending, and before these stockholders had given their assent, he withdrew his. In *Clarke v. The Omaha & Southwestern Railroad Co.*, 4 Neb., 473, is the following: "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." The judge who prepared the opinion of the majority of the court in that case overlooked the fact that Smith Saunders had *not signed the contract*, even at the time suit was instituted, he

being the owner of one hundred shares of stock. This oversight undoubtedly arose from the fact that the fourth volume of Nebraska Reports was being printed at the time the opinion was being prepared; and, therefore, no opportunity occurred to correct the mistake until after its publication. But the grounds of affirmance of the judgment of the court below, on that branch of the case, were based on the assumption of the assent of *all* the stockholders to such transfer. Upon what grounds, then, can such judgment be sustained, when it is discovered that all the stockholders did not give their assent to such transfer?

There is no doubt that the testimony must be confined to the issues presented by the pleadings. But this rule applies only to cases where objection is made at the proper time to the introduction of improper testimony. "An objection on the ground of variance between the proof and the pleadings should be taken on the trial. Where this is not done, it is too late on error to make the objection." *Speer v. Bishop*, 24 Ohio State, 598.

But is there a substantial variance between the allegations of the petition and the proof? I think not. The petition alleges that the plaintiff was to receive from the defendant $10,000 for certain surveys, right of way and franchises; the sum so due to be applied in part payment of his stock, and that he purchased and has paid for two hundred shares of the original stock. Had the answer been a general denial the plaintiff must have proved that he had paid for his stock in full, or have amended his petition on the trial in order to show a partial payment. But the answer expressly states that plaintiff subscribed for two hundred shares but alleges he has paid for only one hundred. The question of payment is one of the questions at issue. The testimony in the case appears to have been admitted without objection from either party, and is all before us, therefore, if the testi-

mony shows a cause of action it is the duty of the court to require the pleadings to conform to the proof, no material change being required.

In *Doty v. Rigour*, 9 Ohio State, 525, in an action at law, while the case was pending in the supreme court, that court permitted an amendment to the original petition, and afterwards affirmed the judgment.

"There are instances where the English court of king's bench, as the appellate court, made the amendments themselves upon error from the inferior courts; but the exchequer chamber and the house of lords usually require the amendments to be made in the court below, and have the record corrected after that, as upon suggestion of diminution of record, as the practice has been stated to be in the supreme court of Ohio, the supreme court of the United States, and in most of the States." Powell on Appellate Proceedings. 151, and cases cited.

And in *Grant v. Ludlow*, 8 Ohio State, 31, it was held in a case reserved from the district court to which it had been appealed from the court of common pleas, that "the amendments of pleadings in the appellate court, cannot be permitted so as to substitute for the cause of action originally brought, a new and different cause of action for determination of the appellate court. But it not unfrequently happens, especially in equity cases, that facts and allegations necessary to determine the subject matter of the original cause of action, and dependent upon and growing out of the original cause of action, is imperfectly stated. Such amendments have been heretofore allowed on appeal in this state; and when the collateral facts in equity suits made it necessary to bring a new party before the court, it has been allowed. Such amendments are made for the purpose of settling and fully determining the cause of action appealed."

Section 138 of the code provides that: "No variance between the allegations in the pleading and the proof is

to be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense on the merits."

Section 144 provides that: "The court in furtherance of justice may amend any pleading, process, or proceeding * * by conforming the pleading or proceeding to the facts proved," etc.

Section 145 provides that: "The court at every stage of the action must disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party."

Under our code, will it be contended in a case like this on appeal, where the testimony is all before the court, and it is apparent that the plaintiff is entitled to relief, although the proof may not fully conform to the pleadings, that he must be turned out of court without relief? I think not. To do so would be to sacrifice substance for a shadow, and make the *forms* of proceedings in court of more importance than the administration of justice. There is no doubt of the power of this court, in a proper case, to permit an amendment of any pleading or proceeding when such an amendment is in furtherance of justice.

The plaintiff was the owner of the companies whose surveys, right of way and franchises he sold to the defendant, therefore is the real party in interest, and the action is properly brought in his name.

The shareholders of an incorporated company cannot change the contract which they have entered into with each other, and form a new one without the consent of *every shareholder in the company*. *Ernest v. Nichols*, 6 H. L., 401. *Ex parte Morgan*, 1 M. & G., 236.

For some time before and at the time this action was commenced, at least three of the members dissented to the transfer of the property to the new company. By what authority, then, was a deed made on the 7th day of

December, 1871? Such a conveyance could not affect the plaintiff's rights. A party must enter voluntarily into a partnership or corporation. And the law will not compel him against his will to place his property and interests under the control of those whom he may believe to be unfriendly to his interests. It is not for us to inquire whether the plaintiff had sufficient grounds to cause him to withdraw from the new company; but, *did he withdraw his assent* before all the other members had given their assent? Of this there is no doubt. The assent of the other members was not procured until the 8th day of January, 1872. The plaintiff, therefore, is entitled to the relief prayed for. I cannot concur in either the statement of facts, or the law as laid down in the opinion of the majority of the court in this case. It seems to me that great injustice (however, unintentional), has been done. I have, therefore, given my reasons for my dissent, together with so much of the record as seemed to be necessary to understand the issues in the case. The motion for a rehearing should be sustained.

MICHAEL FILLION, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Practice in Criminal Cases:** JURORS. To render a juror incompetent in a criminal case on the ground of an opinion formed or expressed, it must distinctly appear that such opinion was in reference to the guilt or innocence of the defendant.

2. ———: ———. If the ground of objection to the juror is, that he heard testimony, it must appear that it was in reference to the case in which the defendant is charged with the crime.

3. ———: PRESUMPTIONS. To obtain a review in the supreme court, error must affirmatively appear in the record. The rule is, that whenever the facts stated in the record are consistent with the

duty of the court, and nothing is shown to establish a contrary theory, it will be presumed that the court acted properly and all things were rightly done.

ERROR to the district court for Lincoln county. It was an indictment for murder and resulting in the conviction of the prisoner, and judgment that he be executed, he sued out a writ of error to this court.

C. A. Baldwin, for plaintiff in error.

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

GANTT, J.

In the assignment of errors in this case, many objections are taken to the impaneling of the jury to try this cause; but the record shows, that the prisoner only asked one person tendered as a juror to be "excused for cause." This was J. Mackle, who, the record states, had "formed and expressed an opinion;" but it is not stated that this opinion was in relation to the innocence or guilt of the prisoner; and again, that he "heard part of Rogers' testimony," but whether that testimony was in respect to the prisoner, the record does not state.

To render a juror incompetent, it must appear, that the opinion formed or expressed by him was in reference to the innocence or guilt of the accused, and that testimony heard by him was in reference to the crime with which the accused is charged in the indictment. It is not sufficient to rely on vague and indefinite expressions which have no reference to the case on trial. The court cannot presume what the juror intended by such indeterminate language; we can only look to the record, and in this case it contains no facts upon which we can adjudge as to the competency of the juror, except that he said he could "render an impartial verdict from the evi-

dence" and had no bias. *Cooper v. State*, 16 Ohio State, 334.

The record shows that a large number of persons called as jurors were "excused" by the court, but it does not show that there was a challenge for cause, or a ruling of the court upon a challenge, in respect to any one of these persons. In this respect the record is wholly silent. Now it is well understood, that a record is constituted of the proper and legitimate elements of a trial, set down in the order of their occurrence; and the rule of law is, that in order to obtain a review in this court of any question in regard to the qualifications of a juror in a case, the record must show, that when the juror was tendered, he was properly challenged, and the grounds of the challenge must be distinctly stated, for, without this, the challenge is incomplete and may be wholly disregarded by the court; and again, it must appear that the court ruled upon such challenge; and that at the time, exception was taken to the decision of the court. If all these steps are not taken, it must be presumed that the party waived all objections to the competency of the juror. 1 Chit. Cr. L., 547. 2 Whar. Cr. L., Sec. 2974.

Again, it is alleged as error, and it is contended that the record does not sufficiently show that the prisoner was present with the jury upon a view of the place where the homicide is alleged to have been committed. In regard to this question, the record shows that on the 3d day of March, when the session of the court was opened, the prisoner was present; and that the "jury having heard the evidence in the case, as well on the part of the state as on the part of the defendant, and it appearing in the opinion of the court it is proper for the jury to have a view of the place in which the alleged homicide is charged to have been committed, in the indictment in this case, it is therefore ordered, that they be

conducted in a body, under the charge of the sheriff, to the place aforesaid, to be shown to them by Alexander Struthers, appointed by the court to accompany said jury; and said jury and sheriff and person appointed shall have no conversation, except to inquire as to the locality."

This record clearly shows the prisoner was present in court when its session commenced, on the day the view of the place was had by the jury. In the case of *Benton v. The State*, 3 Central Law Journal, 255, the record distinctly stated that the prisoner was not present at the view of the place; but in this case there is no intimation whatever, in the record, that the prisoner was not present with the jury all the time that evidence of any sort was received by them, either in court or upon a view of the place where the crime is alleged to have been committed. It is the record only, to which we can look to ascertain the conduct of the trial; and in that record, we find no fact or statement of the prisoner's absence during any part of the trial. Error must appear upon the record, and in the case of *The People v. Bealoba*, 17 Cal., 399, it is said that "error must affirmatively appear." The rule seems to be this, that whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be held that the court acted properly.

I think the doctrine is correctly stated in *Stephens v. The People*, 19 N. Y., 552, in which case the prisoner was tried for the crime of murder. In that case the record shows that the prisoner came into court at the commencement of the trial, and was at the bar of the court when the jury were sworn. The trial was continued from day to day, until the jury rendered their verdict. The court say that "the allegation of a continuance of the trial sufficiently indicates that it was with the incidents before described, of which the presence of the prisoner was

one. Besides, when facts are stated sufficient to confer jurisdiction upon a court of such high attributes, the inference is, that as to its continued proceedings *omnia rite acta.* Hence it is not usual, in either civil or criminal cases, to state on the record the occurrence of the necessary incidents between the selection of the jury and the rendition of their verdict." *Beale v. Commonwealth*, 25 Pa. St., 18. *The State v. Craton*, 6 Ired. Law, 168. *Pate v. The State*, 3 Gilm., 662. *Harriman v. The State*, 2 Greene, 283. *Brown v. The State*, 3 Eng., 100. *Rhodes v. The State*, 23 Ind., 24.

In the case at bar, in respect to the presence of the prisoner during the trial, the record is consistent with the duty of the court; and as no error affirmatively appears in this regard, the presumption is that all things were rightly done.

JUDGMENT AFFIRMED.

A motion for a rehearing in this case was denied.

WENZEL HORACEK, PLAINTIFF IN ERROR, v. JOHN V. KEEBLER, DEFENDANT IN ERROR.

1. **Contract on Sunday.** Neither at common law nor under our statute is a contract entered into on Sunday void for that reason.
2. **Sale.** In sales of property, unless otherwise expressed, it is implied that the seller may retain the possession until the price is paid.
3. ———: PERFORMANCE. And where a day certain is fixed within which the consideration is to be paid, performance or a tender thereof must be made within the time, or the seller will not be bound.

ERROR from the district court of Johnson county. It was an action for the replevin of five calves, brought by

Keebler against Horacek. The jury found in favor of Keebler, and assessed his damages for the wrongful detention of the property at five dollars. Judgment entered on the verdict, and Horacek brought the cause here by petition in error.

E. W. Metcalfe, for plaintiff in error, cited General Statutes, 780. *Bloom v. Richards*, 2 Ohio State, 388. *Johnson v. Brown*, 13 Kan., 529.

S. P. Davidson, for defendant in error, cited 2 Parsons Contracts, 764. *Hill v. Sherwood*, 3 Wis., 346.

LAKE, CH. J.

It is a well established rule of practice in this court, that, in order to entitle a party to a review of errors alleged to have occurred on the trial of a cause in the district court, he must bring such errors to the attention of that court by a motion for a new trial, in which they are distinctly pointed out. *Midland Pacific Company v. McCartney*, 1 Neb., 398. *Mills v. Miller*, 2 Id., 299. *Wells, Fargo & Co. v. Preston*, 3 Id., 444. *Horbach v. Miller*, 4 Id., 31. We regard this rule as a very wholesome one, and which will be rigidly adhered to in the future.

In this case, the only error insisted upon, is the refusal of the court to give certain instructions to the jury which were tendered on behalf of the plaintiff in error.

Referring to the motion for a new trial, we find but three grounds stated therefor:

"1. That the verdict is not sustained by sufficient evidence, and is contrary to law.

"2. Irregularity in the proceedings of the court, by which the defendant was prevented from having a fair trial.

"3. Error of law occurring at the trial, and excepted to by the defendant."

It is not claimed that the errors now complained of are covered by either of the first two grounds upon which the new trial was asked, but it is insisted that they are embraced by the third.

The rule which we have adopted, requiring the errors complained of to be distinctly pointed out in the motion for a new trial, is not complied with by so general a statement of error in the ruling of the court. The error relied on should be so clearly described, in the motion, as to advise both the court and the opposing counsel of the precise ground of complaint,—whether in ruling upon the competency of a juror, the admission of testimony, instructions given to the jury, or any other of the numerous questions necessarily passed upon by the judge during the trial.

But, notwithstanding this motion fails to come up to the full requirements of the rule just referred to, we have taken the pains to examine the record as to the alleged errors in the refusal of the judge to give the two instructions requested on behalf of the defendant, and are fully satisfied that there is no just ground for complaint in this respect.

It is undisputed, that the contract in this case was made on Sunday, the 6th of September, and that the price agreed upon was to be paid within a certain fixed time. Upon this point all the witnesses, on both sides, agreed. The dispute was as to the time actually fixed upon within which the payment was to have been made, whether within fourteen days, as contended by Keebler, or by the 14th of October, as claimed by Horacek.

We understand that, in sales of property, unless otherwise expressed, it is implied that the seller may retain the possession until the price is paid. And where a day certain is fixed upon within which the consideration is to

be paid, payment, or a tender thereof, within the time limited, must be made, or the seller cannot be compelled to part with his property.

It is clear, therefore, that if, by the terms of the contract, Horacek was required to make payment within fourteen days from the 6th of September, then his tender on the 13th of October, was too late, and gave him no right to take the calves.

By the first instruction which the court declined to give, it was sought to have the jury told, in substance, that the defendant could lawfully take the property *at any time*, even after the day fixed upon for payment, by first making a tender of the agreed price. This would have been erroneous, and was properly refused.

By his third instruction, the defendant sought to have the jury distinctly charged that, although the contract for the sale of the calves "was made on Sunday, the mere fact that the sale was so made on that day would not, of itself, invalidate the same." We think this instruction stated the law of this state, on that subject, correctly. By the common law, no distinction was made, in respect to the making of contracts, between Sunday and any other day. But, in England, and pretty generally in this country, more or less stringent laws have been enacted, by which all ordinary labor and business are forbidden under fixed penalties.

Our statute on this subject provides that, "if any person of the age of fourteen years, or upwards, shall be found on the first day of the week, commonly called Sunday, at common labor (work of necessity and charity only excepted), he or she shall be fined in any sum not exceeding five dollars, nor less than one dollar," etc.

In the case of *Bloom v. Richards*, 2 Ohio State, 388, it was distinctly adjudged under a statute, of which our's is a copy, that the simple making of a contract was not embraced in the prohibition of common labor. And,

under a similar statute the supreme court of Kansas has held the same way. *Johnson v. Brown*, 13 Kan., 529.

But, notwithstanding this instruction embodied a sound legal proposition, in view of the undisputed facts, and the instructions actually given, it is not at all probable that the jury were misled, or that the failure to give it could possibly have prejudiced the defendant's case.

It was a conceded fact that the contract was made on Sunday; the only substantial dispute being as to whether payment was required to be made within fourteen days, as claimed by the plaintiff, or, by the 14th day of October, as contended for by the defendant. On this condition of the case the court, *at the request of the defendant*, did charge the jury that, "if the contract for the sale of the calves in controversy was talked up and agreed upon between the plaintiff and defendant on Sunday, but that it was at the time understood and agreed that a sum of money, in consummation of said contract, should be paid on the Monday following; and if he afterwards did so pay a sum of money on any day of the week except Sunday, * * * then the contract is not invalidated for having been agreed upon on Sunday."

This instruction seems to imply, it is true, that if, in addition to agreeing to the contract, the payment of the money had been made on Sunday, the transaction could not be upheld. To this extent it is, of course, erroneous. But there was no pretense that any payment, or tender, was made on Sunday, and we think the jury could not possibly have been misled. Besides, the instruction was framed with especial reference to the defendant's theory of the transaction, and the testimony offered in its support; and the jury were thereby told that if they found this theory to be the true one they should return a verdict in favor of the defendant.

And, again, the judge of his own motion, in different language, repeated the instruction substantially, whereby

the point was brought distinctly to their attention, that if the defendant performed, or tendered performance of the contract, within the stipulated time, they should find in his favor.

On the whole, we think the case was very fairly submitted to the jury, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

EMERSON W. PEET, APPELLANT, v. DAVID O'BRIEN, AND ABSALOM TIPTON, APPELLEES.

1. **Pleading:** ANSWER. Every defense to an action, whether partial or entire, must be set up in the answer.
2. **Taxes:** LIEN OF PURCHASER. The tax lien given to the purchaser at a tax sale by section 61 of the act of 1869, does not extend beyond the time limited by law to redeem the land.
3. ———: FORECLOSURE OF TAX LIEN. An action to foreclose, by a purchaser of land at a tax sale, will not lie until the expiration of the two years allowed the owner to redeem the land, nor until there is a failure of the title acquired by him under the law.

APPEAL from the district court of Otoe county. Tried below before POUND, J. The case is stated in the opinion.

Montgomery & Son, for appellant, cited Gen. Stat., Chap. 66, Secs. 51, 61. Laws 1875, 107. *Dale v. McEvers*, 2 Cow., 118. *Parker v. Baxter*, 2 Gray, 185. *Isaacs v. Decker*, 41 Ind., 410. *Oldhams v. Jones*, 5 B. Mon., 458. *Smith v. Smith*, 15 Kan., 290. *Curl v. Watson*, 25 Iowa, 35. *Gillett v. Webster*, 15 Ohio, 623. *Wakeley v. Nicholas*, 16 Wis., 588.

S. S. Morehouse and *J. C. Watson*, for appellees, cited *Johns n v. Hahn*, 4 Neb., 139. Cooley on Taxa-

tion, 407. Blackwell on Tax Titles, 171. *Catterlin v. Douglass*, 17 Ind., 214. *Hart v. Henderson*, 17 Mich., 218.

GANTT, J.

On the seventh day of December, 1874, the plaintiff purchased from the treasurer of Otoe county, the north-east quarter of section twenty-six, in township eight, range fourteen, east, at private sale, for the delinquent taxes for the years 1871, 1872 and 1873, and at the same time received a certificate of purchase for each years tax; and afterwards paid the taxes on the same land for the years 1874 and 1875. The defendant, David O'Brien, was the owner of the property. The plaintiff commenced this suit on the 27th day of May, 1876, by petition in the nature of a foreclosure of the three several certificates of purchase to enforce the payment of the taxes paid by him on the purchase, and also the taxes subsequently paid by him together with the interest thereon. The defendant, O'Brien, pleaded a general denial, and admitted the mortgage lien of defendant, A. Tipton. Defendant Tipton simply pleaded his mortgage as a first lien on the land, and then for further answer, alleges that at the time of the purchase by plaintiff, the defendant O'Brien "had, previous to that time, and ever since," sufficient personal property out of which the taxes could have been made. It is admitted, that the statements in the plaintiff's petition are true, and that defendant O'Brien, at the time of such sale of the land, and at times subsequent, had sufficient personal property, out of which the taxes could have been made by distress and sale.

Now in regard to defendant Tipton, it is only necessary to observe, that a mortgagee must protect his mortgage security by the discharge of all taxes lawfully assessed upon the land.

But, in respect to defendant O'Brien, it must be observed, that, he fails to plead as a defense, that at the time the taxes became payable, and subsequently until the date of the sales, he had and owned sufficient personal property, out of which the taxes could have been made by distress and sale. Such an answer, sustained by the proofs, would constitute a good defense; for, it has been held, under the statutes then in force, that "so long as a sufficient amount of such personal property could be found in the county, and be distrained and sold for such tax, a sale of the land would be illegal and absolutely void." *Johnson v. Hahn*, 4 Neb., 139. *Catterlin v. Douglas*, 17 Ind., 214. *Rathburn v. Acker*, 18 Barb., 396. But to make such defense available, the facts must be specially pleaded.

Every defense to an action, whether partial or entire, must be set up in the answer. The court determines upon the issues raised by the pleadings, and, therefore, the *allegata et probata* must agree.

Again, it will be observed, that the plaintiff made his purchases of the land from the county treasurer, and received his certificates of purchase on the seventh day of December, 1874, and that he commenced this action of foreclosure, on the 26th day of May, 1876, and within one year and six months after the date of his purchase. Will such an action lie before the expiration of the two years allowed by law for redemption by the owner, after the date of the sale of the land? I think not. The law was not intended to give the purchaser such right of action immediately after he receives his certificates of purchase, nor at any time during the two years allowed for redemption by the owner. Under section sixty-four of the revenue act, he has two years to redeem; and it is clearly the plain intent and object of the law, that during this time, he cannot be subjected to any cost or expense by suit or legal proceedings by the purchaser, in respect

to the land; and, therefore, it seems clear, that the action will not lie, prior to the expiration of the two years.

It was, however, strongly insisted, that the plaintiff, not only had the right of action to foreclose on his certificates of purchase; but also, that by virtue of his purchase, he acquired a perpetual lien upon the land paramount to all other liens. These propositions present the important questions: 1. Will the lien of the tax acquired by the purchaser, under section sixty-one, extend beyond the time limited for the redemption of the land by the owner? 2. When will an action to foreclose lie, under our revenue laws?

Now, in respect to the lien acquired by the purchaser, it is provided by section fifty-one, of the act of 1869, that taxes upon real property shall be a perpetual lien thereon, from the first day of March, of the current year, against all persons and bodies corporate, except the United States and this state. Section sixty-one provides for the issuance of the certificate to the purchaser by the county treasurer, and gives him a lien of the taxes on the land, and for taxes paid by him for any year or years previous or subsequent to the sale. Section sixty-four provides, that the owner or occupant of the land sold for taxes, or any other persons, may redeem the same, at any time within two years after the date of the sale, by paying to the county treasurer for the use of such purchaser, his heirs, or assigns, the sum mentioned in the certificate, and all other taxes subsequently paid by him, whether for any year or years previous or subsequent to the sale, together with the interest thereon allowed by law from the date of such payments. And section sixty-seven provides, that if no person shall redeem the land within two years, then, after the expiration thereof, the treasurer shall, upon presentation to him of the certificate, execute to the purchaser, his heirs, or assigns, in the name of the state, a conveyance of the real estate sold.

Now, when these sections are examined together, it seems evident, that section sixty-one was intended merely to transfer to and invest in the purchaser, the lien of the tax, until the expiration of the time limited for the redemption of the land as provided by section sixty-four; and this construction seems clear and conclusive, when these sections are considered in connection with section one hundred and four of the same act. This last mentioned section provides, that the deed executed by the county treasurer shall be *prima facie* evidence of certain facts therein mentioned; and that in all suits involving the title to the land claimed and held under such deed, the party claiming adverse title shall be required to prove, in order to defeat said title, either of certain things named in the section, but "in no event shall a decree or judgment be rendered against the purchaser, until the claimant * * * shall have paid over to the county treasurer, for the use of the purchaser in case judgment be rendered against him, the amount necessary to redeem the land at that date, at the same rates as are provided by law in cases where land is redeemed within two years from the date of the sale." This section seems clearly to exclude the idea of a tax lien on the land in favor of the purchaser after the expiration of the time for the redemption of the land. If it were not so, why does this section give to the purchaser another and different security for the taxes he has paid, in case his title fails? The whole scope and object of the sections referred to seem designed to protect the purchaser from any incumbrance or disposition of the property by the owner during the time limited for redemption, to give him the deed for the land at the expiration of this time, and by section one hundred and four to secure him the tax money he may have paid, in case this title by deed should thereafter fail. The act certainly contemplates the execution of the deed after the expiration of the time

limited to redeem; the certificate gives the purchaser a mere equitable interest in the property, which may ripen into a title by the execution of the deed, in case the land is not redeemed within the two years; but if the redemption shall be made, then this equitable interest becomes absolutely null and void. But the payment of tax money required to be made by section one hundred and four, must be construed as applying to cases in which the treasurer had authority to sell, and not to cases in which he, without any authority of law, made the sale.

Now, when will the action to foreclose lie? The act of 1869 does not give any such right of action; but section seven of the act of June 6th, 1871, provides, that whenever the title acquired by the purchaser shall fail, he shall have a lien on the real estate purchased by him, and may foreclose. This section expressly declares, that "whenever the *title* acquired by the purchaser at the treasurer's sale shall *fail*, the purchaser at such sale, his heirs, or assigns, shall have a lien on the real estate so purchased," for the taxes paid by him, and may foreclose such lien in manner directed for foreclosing mortgages. When does this lien attach? The law says, whenever the title shall fail. When does this title fail? When it shall be pronounced invalid by the judgment or decree of a court having jurisdiction over the subject matter. What may be foreclosed by the statutory provision? It is clearly this lien which attaches whenever the title fails. What is this title? According to the plain intent and object of the revenue law, it must necessarily be the title acquired by virtue of the failure of the owner to redeem within the time limited by the law.

But does the act of February 19, 1875, in any respect affect the former revenue laws? Assuming this to be a valid act, it provides by section ten, that it shall be construed as cumulative and not exclusive, in respect to the remedy of enforcing liens; and shall in no wise interfere

with, alter, or amend, the existing revenue laws of this state. Section one provides, that any person or corporation having, by virtue of any provisions of the tax revenue laws of this state, a lien upon any property for taxes assessed thereon, may foreclose such lien by an action in the nature of a foreclosure of a mortgage. Section seven of the act of 1871 gives the lien, and declares when it shall attach; but section two of the act of 1875, gives the right of action to foreclose upon the certificate of purchase or deed within five years after the date of the sale, and, therefore, it seems to vest in the purchaser, under the certificate, a title which may fail, and on the failure of which, a lien may attach and a foreclosure be had.

Upon a careful examination of the revenue laws relative to the questions raised in this case, I am of opinion that this action cannot be maintained until the expiration of the time limited by law to redeem, nor, until there is a failure of the title acquired by the purchaser under the law; that until both these events occur the court has no jurisdiction in an action of foreclosure; and, therefore, the finding must be for the defendants, and the cause be dismissed.

DECREE ACCORDINGLY.

MARY E. FURNAS, PLAINTIFF IN ERROR, v. NEMAHA COUNTY, DEFENDANT IN ERROR.

1. **Practice in Supreme Court.** The only mode of reviewing in this court the judgment of inferior courts, and tribunals exercising judicial power, in civil cases, is by appeal or petition in error.

2. ———. This court will not review a decision of the county commissioners, made while acting as a board of equalization, on an agreed statement of facts, when none of the statutory steps have been taken to bring the case here.

THIS case came up upon an agreed statement of facts from Nemaha county.

Robert E. Furnas, appeared in behalf of plaintiff.

W. T. Rogers, for the defendant.

LAKE, CH. J.

It is sought by this proceeding to have a review in this court of a decision of the board of equalization of Nemaha county, whereby certain lands of Mary E. Furnas were, as it is claimed, erroneously entered, and returned upon the tax duplicate for taxation.

The whole subject is presented to this court, as it was also to the district court, upon an agreed statement of facts, and the question first to be determined is whether we will exercise jurisdiction of a matter thus informally brought to our notice.

The statute points out distinctly the course to be pursued "to reverse, vacate or modify judgments and orders in courts of appellate jurisdiction," which, except where an appeal is given, "shall be by petition, to be entitled petition in error, filed in a court having power to make such reversal, vacation or modification, setting forth the

errors complained of," etc. Sec. 584, Code of Civil Procedure.

Waiving entirely the question of our jurisdiction to review the decisions of an inferior tribunal in this informal manner, which has not been raised by the parties, still we are of opinion that the recognition of so loose a practice would lead to infinite mischief, and therefore should be discountenanced.

This court does not sit in the character of a board of arbitration to decide upon the validity of the judgment of other courts, but to adjudge, under the forms of the law, whether errors have been committed prejudicial to the party complaining, the same being brought distinctly to our notice.

For these reasons the case must be dismissed.

CASE DISMISSED.

J. C. AND C. N. MAYBERRY, PLAINTIFFS IN ERROR, v. E. WILLOUGHBY, DEFENDANT IN ERROR.

1. **Statute of Limitations:** CONSTRUCTION OF. The statute of limitations must not be construed as merely raising a presumption of payment, but as a statute of repose.

2. ——: ——. To take a debt out of the statute, there must be an unqualified acknowledgment of the debt as originally due, and a promise to pay it; and if the promise is conditional, the condition must be performed before an action can be maintained on the promise.

3. **Partnership.** The act of one partner, during the existence of the partnership and within the legitimate scope of the partnership business, will bind the other partners; but, upon the dissolution of the partnership, and a notice thereof, such agency, as well as the relations of partners, cease to exist, and the authority to create new contracts is revoked, and the relation of partners to their creditors then becomes that of joint debtors.

4. ———: STATUTE OF LIMITATIONS. A promise by one joint debtor will not take a debt out of the statute of limitations as to his co-contractors, unless he is specially and severally authorized by them for that purpose.

ERROR from the district court of Johnson county. Tried below before WEAVER, J.

T. Appleget, for plaintiff in error, C. N. Mayberry, cited Cooley Con. Lim., 364. *Bell v. Morrison*, 1 Peters, 362. *Yandes v. Le Favour*, 2 Blackf., 371. *Sage v. Ensign*, 2 Allen, 245. *Kelley v. Sanborn*, 9 N. H., 47. *Walden v. Sherburne*, 15 Johns., 409. *Lang v. Kennedy*, 20 Wis., 279. *Lumberman's Bank v. Pratt*, 51 Me., 563.

S. P. Davidson, for defendant in error, cited *Palmer v. Dodge*, 4 Ohio State, 29. *Feigley v. Whittaker*, 22 Id., 614. Gow on Partnership, 212. *Robbins v. Fuller*, 24 N. Y., 574. *Burr v. Williams*, 20 Ark., 189. *Bissell v. Adams*, 35 Conn., 299. *Zent's Executors v. Heart*, 8 Penn. State, 341. *Hunter v. Robertson*, 30 Ga., 479.

GANTT, J.

In the court below, service of summons was had on C. N. Mayberry only; he pleaded the statute of limitations, and he now brings the case into this court as plaintiff in error.

It appears from the facts admitted, that the plaintiff in error and J. C. Mayberry were, formerly, partners, doing business in the state of Illinois, under the firm name of J. C. & C. N. Mayberry; that on the 14th day of January, 1864, the note, on which this action was brought, was executed by the firm and delivered to the defendant in error; that on the 29th day of March, 1864, the partnership was wholly dissolved, and that on or about the 15th day of July, 1868, the defendant in error

had notice of the dissolution of the partnership; that in March, 1869, the plaintiff in error moved to the state of Nebraska, and has ever since resided there. J. C. Mayberry made partial payments on the note, on the 16th day of November, 1864, on the first day of June, 1868, on the 25th day of July, 1870, and on the 29th day of November, 1871; and of these payments the plaintiff in error had no knowledge whatever, until after the commencement of the suit, on the 18th day of April, 1876.

The only question raised in the case is: Do these payments made by J. C. Mayberry take the debt out of the statute of limitations as to the plaintiff in error?

It is said that the statute is a wise and beneficial law, and should not be viewed in an unfavorable light; and it is now generally conceded, that it is not to be construed as merely raising a presumption of payment, but that in its operation it is intended to be emphatically a statute of repose.

Therefore, in order to take a debt out of it, there must be an unqualified acknowledgment, not only of the debt as originally due, but that it continues so; or, if the promise to pay is conditional, the condition must be performed before an action can be maintained on the promise; and the acknowledgment or promise must be made by the person to be charged, or by some person legally authorized by him to do so.

Again, as the law strictly affects the remedy, and not the merits, it seems well settled, that upon the plea of the statute, the *lex fori* must prevail. *McElmoyle v. Cohen*, 13 Peters, 327. *Townsend v. Jemison*, 9 How., 413. *Bell v. Morrison*, 1 Peters, 618.

Hence, the law must be regarded as designed to protect persons from ancient claims, whether well or ill founded; and its tendency is to produce speedy settlements, and if such settlements are not made within the time limited by the law, its effects are such as to extin-

guish the legal liability upon the debt, unless it be revived by a new promise; and, therefore, if the creditor by his own fault and laches, permits the statute to attach, whatever may be the nature or character of his claim, he cannot complain of the operation of the law, since it is by his own negligence that it can be brought to bear against him.

But, as J. C. and C. N. Mayberry were partners at the time the debt was contracted, it is contended that, notwithstanding the dissolution of the partnership with notice thereof to the creditor, and notwithstanding the time limited by the statute within which actions can be commenced after the cause of action shall have accrued, had long expired, as to the plaintiff, yet the payments made by J. C. Mayberry, as above stated, and without the knowledge or assent of the plaintiff, constitute an admission by both, and in law raises a promise by both to pay the claim; and this proposition is urged upon the ground, that, as J. C. Mayberry had authority to discharge the debt or make payments thereon, he necessarily had authority, upon the theory that a virtual agency existed in each co-contractor, by his individual promise to charge the other with the payment of the debt. This is true as to partners, for, it is a familiar and well established doctrine, that during the existence of the partnership, the act of one partner within the legitimate scope of the partnership business, will bind the other partners; and this doctrine, no doubt, had its origin in the fact, that in a partnership, constituted by voluntary contract, with the understanding that there shall be a communion of profits between them, there must necessarily be in each partner a community of interest with the others in the whole property, business and responsibilities, of the concern; and, therefore, each partner is *præpositus negotiis societatis;* and in the diverse and multiplied transactions of the business, each must, *virtute officii*, become the agent

of the others, when acting within the scope and objects of the partnership. But, upon the dissolution of the partnership, this agency, as well as the relation of partners, ceases to exist, and the authority to create new contracts is revoked; and the rights of the partners thereafter can only extend to the settlement of the partnership concerns, and the disbursement of the remaining funds. It is said that, "after dissolution, no valid draft, acceptance or indorsation can be made by the firm; and it is no authority to do so, if any partner is in the notice empowered to receive and pay the debts of the company. The indorsation, draft or acceptance must be done by all of the partners, or by one specially empowered to do the act for them." 2 Bell's Com., 644. Story on Part., Sec. 332. 1 Smith Lead. Cases, 730. No new contract can be created in the name of the firm, and no one of the partners can create such contract so as to charge the others, unless they specially authorize him to do so for them.

Now, the doctrine seems well settled by authority, that an acknowledgment is to be considered, not as a continuation of the old promise, but as the evidence of a new promise; and, therefore, it is alone this new promise which takes the debt out of the statute. This new promise is a new contract, nothing more, nothing less; and it is a contract to pay a pre-existing debt, which of itself does not bind the party, because by force of the law it was extinguished. Hence, is not the acknowledgment, in essence and in law, the creation of a new contract, which gives the creditor a new cause of action, and not simply the enforcement of the old one? It, therefore, seems clear, both upon principle and authority, that after the relation of partners has ceased to exist, one of the partners cannot, upon the ground of mutual agency, bind the others by such contract. The relation of the partners to their creditors, then, becomes

that of joint debtors. *Bell v. Morrison, supra. Hacklie v. Patrick*, 3 Johns., 537. *Green v. Crane*, 2 Lord Raym., 1101. *Thompson v. Peters*, 12 Wheat., 565. *Tompkins v. Brown*, 1 Denio, 247. *Dean v. Hewit*, 5 Wend., 257. *Dunham v. Dodge*, 10 Barb., 569.

It is, however, urged, that the acknowledgment relied on in the case at bar, consists of partial payments made on the original debt of J. C. Mayberry, and as some of these payments were made before the time limited by the statute had expired, the statute of limitations did not attach as to the plaintiff in error; but it is said "that although a part payment of a debt admits its existence as a subsisting obligation, and will, therefore, be sufficient to take it out of the statute, yet that it has no greater effect than any other unqualified acknowledgment, and must consequently be connected by sufficient evidence, both with the parties to the suit, and the claim sought to be enforced." 1 Smith's Lead. Cases, 726. Such payments necessarily prove, only, the existence of the debt to the amount paid, but from the fact of such payment a promise is inferred to pay the residue. *Dunham v. Dodge, supra.* And, again, it is said "the true rule unquestionably is, that whether the admission precedes or follows the bar, makes no difference; and that while proof of the continued existence of the debt, and of the willingness of the debtor to pay, is requisite in all cases, nothing more will be requisite in any." 1 Smith's Lead. Cases, 714. *Ayres v. Richards*, 12 Ill., 146. *Fryeburg v. Osgood*, 21 Maine, 176.

And now, the question is, can one joint debtor by an assumed authority as the virtual agent of the other, legally charge him with the payment of the debt, when otherwise he would be discharged, and the debt be extinguished as to him by operation of the statute?

The doctrine that a promise or acknowledgment by one joint debtor takes the debt out of the statute, and

binds his co-contractor, upon the ground that he who makes the promise virtually acts as the agent of the other, seems to have originated in an unreasoned decision of Lord Mansfield, in the case of *Whitcomb v. Whiting*, Doug., 651. But that case is contrary to the previous case of *Bland v. Haselrig*, 2 Ventris, 151, and it must be regarded as the cause of all the confusion which exists in the decisions, both in England and America, on the subject of the statute, in respect to joint debtors.

In England, however, the doctrine enunciated in *Whitcomb v. Whiting*, has been somewhat restricted, which has remedied some of the mischief inherent in it. 1 B. & Ald., 467. And its force has been much weakened in the case of *Atkins v. Tredgold*, 2 Barn. & Cress., 23, in which HOLROYD, J., seems to doubt *Whitcomb v. Whiting*, as law.

Story, in his work on Partnership, section 324, says that, "in America no small diversity of judicial decision has been expressed on this subject. In some of the states, the English doctrine has been approved; in others it has been silently acquiesced in, or left doubtful; and in a considerable number it has been expressly overruled." In the supreme court of the United States it has been overruled, as unfounded in principle. *Bell v. Morrison, supra. Van Keuren v. Parmelee*, 2 N. Y., 525. *Dunham v. Dodge*, 10 Barb., 570. *Forney v. Benedict*, 5 Barr., 227, and in *Coleman v. Fobes*, 10 Harris, 161, LEWIS, J., says that "it is not true that joint debtors, as such merely, are agents of each other. Partners are so while the relation continues; and this is part of the law and essence of that relation, but not that of joint debtors. The distinction is palpable, when it is noticed that a joint contract by persons not partners can have no inception, and cannot be charged in time, amount, subject, form, or substance, without the several

acts of each of the joint contractors. Their interests are joined only in so far as the contract joins them. Their contract or understanding, by which they agree together to enter into the joint liability, is one thing, and the joint contract with the creditor is another thing. Their relations to each other are defined by the former, and their joint relation to their creditor by the latter; and their joint relations in one aspect in no sense define those in the other. Whether as among themselves, one is to pay all, or half, or none, depends, not upon the contract with the creditor, but on their own engagement. One alone may be the real debtor, and may be so abundantly able to pay, that the others may be said to have no real interest in the matter. And even if they are, as among themselves, equal debtors, there is no real community of interest, for by enforcing contributions, each is made to answer for his true share."

It seems, the doctrine, that one joint debtor can take a debt out of the statute as to all, is based exclusively on the theory that there is a virtual agency in each co-contractor, in such case, by which the promise of one binds the rest. But upon what principle can this doctrine of mutual agency be maintained? It cannot be founded on a communion of profits or a community of interests, as in the case of partnership, for the reason that in fact no such interests exist between the persons who are merely joint debtors; and it cannot be grounded merely upon a new promise by only one of the parties, for the reason that in fact and in law, as seems now to be well settled, such promise is a new contract, which is necessarily different from the original contract in respect to form, time and substance, and is the creation of a new cause of action; and the proposition will not be questioned, that one joint debtor can, by such new contract, bind his co-contractors. It is, therefore, certainly difficult to discover any just grounds upon which the

doctrine of mutual agency in joint debtors can be founded; hence, must it not rest alone upon a mere assumption, which is untrue in fact, and unsupported by any reasonable and just interpretation of law?

It is not only contrary to the earlier cases in England, but we think it is opposed to the object and spirit of our statute, which, it seems clear, was intended to protect the individual against claims after the time limited by the law for the commencement of the action has expired. The statute is one of repose; and when the time limited by it has expired, then in legal contemplation the debt is extinguished, and it can only be revived by a new promise by the person sought to be charged, or by some person lawfully authorized by him for that purpose.

We have carefully examined the question propounded, and must conclude that the case of *Whitcomb v. Whiting* is not accordant with fact or sound principle, and cannot be supported upon sound policy; and we are, therefore, of opinion, that the plea of the statute of limitations, interposed by the plaintiff in error, constituted a good defense in this action, under the evidence in the case; and that the judgment of the court below must be reversed, and the cause remanded.

JUDGMENT REVERSED.

WILLIAM M. PREUIT, PLAINTIFF IN ERROR, v. THE PEOPLE OF THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Practice in Criminal Cases:** GRAND JURY. Where the record shows that the court ordered vacancies in the panel of grand jurors to be filled by certain persons named by the judge: *Held*, error, and that a motion to quash the indictment for that reason should have been sustained.

2. ———: ———. The duty of making the selection of persons to fill vacancies in the panel is confided to the sheriff alone, but when so selected, the court may pass upon their qualifications to serve.

3. ———: CHANGE OF VENUE. On a change of venue in a criminal case, the original indictment must be transmitted to the clerk of the court to which the venue is changed.

4. ———: INDORSEMENT OF PLEA UPON INDICTMENT. The statute directing the entry of the prisoner's plea on the back of the indictment is not mandatory, but directory merely, and the failure to so enter it is no ground for a reversal of the judgment, when the plea is contained in another part of the record.

5. ———: SHORT-HAND REPORTER. The refusal of the court to appoint a short-hand reporter to take down the testimony, is not error. This is a matter resting entirely in the discretion of the court.

6. ———: VERDICT. A verdict in these words: "We, the jury, selected, impaneled and sworn in the above entitled cause, do find the defendant, William M. Preuit, guilty of murder in the first degree," is sufficient, without adding "in manner and form," etc.

7. ———: ———. Where the highest degree of homicide is charged and the verdict is guilty, nothing more is required than to specify the degree which the jury find.

8. ———: JUDGMENT. In recording the judgment, the clerk should follow, substantially, the formal language of the court in pronouncing it.

9. ———: CHARGE OF THE COURT: INTERESTED WITNESSES. Where informers, detectives, or other persons employed to hunt up testimony against the accused, are called to testify against him, he is

entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested.

10. **Evidence:** PRESUMPTION. Where the fact of killing is shown, and no explanatory circumstance is proven, malice is presumed, and the crime of murder in the second degree is established.

THIS was an indictment for murder found in the district court of Jefferson county. The cause was removed for trial to Thayer county, and resulted in the conviction of the prisoner. He then sued out this writ of error.

John Saxon (with whom was *L. W. Colby*), for plaintiff in error, cited *Doyle v. The State*, 17 Ohio, 222. *Portis v. The State*, 23 Miss., 578. *Stevens v. The State*, 3 Ohio State, 453. *Burley v. The State*, 1 Neb., 396. 1 Bishop Crim. Prac., Sec. 921. Nebraska Criminal Code, Secs. 453, 456, 457, 458. *Shoemaker v. The State*, 12 Ohio, 43. Laws Neb., 1875, 63. Cooley Con. Lim., Sec. 329. *Lowenberg v. The People*, 27 N. Y., 336. *Elliott v. The People*, 13 Mich., 365. *Field v. The State*, 47 Ala., 603.

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

No brief on file.

LAKE, CH. J.

A very large number of errors are assigned, but we will notice those only that are essential to a fair consideration of the case.

I. It is assigned for error "that the grand jury was not lawfully chosen, impaneled and sworn."

The record discloses the fact that two of the persons originally drawn as grand jurors were excused from serving, and that "thereupon the court ordered the sheriff to fill the panel by summoning the following persons as

talesmen: D. W. Edgerton and Wilson Armstrong." And it further appears that the said Armstrong was afterward also excused, and "thereupon the court ordered the sheriff to fill the panel by summoning John G. Hollenbeck as talesman."

After the transfer of the case to Thayer county for trial, a motion was made to quash the indictment for the reason, among others, that the grand jury by which it was found was "not summoned, selected, sworn and charged as required by law." This motion was overruled, and exception duly taken.

In the case of *Burley v. The People*, 1 Neb., 385, where the record showed that the court ordered certain vacancies in the panel of grand jurors to be filled from the list of petit jurors, it was held to be erroneous, and the judgment, for this, among other errors, was reversed.

We think the course pursued in this case, as shown by the record, is clearly within the evil pointed out in the case just cited. It appears that the *court* directed the sheriff to call into the jury box certain persons, naming them.

The statute provides for the filling of all vacancies that may exist at any time in the panel of jurors. This statutory direction is clear and explicit. The court may order the sheriff to fill it, not by calling particular individuals designated by the judge, but by summoning, "without delay, good and lawful persons, having the qualifications of jurors." The duty of making the selection of persons to serve as talesmen is confided to the sheriff alone, but when selected by him the court may pass upon their qualifications, and, for good reasons, excuse them from serving.

We think the record shows that the court usurped the province of and exercised a duty conferred expressly upon the sheriff, and that for this reason the motion to quash the indictment should have been sustained.

II. The next point urged upon our attention is, that the original indictment was not sent to Thayer county, to which the venue was changed, and where the trial was had. If this objection were sustained by the record, it would be good grounds for reversal.

On a change of venue being ordered, the statute requires a transcript of all the proceedings in the case, together with "the *original indictment*," to be transmitted to the clerk of the court to which the venue is changed. Crim. Code, Sec. 456.

By reference to the record, however, we find that the original indictment was in fact sent to, and filed in, Thayer county. This objection, therefore, falls to the ground.

III. It is next objected that the defendant's plea of not guilty was not entered by the clerk on the back of the indictment, as required by section 453 of the crimes act. This provision we regard as directory merely, and the failure to so enter the prisoner's plea to be no ground for the reversal of a judgment. The fact that the defendant was duly arraigned, and plead not guilty to the indictment, is clearly shown by the record, and this is enough. No possible injury could be done to the accused by the failure to enter his plea on the back of the indictment.

IV. But it is urged that the record shows no ground for ordering a change of venue from Jefferson county, and that, therefore, the court sitting in Thayer county was not authorized to proceed with the trial against the remonstrance of the defendant.

The statute, Sec. 455 of the Criminal Code, provides that: "All criminal cases shall be tried in the county where the offense was committed, unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein; in which case the court may

direct the person accused to be tried in an adjoining county."

From this it is clear that the venue could not have been rightfully changed from Jefferson county, without a showing by affidavits that a fair and impartial trial could not have been had therein. And the records transmitted to Thayer county ought to have shown that fact.

But, notwithstanding the record is silent on this point, we are well satisfied that the proper showing was made. It is true the prisoner made oath, "That he did not make or file, or authorize, or request the making or filing of affidavits, tending to show that a fair and impartial trial could not be had in Jefferson county." Yet we are quite satisfied that the change was in truth made at his request, and on a proper showing.

In addition to the presumption that the court did its duty in this respect, we have the sworn statement of the defendant himself, in support of an application for a continuance, made on the 18th of June, 1875, that he had in fact made such an affidavit. We are of opinion, therefore, that this objection is not supported by the facts

V. It is claimed that the court erred in refusing to appoint a short-hand reporter, to take down the testimony produced upon the trial. The refusal to grant this request, made by defendant's counsel, was based upon the fact that one could not then be obtained. Even if no such excuse had existed, this refusal of the court to appoint a reporter would not have been error. This whole matter is left entirely to the discretion of the judge presiding at the trial.

Objection is also made to the form of the oath administered to the petit jury. We find, however, that it conforms substantially to that which the statute prescribes. There is no error in this particular.

VI. An objection is made to the form of the verdict

in this, that it does not find the prisoner guilty, "*in manner and form as charged in the indictment.*" The verdict is in these words: "We the jury selected, impaneled, and sworn in the above entitled cause, do find the defendant, William M. Preuit, guilty of murder in the first degree." This is a good verdict, and directly responsive to the question which was submitted to the jury. The addition of the words, "in manner and form," etc., could add nothing to its effect, or make it any more certain, or capable of supporting a judgment. On a trial for murder, under an indictment like the one under consideration, where the highest degree of homicide is charged, and the verdict is guilty, nothing more is required except to specify the degree. In this case the jury found the crime to be murder in the first degree, and so expressly declared in the verdict which they returned.

VII. In regard to the judgment, to which objection is made, the record simply shows that one was rendered, by the court in conformity to the verdict, but it does not appear to have been recorded in the formal language used by the court in pronouncing the sentence. The record merely recites that: "Thereupon the court sentenced the defendant, William M. Preuit, to be hanged by the neck until dead. The sentence to be carried into effect on the 23d day of June, 1876, between the hours of 12 o'clock M., and 6 o'clock P. M."

Now this language of itself is no proper judgment. It is, strictly speaking, but a recital of the fact that one was rendered by the court upon the verdict, the substance of which is given by the clerk. The judgment of the court, substantially in the formal language of the judge, should have been set out at length. Great care should be observed by the clerk in this particular. Even if no other error appeared in the records, it is hardly probable that the judgment, so called, could be affirmed.

VIII. It is urged, also, that there was error in several of the instructions given to the jury, and also in the refusal of the court to give several requested on behalf of the defendant.

As to those given, we see nothing of which the prisoner could reasonably complain. The objection that the court, in the seventh paragraph, "assumed that the deceased was murdered," is entirely unfounded. This language when taken in connection with what immediately preceded it was certainly very favorable to the accused. The court had just given the statutory definition of the different degrees of homicide, including of course those of murder, and then added: "In this case you have heard the testimony of many witnesses, not one of whom claims to have witnessed the murder of Albert O. Whittaker." This is followed by a few suggestions as to the value of circumstantial evidence, and a statement that the prosecution depended entirely upon this sort of testimony for a conviction. We see nothing wrong in all this, and deem it eminently favorable to the defendant.

Of the instructions requested by the prisoner's counsel, the first two were given. The third, however, which was in the words following was refused, viz: "That in weighing the testimony greater care should be used by the jury in relation to the testimony of persons who are interested in, or employed to find, evidence against the accused than in other cases, because of the natural and unavoidable tendency and bias of the mind of such persons to construe everything as evidence against the accused, and disregard everything which does not tend to support their preconceived opinions of the matter in which they are engaged."

Where witnesses of the description here suggested are called and testify in the case we think the accused is entitled to have the jury instructed substantially as here requested, if he ask it. We think the observation

of every judge, who is much accustomed to preside in criminal trials, will bear us out in saying that the testimony of informers, detectives, and other persons employed in hunting up testimony in a criminal case, should be criticised more carefully than that given by witnesses who are wholly disinterested. The court had not covered the ground of this instruction, and we think erred in refusing to give it.

The fourth instruction requested was substantially included in the general charge of the court, and, therefore, there was no error in refusing to repeat it in another form.

As to the fifth instruction requested we think it was properly refused. It does not state the rule of presumption correctly, where the mere fact of killing is shown, with no attendant circumstance whatever. It contained this among other propositions, "that if the jury should find from the evidence that the defendant did kill and slay Albert O. Whittaker, the presumption of the law is that it was manslaughter, until the prosecution has proved malice on the part of the defendant."

Now, the rule has generally obtained in this state, that, where the fact of killing is established, and there is no explanatory circumstance proven, malice is presumed, and the crime is murder. In Ohio, from whence our present criminal code was chiefly derived, this presumption is carried no further than to establish the crime of murder in the *second* degree. *State v. Turner*, Wright's Rep., 20. And this is the rule in Virginia under a similar statute. *Hill's Case*, 2 Grat., 595. Indeed, under our former criminal code, which recognized but one degree of murder, malice was implied from the mere fact of killing, when no considerable provocation was shown. And this is the rule, substantially, of the common law. 1 East. C. L., 340.

As to remaining objections, all that need be said is,

that they point to no substantial error, nothing which, in view of the instructions that the court actually gave, would warrant a reversal of the judgment. Aside from the errors which we have already pointed out, the trial seems to have been very fairly conducted.

We are of opinion, therefore, that the judgment of the district court should be reversed and the indictment quashed, but in view of the enormity of the crime charged against the prisoner, it is ordered that he be committed to the custody of the sheriff of Jefferson county, there to remain and abide the further action of the district court sitting therein.

JUDGMENT ACCORDINGLY.

ISAAC N. MCCONNELL, PLAINTIFF IN ERROR, v. WILLIAM F. DEWEY, DEFENDANT IN ERROR.

1. **Roads:** DUTIES OF SUPERVISOR: ACTION AGAINST. The duties of a supervisor of public roads are of a general public nature, and he acts for the public at large, and therefore an action, at the common law, will not lie against him by an individual for an injury occasioned to his person or property, by reason of a defect in a public road or bridge.

2. ———: ———. It is alone within the province of the legislature to define and regulate the duties and responsibilities of such public officer.

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

N. K. Griggs, for plaintiff in error.

George M. Humphrey, for defendant in error.

GANTT, J.

This action was brought by plaintiff against defendant, as supervisor of highways, to recover damages for an injury received in crossing over a bridge on the highway, alleging that the defendant suffered the bridge to be and remain in such bad repair and condition as to be unsafe and dangerous. The defendant pleaded a general demurrer, which was sustained, and judgment was rendered in favor of defendant.

The only question presented for consideration by the pleadings is, can a private action, under the statutes of our state, be maintained against a supervisor of highways for an injury occasioned to the property or person of a citizen, by reason of a bridge on the public road being out of repair? And upon this question, there is some conflict of authority; but this conflict seems to consist in exceptional cases, except in the state of New York. In that state it seems to be settled by the more recent decisions, that all officers are liable to a private action for negligence, excepting, however, judicial action from such liability; but it must, however, be observed that this doctrine of liability of all officers to private action, is a great departure from the earlier decisions of that state, and, therefore, it may be proper to briefly refer to the New York cases, and notice how this departure obtained in that state.

In *Hutson v. The City of N. Y.*, 5 Sandf., 321, Sandford, J., says, the true distinction is that "when the duty is to individuals specially, for a reward emanating from them, a civil action may be brought for neglect, whether of themselves or their subordinates; but when it is a duty to the public generally, undertaken alike for all citizens, the remedy for neglect is by indictment only, together with removal from office, when prescribed by law."

In *Bartlett v. Crozier*, 17 Johns., 440, Chancellor Kent, in delivering the opinion of the court, *held*, that no civil action will lie against an overseer of highways, at the suit of an individual, for an injury which he has sustained in consequence of the neglect of the overseer to keep a bridge in repair; nor, it seems, against the commissioners of highways, though if such private action would lie at all, it would be against them. *Freeman v. Cornwall*, 10 Johns., 470.

This seems to have been the settled rule in that state until the case of *The Mayor, etc., v. Furze*, 3 Hill, 617, in which Judge Nelson seems to have based his opinion upon the case of *Henly v. Mayor etc. of Lyme Regis* 5 Bing., 91. He quotes with approval, from the latter case, the broad expression that it "was undoubted law, that where an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar injury." But when the questions involved in the case of *Henly v. The Mayor etc.* are critically examined, it seems clear that this expression partakes more of the nature of a *dictum* than an authority, and that it was incautiously used. It must, however, be observed, that as a rule of law, any such general remark of the judge, expressed in an opinion, should be understood with reference to the case under consideration, and not as extended to a class of cases subject to the operation of a different principle, and, therefore, the proposition above quoted should be taken with considerable limitation, and be applied alone to the case in which it was asserted.

It has, however, been said that the cases cited in *Henly v. The Mayor etc.* do not sustain the proposition enunciated. The argument in that case is, that there is no distinction between a liability by prescription and a liability arising within the memory; that if the *origin* of the liability *was legal*, it is wholly unimportant when

it took place, and then it is added: "We do not go the length of saying that a stranger can take advantage of an agreement between A. and B., nor even of a charter granted by the king, when no matter of general and public concern is involved; but where that is the case, and the king, for the benefit of the public, has made a certain *grant* imposing certain public duties, and that *grant* is *accepted*, we are of opinion that the public may enforce the performance of these duties by indictment, and individuals peculiarly injured, by action." This rule applies strictly to corporations by charter or prescription, where an original liability attaches, and not to political subdivisions of the government, constituting *quasi* corporations. In the case referred to by Judge Nelson, the king by letters patent granted to the defendant, the borough or town by the name of Lyme Regis, a charter, and also the pier, quay or cob, with all the liberties, *profits*, etc., belonging to the same, and remitted part of the rents, declaring in the grant that the mayor and burgesses, and their successors, should repair, maintain and support the buildings, banks, sea shore, etc., within the said borough, or situated between the same and the sea, at their own costs and charges. Hence, the argument seems to be based on the ground that having *accepted* the charter with its benefits and profits and the duties imposed, the defendant became legally bound to keep the buildings, etc., in repair, for the reason that the things granted by the charter were the consideration for the repairs to be made. This seems to be the extent to which the doctrine of liability can be legitimately carried in the case of *Henly v. The Mayor etc. of Lyme Regis*, and it will not be questioned that this is the settled rule at the present day. It applies to chartered corporations which derive some advantage to themselves.

The case of *The Mayor etc. v. Furze*, which seems to have been based wholly on that of *Henly v. The Mayor*

etc. of Lyme Regis, was soon followed by that of *Adsit v. Brady*, 4 Hill, 632, though in the latter it is said, that the "neglect should have been charged to be willful and malicious." And this departure from the common law doctrine has ever since been followed in the courts of New York. And in *Robinson v. Chamberlain*, 34 N. Y., 389, the doctrine of liability to private action for negligence is extended to all officers, except that "reason and public policy alike exempt judicial action from liability, in order to secure the perfect independence of the judiciary and for other controlling reasons."

Is this departure from the earlier adjudicated cases in New York sustained by the common law? I think not. On the contrary, the doctrine that a private action cannot be maintained, at common law, for an injury sustained by neglect of one whose duty is to repair highways, seems to be a very ancient one. In Brook's Abr., Title, Action on the Case, it is said upon the authority of the Year Books, that if a highway be out of repair, so that a horse was ruined and injured, no action lies by the owner against him who ought to repair it, for it is a public matter and ought to be reformed by presentment; and this doctrine was affirmed in the case of *Russell v. Men of Devon*, 2 T. R., 608, in which Ashurst, J. delivered the opinion, and after giving other reasons why the action could not be sustained, says: "But I think the case cited from Brook's Abr. is a direct authority to show, that no action could be maintained; and the reason of that case is a good one, namely, because the action must be brought by the public."

That case was followed in the case of *Riddle v. The Proprietors, etc.*, 7 Mass., 186, also in *Waltham v. Kempfer*, 55 Ill., 349, in which the court says, that with but few exceptional cases, this doctrine of non-liability to private action, at common law, has been held ever since

the case of *Russell v. The Men of Devon. Dunlap v. Knapp*, 14 Ohio State, 68.

In *Young v. The Commissioners of Roads*, 2 Nott & McCord, 537, it is said, that "it is difficult to imagine a more prolific source of litigation than would be found in the responsibility of commissioners of roads, in private actions, for neglect of duty to every individual who may be injured by such neglect. In the case of *Russell v. The Men of Devon*, it was held, that such action would not lie against an overseer of the roads, for an error of judgment in the execution of his trust. No case can be found in which such an action has been sustained. Where an officer has been appointed to act, not for the public in general, but for individuals in particular, and from each individual receives an equivalent for the services rendered, he may be responsible in a private action for a neglect of duty, but where the officer acts for the public in general, the appropriate remedy for his neglect of duty is a public prosecution." *Harmon v. Tappenden*, 1 East, 555.

In the case of *The City of Providence v. Clapp*, 17 How., 167, the liability is founded on the thirteenth section of the statute of Rhode Island, which provides a remedy by indictment, and also a liability "to all persons who may in any wise suffer injury to their persons or property by reason of any such neglect." But the court say, that, "it is admitted, that the defendants are not liable for any injury complained of at common law, but that the plaintiff must bring the case within the above statute to sustain the action." Cooley on Const. Lim., 247. *Mower v. Leicester*, 9 Mass., 250. *Farnum v. The Town of Concord*, 2 N. H., 392. *Adams v. Wiscasset Bank*, 1 Me., 361. *Baxter v. Winouski Turnpike*, 22 Vt., 123. *Eastman v. Meredith*, 36 N. H., 284. *Trustees, etc., v. Cottom*, 11 Ind., 216. And in *Freeholders v. Strader*, 3 Har. (N. J.), 118, after a careful

review of the English and American cases, and holding the common law doctrine of non-liability to private action in such case, it is said, that "from the earliest times, both in England and in this country, the immediate duties of attending to the erection and repair of public bridges have been placed by law upon some public officer, chosen for that purpose; and yet not a solitary case is on record of such public officer having been held liable for damages to individuals by reason of a neglect of his public duties."

Shearman and Redfield on Negligence, section 166, say, that, "in speaking of the liability of non-judicial public officers to civil action by private persons, it will be found convenient, if not indeed necessary, to a proper understanding of the decided cases, to make a distinction between those officers whose duties are of a general public nature, and who act for the profit of the public at large, and that other class of officers who are appointed to act, not for the public in general, but for such individuals as may have occasion to employ them for a specific fee paid." Upon this distinction, it seems the common law rule is founded, and is sustained by reason and principle, for in the one case, the officer acts for the public in general, and the manner in which he executes his trust is a matter between him and the public; but in the other, he acts for the individual for a reward emanating from him, and, therefore, the manner in which he performs his duty is a personal matter between him and the individual; and it seems, that in the former case, the rule can only be changed by direct legislative enactment; and I understand that the right of private action for an injury sustained by reason of the public roads being out of repair, is given by statute in the New England States, and in Wisconsin, Alabama, and Georgia, and also in Missouri, when there is willful neglect to keep the roads in repair, and in Iowa, upon notice in writing that any

bridge, or other portion of the public road is unsafe, and the same is not repaired.

Would it not, to say the least, be an unwise, if not a dangerous exercise of power, for courts, in contravention of the settled rules of the common law, to make laws giving the right of private action against public officers, whose duties are of a general nature, and who act for the benefit of the public at large, and not for the individual for reward therefor? And as a road district consists of a political sub-division of a county, in and for which a supervisor is elected, is it not alone within the province of the legislature to define his duties and legal responsibilities? The legislature have done so; and the tenth section of the statutes relating to public highways provides, that if the supervisor neglects to keep the roads in his district in good repair, as the means under his control would reasonably enable him to do, he shall be liable on his official bond to pay a fine, to be recovered by civil action before any justice of the peace in the county.

It is not to be presumed, that the legislature intended to charge the officer entrusted with the repair of roads and bridges with any greater responsibility by action than the penalty provided by statute, for neglect of duty. If it had been the legislative intent to introduce a new remedy for the benefit of individuals, it would certainly have said so by express provision, giving the injured party the right of private action against the officer. But again, section sixteen provides, that the county commissioners may let contracts to the lowest competent bidder for the improvement of such roads as may be of general necessity, and to pay for the same by orders on the county treasurer, payable out of the county road fund. Then, if the road (and a bridge is a part thereof), is of general necessity, and if a private action would lie, who is liable to such action, the county for the neglect of the com-

missioners to make the improvement, or the supervisor for his neglect to do so? May it not be difficult to determine which would be the responsible party?

It seems clear, that the responsibilities of a public officer who acts for the public at large only, must be defined by legislative authority; and that the right of private action for an injury occasioned to an individual by reason of a defect in a public road or bridge can only be given by legislative enactment, and, therefore, we are of opinion that the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

CHARLES C. WHITE, TREASURER, AND THE COUNTY COMMISSIONERS OF LANCASTER COUNTY, PLAINTIFFS IN ERROR, v. THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY, DEFENDANT IN ERROR.

1. **Government Grant of Lands to Railroad.** Under section 20, of the act of Congress, approved July 2, 1864, providing that when "the Burlington and Missouri River Railroad Company shall have completed twenty consecutive miles of its road, the President of the United States shall appoint three commissioners to examine and report to him in relation thereto, and if it shall appear to him that twenty miles of said road have been completed as required by law, then, upon certificates of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company," etc.: *Held*, that until such certificate was issued the company did not become the equitable owner of such lands.

2. ———: TAXATION OF RAILROAD LANDS. The question of the taxation of lands, where there is no exemption in the grant, is governed by the laws of the state.

ERROR from the district court of Lancaster county.

The action was brought by the defendant in error, who was plaintiff in the district court, to enjoin the

plaintiffs in error from collecting taxes levied for the year 1871, upon certain lands situated in Lancaster county. A general demurrer was filed by each of the defendants below to the petition, which demurrers were overruled by the court, and judgment rendered permanently enjoining the collection of said taxes. They thereupon brought the cause here upon petition in error.

Brown, England & Brown, for plaintiffs in error, cited *Hunnewell v. Cass County*, 22 Wall., 464. *Gwynne v. Niswanger*, 15 Ohio, 367. *People v. Cohen*, 31 Cal., 210. *Astrom v. Hammond*, 3 McLean, 107. *Carrol v. Perry*, 4 Id. 25. Blackwell on Tax Titles, 411. Cooley on Taxation, 6. *Atwater v. Schenck*, 9 Wis., 160. *Witherspoon v. Duncan*, 4 Wall., 210. *Carroll v. Safford*, 3 How., 441. *People v. Shearer*, 30 Cal., 645.

T. M. Marquett, for defendant in error, cited *Clark v. Norton*, 49 N. Y., 243. *Mygatt v. Washburn*, 15 N. Y., 316. *Clark v. Norton*, 49 N. Y., 247. *People v. Sups. of Chenango*, 11 N. Y., 563. *Freeman v. Kenney*, 15 Pick., 44. *Lyman v. Fiske*, 17 Pick., 231. *Des Moines v. The County of Polk*, 10 Iowa, 1. *Fisher v. State*, 16 Ill., 394. Cooley on Taxation, 260. *People v. Kohl*, 40 Cal., 127. *Long v. Culp*, 14 Kan., 412. *McShane v. U. P. R. R.*, 22 Wall., 444. *Cedar Rapids & Mo. River R. R. Co. v. Woodbury*, 29 Iowa, 247. *Westfall v. Preston*, 49 N. Y., 354. *Des Moines Navigation and R. R. Co. v. Polk County*, 10 Iowa, 1.

MAXWELL, J.

The petition alleges that the third twenty miles of the Burlington and Missouri River Railroad in Nebraska, commencing in section twelve, township number eleven, north, range eight, east of the sixth principal meridian, and ending in section seven, township nine, north, range

six, east, was completed on the 22d day of April, 1871. It is also alleged that the assessors of the different precincts in Lancaster county, on or about the 20th day of March, 1871, put down upon their lists among other lands in said county the lands in question, for the purpose of taxation.

Section 20, of the act of Congress, approved July 2, 1864, provides: "That whenever said Burlington and Missouri River Railroad Company shall have completed twenty consecutive miles of the road mentioned in the foregoing section, in the manner provided for other roads mentioned in this act, and the act to which this is an amendment, the President of the United States shall appoint three commissioners to examine and report to him in relation thereto, and if it shall appear to him that twenty miles of said road have been completed as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of said road as far as the same is completed, to the amount aforesaid; and such examination, report and conveyance, by patents, shall continue from time to time, in like manner, until said road shall have been completed." Commissioners were duly appointed by the President in July, 1871, who, on the 20th day of November, 1871, made their report to the President, properly certified, that eighty miles of said road, commencing at Plattsmouth, thence west, had been built and equipped as required by law.

Is such a certificate a condition precedent to the right of the company to the lands in question? We think it is. The law required the road to be constructed in the manner prescribed, and to be a first class road in all respects. The certificate, therefore, was the evidence by which it was determined that the company had complied with the law in the construction of their road, and the

company then were entitled to their lands on the payment of the necessary costs.

It is urged, however, that the lands are not taxable until the costs of selecting, surveying and conveying are paid by the plaintiff. Section twenty-one of the act provides, "that before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the treasury of the United States the costs of surveying, selecting and conveying the same by the said company, or party in interest, as the titles shall be required by the said company, which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the Commissioner of the General Land Office for the prosecution of the surveys of the public lands along the line of said road, and so from year to year until the whole shall be completed as provided under the provisions of this act."

In *Railway Co. v. McShane*, 22 Wallace, 462, the supreme court of the United States, in construing a similar provision in the act creating the Union Pacific Railroad Company, say: "But the proposition that the state cannot tax these lands while the cost of surveying them is unpaid, and the United States retains the legal title, stands upon a different ground.

The act of 1864, section twenty-one, declares, that before any of the lands granted by this act shall be conveyed to the company, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same.

That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the government, can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done, without which the company is not

entitled to a patent. The case, clearly, is not within the rule which authorizes state taxation of lands the title of which is in the United States.

The reason of this rule is also fully applicable to this case. The United States retains the legal title by withholding the patent, for the purpose of securing the payment of these expenses, and it cannot be permitted to the states to defeat or embarrass this right by a sale of the lands for taxes. If such a sale could be made, it must be valid if the land is subject to taxation, and the title would pass to the purchaser. If no such title could pass, then it is because the land is not liable to the tax; and the treasurers of the counties have no right to assess it for that purpose. But when the United States parts with her title, she has parted with the only means which that section of the statute gives for securing the payment of these costs.

It is by retaining the title that the payment of the costs of survey is to be enforced. And so far as the right of the state to tax the lands is concerned, we are of opinion that when the original grant has been perfected by the issue of the patent, the right of the state to tax, like the right of the company to sell the lands, has become perfect."

As there is no condition attached to the grant of these lands by which they are exempted in any manner from taxation, *that* question must be determined by the revenue law of this state. Section one, General Statutes, 896, provides for certain exemptions, among which "the property of the United States and this state, including school lands," are included. Section two provides, "*that all other property*, real and personal, within this state, is subject to taxation in the manner herein directed; and this section is intended to embrace lands and lots in towns, including lands bought from or donated by the United States, and from this state, and whether bought

on credit or otherwise." This court, in construing this section, in *Hagenbuck v. Reed*, 3 Neb., 23, say: "Now, to us it seems quite clear that the plaintiff's land is included in this description of property subject to taxation. It had been the property of the state, but at the time the taxes were levied it had been *bought on credit* by the plaintiff, who thereby became the owner, not of the fee, to be sure, but, nevertheless, the owner in the same sense that he would have been had his purchase been made from a private person on like terms." We see no reason why this rule should not be applied to lands granted to a railway company, like the case at bar. When the road is accepted, the company becomes the equitable owner of the lands donated.

Although the costs of surveying, selecting and conveying must be paid before the United States can be required to part with the legal title, yet it is evident that the United States have a mere special interest in these lands in the nature of a lien for the amount of fees that may be due, and cannot be regarded as the owner. These lands are not open to entry nor settlement under the homestead or pre-emption laws, and cannot be disposed of so as to defeat the grant to the company. To all intents, the railway company is the owner, and cannot be permitted to assert its own neglect of duty to defeat the obligation resting upon it to bear its share of the public burdens.

It is unnecessary to review the case further. The plaintiff in the court below was not the owner of the equitable title to the lands in controversy at the time the taxes in question were levied. The lands, therefore, were not liable to taxation. The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

JOHN BELLINGER, PLAINTIFF IN ERROR, v. CHARLES C. WHITE, TREASURER OF LANCASTER COUNTY, AND E. L. CHESTER, DEFENDANTS IN ERROR.

1. **United States Homestead Act:** TAXATION OF LANDS ACQUIRED UNDER. On the fourth day of November, 1864, plaintiff entered certain lands as a homestead, under the act of Congress, approved May 20, 1862, settled upon and improved the same, and continued to reside thereon until the 11th day of October, 1871, at which time he made final proof. On or about the first day of April, 1871, the lands were duly assessed, and in July of that year, the county commissioners levied taxes thereon: *Held,* that a homestead becomes liable to taxation as soon as the owner has the right to make his final proof and complete his title; that an action will not lie to restrain the collection of such taxes; and that the legal title in such a case is held by the United States as a trustee, and not as owner.

2. ———: ———: JURISDICTION OF COURTS OF EQUITY. He who seeks the interposition of a court of equity to restrain the collection of a tax on his real estate, on account of its alleged illegality, must bring himself clearly within some recognized rule of equity jurisdiction; and will not be permitted to allege his own failure to perfect his title, as a ground on which to base a claim for relief.

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

Cobb, Marquett & Moore, for plaintiff in error, cited *Nycum v. McAllister*, 33 Iowa, 375. *Long v. Culp*, 14 Kan., 412. *Commissioners v. Chipman*, Id., 532.

Brown, England & Brown, for defendants in error, cited *Hunnewell v. Cass Co.*, 22 Wall., 464. *People v. Cohen*, 31 Cal., 210. *Gwynne v. Niswanger*, 15 Ohio, 367.

MAXWELL, J.

The plaintiff in his petition alleges, in substance, that ever since the first day of October, 1872, he has been the

owner in fee simple and has been in the peaceable possession of the east half of the southeast quarter, and the southeast quarter of the southeast quarter of section thirty-four, in township twelve, north of range eight, east of sixth principal meridian. That on the fourth day of November, 1864, the plaintiff applied to the local land office at Nebraska City to obtain title to the lands in question, by virtue of the act of Congress approved May 20, 1862, entitled "An act to secure homesteads on the public domain;" that plaintiff settled upon and improved said lands, and has resided thereon from the fifth day of April, 1865, to the eleventh day of October, 1871, when plaintiff made final proof of settlement, residence upon, and cultivation of said lands, and paid the fees and commissions due the register and receiver of the local land office for the entry of said tracts of land; that on the first day of October, 1872, a patent was issued to the plaintiff for said lands; that on or about the first day of April, 1871, the assessor of Mill precinct, in Lancaster county, assessed said lands for taxation, and on or about the twelfth day of July, 1871, the county commissioners of said county levied divers taxes on said tracts of land, amounting in the aggregate to the sum of $25; that on the thirty-first day of October, 1872, the treasurer of said county sold said tracts of land for said taxes to one Chester. The plaintiff alleges that the assessment of said lands was void, because at the time of making the same the legal and equitable title to said premises was in the United States, and that said lands, therefore, were not subject to taxation. Wherefore, plaintiff prays for an injunction, etc.

Was the plaintiff the owner of these lands at the time of the assessment complained of? We think he was. It is true he did not have the legal title. But from his own statement of the facts he had so far complied with the provisions of the homestead law, by residing upon and

cultivating the land for more than five years, that he could complete his title at any time by making final proof and paying the fees required by law. The United States did not own these lands, but held them simply as a trustee, having no interest therein, except a mere special interest for the amount of unpaid fees. The plaintiff was the real owner and could not be deprived of the title, except through his own neglect. All lands owned by individuals or private corporations, not specifically exempted, are taxable. The design of the law is to make the burdens of taxation as nearly equal as possible by requiring all lands, subject to taxation, to be assessed yearly according to a uniform rule—the real value at the time of the assessment. "Taxation is an act of sovereignty to be performed, so far as it conveniently can be, with justice and equality to all. Exemptions, no matter how meritorious, are of grace, and must be strictly construed." *Crawford v. Burrel Township*, 53 Penn. State, 219.

In *Hagenbuck v. Reed*, 3 Neb., 17, this court held that school lands purchased from the state on credit were taxable, and in the case of *White v. The B. & M. R. R. Co.*, *ante*, page 393, it was held that lands donated to the company by the United States, of which they were in equity the owners, were taxable, notwithstanding the failure of the company to pay certain costs and charges required by law. He who seeks the interposition of a court of equity to restrain the collection of a tax on his real estate on account of its alleged illegality, must bring himself clearly within some recognized rule of equity jurisdiction; and he cannot be permitted to allege his own failure to perfect his title in a case like this, as a ground on which to base a claim for relief.

In our view of the law, a homestead is liable to taxation as soon as the owner has the right to make his final proof and complete his title. The tax, therefore, so far

as appears from the petition, was legally levied, and as this is the only question at issue, the judgment of the district court, dismissing the case, is affirmed.

DECREE ACCORDINGLY.

JOHN HUTCHINSON, PLAINTIFF IN ERROR, v. BARNET ASHBURN, DEFENDANT IN ERROR.

1. **County Commissioners.** Two members of the board of county commissioners have no authority under the provisions of Chap. 13., Gen. Stat., to try a third member for an alleged misdemeanor.

2. ———. The board of county commissioners consists of three persons, and the entire board must sit to hear the case, although a majority may pronounce a valid judgment.

3. ———. The words "all county officers" in the first section of the act [Gen. Stat., 250]. are not from the nature of the case intended to include county commissioners.

ERROR from the district court of Franklin county.

It was an information brought by Hutchinson against Ashburn before the county commissioners, setting forth that said Ashburn, who was one of said commissioners, had been guilty of gross partiality, oppression, corruption, and habitual drunkenness. The other two commissioners assumed jurisdiction, and upon a trial rendered judgment removing said Ashburn from office. He thereupon took the cause on error to the district court. Upon a trial there the judgment was reversed at costs of Hutchinson, who brought the cause here by petition in error.

H. S. Kaley, for plaintiff in error, cited Dillon Mun. Corp., 55, 179, 182. Angell & Ames on Corp., Chap.

XII. *State v. Bryce*, 7 Ohio, 414. *State v. Trustees*, 5 Ind., 81. *Queen v. Sutton*, 10 Mod., 76.

J. N. Lucas, for defendant in error.

No brief on file.

MAXWELL, J.

Section 1, Chap. 13, Gen. Statutes (subdivision "Removal from Office," page 250), provides that all county officers, including justices of the peace, may be charged, tried, and removed from office for official misdemeanors in the manner and for the causes following:

First. For habitual or willful neglect of duty.

Second. For gross partiality.

Third. For oppression.

Fourth. For extortion.

Fifth. For willful (mal) administration in office.

Seventh. For conviction of a felony.

Eighth. For habitual drunkenness.

Section two provides that any person may make such charge, and the board of county commissioners shall have exclusive original jurisdiction thereof by summons.

The law of Iowa, from which this chapter of our statutes appears to have been partially copied, provides that the "district court shall have exclusive original jurisdiction thereof by summons."

At common law it was held that a corporation, in the absence of an express grant of authority, had the right to remove an officer for just cause. In *Rex v. Richardson*, 1 Burr., 525, it was held that there were three classes of offenses for which an officer might be removed.

First. Such offenses as have no immediate relation to his office, but are of so infamous a character as to render him unfit to discharge the duties thereof, such as the offenses of bribery, perjury, forgery, etc.; but in

order to authorize a removal in this class of cases, there must have been a previous conviction by a jury according to law.

Second. Such offenses as were against his oath and the duty of his office; in which cases he might be removed on trial and conviction by the corporation.

Third. For offenses not only against his duty as an officer, but also indictable by the law of the land. But the power to remove, unless delegated to a select body, must have been exercised by the entire corporation.

Under our statute the board of county commissioners consists of three persons. Can two members of the board try the third for an alleged misdemeanor? We think not. The entire board is constituted the tribunal, and must hear the case, although a majority may pronounce a valid judgment.

It is evident that the legislature did not intend this act to apply to county commissioners, although its terms include "*all county officers.*" That portion of the act is copied *verbatim* from that of Iowa, which provides an independent tribunal for the trial of such causes. Here, from the nature of the case, county commissioners must be excepted from the operation of the act.

As two commissioners had no authority to hear and determine the case, the judgment of the district court is affirmed; and as the commissioners had no jurisdiction, no judgment can be rendered for costs.

JUDGMENT AFFIRMED.

L. C. SMITH, ASSIGNEE OF FRANK E. FRYE, PLAINTIFF IN ERROR, v. S. N. WHITE, DEFENDANT IN ERROR.

1. **School Lands.** The mere failure of a purchaser to pay the interest due on school lands purchased from the state on credit, does not of itself work a forfeiture of his interest in such lands.

2. ———: STATUTORY REQUIREMENTS. Sec. 18, Chap. 70, General Statutes, provides that notice shall be given by the county treasurer to the purchaser, stating the delinquency complained of, and requiring the removal thereof by the fulfillment of the covenants of the bond and contract; and until such notice has been given, in the manner required by law, a purchaser cannot be divested of his interest in such lands.

ERROR from the district court of Colfax county. The facts upon which the cause was tried below appear in the opinion.

W. A. Marlow, for plaintiff in error, cited *Moore v. M'Intosh*, 6 Kan., 39. *Welch v. Bryan*, 28 Mo., 30. Gen. Stat., 995.

C. J. Phelps, for defendant in error, cited Act relating to school lands, and Laws of 1875, 123.

MAXWELL, J.

The following is the agreed statement of facts in the case:

First. That in the year 1871, F. E. Frye purchased of the state of Nebraska the lands described in defendant's answer. At the time of said purchase he paid one-tenth of the purchase price, and agreed to pay the interest on the balance for the period of ten years, at the expiration of which time he agreed to pay the remainder of the principal.

Second. That said land so purchased was, at the time of said sale, school land, belonging to said state.

Third. That Frye never made any other or further payments on said land.

Fourth. That the first year after he made the purchase, he broke ninety acres of said land at a cost of about $300.00.

Fifth. That, in 1873, Frye became insolvent, and made an assignment of all his property to this plaintiff for the benefit of his creditors, which was accepted by the plaintiff.

Sixth. That the plaintiff, under said assignment, had the right to collect all sums due him, and to sell and dispose of all real estate and his interest in the same.

Seventh. That, in the year 1874, the defendant purchased from the state of Nebraska the land heretofore described, paying the price of unimproved land, and no more.

Eighth. The defendant, after he made said purchase of said land from the state of Nebraska, executed and delivered to the plaintiff the note described in the petition, the only consideration for which was the interest of the plaintiff under said assignment in and to the improvements on said land.

The case was submitted to the district court on this agreed statement of facts, and judgment rendered thereon for the defendant, to reverse which the plaintiff brings the case into this court by petition in error.

Sec. 18, of Chap. 70, of the General Statutes, provides: "In case of the violation of any of the covenants in the contract furnished by the lessee or purchaser, by the non-payment of moneys at the time specified in the contract —by the commission of waste upon the land—by the removal of any improvements thereupon from the land without the consent of the commissioners—the county treasurer shall notify the lessee of his or her delinquency, and require the removal thereof by the fulfillment of the covenant of the bond and contract; and if such delin-

quency is not removed within thirty days, the lessee or purchaser shall yield possession of the premises to the state of Nebraska, and the property shall thereupon immediately revert to and be revested in the state; and the contract shall be dissolved, and the rights of the lessee or purchaser, both legal and equitable, therein, be absolutely determined; and the prosecuting attorney of the district shall, immediately after receiving notice from the county treasurer of the violation of his or her covenants, by the lessee or purchaser of any school land, proceed against the person in possession of the premises involved, in the name of the people of the state of Nebraska for forcible entry and detainer, and obtain restitution of the premises in the same manner and with like effect as in case of tenants holding over."

A condition is said to be a qualification annexed to an estate by the grantor, whereby the estate may be enlarged, defeated or created upon an uncertain event. Taylor's Landlord and Tenant, Sec. 271.

The principal difference between a condition and a limitation is, that a condition does not defeat the estate when broken, until it it avoided by an act of the grantor or his heirs; but a limitation marks the period which is to determine the estate, without entry or claim." Id., Sec. 273. *Stearns v. Godfrey*, 16 Me., 160.

The payment of the purchase money is a condition precedent which must be fully performed on the part of the purchaser to entitle him to an estate in fee; but the mere failure of a purchaser to pay the interest at the time it becomes due, will not of itself forfeit the estate of the purchaser in the land. The statute requires notice to be given by the county treasurer to the purchaser, stating the delinquency complained of; and requiring the removal thereof by the fulfillment of the conditions of the covenants of the bond and contract. It is not

contended that such notice has been given, or that the interest of Frye has been forfeited in the land.

By the agreed statement of facts it is admitted that the plaintiff, under the assignment, had the right to collect all sums due, and to sell and dispose of all real estate and his (Frye's) interest therein.

Such being the case, Frye had an interest in the improvements that the plaintiff was authorized to sell, and which was a sufficient consideration for the note. The judgment of the district court is, therefore, reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SCHOOL DISTRICT NUMBER TWENTY-SEVEN OF SARPY COUNTY, PLAINTIFF IN ERROR, v. JOSEPH B. RANDALL, DEFENDANT IN ERROR.

1. **Contract:** CONDITIONS OF SAME: EVIDENCE. Where a building contract provides that the work shall be done under the direction and superintendence, and to the satisfaction of an architect, to be testified by certificate under his hand, such architect is thereby constituted sole arbiter between the parties, and the parties are bound by his certificate; but if the owner avers that such certificate was procured by collusion and conspiracy between the builder and the architect to cheat and defraud him, then evidence is admissible tending to prove such conspiracy and fraud, and that the building is not erected according to the terms, plans and specifications of the contract, or in a good workmanlike manner.

ERROR from the district court of Sarpy county. Tried below before SAVAGE, J.

J. L. Webster, for plaintiff in error, cited *Ripley v. Gage County*, 3 Neb., 397. *Mercer v. Harris*, 4 Id., 77. Kerr on Fraud, 384. *Marvin v. Keeler*, 5 Conn.,

271. *Ogden v. Raymond*, 22 Conn., 379. *Kauffman v. Swar*, 5 Barr., 230. *Woods v. Gummert*, 67 Pa. St., 136. *McConihe v. Sawyer*, 12 N. H., 396. *Hopkins v. Sievert*, 58 Mo., 201.

George W. Doane, for defendant in error.

GANTT, J.

This is an action upon a contract to erect a school house building. The defendant in error, who was plaintiff in the court below, alleged in his petition that he had performed all the conditions, covenants, and agreements of the contract, on his part to be performed, and had erected and finished the building according to the drawings, plans and specifications made by C. F. Driscoll, architect for the same, and that the same was erected and finished in a good workmanlike and substantial manner, under the direction and to the satisfaction of said C. F. Driscoll, who by the said contract was made the architect and arbiter to attest the same by writing under his hand; that the said architect has made and delivered to him such final certificate, and there remains due to him on said contract for the work so done, the sum of $970.41. He further alleges that he had secured a mechanic's lien upon the building and the lots upon which it stands, and he prays judgment for this balance and interest thereon, and that the building and lots upon which it stands may be sold to satisfy such judgment.

The plaintiff in error denies that the defendant performed all and singular the conditions, covenants and agreements of the contract, or that he erected the building according to the plans and specifications prepared by said architect, or that the work was done in a good and workmanlike manner as provided by the terms of said contract—of all which facts the said defendant in error, and the said architect, had full knowledge at the time

alleged in said petition that the said certificate was made and delivered by said architect to said defendant in error. And further avers that the alleged final certificate was made with full knowledge on the part of the defendant in error and said Driscoll of the neglect and failure of the defendant in error to finish and complete said building according to the terms of said contract, and that said C. F. Driscoll and defendant in error did contrive and conspire together in the making and delivering and receiving of said certificate, to cheat, defraud and injure the plaintiff in error, and he was cheated, defrauded and injured thereby.

It may be noticed here that, as shown by the petition, this is purely an action at law, under section eight of the act in relation to mechanics' liens, and not a suit "in chancery as in other cases of liens" to foreclose such lien, under the provisions of section seventeen of the same act. The prayer of the petition limits the relief sought to a strict judgment, and not a decree of foreclosure of the lien. Hence, the case was a proper one to be given generally to the jury, without restricting the jury to the finding of certain facts only. However, the main ground of exceptions to the proceeding relates to the ruling of the court below in regard to evidence offered by plaintiff in error and rejected, and to the charge of the court to the jury. It is very probable these rulings were made under a misconception, at the time, of the case of *Mercer v. Harris et al.*, 4 Neb., 77. In that case, at page 82, it is said that "by the terms of the contract, 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 as 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 witnesses" to show the character and quality of the material furnished, and the work done, was properly rejected. And again, it is said in respect to the certificates of the architect that "*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." It will therefore be seen that the question of fraud was not raised in that case, and that the testimony was properly rejected as not being pertinent to the issue joined by the pleadings. It is a well established doctrine of the law that all obligations and contracts, not made in violation of law, are binding on the parties to them; the rule is equally well settled that fraud vitiates everything, contracts, obligations, and even records and judgments of courts. Chitty on Con., 678. *Hoit v. Holcomb*, 3 Foster, 554. And it is an axiom in jurisprudence that in the adjudication of a cause, the court can only adjudge upon the issue joined by the pleadings in the case. Now in the case at bar, the plaintiff in error distinctly alleges that the contractor and the architect did contrive and conspire together to cheat, defraud, and injure him, by the making and delivering and receiving of the final certificate attested by the architect; and the evidence offered by plaintiff in error, and objected to and rejected by the court, tended to show collusion, conspiracy and fraud between the contractor and the architect in the procurement of the final certificate, attested by the architect. And as the question of fraud was distinctly raised and the issue in respect to it was fairly joined by the plead-

ings in the case, we are of opinion that the evidence offered was properly admissible, and erroneously rejected.

Again, the court "instructed the jury to return a verdict in favor of the plaintiff on the issues submitted to them." Under the law of the case as above stated, it was the province of the jury to decide from the evidence all questions of fact material to the issues joined by the pleadings; and all these questions of fact, together with the evidence pertinent to the issues joined, should have been submitted to the consideration and determination of the jury; but on the contrary, the instruction given took from the consideration and decision of the jury every question of fact in the case. This we think was error. And for the reasons given in this opinion, the judgment of the district court must be reversed and the cause be remanded for trial *de novo*.

REVERSED AND REMANDED.

RICHARD D. CURRY, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Practice in Criminal Cases:** QUALIFICATION OF JURORS. If, upon examination of a juror, it is shown that he has an opinion, founded upon rumor, newspaper reports, or hearsay, and it shall satisfactorily appear that the character of such opinion is such that it will not interfere with his rendering an impartial verdict, it is not error to admit him to the jury. Loose and unguarded expressions made by persons at the time the offense is committed and not thought of afterwards, are entitled to very little, if any, weight, as objections to a juror.

2. ———: EVIDENCE. In a prosecution for an assault with intent to murder, physicians and surgeons may be allowed to testify what in their opinion would be the natural and probable results of injuries inflicted by the accused upon the person assaulted.

3. ———: ASSAULT WITH INTENT TO MURDER. Under the statute, an assault with intent to murder is but one offense, and if the indictment contains no other, a general verdict of guilty is good and valid.

4. ———: INSTRUCTIONS TO JURY. When instructions requested are substantially given in the charge prepared by the court on its own motion, it is not error to refuse to repeat them, though expressed in language different from that used by the court.

ERROR from the district court of Douglas county. Tried below before SAVAGE, J. It was a re-trial of the cause, granted by this court, and reported in 4th Neb., 545. Resulting in the conviction of the prisoner he again sued out a writ of error to this court.

C. A. Baldwin, for plaintiff in error.

George H. Roberts, Attorney General (with whom was *John M. Thurston*), for the state.

GANTT, J.

The plaintiff in error was indicted for an assault with intent to murder one Edward Rosewater.

The main ground of error relied on relates to the supposed disqualification of Charles Wilkins, a juror, who after his examination upon his *voir dire*, was challenged for principal cause, and the ground of the challenge is that he had expressed an opinion in relation to the issue. It is a constitutional guaranty that in all criminal prosecutions the accused shall have the right of "a trial by an impartial jury," that is, a jury "not biased in favor of one party more than another; indifferent; unprejudiced; disinterested." This right to have an impartial jury cannot be abridged, and therefore, the body of the triers should be composed of men indifferent between the parties, and otherwise capable of discharging the duty of jurors. Whether, in the practical administra-

tion of justice, the right is infringed, is necessarily a judicial question; and whether, in a particular case, a proposed juror has the state of mind which will render him impartial, is a question of fact, which it is the duty of the court, trying the case, to decide. "The constitution does not prescribe rules of evidence; it only requires the fact of the impartiality of the jury to exist," and therefore "the previous demeanor of the juror, the information he may have received, or the opinions he may have entertained or expressed, are only evidence of the state of his mind, and are material only as they may tend to show a free judgment of the case, the existence of prejudice against either of the parties, or his indifference between them;" and from all the evidence disclosed, the court must decide whether the jurors have the qualifications which the constitution requires they should possess. However, by the provisions of section 468 of the criminal code, it seems that if a juror has formed or expressed an opinion, founded upon conversations with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, he may for such opinions be successfully challenged for principal cause, without further examination; but if his opinion is founded upon reading newspaper statements, communications, comments, or reports, or upon rumor, or hearsay, it will not disqualify him as a juror, if from all the evidence disclosed the court shall be satisfied that he will render an impartial verdict. This latter clause of the section is not repugnant to the constitutional guaranty; it simply prescribes, as a rule of evidence that an opinion based on such grounds shall not be conclusive evidence of incompetency, and it leaves the judicial mind perfectly free to find the fact of the juror's competency, or incompetency, according to the truth, from the evidence submitted. Hence, "if from the investigation, the court is satisfied that the character of the

opinion is such that it will not interfere with the jurors rendering an impartial verdict, it is authorized to admit him to the jury; but if not satisfied, he is to be rejected." *Cooper v. The State*, 16 Ohio State, 331.

The juror Charles Wilkins, on his examination, distinctly stated several times that he had not formed or expressed an opinion as to the guilt or innocence of the accused. However, on cross-examination by counsel for the accused, to the question: "Do you say you have formed an opinion as to the guilt or innocence of the defendant?" He answers, "I have;" but we think the juror very satisfactorily explains this answer, when he afterwards stated that he had read and heard of the case, but did not pretend to have heard all the case, and that he had thought nothing about it since the temporary opinion was expressed, which he got for a moment. Loose and unguarded expressions made at the time the offense was committed, and not thought of afterwards, are entitled to very little weight; and it can scarcely be said that the opinion of the juror amounted to anything more than such an expression. It is not claimed that he heard any conversation of witnesses of the transaction, or read reports of their testimony or heard them testify, and, therefore, if his expression is considered as an opinion formed, it would merely be hypothetical, dependent alone upon what he read and heard, without pretending to know all the facts and circumstances of the case. In *McCausland v. Crawford*, 1 Yeates, 378, it is said that "prejudging and giving an opinion on a statement of certain facts, are very different things. The first implies a strong disposition to favor one side or the other; a determination to find one way, let the evidence be what it may. The last involves the truth of certain facts and propositions in the sentiments delivered; and impressions thus made may be effaced by the production of other evidence." The first renders the

person incompetent as a juror; the second is an opinion only binding or influencing the juror, provided the case should turn out as represented, and this is a hypothetical opinion. And such hypothetical opinion is natural to the human mind, for experience teaches us that few persons can keep their minds from the expression of some opinion upon hearing the strong one-sided statements made by rumor or newspaper comments. Rogers, J., in delivering the opinion in the case of *The Commonwealth v. Flanagan*, 7 Watts & Sergeant, 422, very justly remarks, that "it is difficult, if not impossible for men, in moments of general excitement to repress all feelings, and refrain from expressing themselves in strong and emphatic language, which means but little at the time and is soon forgotten, having none or very slight influence on their future conduct."

In *Baxter v. The People*, 3 Gilm., 377, it is said that "most jurors, when inquired of as to their opinion, have not been in the habit of carefully analyzing their minds on the subject, and the first answer which they give, especially to questions ingeniously framed to elicit a desired reply, may be very far from giving the true state of the person's mind. Hence, it is not uncommon to observe during the examination by the counsel on either side, the most palpable contradictions in the expressions used by jurors in giving the extent of their opinions, and that too by men of intelligence and integrity. It often happens that a juror may suppose that his belief in the existence of a certain fact, will constitute an opinion, when in truth it may be necessary to establish a great many other facts, before the guilt or innocence of the party could be established. A man may be charged with murder, and the juror may have no doubt but that the person alleged to have been murdered, was killed, and that the accused killed him, and yet have no sort of an idea whether the homicide were justifiable, excusable or

felonious. No one will pretend that such a juror has an opinion of the guilt or innocence of the accused. If such opinions were to disqualify jurors, it would in very many, if not in a majority of instances, be utterly impossible to get a jury in these cases."

In the case under consideration the evidence does not tend to show that the juror had any fixed and definite opinion as to the guilt or innocence of the plaintiff in error. Such an opinion is necessary to sustain a challenge for principal cause; but an opinion imperfectly formed or merely hypothetical, "may be urged by way of challenge to favor, which is to be allowed or disallowed, as the triers may find the fact of favor or indifferency." No such challenge was made in the case. *Baxter v. The People, supra. The State v. Benton*, 2 Dev. & B., 212. *The People v. Bodine*, 1 Denio., 308.

It is contended that the court erred in admitting the testimony of several medical men, who were examined on the part of the prosecution, in respect to the natural and probable result of the injuries inflicted on E. Rosewater by the accused. The questions propounded to these witnesses upon the subject are all substantially like the following: "State what in your opinion would be the natural and probable result of such injuries as you found upon Mr. Rosewater's head?" The charge in the indictment is an assault with intent to commit murder. The intent therefore is an essential and material ingredient to constitute the offense charged; and this *intent* is an important question of fact to be determined by the jury from the evidence in the case; and we think that all evidence which tends to disclose the natural and probable results of the acts of the accused, and to reflect light upon the question, may be admitted. It is true that such evidence consists of opinion only, but, because the physician has made the subject of inquiry a particular object of study, the law makes his opinion competent

evidence whereby the facts which science supplies to him, through him are made available to the jury. It seems well settled as a rule of law that physicians and surgeons may be allowed to say, upon a state of facts testified either by themselves or other witnesses, whether in their opinion a particular wound or blow described, would be adequate to cause death, or even whether such wound was, in their opinion, the cause of death. In a prosecution for murder, the object of such evidence relates to the inquiry of fact, whether the killing was or was not with a felonious or malicious *intent.* And why shall not the rule apply to prosecutions like the one under consideration? In either case the fact sought to be proved is the *intent;* and we find no reason why all evidence which legitimately reflects light upon the subject of inquiry, should not be admitted. 1 Phil. on Ev., 378. *Rex v. Harvey*, 2 B. & C., 268. *Commonwealth v. Rogers*, 7 Metc., 504. *Livingston's Case*, 14 Gratt., 603, *Hathorn v. King*, 8 Mass., 371. And in the case of *The State v. Shields*, 1 West Law Journal, 118, it is held that if death is the natural and probable consequence of wounds inflicted in an assault, the jury may infer that death was intended. We are of opinion that the evidence was properly admitted. But it may be proper, however, to observe, that the opinion of medical men in such cases, should be considered in connection with the evidence of other facts, namely, the language of the accused uttered at the time of the assault, the violence of the assault, the nature and kind of weapon used, and from all the circumstances disclosed by the testimony, the jury must determine the question of fact as to the intent of the accused.

In regard to the verdict it is only necessary to remark that, by statutory provision, an assault with intent to murder is but one offense, and as this is the only offense charged in the indictment, we can have no doubt of the validity of a general verdict of guilty.

The several instructions asked to be given to the jury on the part of the plaintiff in error, and refused, were substantially and very fairly given in the general charge of the court to the jury.

We find no sufficient grounds in the record to disturb the judgment of the court below in this case.

JUDGMENT AFFIRMED.

JOHN MYERS, PLAINTIFF IN ERROR, v. REINHART KOENIG, DEFENDANT IN ERROR.

Forcible Entry and Detention of Real Property. In a proceeding for forcible entry into property, the gravamen of the action is, the unlawful and forcible entry into and detention of real property, in the trial of which title to real estate cannot be drawn in question.

ERROR from the district court of Butler county. Tried below before POST, J.

The plaintiff in error commenced the action before a justice of the peace against the defendant for the unlawful and forcible entry into and detention of real property. The bill of exceptions shows that plaintiff offered in evidence a patent of the United States for the lands in controversy, dated March 1, 1875 and recorded May 4, 1875. Defendant offered receiver's certificate to Rudolph Martin dated June 29, 1871, and recorded August 18, 1871, and deed from Martin to him of same date, and moved the court to dismiss the cause on the ground that title to real estate was drawn in question, and the justice was thereby ousted of jurisdiction, which motion the court overruled. The justice rendered judgment that the plaintiff have restitution of the premises and recover of

the defendant his costs. This judgment was reversed by the district court and plaintiff brought the cause here by petition in error.

Millet & Son, and *E. R. Dean*, for plaintiff in error.

Title to real estate was not drawn in question for the reason that there was no evidence introduced by the defendant in the trial before the justice that was competent to draw the title in question. 1 Cokes Inst., 345. 2 Black Com., 195. A justice of the peace may try titles, so far as they come incidentally in question in deciding upon unlawful entries. *Jarvis v. Hamilton*, 16 Wis., 581. *Heritage v. Wilfong*, 58 Penn. State, 137. *Cary v. Richards*, 4 West Law Monthly, 251.

Higgins & Crites, and *Whitmoyer*, for defendant in error.

The defendant was in peaceable possession of the premises, and where plaintiff is compelled in the first instance to prove title to real estate, the jurisdiction is excluded. *Bridewell v. Barcroft*, 4 West Law Mon., 619. *Main v. Cooper*, 25 New York, 180. *Gage v. Hill*, 43 Barb., 46.

A deed of land is evidence of legal title of as high an order as a patent. A patent from the government is no more conclusive as to the rights of the grantee, than is a warranty deed from an individual. They are both among the highest evidences of legal title with the advantages in favor of the deed. The patent is more fluctuating and more uncertain. It may issue to-day and be declared void to-morrow. It may issue to-day to A. and for the same premises to B. one year hence. Upon the introduction of the deed in evidence before the justice by defendant, the plaintiff and defendant confronted each other with their respective evidences of legal title, and the

justice had no power to pass upon the relative validity of such deeds. If the justice could go behind the deed from Martin and inquire into his rights to convey, where would his investigation end? If he could go back one step he could go back twenty, and inquire into the validity of as many mesne conveyances. His act in declaring the deed from Martin, held by Koenig, as of no avail against the patent held by Myers, is the very act which the law says he has no power to perform.

In the absence of evidence showing the fraud or cancellation of the receiver's certificate to Martin, the same in connection with the deed constituted evidence of legal title in the defendant. *Franklin v. Kelly*, 2 Neb., 79. *Myers v. Croft*, 2 Neb., 481. *Dillingham v. Fisher*, 5 Wis., 475.

GANTT, J.

Upon error to the district court, the judgment of the justice of the peace in this case was reversed, and the cause was dismissed on the ground that, in the trial before the justice, title to real estate was drawn in question so as to oust the jurisdiction of the justice over the subject matter. This is the controlling question in the case, and the only one it is deemed necessary to notice. Title XXX, Chap. 1, of the civil code defines the jurisdiction of justices of the peace, and provides that they shall not have cognizance of "actions in which title to real estate is sought to be recovered, or may be drawn in question, except actions of trespass on real estate, which are provided for in this title." The only action of trespass upon real estate provided for in this title, is that for trespass *vi et armis*, under Chap. 10, entitled "action for forcible entry and detention, or forcible detention only of property." Hence, it seems that the restraint of jurisdiction, contained in the law referred to,

was not intended to apply to actions brought under Chap. 10 for forcible entry into and detention of real estate. The jurisdiction given in such actions is well founded in the principles of jurisprudence, and is not in conflict with the constitution, for the complaint sets forth an injury or wrong criminal in its nature, and the gravamen of the action is, the *unlawful and forcible entry into and detention of real property.* Therefore the title to real estate cannot be drawn in question on the trial of such action; and it is expressly provided in the law that the judgment in such action of trespass shall not be a bar to any after action brought by either party. In *Mitchell v. Davis*, 23 Cal., 385, it is said that "if the defendant has any title or right of possession, it must be tried in some other action proper for trying such questions, but the present is not an action of that kind. He was not justified in attempting to force any such right by taking forcible possession of the land in dispute. He must first deliver up the possession thus forcibly acquired, and then he may be in a situation to litigate, in a proper action, any valid right or title he may have to the land. One great object of the forcible entry act is to prevent even rightful owners from taking the law into their own hands and attempting to recover by violence, what the remedial powers of a court would give them in a peaceful mode. 3 Black. Com., 179. *Carroll v. O'Conner*, 25 Ohio State, 617. *Jarvis v. Hamilton*, 16 Wis., 580.

The judgment of the district court must be reversed, and the judgment of the justice of the peace in favor of plaintiff and against defendant is affirmed.

JUDGMENT ACCORDINGLY.

REGENTS OF THE UNIVERSITY OF NEBRASKA, PLAINTIFF IN ERROR, V. JOHN L. MCCONNELL, DEFENDANT IN ERROR.

1. **The Regents of the University of Nebraska,** as such corporation, may sue and be sued in matters over which express authority is given to such corporation.
2. ———. The creation of such public corporation by legislative authority is not repugnant to the constitution.
3. ———. Such public corporation is but part of the machinery employed in carrying on the affairs of state, and is subject to be changed, modified, restrained or destroyed, as the general interests and public exigencies may require, without infringing private rights.
4. ———. Under the legislative acts of 1869 and 1875, the state treasurer is made the custodian of all the university funds, to be disbursed by him upon warrants drawn by the state auditor.
5. ———. The university corporation acts simply by delegated authority, and can exercise only such powers as are expressly given to it; and not having corporate power over the university funds, it has no authority to bring and maintain an action to recover such funds.

THIS action was brought in the district court, in Lancaster county, by the "Regents of the University of Nebraska," against John L. McConnell, to recover of him the sum of about $3,400, moneys belonging to the "Regents' Fund," which came into the hands of the defendant as treasurer of the University, under his appointment by the Regency; and which the defendant refused to turn over to the state treasurer, as required by the act of 1875, [Laws of 1875, p. 154,] abolishing the office of treasurer of the University, and requiring the fund to be turned over within sixty days.

The defendant, McConnell, demurred to the plaintiff's petition;

First. That the petition did not state facts sufficient

to constitute a cause of action in favor of the plaintiff, and against the said defendant; and,

Second. That the plaintiff had no legal capacity to sue in manner and form, and for the purposes in the petition stated.

This demurrer, the court, POUND, J., presiding, sustained, and rendered judgment against the plaintiff, to which the plaintiff excepted and brought the cause here by petition in error.

Lamb, Billingsley & Lambertson, for plaintiff in error.

We claim as a matter of law, that being expressly empowered by the legislature to sue, the plaintiff's right is commensurate with their public duties and trust, and by a reasonable construction, includes the right to maintain this suit for these moneys. Angell & Ames on Corp., Sec. 23, 24. *Todd v. Birdsall*, 1 Cow., 260. *School District v. Wood*, 13 Mass., 192. *Tilden v. Metcalf*, 2 Day, 259. *School District v. Malcoon*, 4 Wis., 79. *East River Bank v. Judah*, 10 How. Pr., 135.

J. R. Webster, for defendant in error.

A public officer or board cannot in their own names, or officially, maintain an action even in cases where they are entitled to the possession and control of moneys sued for, unless specially authorized by statute. *Commissioners v. Perry*, 5 Ohio, 56. *Hunter v. Commissioners*, 10 Ohio State, 515. *State v. Grant*, 7 Blackf., 73. *State v. Wright*, 8 Id., 65.

The only proper, or possible construction of the act of 1869, to carry out its intent, or to sustain its validity, is that the regents are merely the governors of the institution, and that the institution itself is merely part of the

system of public instruction, founded, fostered and maintained by the state as a part of its educational machinery. The regents are not corporators, having any beneficial interest in the property, but mere officers of the state, mere guardians, servitors of the trusts placed in their hands, a board of governors of the institution, having only such power and such privileges as the legislature from time to time may commit to, or permit to remain in their hands. The property of the university, its realty, its personality, its funds, is the property of the state, subject absolutely to the legislative will in its government, and in the control, deposit, and disbursement of its funds—and the state may at any time without violation of any corporate right of the regents, change as it sees fit the trustee, the deposit and control of the fund, and the government and management of the institution. Perry on Trusts, Sec. 707. *Dort v. Houston*, 22 Ga., 506.

GANTT, J.

The act of Congress, approved April 19, 1864, to enable the people of Nebraska to form a constitution and state government, and for the admission of such state into the Union, granted to the state seventy-two sections of the unappropriated public lands, to be selected and located under the direction of the legislature, for the use and support of a state university and for no other purpose. The constitution adopted in pursuance of this act provides that "the principal of all funds arising from the sale or other disposition of lands or other property, granted or intrusted to the state for educational purposes, shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations."

Under both the enabling act of Congress and the constitution of the state, it was the duty of the legislature to establish a state university, and provide for it a polity, proper and adequate for the government of such an institution. This duty was performed; and by the act of February 15, 1869, entitled "an act to establish the university of Nebraska," the institution was established under the name and style of the "University of Nebraska." The act declares its objects, vests its government in a board of regents, and confers on this board certain powers and duties, and provides for the appointment of a secretary and treasurer by the regents. Section five provides that the regents and their successors "shall constitute a body corporate to be known as 'The Regents of the University of Nebraska,' and as such may sue and be sued." It further provides that the "funds of the University shall be two, to-wit: the endowment fund, and the regents' fund;" that the state treasurer shall be the custodian of the principal of the endowment fund, which shall be invested under the advice of the governor and auditor of the state, as prescribed by law, and that the state treasurer shall pay over monthly to the treasurer of the university all moneys belonging to the regents' fund. By this act the regents are invested with the essential powers of a corporation under the corporate name of "The Regents of the University of Nebraska." And in respect to all matters, relating to the university, over which express authority is given to the corporation, there seems to be no doubt that it may sue and be sued. And the legislative authority to create such corporation, for the purpose of conducting the affairs of the university seems clear from section one, article VII, of the constitution of 1867, and is not repugnant to article VIII thereof: and the constitution of 1875 provides that the "duties and *powers*" of the board of regents "shall be prescribed

by law," and it declares that corporations for "charitable, *educational*, penal or reformatory purposes" shall be excepted from the inhibition that "no corporations shall be created by special laws." Constitution, Art. VIII, Sec. 9. Sec. 1, Article "Miscellaneous Corporations."

But this incorporation, under the name of "The Regents of the University of Nebraska," is not, in any sense, to be considered in the nature of a private eleemosynary corporation for the general promotion of learning, because its whole interests and franchises are the exclusive property and domain of the government itself, and, therefore, it is in the strictest sense a public corporation. Public corporations are not limited to those created for municipal purposes only, but, strictly speaking, public corporations are all such as are founded for public purposes, where the whole interests belong to the government. *Trustees of Dartmouth College v. Woodward*, 4 Wheat., 508. And such "public corporations are but part of the machinery employed in carrying on the affairs of state; and they are subject to be changed, modified or destroyed, as the exigencies of the public may demand." *Trustees v. Tatman*, 13 Ill., 30. "Over them the legislature has power, not limited by the constitution to impose such modifications, extensions or restraints, as the general interests and public exigencies may require, without infringing private rights. All corporations invested with subordinate powers, for public purposes, fall within this class, and are subject to legislative control." *Inhabitants of Yarmouth v. Trustees of North Yarmouth*, 1 Am. Law Reg., O. S., 598. Coke Litt., § 413. Vin. Abr. Corp., A., 2. *Phillips v. Bury*, 2 Term Rep., 346. *Allen v. McKeen*, 1 Sumn., 276. *People v. Morris*, 13 Wend., 325. *Penobscott Broom Corp. v. Lamson*, 16 Me., 224. Hence it is very clear that the rights and franchises of such public corporations never become vested rights as against the

state, and its charter constitutes no contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated. Cooley on Const. Lim., 193.

Under the act of 1869, the university corporation had no control over or disposition of the endowment fund, and now by the act of February 23, 1875, the legislature has deemed it proper to abolish the office of treasurer of the university, and to make the state treasurer the custodian of the funds appropriated for the support and maintenance of the university, to be disbursed by him upon warrants drawn by the state auditor, in the same manner as funds appropriated for the support of other state institutions, not incorporated, are disbursed. Hence, by this latter act, the custody and control of these funds are taken from the corporation and placed in the custody of the state treasurer for disbursement; and under the settled doctrine of the law, in respect to public corporations of this kind, the legislature had the undoubted authority to take these funds from the custody of the corporation, and divest it of any corporate power over them, and having done so, we think it clear that the regents, as such corporation, have no authority, in law, to bring or maintain this action. It acts simply by delegated authority, and can exercise only such powers as are expressly given to it, or which may be necessary to carry into effect those powers specially given.

The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

W. NESBITT, PLAINTIFF IN ERROR v. T. J. CAMPBELL, DEFENDANT IN ERROR.

1. **Pleading:** DEMURRER TO ANSWER. A general demurrer to an answer admits as true all new matter pleaded therein, which constitutes a defense.

2. **Practice:** ATTACHMENT. A debt due upon a note or bill overdue, is subject to attachment and garnishment.

3. ———: ———: FORECLOSURE OF MORTGAGE: DEFENSE. In a foreclosure suit, an answer setting up a garnishment of the money in the hands of the mortgagor by a creditor of the mortgagee, and averring that an assignment of such mortgage and note was collusive, without consideration, and for the sole purpose of defrauding the creditor of the mortgagee, constitutes a good defense, if true.

4. **Deed:** COVENANTS: TAXES. Where it appears that a mortgage security was given in part payment of the land mortgaged, and that the same land was sold and conveyed to the mortgagor with covenants against all incumbrances thereon, unpaid taxes, due at the time of the sale, constitute an incumbrance on the land, and in a foreclosure suit may be pleaded as an off-set *pro tanto*.

ERROR from the district court of Nemaha county. Tried below before WEAVER, J. Judgment was rendered against Nesbitt who was defendant in the action there, and he brought the cause here by petition in error. The opinion states the case.

J. H. Broady, for plaintiff in error.

I. There is no question of negotiable paper in this action. No paper is negotiable in the commercial sense after due. The paper in this case was long since past due and dishonored at the time of the first alleged assignment, and hence not negotiable paper, but carried its infirmities with it into whosesoever hands it went; ever since due it has been but a chose in action, on a common

footing with other choses in action, all of which can alike be assigned under our statute subject to all defenses, and if the one cannot be attached the other cannot. Code, sections 29, 30 and 31. *Stone v. Elliott*, 11 O. S., 252. *Howe v. Hartman* 11 O. S., 449.

But debts on notes and bills past due can be attached, and the confusion on the subject arises from the loose use of the term negotiability, which, in the sense of the "law merchant," never applies to any paper past due. Drake on Attachment, Sec. 584. *Hill v. Kroft*, 29 Pa. St., 186. *Stevens v. Pugh*, 12 Iowa, 430. *Littlefield v. Dodge*, 6 Mich., 326. *Hubbard v. Williams*, 1 Minn., 54. *Enos v. Tuttle*, 3 Conn., 27. *Dore v. Dawson*, 6 Ala., 712. *Camp v. Clerk*, 14 Vt., 387. *Inglehart v. Moore*, 21 Texas, 501. *Colcord v. Daggett*, 18 Mo., 557. *Kimball v. Gay*, 16 Vt., 131.

The covenant against incumbrances was part of the consideration of the conveyance, and was broken when made, and hence there was a partial failure of consideration which comes in as a counter-claim, and is susceptible of exact measurement; indeed, is already liquidated and raised to the dignity of a debt and incumbrance of perpetual record in the office of the county treasurer. *Long v. Moler*, 5 O. S., 272. *Funk v. Creswell*, 5 Iowa, 62.

Under the second defense the plaintiff in error can show in evidence that since filing his said answer, he has been compelled to pay off the said incumbrance. *Mosly v. Hunter*, 15 Mo., 322. *Brooks v. Moody*, 20 Pick., 475. *Kelly v. Lord*, 18 Me., 244. *Leffingwell v. Elliott*, 10 Pick., 204. *Wilcox v. Executors*, 4 Peters, 182. *Foote v. Burnett*, 10 Ohio, 317.

W. T. Rogers, for defendant in error.

No brief on file.

GANTT, J.

This is a foreclosure case. The note and mortgage were executed by plaintiff in error to Samuel Bennett, and became due and payable, March 10, 1872. On the 15th day of May, 1874, Samuel Bennett assigned the note and mortgage to Daniel Bennett, and on the 10th day of November, 1874, Daniel Bennett assigned the same to the defendant in error. In his answer the plaintiff in error admits the execution of the note and the payment of a certain sum thereon, but denies each and every other allegation of the petition. He further pleads as an affirmative defense, that on the 3d day of July, 1874, the unpaid balance of said note was attached in his hands, upon a judgment recovered by one F. A. Holmes against the said Samuel Bennett, and that he was summoned to answer as garnishee his indebtedness on the said note; that on the 6th day of October, 1874, the district court found that he was indebted to said Samuel Bennett on said note, in an amount to exceed the amount due from said Samuel Bennett to said F. A. Holmes, and ordered and adjudged that as such garnishee he pay to said F. A. Holmes the sum of $945.50 within twenty days from that date, and in default thereof that execution issue against him for the collection of the same. He further avers that Samuel Bennett was then the owner of the note and mortgage, and that the pretended assignment of the same to Daniel Bennett was without consideration, procured by the collusion of defendant in error and said Samuel and Daniel Bennett, with intent and for the purpose of hindering, delaying, and defrauding the said F. A. Holmes, in the collection of her debt against said Samuel Bennett. For a further defense, he avers that the note and mortgage were given in payment of the balance of the purchase money of the same lands described in the petition, which the said

Samuel Bennett had sold and conveyed to him by deed with covenants thereon against all incumbrances on said land, and alleges that at the time of the execution of said conveyance there were tax liens on said lands to the amount of $128.73. To this answer a general demurrer was interposed. The demurrer was sustained, and the cause is now brought into this court upon petition in error.

Notwithstanding the execution of the note and mortgage is admitted, yet the general denial of all other allegations of the petition, was sufficient to put the defendant in error upon proof of his ownership of the note and mortgage. But the demurrer admits the truth of all the new matter set up in the answer as a defense. It admits that Samuel Bennett was the real owner of the note and mortgage and that the pretended assignment of them was collusive, without consideration, and solely for the purpose of defrauding F. A. Holmes, a creditor of Samuel Bennett; and it further admits the tax incumbrance on the land at the time the plaintiff purchased it from Samuel Bennett. These allegations are material to the case, and if they are true (and under the pleadings they must be taken as true by the court) they will certainly constitute a good defense, at least *pro tanto*. The law is so well settled that a debt due upon a note or bill overdue, is subject to attachment, that it is unnecessary to refer to authority in support of it.

Again, as to the partial defense set up in the second count in the answer, it need only be observed, that in actions for breach of covenants against incumbrance, the ground of the action is not the debt or obligation to pay money, but the breach of the covenant is the ground of action and it will lie whether the incumbrance is or is not paid by the vendee; and if it is paid after the commencement of the action, the vendee may recover the full amount fairly and justly paid to remove such incum-

brance. And when the maker of a promissory note, given as payment on real estate, conveyed with warranties against incumbrance, is sued on such note, he may set off against the same, the amount which he has been compelled to pay to discharge such incumbrance, whether paid before or after the commencement of such suit. *Schuchmann v. Knoebel*, 27 Ill., 177. *Kelly v. Low*, 18 Me., 244. *Brooks v. Moody*, 20 Pick., 475. *Delavergne v. Norris*, 7 Johns., 357. *Owens v. The State*, 38 Penn. State, 211. A tax lien is such incumbrance as to work a breach of the covenant. *Long v. Moler*, 5 Ohio State, 273.

As there is error in sustaining the demurrer, the decision of the court thereon and also the decree rendered in the case, in the court below, must be reversed and the cause remanded for trial.

REVERSED AND REMANDED.

JOHN M. YOUNG, JAMES O. YOUNG, CYRUS CARTER, JOHN MCKESSON, JOHN MORRIS, H. E. NEEDHAM AND JAMES M. RIDDLE, PLAINTIFFS IN ERROR, v. JOHN A. T. HIBBS, DEFENDANT IN ERROR.

1. **Promissory Notes.** A note taken for a pre-existing debt will not discharge the original cause of action, unless it is by express agreement taken in payment of such prior debt and at the risk of the creditor.
2. ——: EVIDENCE. When the original debt is sued on, the plaintiff must produce the new note on the trial, or satisfactorily show that it is lost or destroyed.
3. **Practice:** CREDIBILITY OF WITNESSES. In case of conflict of testimony the jury must judge of the credibility of witnesses, and determine the weight due to that of each witness.

ERROR from the district court for Lancaster county. Tried below before WEAVER, J. It was an action

brought by the defendant in error against the plaintiffs in error, in the probate court of Lancaster county, to recover of the plaintiffs in error the sum of $300, and interest, on a promissory note, dated November 18, 1869. The defendant in error there had judgment; plaintiffs in error appealed to the district court.

The defendants answered separately—John M. and James O. Young, Cyrus Carter, and John M. McKesson plead as first defense, usury; and as a second defense, that defendant in error, at the time the note in controversy was due, took as payment therefor notes of plaintiffs in error—Cyrus Carter, John M. McKesson, and James O. Young, and further answered that James O. Young had paid $170 on the note in suit.

James M. Riddle plead in one defense, usury, and in another, that for a valuable consideration he was released from any and all liability on the note.

John Morris and H. E. Needham did not answer. The defendant in error, to these several answers, filed replies denying generally all the allegations in the answers.

There was a trial and upon the evidence adduced the jury returned a verdict in favor of Hibbs. Motion for a new trial overruled. Judgment upon the verdict, and cause brought here by petition in error.

A. C. Ricketts, for plaintiffs in error.

It is one of the cardinal principles of a right to recover upon an original indebtedness or note — that the note or renewal should be surrendered for cancellation or shown to have been lost—wherefore the verdict must have been for the defendants had the resisted evidence been excluded. Story on Promissory Notes, section 104. *Holmes v. D'Camp*, 1 Johns., 34. *Burdick v. Green*, 15 Johns., 247. *Smith v. Rogers et al.*, 17 Johns., 340. *Hughes v. Wheeler*, 8 Cow., 77. *Dayton v. Trull*, 23 Wend., 345.

The evidence shows that Carter, McKesson and J. O. Young were primarily liable on this note; that Hibbs knew this fact. It was the understanding of Carter, McKesson, J. O. Young and Riddle, that Hibbs agreed to accept the new notes as payment. That Hibbs carried new notes which he had made out to those parties to be executed. That he told McKesson that he was to take Carter, and was willing to give him time. That at the maturity of these new notes, he made out other new notes to be executed by same parties. That during a period of about three years he thought these parties ought to pay this debt, and he tried to get it from them. During all this time he never mentioned the indebtedness to the other original parties.

As to the question of usury, Carter was instructed to borrow this money at 24 per cent. Carter, McKesson, Riddle and J. O. Young all agree that they only received in money on the note in suit its face less 24 per cent. Hibbs, being the only witness testifying to the contrary, has not a very distinct memory on this point. His answers are not direct but invariably evasive. If the note was usurious, then the verdict should have been for $241.93. If not usurious, then $300, with interest at 12 per cent, from November 18, 1870.

It is true that courts are reluctant to disturb the verdict of a jury; but they will nevertheless set aside the verdict, and grant a new trial, when it is against the clear weight and preponderance of testimony, as the record of this case shows. Hilliard on New Trials, 444, and authorities there cited. *Ide v. Churchill*, 14 O. S., 372. *Southworth v. Hoag*, 42 Ill., 446.

C. C. Burr, for defendant in error.

The instructions given, on behalf of defendant in error, by the court below, were properly given. The accept-

ance of a note for another note is not a discharge or payment of the first note without an agreement that it shall be so, or unless such appears to be the intention of the parties. *Gordon v. Price*, 10 Iredell, 385. *Bank of Commonwealth v. Letcher*, 3 J. J. Marsh, 195. *Morgan v. Bitzenberger*, 3 Gill, 350. *Smith v. Harper*, 5 Cal., 329. 2 Parsons on Notes and Bills, 205 and 206. 2 American Leading Cases (5th ed.), 263 to 274, and numerous cases cited. *Olcutt v. Rathbone*, 5 Wend., 490. *Kean v. Dufresne*, 3 Serg. & Rawle, 233.

GANTT, J.

It appears that after the note sued on in this action became due, three of the makers thereof made and gave to the payee other notes for the same debt—the payee retaining the original note; and in the second count of the separate answer of John M. Young, James O. Young and C. Carter, it is alleged that the defendant in error agreed to and did receive and accept these new notes in full payment and satisfaction of the note in suit. It is also alleged that the note sued on was given upon an usurious contract. In his reply the defendant in error denies these allegations. The evidence offered at the trial upon these issues was submitted to the jury to find the facts. It is now contended that the court erred in giving to the jury the following instructions, asked by the defendant in error:

"1. Although you may find that defendants have executed notes, and delivered them to the plaintiff, in renewal of the note sued on in this action, yet if you further find that the notes so given in renewal have been destroyed, surrendered with the knowledge of defendants, or either of them, you will find for plaintiff, unless you further find that the renewal notes were received in payment of the note in suit. 2. If the jury find from the evidence that the defendants did give notes in lieu

of the note sued on you will find for plaintiff, if you further find that the note or notes given in renewal of the note sued on, were either returned to the defendants or destroyed, unless you further find that the renewal notes were received in payment of this note."

Now whether the defendant in error did accept or not the new notes in payment of the one sued on, is a question of fact, which it was the province of the jury to determine from the evidence offered on the trial; and we think these instructions fairly submitted that question to the jury.

The rule of law seems to be well settled that a note given for a pre-existing debt will not discharge the original cause of action, unless it is by special contract taken in payment of such prior debt and at the risk of the creditor. It is said "that no principle of law is better settled than taking a note, either from one of several debtors, or from a third person, for a pre-existing debt is no payment, unless it be expressly agreed to be taken as payment, and at the risk of the creditor." *Milden v. Whitlock*, 1 Cow., 306. "And most clearly all the authorities go to show that, at law, accepting of a security of equal degree, either from the debtor himself with or without surety, or from a stranger alone, at the instance of the debtor, is no extinguishment of the first debt," and therefore the giving of a new note for the same debt, without an express agreement that it shall be in payment and satisfaction of the old one, has ever been considered a mere collateral security, which does not affect or alter the original liability of the parties on the old note in any respect whatever. *Weakley v. Bell*, 9 Watts, 273. 1 Burr, 9. 1 Strang., 427. 1 Mod., 225. *Day v. Leal*, 14 Johns., 404. *Ripley v. Greenleaf*, 2 Vt., 129. *Nicholson v. Leavitt*, 4 Sandf., 308. *Smith v. Harper*, 5 Cal., 329. *Gordon v. Price*, 10 Ired., 385. 2 Am. Leading Cases, (5th ed.,) 263.

Again it is contended that the court erred in refusing to give the jury certain instructions requested by the plaintiffs in error. But in respect to this alleged ground of error, it need only be remarked that, as the propositions contained in these instructions are precisely the converse of the instructions given as above stated, the court properly refused to give them to the jury, for, according to the law as above stated, it would have been error to have given these instructions.

Again, there was no error in admitting evidence as to what became of the new notes, for on the trial of the cause, it was necessary for the defendant in error to produce these notes, or satisfactorily show they were destroyed or lost. *Hughes v. Wheeler*, 8 Cow., 80. *Hays v. M'Clurg*, 4 Watts, 452.

The only testimony we find bearing directly on the question of a usurious contract in the execution of the note sued on, is that of the plaintiff in error, C. Carter, and the defendant in error, and their testimony upon this question is very conflicting. In such case, the rule seems to be that the "jurors are the unfettered and final judges" of the credibility of the witnesses, and therefore the whole testimony in conflict is, generally, referrable to the jury to determine the weight due to that of each witness. *Heister v. Lynch*, 1 Yeates, 108. *Fehl v. Goods*, 2 Binn., 495. *Winchell v. Latham*, 6 Cow., 682. *Ackley v. Kellogg*, 8 Cow., 223. *Sprague v. Mitchell*, 1 Chitty Rep., 271. *Bucklin v. Thompson*, 1 J. J. Marsh, 223. *Jackson ex dem, Fowler v. Loomis*, 12 Wend., 27. *Doe ex dem, Jones v. Fulgham*, 2 Murph., 364. And it is said that "a mere difference of opinion between the reviewing court and the court below, as to the weight of evidence, ought never, for the most obvious reasons, be deemed sufficient to reverse a judgment." *Ide v. Churchill*, 14 Ohio State, 377. *Jones v. Edwards*, 1 Neb., 170. The preponderance of evi-

dence against the finding must be clear, obvious and decided to justify such interference. We do not find it so in this case, and therefore the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

ROBERT W. OLIVER & CO., PLAINTIFFS IN ERROR, v. L. P. HAWLEY, DEFENDANT IN ERROR.

1. **Contract:** ALTERATION OF. An alteration is an act done upon an instrument by which its meaning or language is changed.

2. ——: ——. It is the duty of the court to determine as a question of law whether an alteration is material; and it is error to submit such questions to the jury.

3. ——: SEED CONTRACT: DAMAGES. Where a party has knowledge of the inferior character of seed before he sows the same, the party furnishing the seed is not liable for damages resulting to either the crop or land in consequence of the *use* of such inferior seed.

ERROR from the district court of Adams county. Tried below before GASLIN, J. The action was brought upon the written instrument, set forth in the opinion, before a justice of the peace, taken on appeal to the district court and tried before a jury at the April Term, 1876. Defendant there recovered judgment for $45.00, damages and costs of suit. Upon the trial, after evidence on the part of plaintiffs tending to show that defendant had delivered to plaintiffs fifty-two bushels and forty-one pounds of flax seed, leaving a balance due on the contract of nine bushels and twenty-five pounds, which balance according to the terms of the contract was worth $25.48, the defendant testified that he signed the contract, and received the seed mentioned therein; that the seed was not as good quality as represented;

that it was bought by sample; that it was not as good as the sample; that he did not see the seed bought until he got it home; that he sowed it himself; that there was as much mustard seed in the flax seed, as there was flax seed; that when it came up, it looked like it was all mustard; that the amount of damage done to his crop by reason of mustard and other foul seed was about $100.00, that damage done to his land on account of such foul seed was about $100.00; and that before he sowed it, he saw mustard and other weed seed in it, but did not think there was as much foul seed in it as there appeared to be after it came up.

Ash & Scofield, for plaintiffs in error.

The evidence of defendant as to the damage done to his flax crop of 1875 by cause of mustard seed and other foul seed growing therein, was erroneously admitted before defendant had laid any foundation for proving damages. It was incumbent on him to prove as a foundation for damages an express warranty of the quality of said flax seed. The defendant having failed to prove an express warranty the law will not imply one in this case. *Jackson v. Wetherill*, 7 S. & R., 480. *M'Farland v. Newman*, 9 Watts, 56. *Wetherill v. Neilson*, 8 Harris, 448. *Jennings v. Gratz*, 3 Rawle, 169. *Sands v. Taylor*, 3 Johns, 396.

But if this court hold that it was competent for defendant to recover damages to said flax crop by reason of its containing mustard seed and other foul seed, we insist that defendant could not recover such damages until he had proven in addition to the several points above raised the following facts:

1. That the land on which said flax crop was raised was free from mustard seed and other foul weed seed previous to and at the time said flax seed was sown thereon.

2. The quantity of the flax raised on the land seeded with said flax seed and the value thereof.

3. The quantity of flax seed which should have been raised from said flax seed if it had been as warranted and the value of the same.

The proper measure of damages, if allowable at all, would be the difference between the value of the crop raised and what it would have been worth had the flax seed in question filled the warranty. Nash's Pldgs. and Prac., pages 991 to 998, and cases there cited.

All the injury which resulted to the flax crop in question, and to the land on which the same was raised, by reason of mustard and other foul seed was caused by the negligence of the defendant himself. The evidence clearly shows that defendant had ample opportunity to examine the seed before he bought it, and that he did examine it before he sowed it on the land, and instead of returning it to the plaintiffs after possessing full knowledge of its quality he deliberately sowed it with his own hand, and if he became damaged in his flax crop and land he cannot recover of the plaintiffs therefor.

The well settled rule which declares that a party who by his own negligence contributes to the injury complained of cannot recover therefor, applies with double force in this case. *Brownell v. Flagler*, 5 Hill, 283. *Bush v. Brainard*, 1 Cow., 78. *Welden v. Liverpool Gas Co.*, 3 C. B., 1. *Gen. Steam Nav. Co. v. Morrison*, 14 C. B., 127. *Mastin v. G. N. Kadway*, 16 C. B., 179. *Williams v. Mich. Cen. R. R.*, 2 Mich., 259. *Mich. Cen. R. C. Co. v. Leahey*, 10 Mich., 193.

M. V. Moudy and *J. M. Abbott*, for defendant in error.

The acknowledgment in the contract by defendant of the receipt of prime flax seed, is not conclusive upon defend-

ant and may be explained or contradicted by parol testimony. 1 Greenleaf on Ev., Sec. 305. 8 Am. Rep., 539.

The flax seed sold by plaintiffs to defendant was not prime flax seed, and was a matter of fact in the court below, and the evidence introduced, tending to show that a warranty was made, the finding cannot be reviewed in this court.

One measure of damages in such cases is the difference between the market value of the crop raised and the crop that would have been raised had the flax seed been prime, instead of foul.

Defendant, Hawley, having sown the flax seed on his land before discovering the foul condition of the seed, he could not then rescind the contract and return the seed, but had to treat the sale as a warranty, for the breach of which defendant was entitled to recover damages. The damages awarded by the jury in this case were not remote nor excessive, and the evidence was properly submitted to the jury. *Walcott v. Mount*, 13 Am. Rep., 438. *Hawkins v. Pemberton*, 10 Am. Rep., 595.

The flax seed in this case was sold by sample, and implied a warranty that the bulk would conform to the sample. *Getty v. Rountree*, 2 Pinney (Wis.), 379. 6 Wis., 294. 13 Id., 671. 18 Id., 206.

MAXWELL, J.

I. The action is brought on the following contract:

"HASTINGS, Adams Co., Neb., March 12, 1875.

"In consideration of fifty 10-56 bushels of prime flax seed this day furnished me by Oliver & Co., of Hastings, Adams county, Nebraska, the receipt of which is hereby acknowledged, to be by me sown on a certain farm by me held as a homestead, situated on section ten, township eight, range ten west, in the county of Adams, state of Nebraska, I promise to pay them, or to their order, on

or before first day of October, 1875, sixty-two 30-56 bushels of prime flax seed. In case of the failure of the crop to pay them the said sixty-two 30-56 bushels of prime flax seed at said time, I hereby agree to pay them or their order, on demand, the sum of one hundred and thirty 45-100 dollars, with interest at the rate of twelve per cent per annum from the time said seed should have been delivered. I further agree to sow said advanced seed on suitable and well prepared ground the coming season and to carefully harvest the same, and to sell them or their order my entire crop of flax seed, except fifty bushels, to be by me raised, at ten cents per bushel and freight less Chicago price day of delivery. All of said seed to be delivered well cleaned, in prime order, on or before the first day of October, 1875, to said Oliver & Co., or their order, at their warehouse at Hastings, Adams county, Nebraska. This contract to bear interest at the rate of twelve per cent per annum from and after the first day of October, 1875.

"In witness whereof, I have hereunto set my hand and seal the day and year first mentioned.

In presence of, L. P. HAWLEY. [SEAL]

B. E. BOYER.

"$5.00 commission to be charged on the fifty bushels reserved."

The plaintiffs claim a balance due on the contract of $25.48 and $5.00 as commission on the fifty bushels reserved.

The answer of the defendant admits making the contract, but alleges that "said plaintiffs have made a material alteration in the written conditions of said written instrument by writing and adding thereto the following condition therein in words and figures as follows, to-wit: '$5 commission to be charged on the fifty bushels reserved;' that the flax seed was foul and unfit for seed, and was

mixed with and was about one-fourth mustard seeds, and other obnoxious weed seeds, to defendant's damage in the sum of $200." Defendant denies that he promised to pay $5.00 commission on the fifty bushels reserved.

The plaintiffs in their reply denied the new matter contained in the answer.

On the trial of the cause the court instructed the jury: "If you find from the evidence in the case that the said contract has been changed in a material respect by the plaintiffs since its execution and delivery, without the knowledge and consent of the defendant, you are warranted in finding for the defendant."

"If you find from the evidence in the case that the change in the contract was made as charged in the answer, in law I charge you that they cannot recover thereon."

To which instructions the plaintiffs duly excepted. The jury returned a verdict for the defendant for the sum of $45, on which judgment was rendered.

In *Palmer & Orton v. Largent*, *ante*, page 233, this court held that a memorandum written under a negotiable instrument and qualifying it, is to be taken as a part of the contract and the fraudulent removal of such a memorandum would vitiate the instrument, even in the hands of an innocent purchaser. But where the words alleged to have been removed were, "this note is given upon condition," there being nothing to show what the condition was, it did not vitiate the instrument, as they were entirely immaterial; but it is the duty of the court to determine whether such an alteration is material or not, and it is error to submit such question to the jury.

"An alteration is an act done upon the instrument by which its meaning or language is changed. If what is written upon or erased from the instrument has no tendency to produce this result, or to mislead any person, it is not an alteration. The term is, at this day, usually applied to the act of the party entitled under the deed or

instrument, and imports some fraud or improper design on his part to change its effect." 1 Greenleaf Ev., Sec. 566. In this case there is no alteration of the contract. The memorandum complained of is not, and does not purport to be any portion of the contract. It is at most a mere memorandum. It is for the court, not the jury, to determine whether an alteration is material. The court, therefore, erred in submitting this question to the jury.

In *Randall v. Roper*, 96 Eng. Com. Law, 82, the defendant had sold the plaintiff barley, warranting it to be "Chevalier seed barley." The plaintiff, relying upon the warranty, re-sold it with a similar one. The barley proved to be an inferior variety and not "Chevalier barley," in consequence of which plaintiff's vendee obtained a poor crop. It was held that the plaintiff was entitled to recover the amount to which he had become liable to the vendee.

In *Passinger v. Thorburn*, 34 N. Y., 634, the defendant sold cabbage seed under an express warranty that it was the seed of a variety known as "Bristol cabbage," which it proved not to be. The damages were held to be the value of a crop such as should have been produced by the seed if it had conformed to the warranty, deducting the expense of raising the crop and the value of the one in fact raised.

But I think no case can be found in which consequential damages have been recovered where a party, as in this case, had knowledge of the inferior character of the seed before sowing the same; in such case, the party furnishing the seed is not liable for damages resulting to either the crop or the land in consequence of the *use* of such inferior seed.

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

JUDGMENT REVERSED.

THE CITY OF OMAHA, PLAINTIFF IN ERROR v. ELLEN OLMSTEAD, DEFENDANT IN ERROR.

1. **Incorporation of Cities.** An act providing for the incorporation of a city must be accepted as a whole; and the city in accepting the benefits derived therefrom, must perform the duties required by law.

2. ———. The corporate franchise is a valuable privilege and is a sufficient consideration for the duties which the law imposes.

3. **Jurors in cases in which a Municipal Corporation is a party.** The object of the law is to secure fair, impartial, unbiased jurors; but the mere interest of a tax payer and resident of a city is not in itself, under ordinary circumstances, sufficient to disqualify him from acting as a juror in a case in which the city is interested.

ERROR from the district court of Douglas county.

Ellen Olmstead, as plaintiff in the court below, brought suit to recover damages for injuries alleged to have been sustained by her in stepping into a hole in a sidewalk, on the north side of Douglas street, between Ninth and Tenth streets, in the city of Omaha.

All material allegations of the petition are denied by the answer. And it is further alleged that any injury received by plaintiff was occasioned by reason of her own carelessness. The time of the accident, as alleged, was about 8 o'clock in the evening of December 1, 1873.

A trial was had at the February term, 1876, at which a verdict was returned for the plaintiff, fixing her damages at five thousand dollars, which verdict was set aside and a new trial granted on the ground that the evidence was insufficient to sustain it.

The case again came on for trial at the October term of the court, before POUND, J., and a verdict was returned by the jury for the plaintiff, fixing her damages at $5,500. A motion for a new trial was duly made, which

was overruled and a judgment entered upon the verdict. To reverse this judgment the defendant in the court below came here upon petition in error.

On the trial in the court below Ferdinand Streitz was regularly called as a juror, and in response to questions put by defendant in error, made answers showing that he was a duly qualified juror in all other respects, but that he was a resident taxpayer of the city of Omaha—whereupon defendant in error challenged said juror for cause, in that he was a taxpayer in the city of Omaha, and hence an interested party, which challenge the court sustained, and the juror was excused, to which the plaintiff in error duly excepted. Other jurors were challenged for cause, on the same ground, by both parties to the suit.

John M. Thurston, for the plaintiff in error.

I. Is a resident taxpayer of a municipal corporation disqualified thereby from sitting upon a jury in which the city is a party? We submit not. Dillon on Municipal Corporations, 23 and 30.

The interest of a person in the result of a suit that will disqualify him as a juror, must be a direct pecuniary interest. Such is not the interest of a tax-paying citizen of a municipal corporation, as created by our laws. His interest is too remote and uncertain. He is no part of the corporation—he may even sue the corporation and recover judgment, though his own property may indirectly and remotely pay a portion of it. The general experience of mankind has been that so remote an interest cannot affect in any material degree the judgment of a juror competent in other respects, and the current of decisions in our country is tending to abrogate the harshness of many of the common law precedents, which are neither harmonious with our system of government nor with the age in which we live.

Those cases where citizens and taxpayers are held to be competent judges, jurors and witnesses in municipal courts, are based as much upon the remoteness of the alleged disqualifying interest as upon the necessities of the case. And experience teaches us that as fair and just verdicts are given by taxpayers in cases where the municipality is a party, as by non-residents, whose natural prejudices are excited and aroused against the corporation. *Corwein v. Hames*, 11 Johns., 76. *Thomas v. Mount Vernon*, 9 Ohio, 290. *City Council v. Pepper*, 1 Rich. (S. C.), 364. *City Council v. King*, 4 McCord (S. C.), 487. *Hill v. Wells*, 6 Pick., 104. *Commonwealth v. Emery*, 11 Cushing, 406.

II. A municipal corporation, organized under a general law, as in this state, is not liable for injuries resulting from a neglect of the corporate officers, to repair a defect in the sidewalk. In order to properly raise this question, the court below was asked to instruct the jury as follows: "A municipal corporation organized under the general laws relating to cities of the first class is not liable for damages resulting from a defect in a sidewalk, caused by decay or the unlawful act of a third party." This instruction the court refused to give and defendant duly excepted.

We admit that for acts of misfeasance by which a traveler along a street of a city is injured, an action lies, but does it in the case of a mere nonfeasance; a mere failure to repair a defect in the street or sidewalk, caused by wear, decay, or the act of a third person?

It has always been held in England and in this country, with the exception of perhaps one state (Maryland), that no such liability rests upon public corporations, such as counties and towns, which are created for public purposes, where incorporation is forced upon them, and where the law creating them can in no way be construed as in the

nature of a contract. Cooley's Constitutional Limitations, 247. Dillon on Municipal Corporations, 762. *Mower v. Leicester*, 9 Mass., 247. *Bartlett v. Crosier*, 17 Johns., 439. *Farnum v. Concord*, 2 N. H., 392. *Baxter v. Winoski Turnpike*, 22 Vt., 123. *Beardsley v. Smith*, 16 Conn., 375. *Commissioners v. Martin*, 4 Mich., 557. *Lorrillard v. Monroe*, 11 N. Y., 392. *Reardon v. St. Louis*, 36 Mo., 555. *Sherbourne v. Yuba Co.*, 21 Cal., 113. *State v. County of Hudson*, 1 Vroom, 137. *Treadwell v. Commissioners*, 11 Ohio St., 190.

All of these cases and a vast array of others follow the case of *Russell v. Men of Devon*, 2 T. R., 667, and are unanimous in holding that no such liability exists. *Detroit v. Blackeby*, 21 Mich., 84.

Baldwin & Smythe, for defendant in error.

Is the city liable for injuries caused by reason of defective sidewalks? We invite attention to the following propositions submitted upon the part of the plaintiff below, and which were given by the court to the jury as the law in the case, in his charge.

1st. When a public body is clothed by statute with power to do an act which the public interests require to be done, and the means for the performance are placed at its disposal, the execution of the power may be insisted upon as a duty, although the statute conferring it be only permissive in its terms.

2d. That in the absence of an express statute, imposing the duty and declaring the liability, municipal corporations proper having the power ordinarily conferred upon them, respecting bridges, streets and sidewalks within their limits, owe to the public the duty to keep them in safe condition for use in the usual mode by travelers, and are liable in a civil action for special injuries resulting from neglect to perform this duty.

The learned counsel for the city, admits that the weight of authorities is with us, but claims that they are not founded upon the better reasons. It is a little remarkable that the eminent jurists comprising the several courts of last resort, in most of the states of the Union have failed to see these reasons as the *paid attorney* of a corporation sees them. 5 Seld., 163. 3 Hill, 612. 1 Denio., 595. 3 New York, 463. 16 Id., 158. 45 Id., 129. 25 Ill., 535. 24 Ala., 112. 9 Ired., 73. 20 Maryland, 468. 24 Wis., 191. 34 Id., 285. 17 Gratt., 375. 12 Ohio State, 377. 1 Black, 39. 2 Id., 590. 4 Wall., 194, 435, 658.

MAXWELL, J.

I. The plaintiff in error is organized as a city, under the provisions of "An act to incorporate cities of the first class."

Section fifteen of the act gives to the mayor and council the care, management and control of the city, its property and finances. The twenty-fourth sub-division of section fifteen, grants the power "to care for, and control, to name and re-name streets, avenues, parks and squares within the city, to provide for the opening and vacating of streets, avenues and alleys within the city, under such restrictions and regulations as may be provided by law."

Section forty-one provides that "the council shall have power to open, extend, widen, grade, pave, or otherwise improve and keep in good repair or cause the same to be done in any manner they may deem proper, any street, avenue or alley within the limits of the city, and may also construct and repair, or cause and compel the construction and repair of sidewalks in such city, of such material and in such manner as they may deem proper and necessary, and to defray the cost and expense of such improvement on any of them, the mayor and council

of such city shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent to, and abutting upon the street, avenue, alley or sidewalk thus graded, paved, extended, constructed or otherwise improved or repaired."

Section forty-nine provides that "the council shall have power to provide for keeping sidewalks clean and free from all obstructions and accumulations, and may provide for the assessment and collection of taxes on unoccupied real estate, and for the sale and conveyance thereof to pay the expenses of keeping the sidewalks adjacent to such real estate clean and free from obstructions and accumulations as herein provided."

By an act approved November 4, 1858, the city of Omaha was incorporated under a special charter, which conferred certain benefits and privileges upon the city.

On the 8th day of February, 1869, an act to incorporate cities of the first class became a law. The first section provides that all cities within this state having three thousand legal voters shall be deemed cities of the first class.

Section sixty-four provides that all rights and property of every description which were vested in any municipal corporation under its former organization, shall be deemed and held to be vested in the same municipal corporation under the organization made by this act. Various amendments to the act have since been made by the legislature, which do not require examination.

It will not be denied that an act providing for the incorporation of a city must be accepted as a whole, and that the city in accepting the benefits derived therefrom, must perform the duties required by law. The corporate franchise is a valuable privilege; and is a sufficient consideration for the duties which the law imposes. The state grants to the municipality a portion of its sovereign authority, in greater powers of self-government than are

given to *quasi* corporations, in increased facilities for the acquisition and control of corporate property, and in the special authority over, and control of, the streets, and their adaptation to the wants and convenience of the citizens of the municipality. The acceptance of these privileges is considered as raising an implied promise on the part of the city to perform its corporate duties; and this implied agreement made with the sovereign power enures to the benefit of every individual interested in the proper performance of such duties. Cooley's Con. Lim., 248. *Weet v. Brockport*, 16 N. Y., 161. *Browning v. Springfield*, 17 Ill., 143. *Pittsburgh v. Grier*, 22 Penn. St., 54. *Weightman v. Wash*, 1 Black, 41. *Chicago v. Robbins*, 2 Black, 418. *Neb. City v. Campbell*, Id., 590.

The city has the exclusive control of its streets, and ample means are placed under the control of its constituted authorities to maintain the streets in a safe condition. Under these circumstances the city is liable for its failure to perform its duty.

In *Detroit v. Blackeby*, 21 Mich., 114, it was held (COOLEY, J., dissenting), that the city was not liable. The court say: "In the case of *Eastman v. Meredith*, 36 N. H., 248, the distinction between the English and American municipal corporations is clearly defined. The former often hold special property and franchises of a profitable nature which they have received upon conditions, and which they can hold by the same indefeasable right with individuals. But American municipalities hold their functions merely as governing agencies."

While it is true that in particular instances property and valuable franchises of a profitable nature were conferred upon municipal corporations as a condition for the performance of certain acts; yet it will not be contended that all, or any considerable proportion, of such corporations were thus endowed. Nor will it be claimed

that liability for neglect of duty was restricted to corporations thus benefitted. I think it will be found on examination, that as a rule, as valuable privileges and benefits are conferred by our laws providing for the incorporation of cities as were conferred by ancient charters.

II. In selecting jurors the object of the law is to secure fair, impartial, unbiased persons, and it is the duty of the court, where objection is made, to see that such persons only are permitted to sit on a jury; but the mere interest of a tax-payer and resident of a city is not of itself, under ordinary circumstances, sufficient to disqualify him from acting as a juror in a case in which the city is interested. In this case both parties objected to residents of Omaha as jurors, and the objections were sustained by the court. The plaintiff in error, therefore, is not in a position to insist on the objection. A fair jury appears to have been selected, and the questions of fact fairly submitted to them, and we see no sufficient ground to disturb their finding. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

WILLARD H. STORMS, PLAINTIFF IN ERROR v. EMERSON H. EATON, DEFENDANT IN ERROR.

1. **Practice**: TRIAL OF RIGHT OF PROPERTY. Where goods are levied upon by a sheriff under execution, and such goods are claimed by a person other than the one designated as defendant in the execution, a trial of the right of property can be had in the mode prescribed by sections 486, 487 and 488 of the Code of civil procedure only at the instance of the claimant of such goods. A sheriff has no authority to institute such proceedings without the consent of the claimant.

2. ———: ACTION BY CLAIMANT AGAINST OFFICER. In such pro-

ceedings if the jury find against the claimant he cannot afterwards maintain an action against the officer; while if the jury find in favor of the claimant, the plaintiff in execution may tender the undertaking provided for by Sec. 488, and require the sale to proceed; and the officer in such case will not be liable to the claimant, his remedy being upon the undertaking.

3. ———: SETTING ASIDE VERDICT. Where a verdict is clearly wrong it should be set aside; but a mere difference of opinion between the court and jury will not warrant the former in setting aside the verdict of the latter.

ERROR from the district court of Saline county. Tried below before WEAVER, J.

It was an action of replevin brought by the defendant in error against the sheriff for property which had been seized on executions and attachments which came into the hands of the plaintiff in error, as sheriff, for levy and service issued in numerous actions against William T. Eaton, son of Emerson H. Eaton, the defendant in error, and who was carrying on the business of buying and selling merchandise in his own name and managing the concern in all respects. It also appears from the record that a trial of right of property was had before this action was brought, which resulted adversely to the defendant in error, who thereupon replevied the goods from plaintiff in error.

There was a trial, and verdict rendered in favor of Eaton, the defendant in error. Judgment upon the verdict. Exceptions thereto; and cause brought here upon petition in error. The evidence brought to this court is quite voluminous, and its publication not deemed necessary to an understanding of the points decided in the opinion.

W. H. Morris and *Hastings & McGintie*, for plaintiff in error.

This action is not maintainable. *Ralston v. Oursler*,

12 Ohio State, 105. *Armstrong v. Harvey*, 11 Id., 532. *Patty v. Mansfield*, 8 Ohio, 371.

The plaintiff in error contends that the facts stated in the petition of the defendant in error do not justify the entering of a judgment in his favor.

Replevin can only be maintained for the recovery of the possession of specific personal property which must be described, not only in the affidavit for replevin, but in the petition in such a manner as to be recognized by an officer about to seize them.

And in defendant's petition he describes the articles as all the goods in a certain store on a given day long prior to the issuance of the writ. It would seem therefore he sues for a conversion as well as to recover possession. *Maxwell v. Farnam*, 7 How, Prac., 236.

Notwithstanding the statutes make questions of fraudulent intent concerning fraudulent conveyances a question of fact for the jury, a verdict against evidence may be set aside in this as in other cases, and if the court submit the question of fraud without proper instructions the verdict may be set aside in like manner. *Marston v. Valtee*, 12 Abbott's Prac., 143. *Tappan v. Butler*, 7 Bosw., 480.

A verdict unsupported by or against the decided weight of evidence, will be set aside. *Dean v. King*, 22 Ohio State, 110, and cases there cited.

M. C. B. True, for defendant in error.

I. The court gave the jury only one instruction asked for by plaintiff below, to-wit:

"4. If the jury find the right of possession of the goods in question to have been in the plaintiff at the commencement of this action, they will find for the plaintiff; and with reference to the right of possession, it does not make any difference whether the so-called

bill of sale was intended as an absolute sale or mortgage, if they also find that possession of the goods, was taken and continued by said Emerson H. Eaton, under the said bill of sale and the transaction between the two Eatons was in good faith."

That this instruction as given was manifestly correct, see Gen. Stat., 393, 394, 554, 693.

II. A debtor in failing circumstances may prefer his own relatives in payment or security of his debts, and this of itself is not evidence of fraud. *Hempstead v. Johnston et al.*, 18 Ark., 123. *Jackson v. Brownell*, 3 Caine's R., 222. *McMenomy et al v. Ferrens*, 3 Johns., 71.

III. The verdict of the jury will not be disturbed if there is any testimony to sustain it. *Weisiger v. Chisholm*, 28 Texas, 790. *Hicks v. Stone*, 13 Minn., 436. *Breese v. State*, 12 Ohio St., 156. *Hammond v. Hammond*, 21 Ohio St., 621. *State v. Lamont*, 2 Wis., 437. *Lockwood v. Stewart*, 12 Wis., 628. *Hendy v. Smith*, 28 Ga., 308. *Bowman v. Torr*, 3 Clarke, 574. *Edminston v. Garrison*, 18 Wis., 594. *Robbins v. Alton Ins. Co.*, 12 Mo., 381. *McKnight v. Wells*, 1 Mo., 13.

MAXWELL, J.

I. In this action the answer alleges that after the issuance and levy of certain executions on the goods in controversy, defendant in the court below "received a notice from the plaintiff that he was the owner of said goods and chattels, and I then forthwith gave notice to said plaintiff that the trial of the right of property in said goods and chattels would be had, as is provided by law, before R. L. Comwell, one of the justices of the peace in and for said county of Saline, and state of

Nebraska, and a jury; and afterwards, to-wit, on the eleventh day of March, 1874, a trial of the right of property was had before the said R. L. Comwell and a jury, and upon said trial the right of property was found to be in the said W. T. Eaton and not in said plaintiff."

The plaintiff in error was sheriff of Saline county and as such levied on the goods in question. But two questions are presented by the bill of exceptions:

First. Did a trial of the right of property before a justice of the peace preclude the defendant in error from bringing an action of replevin?

Second. Is the verdict sustained by the evidence?

It is claimed that a trial of the right of property was had under the provisions of sections 486, 487, and 488, of the code of civil procedure, and that in consequence thereof an action of replevin will not lie against the sheriff. These sections of our code were copied from the code of civil procedure of Ohio. This question has frequently been before the supreme court of that state.

In *Ralston v. Oursler*, 12 Ohio State, 111, the court say: "The claimant having in this instance voluntarily availed himself of the statutory remedy instead of resorting, as he might have done, to the remedies left open to him by the common law, must be regarded as having elected to take this peculiar remedy, with all its statutory incidents, and cannot now, so far at least as the sheriff is concerned, complain of its infringement of his constitutional rights."

In *Abbey v. Searls and Rider*, 4 Ohio State, 598, the court say: "The claimant is not bound to have a trial of the right of property, and if he nevertheless see fit to have it, and fail to establish his right, thereby adding apparent strength to the claim of the creditor, that the property be held by the process, he ought not to be allowed, in a subsequent proceeding against the officer, to show his right to it."

In *Patty v. Mansfield*, 8 Ohio, 369, the court say: "No person is bound to claim his property under this statute. He may at once commence his action at common law against the sheriff or other officer. And if he prefer the statutory remedy he ought to be concluded by it, so far at least as the officer is concerned."

In *Jones v. Wilson, Carr & Co.*, 16 Ohio State, 420, it was held that where goods were levied upon by a sheriff under color of process in attachment or execution issued from a court of record, and the same are claimed by a person other than the defendant named in the process, a trial of such claimant's right to such property under the statute can be instituted only at the instance of the claimant, and cannot be instituted at the instance of the sheriff or other officer making the levy against the will of the claimant.

In a proceeding of this kind the *claimant* becomes the actor. It is his duty to give notice in writing to the plaintiff in execution of the time and place of trial; and no trial of his right to the property can be had until it is made to appear that such notice has been given. The result of the trial is or may be to prevent the claimant from bringing an action against the officer making the levy. If the jury find against the claimant he cannot afterwards maintain an action against the officer; while if the jury find in favor of the claimant, the plaintiff in execution may tender the undertaking provided for by section 488, and require the sale to proceed, and the officer in such case will not be liable to the claimant, his remedy being upon the undertaking. But the officer has no authority whatever to institute proceedings of this kind without the consent of the claimant, as he cannot be deprived without his consent of his right to a trial by jury, nor (under our present constitution) his right to have the case reviewed in the court of last resort.

But there is no allegation in the answer, nor proof to

show at whose instance the proceedings before the justice were instituted. It is said that E. H. Eaton claimed the goods, but that of itself is not sufficient to authorize the commencement of summary proceedings under the statute. Nor is there anything in the answer or bill of exceptions to show that the justice rendered judgment on the finding of the jury in favor of the plaintiffs in execution, as required by section 487 of the code. The case, as made by the record, falls far short of being a judgment in bar, which would prevent the defendant in error from maintaining an action against the officer for the recovery of the goods.

II. Where a verdict is clearly wrong it should be set aside, but a mere difference of opinion between the court and jury will not warrant the former in setting aside the verdict of the latter. It is the province of the jury to pass upon questions of fact; but if a mere difference of opinion between the court and jury would be sufficient to authorize the court in setting aside a verdict, it would in effect substitute the court for the jury in the determination of questions of fact. *Seymour v. Street*, *ante*, page 85. *McGatrick v. Wasson*, 4 Ohio State, 566.

After a careful examination of the evidence in this case, we are of the opinion that the verdict is fully sustained. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

DON. T. C. PETERS, APPELLEE V. LLOYD W. DUNNELLS, APPELLANT.

1. **Statute of Limitations:** DEMURRER. When it appears on the face of the petition that the cause of action arose at such a period, that under the statute of limitations no action can be maintained thereon, the defendant may demur to the petition, on the ground that the facts stated therein are not sufficient to constitute a cause of action.

2. ———: MORTGAGES. An action to subject mortgaged property to the payment of the mortgage debt is a proceeding *in rem*.

3. ———: ———: CONSTRUCTION OF STATUTE. The proviso to Sec. 17 of the code of civil procedure, that the absence from the state, death or other disability of a non-resident, shall not operate to extend the time within which actions *in rem* shall be commenced by, and against, such non-resident applies, to mortgages.

4. ———: ———: ———. If an action upon a note secured by mortgage is barred by the statute of limitations, an action for foreclosure of the mortgage is also barred. *Kyger v. Ryley*, 2 Neb., 20; *Webb v. Hoselton*, 4 Neb., 308.

APPEAL from the district court of Sarpy county. Tried below before LAKE, CH. J. The opinion states the case.

C. A. Baldwin, for appellant Dunnells.

It seems almost impossible to add anything by way of argument to the plain words contained in the proviso to section 17 of the civil code.

The plaintiff refers to section 20 for aid, and upon demurrer to his original petition amends so as to make the averments thereof correspond with that section, and to that end, proof was taken and is set forth in the bill of exceptions.

To defeat the statute of limitations, the plaintiff claims that the defendant was a non-resident of the county; and yet does not claim or pretend, but that he

could have brought his action at any time to foreclose, notwithstanding such absence. He now brings his action while the defendant is still such non-resident.

So far as the testimony is any way important, it shows that at the maturity of the note, and for a year thereafter, the defendant resided in Sarpy county.

The plaintiff's witness does not know what became of him afterwards.

The defendant's witness swears that he was occasionally in Sarpy county, but became a non-resident some year or more after the note became due.

So far as relates to the question of limitation the evidence will not affect the case.

A construction of Secs. 6 and 17 will determine the whole matter. The real question is as to the nature of the action.

Is it an action *in rem?* *In rem* is a technical term used to designate actions instituted against the thing in contradistinction to personal actions which are said to be *in personam.*

Proceedings *in rem* include not only those instituted to obtain decrees or judgments against property as forfeited in the Admiralty or the English Exchequer, as a prize, but also suits against property to enforce a lien. See 1 Greenleaf Evidence, §§ 525–541; also, Bouvier's Law Dictionary.

This distinction has ever been recognized in our courts.

If, then, this be a proceeding to enforce a lien, a proceeding *in rem*, does not section 17 apply, and by express terms provide, that "absence from the state shall not operate to extend the time" within which, actions shall be commenced as fixed in Sec. 6, to-wit: ten years, and determine this case?

I make no appeal in behalf of the statute of limitations, as our courts are bound to recognize it as a legal

defense. Nor will I cite authorities to sustain fundamental principles here involved.

The judgment below should be reversed.

W. J. Connell, for appellee.

The counsel for appellant, in this case, in submitting his defense, proceeds entirely upon the theory that this is exclusively an action *in rem*, and that section 6 referred to, is the one applicable to this case. In this, we think, he is wrong. Section 6 applies to the recovery of the title or possession of lands, tenements, etc., limiting the time within which such actions can be brought, to ten years, and declaring that said section shall also be construed to apply to mortgages. This section was amended February, 1869, in two particulars, as follows: 1st, by changing the time within which such action could be brought, from *twenty-one* to *ten* years, and 2d, by adding the last clause, "This section shall be construed to apply also to mortgages." Previous to the time of the taking effect of this amendment, to-wit: July 1st, 1869, the section referred to, even though applicable so far as the *time* within which actions could be brought was concerned, would not affect *this* action, as such section could not, without legislative enactment, properly be held to apply to mortgages.

But, independent of this objection, we think, section 6 as amended, could not, in view of the evidence as admitted, be held to apply to this action for the reason that this action is clearly taken out of its provisions by section 20, of the same title.

And we submit further that section 6, as amended, or even before amended, could have no application to this case, for the reason that the proper statute of limitation governing this case is, that which relates to the time within which an action may be commenced on a promise in writing (promissory note), the note being the princi-

pal and the mortgage being only incident thereto. See *Kyger v. Ryley*, 2 Neb., 20, which expressly decides this point. Also see *Jackson v. Sackett*, 7 Wend., 94 and other cases referred to in opinion in *Kyger v. Ryley*, delivered by Mason, Ch. J.

If, then, we are correct in this position, the defense here sought to be made is utterly without foundation and cannot be sustained in law.

If the action upon the note was barred, could the action of foreclosure upon the mortgage be sustained, even though commenced within the ten years? We think not, and on this point, we think counsel for appellant will agree with us. How, then, if the action on the note be not barred, can the mortgagee be estopped from foreclosing his mortgage securing the same, and obtaining his rights thereunder by proper decree? Supposing a mortgage was given to secure a note due in one year, and time of paying principal upon payment of interest annually, was extended from year to year, for *twelve* years. Could it then be claimed that the statute of limitations had run against the *mortgage*, and therefore no decree of foreclosure could be rendered? We think not.

The evidence in this case clearly shows that the action on the note was not barred by reason of the absence of appellant from this state, and even had appellant resided in this state *constantly*, from the time of executing the note to the present, this action would not be barred.

The note matured August 31, 1859, and the law then in force relating to the limitation of such action was as follows: "An action upon a specialty, or any agreement, contract or promise in writing, can only be brought within fifteen years." Laws 1859, page 111.

No change was made in said law of 1859 until the revision of 1867, when such time was reduced to five years by section 10 of said title, and the *five* years then having already expired, such amendment could not affect the

rights of said parties, but the old law would continue in force. See Angell on Limitations, fifth edition, section 22 and cases there cited.

It is very questionable if the appellee in this case would be affected by the amendment of section 6, reducing time from twenty-one years to ten years, even if said section was held to apply to this case. See *Wilson v. Richards*, 1 Neb., 342.

MAXWELL, J.

This is an action to foreclose a mortgage on certain real estate in Sarpy county. The note was due and payable August 31, 1859. The petition, in addition to the usual averments in an action of foreclosure, alleges that the defendant before the maturity of the note removed from the state and has continued to reside out of the state ever since.

The defendant demurred to the petition on the ground the the facts stated therein were not sufficient to constitute a cause of action. The demurrer was overruled by the court. The defendant then answered the petition alleging among other grounds of defense, that the cause of action did not accrue within *ten* years next before the commencement of the action. Testimony was taken and a decree rendered in favor of the plaintiff. The defendant appeals to this court.

The principle is well settled under our code that where it appears on the face of the petition that the cause of action arose at such a period that under the statute of limitations no action can be brought, the defendant may demur to the petition on the ground that it does not state facts sufficient to constitute a cause of action. Section ten of the code of civil procedure provides that "an action shall be commenced within five years upon a specialty, or any agreement, contract, or promise in writing." The proviso to section seventeen, which took effect Sep-

tember 1, 1866, is "that the absence from the state, death, or other disability of a non-resident, save the cases mentioned in this section, shall not operate to extend the period within which actions *in rem* shall be commenced by or against such non-resident and his representatives."

What is an action *in rem?* In *Woodruff v. Taylor*, 20 Vt., 65, the Supreme Court of Vermont say: "The object and purpose of a proceeding *purely in rem* is to ascertain the right of every possible claimant; and it is instituted on an allegation, that the title of the former owner, whoever he may be, has become divested, and notice of the proceeding is given to the whole world to appear and make claim to it. From the nature of the case the notice is constructive only as to the greater part of the world." "But beside these, there is another class of cases, which may, perhaps, to some extent, be considered as proceedings *in rem*, though in form they are proceedings *inter partes*. An attachment of property in this state, where the court has jurisdiction of the property, but not of the person of the defendant, and a sale of it (or a levy upon it if it be real estate), on execution, is in the nature of a proceeding *in rem*."

The payment of a debt in obedience to the order of the court which issued the attachment, will protect the garnishee, not only against the defendant, but against third persons claiming under him, by an assignment made after notice was served on the garnishee.

While proceedings *in rem* appear originally in England to have been restricted to cases arising in the spiritual, admiralty, or prize courts, such as those relating to the revenue, condemnations of captured property, divorce and alimony, and probate of wills and letters of administration, it will not be contended that such restrictions prevail at the present time. In this country the courts have generally held proceedings *in rem* to include proceedings by creditors against the property of

their debtors. "In such cases, for all the purposes of the suit, the existence of the property so seized or attached within the territory, constitutes a just ground of proceeding to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the decree or judgment. But if the defendant has never appeared and contested the suit, it is to be treated to all intents and purposes as a mere proceeding *in rem*, and not as personally binding on the party as a decree or judgment *in personam;* or in other words, it only binds the property seized or attached to the extent thereof." Story's Conflict of Laws, Sec 549; *Andrews v. Herriot*, 4 Cowen, 520, note; *Holmes v. Rawson*, 20 Johns., 229; *McDaniel v. Hughes*, 3 East., 336.

This action, so far as it is sought to subject the mortgaged property to the payment of the debt, is clearly a proceeding *in rem*, and more than five years having elapsed after the law took effect, before the commencement of the suit, the action is barred by the statute of limitations.

In *Kyger v. Ryley*, 2 Neb., 20, this court held that if a recovery upon a note secured by mortgage, is barred by the statute of limitations, an action for foreclosure of the mortgage is also barred; the demurrer to the petition, therefore, should have been sustained.

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

REVERSED AND REMANDED.

GRIGGS AND ASHBY, APPELLEES, v. GEORGE W. WHITE, APPELLANT.

1. **Attorney's Lien.** An attorney has a lien upon a judgment to the extent of his reasonable fees and disbursements in the suit in which it was obtained. And this right is paramount to the rights of the parties in the suit.

2. ———: DEFENDANT CANNOT AVOID LIEN BY PAYMENT TO CREDITOR. Where a defendant against whom judgment has been recovered has notice of such lien, he cannot evade the payment of the sum actually due for such services by payment to the creditor of the amount of the judgment.

3. ———: ASSIGNMENT OF. But where attorneys have rendered services in a case, but have filed no notice of a lien, the mere assignment of their account to parties claiming a lien will not authorize the latter to enforce such claim against the debtor. The right to a lien against a debtor is restricted to the claim set forth in the notice.

THIS was an appeal from the district court of Jefferson county. Tried below before POUND, J. From the pleadings and evidence in the cause it appears that in 1869, Calhoun and Croxton, attorneys residing in Nebraska City, Otoe county, sent to Griggs and Ashby, at Beatrice, Gage county, a transcript of a judgment recovered by them in the district court of Otoe county in an action wherein Benjamin F. Hampton was plaintiff and one James Frazier was defendant. In 1873, a decree was rendered in the district court of Jefferson county foreclosing a certain mortgage held by said James Frazier against premises owned by George W. White, in which cause Benjamin F. Hampton appeared as defendant, and it was adjudged that of the amount due from said George W. White to said Frazier, the claim of said Hampton be first paid. Upon this decree Griggs and Ashby, who were attorneys for Hampton, filed an attorney's lien for the sum of five hundred dollars. The

notice of the lien was filed with the papers in the suit January 27, 1874. From other evidence introduced it appears that in August, 1872, and prior to the rendition of the decree in the case of Frazier against George W. White, that Hampton assigned to one George H. White all his right, title, and interest in and to the judgment recovered against Frazier. On the 16th of April, 1875, Hampton and George H. White, in consideration of the payment of the said claim of Hampton as found in the foreclosure suit, executed a release thereof to said George W. White, he failing to deduct therefrom the lien claimed by Griggs and Ashby. Griggs and Ashby then commenced their action to set aside said release so far as it affected their lien and for its enforcement against the premises of George W. White. The district court found in their favor entering a decree for the sum of $279.80, and White appealed.

W. L. Wheeler, for appellant.

E. E. Brown, for appellees.

MAXWELL, J.

Section eight, Chap. V, Gen. Statutes, provides as follows: "An attorney has a lien for a general balance of compensation upon any papers of his client which may come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and the hands of the adverse party in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party."

In *Boyer v. Clark & McCandless*, 3 Neb., 168, this court held that an attorney had a lien upon a judgment to the extent of his reasonable fees and disbursements in the suit, in which it was obtained, and that this right is paramount to any rights of the parties in the suit. We still adhere to the opinion announced in that case.

The defendant in his answer denies notice of the lien; but we think there is sufficient evidence to warrant the court in finding that he had notice of the lien before paying the amount due on the decree. Such being the case, he could not evade the payment of the sum actually due the plaintiffs for services rendered in the case, by payment to the mortgagee of the amount due on the decree. The plaintiffs are therefore entitled to judgment for the sum of $150.00, with interest from the time of filing the lien.

The plaintiffs are the assignees of the account of Calhoun & Croxton for services rendered in the same case. In the notice claiming a lien, however, there is no claim for such services, therefore no allowance can be made in this case, as the right of recovery is restricted to the grounds set forth in the notice. The judgment of the court below will be modified in accordance with this opinion.

JUDGMENT ACCORDINGLY.

GEORGE P. EATON, IMPLEADED WITH NAVE, MCCORD & COMPANY, PLAINTIFF IN ERROR, v. SAMUEL BARTSCHERER, DEFENDANT IN ERROR.

GEORGE P. EATON, IMPLEADED WITH TURNER, FRAZIER & COMPANY, PLAINTIFF IN ERROR, v. SAMUEL M. BARTSCHERER, DEFENDANT IN ERROR.

1. **Practice**: UNDERTAKING IN ATTACHMENT: ACTION ON. In an action on an undertaking in attachment the petition should allege that the order of attachment was *wrongfully* sued out, or obtained.

2. ——: ——: ——. It is not enough to state in the petition that the attachment was quashed, and the property released by proceedings in error.

ERROR to the district court of Lancaster county. Tried below before POUND, J. The opinion states the case.

D. G. Hull, for plaintiff in error.

Lamb, Billingsley & Lambertson, and *J. S. Stull*, for defendants in error.

LAKE, CH. J.

These two cases involve precisely the same questions, and therefore will be considered together.

The plaintiff in the court below, who is defendant here, brought his actions to recover damages upon two undertakings executed to him as defendant in certain attachment proceedings, whereby his property was seized and subjected to the payment of his debts.

After trials to the court upon the petitions, answers and proofs, and findings in favor of the plaintiff, motions were duly made for judgments in favor of the defendants, upon the pleadings, notwithstanding the findings of the court upon the trial. These motions were both overruled and judgments entered in favor of the plaintiff. No testimony was preserved, and the only question to be determined is whether under the pleadings these judgments can be sustained. In the examination of this question it is necessary to look first to the petitions, in order to ascertain whether they state good causes of action, for if they fail in this respect the judgments cannot stand.

The undertakings upon which these actions were brought, contain simply the statutory requirements by which the obligors therein promise to pay the defendant all damages, which he might sustain by reason of the attachments, if the orders therefor were "wrongfully obtained." There is no agreement to pay all damages that might be occasioned by the attachments, in any

event, but only in case it should be established that the orders of attachment were "wrongfully" sued out.

In these petitions there is no charge that these orders of attachment were wrongfully or unjustly obtained, nor is there any statement from which that fact can possibly be inferred. There is, to be sure, in each of them an allegation that after the attached property had been sold, and the proceeds applied upon the judgments in pursuance of the orders of the court, proceedings in error were prosecuted which resulted in the dissolution of the attachments. But there is nothing to show upon what this decision was based; and for aught that appears it may have been for a mere technicality, or for some other cause entirely consistent with the fact that the plaintiff's were fully justified in resorting to the process of attachment for the collection of their claims. In *Sharp v. Hunter*, 16 Ala., 765, the court say: "We think that by the wrongful suing out of the attachment is meant not the omissions, irregularities or informalities which the officer issuing the process may have committed in its issuance, but that the party resorted to it without sufficient grounds." The following are authorities on the same point under statutes quite similar to our own. *Petit v. Mercer*, 8 B. Monroe, 51. *Raver v. Webster*, 3 Iowa, 502.

We are of opinion therefore that, in failing to allege, or to show by reasonable inference that the orders of attachment were "*wrongfully*" sued out, or, in other words that no just grounds actually existed for a resort to this extraordinary process, these petitions are fatally defective, and wholly inadequate to support these judgments. As the pleadings stood the defendants were clearly entitled to judgments in their favor, and the motions therefor should have been sustained, unless the plaintiff saw fit to remedy the defect by amending his petitions.

This being decisive of the cases it is unnecessary to examine the answers, or to determine the effect of there being no reply. It is not claimed that there is anything in the answers which would supply the defects which we have pointed out in the petitions, and it is clear that there is not.

For these reasons the judgments must be reversed and the cases remanded to the district court, with instructions to permit amended petitions to be filed, supplying the defect above pointed out, otherwise to render final judgments in conformity with this opinion.

REVERSED AND REMANDED.

WILLIAM S. HORN, APPELLEE, v. WILLIAM W. QUEEN, APPELLANT.

1. **Practice:** APPEAL. An appeal will lie to the supreme court from the final judgment of the district court, in an action brought to set aside a judgment of a justice of the peace, and to obtain a new trial.

2. **Equity.** A court of equity will grant relief against judgments obtained by fraud, surprise or mistake, or when from any cause manifest injustice has been done.

THIS was an appeal from a decree rendered by HON. S. B. POUND, sitting in the district court of Lancaster county, granting a new trial to the plaintiff, in an action before a justice of the peace wherein he was defendant. The case came before this court upon demurrer to the petition and is reported in 4 Neb., 108. A motion to dismiss the appeal was made and overruled, the following opinion being filed:

LAKE, CH. J.

A motion is made in this case to dismiss the appeal for two reasons: *First*, that the action is not a proceeding in equity. *Second*, because it does not appear that a final judgment has been rendered in the court below.

I. The action was brought in the district court to set aside a judgment of a justice of the peace, and to obtain a new trial on the ground that the judgment was rendered against the defendant in the suit during his necessary and unavoidable absence, and of which judgment he had no knowledge until it was too late to prosecute an appeal to the district court. The action, therefore, is clearly an original proceeding in equity to obtain relief from a judgment, which could be afforded only by a court exercising equity powers. Being an equity case, it is one in which an appeal will lie to this court from a final judgment of the district court.

II. As to the second ground of the motion, we only need to refer to the record, which discloses the fact that a final judgment was rendered, although somewhat informally, yet substantially in accordance with the prayer of the petition. The motion to dismiss the appeal must therefore be overruled.

MOTION OVERRULED.

The cause then came on to be heard, and from the evidence in the record brought to this court, it appeared that the plaintiff held a certificate of purchase of a certain tract of land from the Burlington and Missouri River Railroad Company, upon which he had entered and carried away some oats which defendant had sown thereon. The defendant introduced in evidence copy of letter from the commissioner of the general land office to the secretary of the interior, transmitting papers

in the case of C. L. Gumaer on appeal from decision of said commissioner canceling his homestead entry upon the same tract of land. From this letter and its accompanying documents it appeared that the defendant, Queen, had made an application for the entry of the said tract of land as a homestead, December 22, 1870, which was rejected on the ground that said tract had enured to the benefit of the Burlington and Missouri River Railroad Company; that said application was prior to the date at which Gumaer was allowed an entry upon the tract, being May 10, 1871; but that afterwards Gumaer's entry was cancelled, and permission given Queen to perfect his title. These facts, together with those stated in the opinion, are sufficient to an understanding of the issues involved in the case.

Tuttle, Harwood & Ames, for appellant, Queen, presented the following points:

I. The demurrer admitted—and this point was especially dwelt upon by the learned judge who pronounced the opinion of the court, 4 Neb., 108, that the plaintiff held a certificate of purchase of the tract of land from the B. & M. R. R. Co., and that the defendant, Queen, had a second homestead entry on the land, the first held by one Gumaer being uncanceled, yet he had never resided on the land, or complied with any of the provisions of the law. In short, the demurrer admitted that Queen's homestead entry, under which alone he claimed, was void, and that the plaintiff was the rightful owner of the property, rightfully in possession. Whereas, the testimony shows conclusively that Gumaer's entry was cancelled before that of Queen was made or allowed, and that consequently Queen had the first and only valid entry on the land, and the decisions of the Land Department, and of the Secretary of the Interior of the United

States, certified transcripts of which constitute a part of the record, are to the effect that the railroad company never had a title or right of possession to the land, and hence could not confer either upon the plaintiff. These decisions have been acquiesced in by the parties concerned, and are conclusive upon the parties to this suit. It may be added that the United States Supreme Court has decided the exact question involved in exactly the same way. In no event, then, can the plaintiff be regarded otherwise than a trespasser, without color of right, as against the defendant, who possessed the license and authority of the United States Government.

II. It is a familiar and fundamental principle, especially applicable where relief is sought in equity, that "ignorance of the law excuses no one," and it *never*, except under very peculiar circumstances, and where the opposite party has been guilty of fraud, or some positive misconduct, furnishes ground for relief. *Bank of U. S. v. Daniel*, 12 Pet., 32. *Petters v. Clarence*, 38 Penn. State, 194. *Smith v. McClong*, 2 Cal., 586. *Mellich v. Robinson*, 25 Vt., 603. *Shafer v. Davis*, 13 Ill., 395. *Cooper v. Crosby*, 3 Gilm., 506. *Smith v. Pinney*, 2 Neb., 139.

III. The plaintiff shows himself to have been grossly negligent in not taking an appeal. He does not show that he had any defense to the action, but, on the contrary, virtually admits that he had none. The damages assessed by the justice, instead of being excessive, are, by the plaintiff's own showing, exceedingly moderate. The plaintiff, by his own showing, was a trespasser on the land, and by the testimony of witnesses was a willful trespasser on defendant's grain. As a matter of history, the plaintiff has long since abandoned the land, and rescinded his contract with the railroad company, receiving back from them his purchase price therefor.

If, upon this state of facts, a new trial can be granted, then in every instance, where a party is dissatisfied with the judgment of an inferior court, he may apply for and obtain a new trial, and that, too, by the tedious, dilatory and expensive means of a petition in equity, instead of by the cheap, simple and expeditious method of appeal provided by the statute.

Mason & Whedon, for appellee, cited *Horn v. Queen*, 4 Neb., 108. *Merrick v. Bowry*, 4 Ohio State, 60. *Tracy v. Sacket*, 1 Ohio State, 54. *Palmer v. The People*, 4 Neb., 68.

GANTT, J.

It appears from the record that, on the 18th day of January, 1873, the defendant commenced an action against the plaintiff, before a justice of the peace, in the city of Lincoln, to recover damages for an alleged trespass in entering upon land and taking and carrying away some oats. The summons was served by leaving a copy thereof at the residence of the plaintiff; the time fixed for the trial of the case was the 25th day of the same month, at ten o'clock. A. M., and at that time judgment was rendered against the plaintiff. The plaintiff brought this suit by petition in equity to set aside that judgment and grant a new trial, and to maintain his cause of action he offered evidence showing that from the 14th until the 24th of January he was away in Nemaha county attending to his son, who was dangerously ill with erysipelas, and requiring his constant care and attention during that time; that on the 25th day of the month he arrived home in very ill health himself, and in the afternoon of that day he saw a copy of the summons which had been left at his residence during his absence, but was too unwell to attend to any business. The next day he rode to Lincoln, but becoming very

sick, he immediately returned home without seeing any person in relation to the case, and from that day, for nearly three weeks thereafter, he was confined to his bed with a severe attack of erysipelas. His physician testified that he was unfit to attend to any business during this time, and "was quite delirious at times." He also offered evidence showing grounds of defense to the action against him, which we think were sufficient to invoke the interposition of a court of equity when considered in connection with the facts above stated.

It seems clear from the evidence that the plaintiff's care of and attention to his son in his sickness, was an absolute necessity, and could not be avoided; and that when he returned home he was sick and incapable of attending to business for nearly three weeks thereafter. Under these circumstances we think he is entitled to the relief sought.

A court of equity will grant relief against judgments obtained by fraud, surprise or mistake, or when, from any cause, manifest injustice has been done. And when a party, from some unavoidable circumstance, and without any laches or want of reasonable diligence on his part, is prevented from appearing and making his defense to a suit, courts will relieve him upon being satisfied that there is reasonable ground to believe injustice has been done to him by a trial in his absence. *Horner v. Conover*, 2 Dutch. (N. J.), 139. *Brooks v. Whiston*, 7 S. & M., 513.

We are satisfied from the evidence that the plaintiff's case comes within the above rule, and therefore the finding must be in his favor, and the decree of this court must be rendered accordingly.

DECREE FOR PLAINTIFF.

MATT MILLER AND OTHERS, PLAINTIFFS IN ERROR, v. NICHOLS, SHEPARD & CO., DEFENDANTS IN ERROR.

1. **Warranty.** When the soundness of a piece of machinery is guaranteed by a warranty, one of the conditions of which is that in case of a defect being discovered in any portion of it, the seller shall be liable only on condition of the production of the defective piece at the manufactory, or to the agent by whom it was sold, this is a condition precedent, and must be complied with, or there can be no recovery.

2. ———. Where the very defect complained of is fully and clearly covered by the warranty, no liability can be established against the seller on the ground of fraud in not disclosing the defect if known by him at the time of the sale. In such case the purchaser must rely on the contract of warranty.

ERROR to the district court of Colfax county. Tried below before POST, J. It was an action upon two promissory notes given by plaintiffs in error in part payment of a threshing machine which they had purchased from defendants in error, who sold the same upon the following warranty:

"This machine is ordered, purchased, and sold subject to the following warranty and agreement: That with good management it is capable of doing a good business in threshing and cleaning grain, and is superior to any other kind of machine or to any 'endless apron' thresher manufactured in the United States in its adaptation for separating and saving from the straw the various kinds and conditions of grain and seeds, with less waste, less litterings and less detention from wet or bad conditioned straw or bad weather. Conditioned that upon starting the machine the undersigned purchasers shall intelligently follow the printed hints, rules and directions of the manufacturers, and if by so doing they are unable to make it operate well, written notice, stating wherein it fails to satisfy the warranty, is to be given by the pur-

chaser to the dealer through whom purchased, and to Nichols, Shepard & Co., at Battle Creek, Michigan, and reasonable time allowed to get to it and remedy the defect, unless it is of such a nature that they can advise by letter. If they are not able to make it operate well (the purchasers rendering necessary and friendly assistance), and the fault is in the machine, it is to be taken back and the payments refunded, or the defective part remedied and made the same as in their other machines which do perform satisfactorily. But if the purchaser fail to make it perform through improper management, or neglect to observe the printed or written directions, then the purchasers are to pay all necessary expenses incurred.

"Also, that if any part of said machine, except the levers or belting, fails during this year in consequence of any defect in material of said part, if the purchaser shall have observed the printed or written directions applicable to the management of such part, Nichols, Shepard & Co. are to furnish a duplicate of said part free of charge, except freight, after presentation of the defective piece, clearly showing a flaw in material, at the factory or to the dealer of whom said machine was bought at any time within one year; but deficiencies in pieces not to condemn other parts, and deficiencies in general adaptation for threshing, separating and cleaning, which alone involve the taking back of the machine are to be reported within ten days after starting it, and not after long use and injury to the machine."

The first defense in the answer of plaintiffs in error was that the warranty had been broken in this: One of the timbers on which the horse power rested was broken when purchased, bolted together, puttied over and painted; by reason of the insufficient timber the power gave way in the wheels, iron, etc., and could not be used.

That Miller and others, as soon as the defect was discovered, notified in writing Nichols, Shepard & Co. and their agent of the defect. That Nichols, Shepard & Co. failed to remedy the defect or refund the money.

The second defense charges fraud in the sale, in misrepresentations of the kind of materials used in the construction of the machine, etc., claiming damages in the sum of one thousand five hundred dollars. To this answer Nichols, Shepard & Co. replied. The case was tried by a jury, and upon the evidence adduced the court instructed the jury to return a verdict for Nichols, Shepard & Co. Judgment on the verdict. Exceptions. Cause brought here by petition in error.

W. A. Marlow and *C. J. Phelps*, for plaintiffs in error.

The manufacturer of new machinery impliedly warrants that it is constructed out of sound and good materials, and is fit for the use intended; if not so constructed he is liable to the purchaser for all damages sustained. This rule is too well settled to require the citation of authorities to sustain it. This implied warranty must govern in this case, because it has not been changed by the express warranty as given. The implied warranty is modified in this: it fixes the measure of damages. If the machine was not as warranted, Nichols, Shepard & Co. had the privilege of making it so on being notified, etc. If they could not make it operate well, then they should have taken it back and refunded the money. *Rodgers v. Miles*, 11 Ohio State, 48. *Field v. Kinner*, 4 Kan., 476. *Brenton v. Davis*, 8 Blackf., 316. *Walton v. Cody*, 1 Wis., 420.

This implied representation may or may not amount to a fraud on the purchaser, according to the circumstances of the particular case. In this case it did, because

the manufacturer intended to deceive. He could have prevented the injury; he knew of the broken timber; he could have advised the purchaser of that fact; his silence was a fraud on the purchasers. 1 Parsons on Contracts, 590. *Jones v. Edwards*, 1 Neb., 170. *Frenzel v. Miller*, 37 Ind., 1. *Belden v. Henriques*, 8 Cal., 88. *Miller v. Stewart*, 24 Cal., 503. *Hadley v. Clinton County*, 13 Ohio State, 502. *Miner v. Medbury*, 6 Wis., 295. *Hill v. O'Ferrell*, 45 Ind., 268. *Fowler v. Swift*, 3 Ind., 188. *Page v. Ford*, 12 Ind., 46.

W. H. Munger, for defendants in error.

The giving of the notice, if the machine failed in its general adaptability to do a good threshing business, and the presentation of the part manufactured of defective material at the factory, if the fault was in being constructed of defective material, were conditions precedent to be performed on the part of the purchaser, and unless they fully complied with the conditions precedent they cannot hold Nichols, Shepard & Co., liable for a breach of the warranty. *Walton v. Cody*, 1 Wis., 420. *Bromburger v. Greiner*, 18 Iowa, 477. *Horner v. Woodruff*, 1 Doug. (Mich.), 51. *Hills v. Bannister*, 8 Cow., 33. *Priney v. Hall*, 1 Hill, 90. *Bragg v. Bamburger*, 23 Ind., 198.

No representations are shown to have been made, except such as are contained in the express warranty given. That N., S. & Co. had knowledge of the defects is not shown, unless such knowledge is inferred from the fact that they were the manufacturers. No intention to deceive can be maintained, because N., S. & Co. agree to furnish duplicates of defective parts free of charge.

The fact that portions of said machine was constructed of defective material would not constitute a fraud in this case even if such was the rule ordinarily, as the parties

seemed to contemplate that there might be defective material, and provided what should be done in such case, to-wit: defendants should present the defective pieces at the factory and plaintiffs would furnish duplicates of such pieces; defendants cannot claim any surprise in this case; had they presented the material at the factory and plaintiffs refused to furnish duplicates, defendants could recover on breach of warranty.

LAKE, CH. J.

In principle this case is not distinguishable from that of *Nichols, Shephard & Co. v. Hail*, 4 Neb., 210, in which this court held that, "when in a contract of warranty there are conditions precedent to be observed and performed by a purchaser, he must show a fair and reasonable compliance with the terms of the contract on his part or he will not be permitted to enforce it against the warrantor."

In the case now before us the terms of the contract are undisputed. It is in every particular conditional, and covers every conceivable defect that could exist in the machine.

As to the general adaptability of this threshing machine to do all the work that was expected of it, and to do it well, there is no complaint. In these respects it answered fully the requirements of the warranty. The only substantial defect being in one of the timbers on which the horse-power rested.

The testimony shows that this timber gave way so as to need repairing in January, 1873, after having been run steadily some five months; and it was continued in service until the following September, when it was cast aside. The defect was caused by a check, or split in the timber, which in the manufacture had been so brought together and secured with iron bolts and paint as not to be observed until it finally gave out.

This defect was covered by the warranty, and Nichols, Shephard & Co. would have been required to make it good had it been properly brought to their notice. That portion of the contract bearing upon this point, is in these words, viz: "Also, that if any part of said machine, except the levers or belting, fails during this year in consequence of any defect in the material of said part, if the purchasers shall have observed the printed or written directions applicable to the management of such part, Nichols, Shephard & Co. are to furnish a duplicate of said part free of charge, except freight, after presentation of the defective piece, clearly showing a flaw in material, at the factory, or to the dealer of whom the machine was bought, at any time within one year."

Such being the condition of the warranty, in order to show a liability under it, it is not enough to prove merely that a part of the machine was defective, but in addition to that fact it should appear that the defective piece was presented, either to the manufacturers themselves, or to their agent from whom the machine was purchased. But there is nothing in the record tending to show that there was any attempt on the part of the plaintiffs in error to comply with this condition, and having wholly failed in this respect, they are in no situation to complain of the defendants in error.

The attempt to establish the existence of fraud on the part of Nichols, Shephard & Co., in the sale of this machine, on the ground simply that a defective piece of timber was used, is futile. There was nothing tending in the least degree to taint the transaction with fraud so far as they are concerned. In the supposition that at least some unsuitable material might have been used in the manufacture of the article the parties agreed in writing what the effect should be, if on trial it should be shown that such was the case. By this contract, entered

into with a full knowledge of its import, and what it required of each, the parties are bound.

The evidence shows very clearly that there was no just defense to the notes, and the court did right in directing a verdict accordingly.

JUDGMENT AFFIRMED.

JOB A. DILLON, PLAINTIFF IN ERROR, v. RUSSELL & HOLMES, DEFENDANTS IN ERROR.

1. **Pleading:** ANSWER. When an answer contains an allegation that one of several defendants, joint makers of a promissory note, was in reality only a surety thereon, to which allegation there was no reply, it will be taken as true.

2. ———: ———: INSTRUCTIONS TO JURY. And if the court on request refuse to instruct the jury to this effect it is error.

3. **Error:** REVERSAL OF JUDGMENT. But it is not every error that calls for a reversal of a judgment. To have this effect the error must appear to have been prejudicial to the party seeking to take advantage of it.

4. **Principal and Surety:** RELEASE OF SURETY. Where the defense depended upon showing in addition to the fact of suretyship, the fact of an extension of the time of payment to the principal, which was alleged but not proved, the refusal of the court to instruct as above stated is no ground for reversal of the judgment.

5. ———: EXTENSION OF TIME TO PRINCIPAL. An extension of time to the principal for the payment will not have the effect to release the surety, unless the agreement to extend the time be such as will bind the holder of the note, and bar his action against the principal for some definite time.

6. ———: ———: ———. A mere voluntary forbearance on the part of the creditor, enlarging the time of payment, without consideration, will not work a discharge of the surety. Nor will such extension, if there be no definite time agreed upon, have the effect to release him.

ERROR to the district court of Johnson county. The plaintiff in error and H. N. Cornell were defendants in the court below, and upon the trial plaintiff in error requested the court to give the following instructions to the jury, which the court refused to do, and he excepted.

1. "The court instructs the jury that every material allegation of new matter as a defense, contained in defendant's answer, not controverted or denied in the reply of the plaintiffs must, for the purposes of the trial, be taken and considered as true, except allegations of value and amount."

2. "The court further instructs the jury that if they believe from the evidence that defendant Dillon is only surety for defendant Cornell on the note sued on, and that soon after it became due said Dillon requested plaintiffs to proceed at once to collect said note, and that defendant Cornell, the principal on the note, was then in insolvent circumstances; but that plaintiffs refused to do so and extended the time of payment to said Cornell without said Dillon's consent, and that afterwards, but before the institution of this suit said Cornell became and has since remained insolvent, that in that case defendand Dillon has become absolved from all liability on said note and you will find in his favor."

The court gave the following instruction at the request of said plaintiff in error:

3. "The court further instructs the jury that if they believe from the evidence that defendant Dillon is only surety, on the note sued on, for said Cornell, and that after said note became due said Cornell and plaintiff entered into a valid contract for the extension of the time of payment of said note, without the consent or knowledge of said Dillon, and that in pursuance of said contract the time of payment of said note was extended by said plaintiffs to said Cornell, without said Dillon's consent, you will find for defendant Dillon."

At the request of the defendants in error, Russell & Holmes, the court gave the following instructions, to which the plaintiff in error excepted.

1. "If you are satisfied from the evidence that no binding contract was made between Cornell and these plaintiffs, wherein the plaintiffs agreed to give him longer time without the consent of Dillon, you will find for plaintiffs, Russell & Holmes."

2. "In order that any agreement between Cornell and these plaintiffs shall operate as a release of Dillon, it must be an obligatory contract founded upon a consideration, or in other words the contract for extension between Cornell and these plaintiffs must be such a contract, as Cornell himself could have enforced if plaintiffs had brought action on the note against him."

3. "If you find from the evidence that Dillon was simply a surety on the note, you must yet render a verdict against him, and in favor of plaintiffs, unless you also find from the evidence that a contract was made between Cornell and the plaintiffs, based upon a consideration, to extend for a definite length of time, and without Dillon's consent."

S. P. Davidson, for plaintiff in error.

Where a party executes a note in form as principal, but in fact as a surety, which fact is known to the payee, parol evidence is admissible to show his real relations to the other contracting parties. *Riley v. Gregg*, 16 Wis., 703 [671].

And where a creditor does any act injurious to the surety, or inconsistent with his rights, or omits to do any act when requested by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases the surety will be discharged. *Gardner v. Van Nostrand*, 13 Wis., 608 [544]. *King v. Baldwin*, 17 Johns., 384.

If the surety on a note, at its maturity, request the creditor to proceed at once to collect the same, by suit if necessary, and the principal is then solvent, and the creditor refuses and neglects to do so until after the principal becomes insolvent, the surety will be exonerated from all liability on the note. *Pain v. Packard*, 13 Johns., 174. *King v. Baldwin*, 17 Id., 384.

The creditor is under an equitable obligation, and such is the essence of the contract, to obtain payment of the principal debtor, and not from the surety, unless the principal debtor is unable to pay the debt.

This is, also, evidently the proper construction to be put upon our own statute. Where judgment is rendered in any court of record upon any instrument of writing in which two or more persons are jointly and severally bound, and it be made to appear to the court by parol or other testimony, that one or more of said persons so bound signed the same as surety for his co-defendant, the clerk, in recording, shall certify which of the defendants is principal and which surety; and execution issued on said judgment shall command the sheriff to exhaust the property of the principal debtor first, and for want of sufficient property of principal debtor, to make the claim out of the property of the surety; and in all cases the property, both real and personal, of the principal debtor shall be exhausted before any of the property of the surety shall be taken in execution. General Statutes, 613, section 511.

The court erred in refusing to give the instructions asked for by plaintiff in error. See *Steele v. Russell*, *ante*, p. 211.

T. Appleget, for defendants in error.

An agreement by the creditor to enlarge the time, unless it is made in such consideration or in such form as to be binding upon him, and estop him from bringing an

action against the principal, does not discharge the surety. *Hunter v. Clark*, 28 Texas, 159. *Levitt v. Savage*, 16 Me., 72. *Bailey v. Adams*, 10 N. H., 162. *Joslyn v. Smith*, 13 Vt., 353. *Harter v. Moore*, 2 Blackf., 367. 1 Parson Contract (4th ed.), 513. *King v. Baldwin*, 2 Johns. Ch., 554.

A mere voluntary forbearance on the part of a creditor enlarging the time without consideration, is no discharge of the surety. Batemen's Commercial Law, 262. *Tate v. Wymond*, 7 Blackf., 240.

An agreement must not only be valid and binding in law, but the time of the extension must be definitely fixed. Batemen's Commercial Law, 263. *Miller v. Stern*, 2 Penn. State, 286. *Parnell v. Price*, 3 Rich. L., 121. *Gardner v. Watson*, 13 Ill., 347. *Waters v. Simpson*, 2 Gilm., 570.

LAKE, CH. J.

I. The action in the court below was upon a promissory note signed by the plaintiff in error and one Cornell as joint makers. To the petition Dillon answered that he was in reality only a surety for Cornell, who was the real principal, he having received the entire consideration for which the note was given, and that this was well known to the plaintiffs at the time they received it. Of this allegation there was no denial in the reply, and, therefore, for all the purposes of the action it must be taken as true.

Under the rules of pleading, as they stood prior to the code amendments of February 26, 1873, no reply was necessary to an answer, except to allegations constituting a counter-claim or set-off. *McCann v. McLennan*, 2 Neb., 286. By those amendments, however, a reply must be made to all material allegations of new matter contained in the answer, or they will be taken as admitted.

This is a statutory rule which the courts cannot disregard when the condition of the pleadings is such as to render it applicable. For these reasons we must hold that the court erred in refusing to give to the jury the first instruction tendered on behalf of the plaintiffs in error which embodied substantially the above proposition of law.

But in view of the fact that, even although his suretyship were fully admitted, there is nothing in the record tending to show that this error could possibly have prejudiced the plaintiff in error, it furnishes no ground for a reversal of the judgment. *Chase v. Washburn*, 1 Ohio State, 244. In order to justify the reversal of a judgment, the record must show affirmatively not only that error has intervened, but that it was prejudicial to the party seeking to take advantage of it. *Ohio Life Insurance and Trust Co. v. Goodin*, 10 Ohio State, 557.

In order to have made the admission that Dillon was a mere surety available as a defense, it was necessary also to establish by evidence that Russell and Holmes actually extended the time of payment on the note. This was attempted by the testimony of the defendant Cornell; but giving full credit to all that he says, it falls very far short of showing that they made such an extension as would have barred an action brought by them at any time after the note matured. Unless the extension be of this character, it does not prejudice a surety, nor will it operate to release him from his obligation to pay the demand. *Farmers' Bank v. Reynolds*, 13 Ohio, 84.

II. But in the refusal to give the defendants' second instruction, we see no error. The first proposition which it contained being to the effect that the plaintiffs were obliged, at their peril, to bring suit against the principal, at the mere request of the surety, is not sustained by the authorities. The better and almost universal rule

seems to be that in addition to the demand that the holder of the instrument shall proceed against the principal, there must, even in equity, be an offer of indemnity against costs and expenses in case the litigation should prove fruitless. *Wright v. Simpson*, 6 Ves., 734. *Bellows v. Lovell*, 5 Pick., 307. *Mahurin v. Pearson et al.*, 8 N. H., 539. *Page v. Webster*, 15 Me., 249. And another proposition contained therein, viz: that a mere postponement of payment, to no definite time, and for no new consideration, will have the effect to release the surety, is equally untenable. As before observed, in order to have this effect, there must be such an agreement as will bind the holder of the note, and bar his action against the principal for some definite time beyond its maturity. A mere voluntary forbearance on the part of the creditor enlarging the time of payment without consideration, will not work a discharge of the surety. *Leavitt v. Savage*, 16 Me., 72. *Waters v. Simpson*, 2 Gilman, 570. *Bailey v. Adams*, 10 N. H., 162. The defendants' third instruction, and also those tendered on behalf of the plaintiffs, and which were given to the jury, stated the law of the case correctly.

As to the pretended extension, Cornell was the only witness called upon to establish it. He says on this point: "I called on plaintiff Russell and made an agreement with him with reference to the payment of said note, which was as follows: that if he would extend the time of the payment of the note sixty days, or thereabouts, I would allow him fifteen per cent, which was agreed upon. This agreement was in March, 1875." Now, conceding all that can possibly be claimed from this testimony, yet it does not show that any extension was mutually and definitely agreed upon. The witness does not swear that Russell agreed to extend the time of payment for sixty days, or for any other definite time. If no definite time be fixed upon, there can be no bind-

ing extension. *Waters v. Simpson*, 2 Gilman, 570. *McGee v. Metcalf*, 12 S. & M., 535.

There being no error disclosed that could possibly have prejudiced the plaintiff in error, the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

ALLEN B. STRUTHERS AND OTHERS, PLAINTIFFS IN ERROR, v. J. B. MCDOWELL AND OTHERS, DEFENDANTS IN ERROR.

1. **Practice:** ATTACHMENT: AMENDMENT. An affidavit for the issuance of an attachment may be amended by leave of the court, even after a motion to quash the proceedings is filed, because of that particular defect.

2. ——. It is not error for the court to permit the officer before whom the affidavit was made to attach a venue, according to the fact, even after a motion has been filed to dismiss the attachment, on the ground of its omission.

THIS was a suit in the district court for Jefferson county, brought by defendants in error against plaintiff in error and R. B. Wallace as partners, under the firm name of Struthers & Wallace. Tried below before POUND, J. An attachment was issued in the cause. The affidavit filed in said cause as the basis for the attachment proceedings lacked a *venue;* Struthers, appeared specially and made a motion to set aside, dissolve, and discharge the attachment.

Defendants in error made a motion for leave to amend the affidavit. The motion to amend was sustained; the affidavit was amended, and the motion to dissolve the attachment overruled; to all of which rulings said Struthers excepted, and for the reversal of these erroneous rulings brought the cause here by petition in error.

S. P. Davidson, for plaintiff in error, contended that the venue is an essential part of an affidavit. Without it an affidavit is fatally defective and void. The affidavit must show on its face that it was made before some officer competent to take an affidavit, and within some place where he was authorized by law to administer oaths. *Lane v. Morse*, 6 How. Prac., 395. *Cook v. Staats*, 18 Barb., 407. *Thompson v. Burhans*, 61 N. Y., 62, 63. *Crowell v. Johnson*, 2 Neb., 153. *Small v. Echerson*, 8 Iowa, 284. *Bowen v. Slocum* 17 Wis., 190. *Lathrop v. Snyder*, 16 Wis., 293.

If there be no statutory authority for amending an affidavit, the court has no power to allow such an amendment. Drake on Attachment, Sec. 84. *Brown v. McClosky*, 26 Ga., 577. *Cohen v. Manner*, 28 Ga., 27.

In this state a process or proceeding can only be amended in certain cases of mistake, omission of material allegation, failure of pleading to conform to the facts proved, or failure of the proceeding to conform in any respect to the provisions of the code. Gen. Stat., p. 546, Sec. 144. This relates only to such defects as do not render the process absolutely void. There must be something to amend, and a void writ is a nullity. To amend in such a case would be to create the writ anew. *Whitney v. Brunette*, 15 Wis., 69, 76. Drake on Attachments, Sec. 84.

Brown, England & Brown, for defendants in error.

Even if the affidavit were defective and insufficient, the court properly sustained the motion of the defendant in error to amend. The attachment should not have been dissolved in consequence of such defects, if the defendants in error offered to cure them by amendment. *Campbell v. Whetstone*, 4 Ill., 361. *Bunn v. Pritchard*, 6 Iowa, 56. *Langworthy v. Waters*, 11 Iowa, 432. *Hen-*

derson v. Drace, 30 Mo., 358. *Furman v. Walter*, 13 How. Pr., 348. Drake on Attachment, Sec. 113.

LAKE, CH. J.

The first error assigned is the overruling of the motion made to quash the summons. This point was not urged in argument, and we suppose it was abandoned. At all events, the objection to the sufficiency of this writ was not warranted, it being in all respects in strict conformity to the requirements of the statute.

The other objections all relate to the affidavit on which the order of attachment was issued; the chief of these being that no venue was given. It is also objected that the court erroneously permitted the notary public before whom the affidavit was made, to insert the proper venue, according to the fact, after a motion to quash the attachment had been filed, and thereupon overruled the motion.

It is not pretended that the facts set forth in the affidavit were not ample to justify the issuing of the writ, but it is insisted that the omission of the venue was a fatal defect; not amendable and rendering the order of attachment absolutely void. This position cannot be sustained. In the first place the venue is really no part of the affidavit, its office being simply to show by an inspection of the instrument whether it was made within the jurisdiction of the officer who administered the oath. We are not aware of a single case that goes so far as to hold that such a defect may not be amended, so as to show the fact, where the request to do so is properly made.

Under our statute of amendments great latitude is given to the court in permitting even material defects to be remedied, especially where they were occasioned by mistake, or are the result of oversight, and it can be seen that by so doing, substantial justice will be done.

And this rule is not limited to pleading merely, but is applicable to all proceedings in civil actions. *Irwin v. Bank of Bellfontaine*, 6 Ohio State, 81; *Campbell v. Whetstone*, 4 Ill., 361; *Langworthy v. Waters*, 11 Iowa, 432; *O'Dea v. Washington Co.*, 3 Neb., 118.

We are of opinion, therefore, that there is no error shown in the record, and the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

JOHN W. WEHN, PLAINTIFF IN ERROR, v. COMMISSIONERS OF GAGE COUNTY, DEFENDANT IN ERROR.

Nuisance: COUNTY NOT LIABLE FOR. A county is not liable at the suit of a private person for damages occasioned by reason of the erection of a county jail in near proximity to his residence. Neither is it liable if the jail be kept in so filthy a condition as to become an actual nuisance to those persons living near it.

ERROR to the district court of Gage county. Tried below before GANTT, J. The case is stated in the opinion.

L. W. Colby (with whom was *Griggs & Enlow*), for plaintiff in error.

There are two classes of cases where damages may be sustained by a private person as the consequences of the act of a municipal corporation. *First*, where the corporation, in a careful manner, performs a lawful act without wrong or negligence, but by such act private property is injured as a consequence. *Second*, where the corporation does an authorized act, but in performing it commits a wrong, such as performing the work carelessly, or negligently, or wantonly and maliciously; or performing the work so as to create a nuisance.

I. In the first of these cases stated, it has been held by able authority that a municipal corporation like an individual is liable for the injuries resulting to the property of others from the acts of such corporation, though acting within the scope of its corporate authority and without any circumstances of negligence or malice. *Rhodes v. Cleveland*, 10 Ohio, 159; *Goodall v. Milwaukee*, 5 Wis., 32; *Barnes v. Racine*, 4 Wis., 454.

II. In the second of the cases stated, which is the case in point, it is held that where a corporation does an authorized act but in performing it commits a wrong, it is liable the same as a private person. Dillon on Municipal Corporations, 780.

They may erect buildings for corporate purposes, but if in so doing they should place their foundations so as to cause water to flow back on private owners the latter would have their action for the damage the same as if the injury had been caused by the individual. 12 U. S. Dig., 453, and cases cited; 1 Hilliard on Torts, 555; Dillon on Municipal Corporations, Sec. 780, Note 1.

A municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual. *Bailey v. The Mayor*, 3 Hill, 531, 541. *Thayer v. Boston*, 19 Pick., 511. *Rhodes v. Cleveland*, 10 Ohio, 159.

Whatever is injurious to the health, or indecent, or offensive to the senses, or an obstruction to the free use of the property, so as to essentially interfere with the comfortable enjoyment of life or property, is a nuisance. 18 U. S. Dig., 550.

Noise may amount to a nuisance. 1 Hil. on Torts, 561.

"Anything offensive to the sight, smell, or hearing, erected or carried on in a public place, where the people dwell or pass or have a right to pass, to their annoyance,

is a nuisance at common law." *Hackney v. State*, 8 Ind., 494.

S. C. B. Dean and *Alfred Hazlett*, for defendant in error.

I. A county is a political and territorial sub-division of the state, invested with certain powers, expressly granted, to aid in the administration of government. It is but an instrumentality of the state. Its officers are officers of the state, and their duties, with scarcely a single exception, have a direct and exclusive reference to the general policy of the state. *Hamilton County v. Mighels*, 7 Ohio State, 109. *Soper v. Henry County*, 26 Iowa, 264. *Treadwell v. Commissioners*, 11 Ohio State, 183. Dillon on Mun. Corporations, Sec. 10.

II. A county is a *quasi* corporation, and an agency of the state. It owes no duties to the public nor to individuals, except such as are imposed by law. It cannot be sued at common law, and unless an action be expressly given by statute, the county is not liable. *Crowell v. Sonoma County*, 25 Cal., 313. *Hunsaker v. Borden*, 5 Cal.; 288. *Lyell v. St. Clair County*, 3 McLean, 580. *Ward v. County of Hartford*, 12 Conn., 404. *Schuyler Co. v. Mercer*, 4 Gilm., 20. *Anderson v. State*, 23 Miss., 459. *Rock Island v. Steele*, 31 Ill., 543.

III. Where the officers, whose acts or neglect of duty is complained of, are elected by the corporation in obedience to some statute to execute a public duty on behalf of the state, such officers are public or state officers, and the doctrine of *respondeat superior*, is not applicable. Accordingly, the county is not liable for the acts or negligence of its officers as claimed by plaintiff in error. *Small v. Inhabitants of Danville*, 51

Maine, 361. *Russell v. Mayor of New York*, 2 Denio, 481. *Oliver v. Worcester*, 102 Mass., 499. *Detroit v. Corey*, 9 Michigan, 184. *Cobb v. City of Portland*, 55 Maine, 381.

LAKE, CH. J.

This is a proceeding in error, to reverse the judgment of the district court, sustaining a general demurrer to the plaintiff's petition.

The plaintiff sought to recover a judgment against the county for damages alleged to have been occasioned by reason of the erection of a county jail in the immediate vicinity of his residence, and in permitting it to be so occupied and managed, as to have become, in fact, a nuisance to himself and family.

Admitting all that is alleged in the petition to be true, which the demurrer does, the question to be determined is, whether or not the county is liable for the damages sustained by the plaintiff in consequence thereof.

From an examination of the authorities at our command, bearing upon this question, we are well satisfied that no such liability exists unless created by statute. *Russell v. The Men of Devon*, 2 T. R., 667. *Hamilton Co. v. Mighels*, 7 Ohio State, 109. *Crowell v. Sonoma County*, 25 Cal., 313. *Ward v. The County of Hartford*, 12 Conn., 404. And it is equally clear that there is nothing in the legislation of this state, either directly or by reasonable implication, recognizing the liability of counties to private actions for the neglect of their officers in the performance of public duties.

By an act of the legislature, approved February 27, 1873, it is made the duty of the board of county commissioners of each organized county in the state, to erect a suitable jail for the confinement of all such per-

sons as under the laws are required to be kept therein. Section three of said act is as follows: "Each county, organized for judicial purposes, shall, as soon as practicable, provide a suitable court house, and a suitable and sufficient jail, and fire-proof offices, and other necessary buildings, and keep the same in repair."

But while the duty to provide a jail is thus imposed upon each county, there is no direction given as to the particular plan, or style to be followed in its erection. These, as well as all the other details, are left entirely to the discretion of the people of each county, acting through the board of commissioners, by which all the powers of the county, as such, are required to be exercised. The board have the power to designate the precise spot upon which the jail shall stand; of what materials, and according to what particular style of architecture it shall be built, the only restriction being that if it be necessary to borrow money to carry forward the work, the proposition must be indorsed by a vote of the people at an election called for that purpose.

In building a jail, therefore, the county simply obeyed a command of the law-making power of the state, in a matter of public concern, and for which it cannot be called upon to defend its action at the suit of an individual for damages alleged to have been occasioned thereby. It may be exceedingly distasteful to have a jail or poor house located adjoining one's private residence; it may even occasion an actual damage, by reason of the annoyances necessarily resulting from a near proximity of one of these institutions; but these, like many other perplexities and annoyances necessarily attending the operations of even the very best of governments, must be submitted to by the citizen as a sacrifice for the public good, and for which the law furnishes no redress.

But, we gather from the petition that the injury complained of resulted not so much from the character of

the structure itself, or the persons kept therein, as from the want of order and the filthiness displayed in its management by the person having it in charge. The complaint is that criminals and drunken men were permitted "to be loose and go at large around said premises, whereby * * * offensive and frightful noises, wild and terrible yells, shrieks and ravings, vile, profane, obscene and indecent language and words; noxious and offensive swills and stenches were permitted therein." That these noises and stenches "entered the dwelling house and premises of plaintiff nightly and daily, and rendered the same unwholesome and uninhabitable, and incommoded, and exposed to insult and injury the plaintiff and his family," to his great damage, etc.

In this state the care of the county jail, and the government of the prisoners confined therein, is intrusted to the jailer, under such rules and regulations as the judge of the district court sees fit to prescribe in addition to those given in the statutes. If he fail to observe these rules, or to perform any other duty required of him by the law, he renders himself liable to a fine of from five to one hundred dollars, in the discretion of the court. But this liability is personal to the jailer alone. His failure to perform his duties may give a cause of action against him, but none whatever against the county.

We are of opinion the demurrer was properly sustained, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

WILLIAM NULL, PLAINTIFF IN ERROR, v. REBECCA JONES AND OTHERS, DEFENDANTS IN ERROR.

1. **Pleading:** DEMURRER TO AMENDED PETITION. In determining whether a demurrer should be sustained to an *amended petition*, which covers the entire ground of the original, and takes its place, the court will not look beyond the pleading against which the demurrer is directed.

2. ———: The fact that the amended petition predicates the right to recover upon a fact which did not exist when the original petition was filed, is not ground of demurrer.

3. ———: Where facts which have arisen since the bringing of the action, and therefore could be properly brought into the case by a supplemental petition, are included in the amended petition, it is no ground of demurrer, but should be taken advantage of, if at all, by motion.

4. **Mortgage:** FORECLOSURE AGAINST ESTATE OF DECEDENT. Under our statute an action to foreclose a mortgage executed by the deceased in his lifetime, may be brought and prosecuted to final judgment within the time fixed by the court for the payment of debts by the administrator.

5. ———: ———. Such mortgage is not barred, as to the property which it covers, by a failure to present it to the court for allowance as a claim against the estate.

6. ———: ———. But unless so presented the holder is confined to the mortgaged property, and cannot share in the general assets of the estate.

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

Mason & Whedon, for plaintiff in error.

The position that the holder of a note secured by mortgage upon real estate must prove his claim before the administrator, is untenable. Sec. 2, Washburne on Real Property 232. *Slaughter v. Foust*, 4 Blackford, 379. *Shirkey v. Hanna*, 3 Blackford, 403. *Harvey v.*

Thornton, 14 Ill., 217. But our statute and the decisions of this court expressly authorize the foreclosure of the mortgage. Sec. 227 Gen. Statutes, 320. *Watson v. McCartney*, 1 Neb., 133, Sec. 855. Gen. Statutes, 655.

In this case it is admitted that the installments of interest were due when suit was commenced, and for that a decree could have been taken; it could have been no objection to the pleading that the plaintiff prays for more than he was entitled to, he was entitled to a decree for what the facts stated showed was then due, and the present amended petition shows the whole sum was due, and the demurrer should have been overruled. *Lansing v. Capron*, 1 Johns. Ch., 617. *Everitt v. Huffman*, 1 Page Ch., 648. *Ontario Bank v. Strong*, 2 Page, 303. *Adams v. Essex*, 2 Barb., 144. *Smith v. Shuler*, 12 Sargt. & Rawle, 240.

W. H. Ashby, for defendant in error, cited *Ellis v. Polhemus*, 27 Cal., 350. *Pitte v. Shipley*, 46 Id., 154. *Basse v. Gallegger*, 7 Wis., 442.

LAKE, CH. J.

This is a petition in error from Gage county, and the main question presented by the record is whether the amended petition states a good cause of action.

The action was brought against the administrator and heirs of Samuel Jones to foreclose a mortgage given by him on the 4th day of July, 1871, to secure the payment of a promissory note of that date for the sum of $4,200.00, on the 4th day of July, 1874, with interest thereon at the rate of twelve per cent. per annum, payable annually. The mortgage contained a clause to the effect that in case of any default in the payment of any installment of interest as it became due, for the period of thirty days, the whole sum thereby secured should, at the

option of the mortgagee, his heirs or assigns, become immediately due and payable.

On the 30th of October, 1872, the first installment of interest not having been paid within the time limited, the plaintiff commenced an action to foreclose for the whole amount secured by the mortgage.

The case seems to have rested in this condition until after the note by its terms fell due, when an amended petition, the one now under consideration, was filed. This petition declares, as is usual on a mortgage demand past due, without reference to the fact of delinquency in the payment of the first year's interest, which was the sole ground upon which a recovery of the principal was demanded by the original petition.

The defendants contend that this petition is demurrable for two reasons. *First:* In not alleging that the plaintiff gave notice to the mortgagor, or his representatives, of his election to exercise his option and declare the whole debt due. *Second:* In not containing an allegation to the effect that the claim had been presented, as the statute directs, for allowance and payment by the administrator out of the assets in his hands.

The *first* of these questions is not raised by the record. In deciding whether the demurrer should be sustained, we cannot look beyond the pleading against which it is directed. This objection might have been urged to the original petition had it not been entirely superseded by the amendment which completely ignored the failure to meet the interest as it fell due, and sought to recover on the ground alone that the note had then fully matured.

The plaintiff, by a proper motion, might have been held in his amended petition to a statement of the facts as they existed at the commencement of the suit; if this had been done, and the defendants' position be correct, nothing beyond the interest then due could have been recovered, and a foreclosure to that extent only could

have been decreed, unless other installments of interest, or the principal if it had become due, had been brought into the case by a supplemental petition. This was the rule in chancery practice. *King v. Longworth*, 7 Ohio, 585. And it has not been changed by the code practice. *Glenn v. Hoffman*, 2 Western Law Monthly, 599. Sec. 149 Code of Civil Procedure. For these reasons we abstain from the expression of an opinion on the first question.

The second ground on which it is claimed that the petition is defective cannot be sustained. Cases were cited, particularly that of *Harp v. Calahan*, 46 Cal., 222, which holds to the rule contended for by defendants' counsel. But we apprehend the statutes under which they were made were very different from our own. At all events we do not consider them applicable to our act concerning the settlement of the estates of decedents.

Section 227, page 320, of what are known as the "General Statutes," very clearly recognizes the right of a creditor, whose claim is secured by mortgage, to institute a foreclosure suit thereon and carry the same forward to final decree, at any time during the settlement of the estate, while an ordinary creditor of the estate is prohibited from commencing an action on his claim "until the expiration of the time limited by the court for the payment of the debts."

Again, section 99, page 294, of the same statutes, expressly provides that "all sales and conveyances of land made by executors * * * * * shall be subject to all charges thereon by *mortgage* or otherwise, existing at the time of the death of the testator or intestate," etc. And the purchaser at a sale of such property is required, by the same section, to give a bond to protect the estate against any such mortgage or lien.

We are not aware that we have any statute authorizing an executor or administrator to sell lands discharged of

such an incumbrance, and out of the proceeds of the sale to first satisfy the debt secured thereby; but the holder of such a claim is left to proceed according to his own will to enforce payment out of the property bound therefor.

It is evident that section 226, which provides that all claims "against a deceased person, proper to be allowed by the judge or commissioners," which shall not be exhibited to them for allowance within the time limited by the court, "shall be forever barred," was not intended to apply to claims secured by mortgage, unless the holder expects to look to the assets in the hands of the executor or administrator for payment. The legislature could not have intended that the mere failure of the holder of a claim, secured by mortgage duly recorded, to present the same for allowance, should bar him of his action against the security.

We are of the opinion, however, that if such a claim be not exhibited for allowance, the holder is confined to the property covered by his mortgage, and cannot, should that prove insufficient for that purpose, resort to the general assets for payment.

For these reasons we think the amended petition stated a good cause of action, and the demurrer should have been overruled.

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

JUDGMENT ACCORDINGLY.

CHARLES C. WHITE, TREASURER OF LANCASTER COUNTY, PLAINTIFF IN ERROR, v. THE CITY OF LINCOLN, DEFENDANT IN ERROR.

1. **License Moneys.** Moneys received for license of the sale of malt, spirituous and vinous liquors in cities of the second class, belong to the school fund of the county, and should be paid over to the treasurer of the proper county. Where such moneys are not paid voluntarily, the treasurer may maintain an action in his own name to recover the same. *City of Tecumseh v. Phillips*, *ante*, p. 305, cited and approved.

2. **Construction of Statutes.** In the construction of statutes, the earliest continues in force, unless the two are clearly inconsistent with, and repugnant to, each other.

3. ———. There is no repugnancy between the provisions of section 350, chapter 29 of the criminal code of the Revised Statutes [Gen. Stat., 855], and the act entitled "an act to incorporate cities of the second class and to define their powers." Approved, March 1, 1871.

4. **Constitutional Law:** TITLE OF ACTS. The object of the constitutional provision that "no bill shall contain more than one subject, which shall be clearly expressed in its title", is to prevent surreptitious legislation by incorporating into a bill obnexious provisions which have no connection with the general object of the bill, and of which the title gives no indication.

5. ———: ———. Where a bill has but one general object it will be sufficient if the subject is fairly expressed in the title.

ACTION brought in the district court of Lancaster county, Nebraska, by the above plaintiff against the said defendant to recover the sum of twenty-two thousand five hundred and twenty-four dollars and fifty-six cents, with interest from the 24th day of September, A. D., 1873, for money alleged to have been received by the said city for license granted by the said city for the sale of malt, vinous and spirituous liquors within the limits thereof.

The defendant answered the petition, admitting the incorporation of said city of Lincoln as a city of the second class, but denying all the other allegations in the petition; and for a second defense admitted the receipts in all of the sum of three thousand nine hundred and ninety-nine dollars and seventy-five cents as license and no more, and averred that before the beginning of this suit the same was paid over by the city of Lincoln to the treasurer of Lancaster county.

The defendant answered further that within the times mentioned in the petition, to-wit: from June 29, 1869, and June 7, 1873, it received about fifteen hundred dollars as a license tax assessed by the city council of the city of Lincoln for police and city purposes, and not as a license under chapter 29, criminal code, R. S., 1866, which sum was received from a large portion of persons named in the petition; and that all of said moneys, except three thousand nine hundred and ninety-eight dollars and seventy-five cents, was, prior to the 23d day of September, A. D. 1873, expended by the city of Lincoln in works of internal improvement and otherwise for said city.

Upon trial before POUND, J. the plaintiff offered in evidence a large number of receipts from various persons for money paid over to the city treasurer of said city of Lincoln, for the sale of liquors in said town, which amounts had not been paid over to the county treasurer. Portions of these receipts to the amount of twenty-five dollars for each person to whom license had been granted were admitted in evidence, but all of said receipts, and all other evidence tending to show that amounts in excess of said twenty-five dollars had been paid into said treasury from time to time by various parties, were excluded.

At the request of the defendant the court instructed the jury as follows:

1. "The law provides that the city council may license liquor sellers within the corporate limits of the city and might fix the amount to be paid for said license at a sum not less than $25.00 and not more than $1,000, and that for licenses granted within the corporate limits of a city of the second class, the council have the sole right to fix the amount to be charged for such licenses."

2. "The city council under the laws relating to cities of the second class have the additional power to levy a license tax, which may be exercised by said council, in addition to the amount which the council shall fix as the sum to be paid for license to sell intoxicating liquors."

3. "The defendant, the city of Lincoln, in this action is liable to the plaintiff for such sum only as you find from the proof to have been charged and received as a license for the sale of malt, spirituous and vinous liquors. And the defendant is not liable to the plaintiff for such sum as you may find to have been charged and received by defendants as a license tax for city and police purposes."

4. "If you find from the evidence that the city council did grant and issue the several licenses for the sale of spirituous, malt, and vinous liquors to the persons mentioned in the petition, and you further find that in their discretion the said council charged the several persons to whom such licenses were issued the sum of $25 each and you find that in addition to this the said council did also levy a license tax for city and police purposes, of any additional sum, you cannot allow the plaintiff for this additional sum charged, although both sums are included in the same receipt."

5. "If you find that any of the amount as shown by the receipts offered in evidence was levied by the council as a license tax for city and police purposes, and was by the treasurer of the city at the time he gave the receipt for the same. retained for such purposes, you will deduct

from the amount of said receipt the said sum received for said city and police purposes, and allow plaintiff the remainder only."

The jury, under the evidence and these instructions, returned a verdict for plaintiff for $2,916.66. Judgment on the verdict, cause brought here by plaintiff upon exceptions to the exclusion of evidence, and instructions to jury.

Brown, England & Brown, for plaintiff in error.

The ordinances under which the licenses were issued for which the money in controversy was paid required the payment of not only the amount which the defendant admits belongs to the school fund, but also the amount which it required to be paid into the city treasury for the use of the city, before the license should be issued. It is evident, the whole sum was collected for licenses to sell intoxicating liquors, and belongs to the school fund. The declaration or direction to the treasurer contained in the ordinance as to how much was collected for school, and how much for city purposes, is absolutely void, and but a flimsy device on the part of the city to defraud the school fund.

Subdivision four, of section 31, of chapter 9, does not authorize the city council to impose a tax for revenue purposes. The most that this provision authorizes the council to do is to charge a fee sufficient to pay for issuing the license, and to meet such other expenses as may thereby be imposed. Cooley's Constitutional Limitations, 200, 586. Cooley on Taxation, 408. *State v. Roberts*, 1 Gill & John., 506. *Mays v. Cincinnati*, 1 Ohio St., 268. *Johnson v. Philadelphia*, 60 Pa. St., 451. *Ash v. People*, 11 Mich., 347.

That this law was not intended to authorize a tax for revenue purposes is apparent from the fact that there is no limit to the amount of special tax the council may

impose. Section 4, of article 8, of the old constitution, provides that "the legislature shall provide for the organization of cities and incorporated villages, by general laws, and restrict their powers of taxation, assessment, etc., * * to prevent the abuse of such power." The fact that subdivision four, of section 31, contains no limit as to the amount of tax that may be imposed (except the one we contend for), would, as an act for revenue purposes, render it obnoxious to the constitutional provision.

N. S. Scott and *Philpott, Galey & Knight*, for defendant in error.

The city council are empowered to license the sale of intoxicating liquors within the corporate limits. General Statutes, 851, Sec. 572.

The city council of cities of the second class are also empowered to *levy* and *collect* a *license tax*. *Id.*, 144, Sec. 31.

These powers are distinct and independent of each other. The former is to be exercised for the sole benefit of the *school fund*, the latter for the exclusive use of the corporation, and is intended for revenue for city purposes.

The sale of intoxicating liquors is in this state a crime unless it is licensed. Gen. Stat., 854, Sec. 881.

That business by a license is made lawful. Then it is subject to an additional tax the same as any other lawful business. See Cooley on Taxation, 386. *Coulson v. Harris*, 43 Miss., 728. *Drysdale v. Pradat*, 45 Miss., 445.

That this *license tax* is intended for revenue for city purposes, we think is established—

First. By the language used, license tax. Each word in a statute shall have effect. Cooley on Const.

Lim., p. 57. Sedgwick on Constitutional and Stat., 260–2. Bouvier Law Dictionary, title License and Tax. Cooley's Definition of Tax, p. 1.

Second. By the enumeration of the different kinds of business which shall be subject to a license tax. Gen. Stat., 144, Secs. 31–4.

Third. By the immediate context in the same section. The three preceding subdivisions, as also the fourth, speak of the sources and the only sources of revenue to the city.

Fourth. The power of the city to charge in the matter of *license* is limited within $25 and $100, while there is no limit on the power of the city council to levy and collect a *license tax.* Large assessments for such purposes have been held legal. *Burch v. Savannah,* 42 Georgia, 596. *Baker v. Panola County,* 30 Texas, 86.

If the city council had the right under the law to make such assessments, clearly, for levying and collecting such *license tax,* the city cannot be liable to account for the same as for *school fund* to any authority, but the city is the lawful owner of the money.

MAXWELL, J.

In the case of *The City of Tecumseh v. Phillips, ante,* p. 305, this court held that where money was collected by the corporate authorities of towns, and cities of the second class, for license to sell intoxicating liquors, and such funds were not paid over voluntarily to the proper county treasurer, that it was his duty to enforce payment thereof by suit. The authority to bring such action, although not expressly given by statute, is clearly implied from the obligation he is under to make the collection.

Lincoln was incorporated as a town under the provisions of Chap. 53 of the Revised Statutes, on the 6th

day of April, 1868. The exact date at which it became a city of the second class does not appear from the record. In June, 1871, an ordinance relating to the sale of intoxicating liquors in that city was passed. The following is a copy:

Section 1. "Be it ordained by the mayor and councilmen of the city of Lincoln, Nebraska, that all petitions for the sale of liquors within the corporate limits of the city of Lincoln shall be presented to the city clerk of the city of Lincoln, and by said clerk presented to the city council of the city of Lincoln, at a regular meeting of the same, and before any license shall be granted by the council, the person petitioning for the same shall execute a bond in the penal sum of not less than one thousand dollars, and not to exceed five thousand dollars, as shall be determined by the council in such case, with good and sufficient surety to be approved by the council, and conditioned that during the continuance of his license he will not keep a disorderly house, and that he or they will not allow gambling with cards, dice or any other implements or devices used in gambling, within his or their house or within any outhouse, yard or other premises in his or their control, and for the payment of all damages, fines and forfeitures which may be adjudged against him under the provisions of Chap. 29 of the criminal code of the State of Nebraska and the ordinances and by-laws of the city of Lincoln; and further, said petitioner shall pay to the city treasurer a license of twenty-five dollars, and the said treasurer is hereby required to pay the same to the county treasurer, as provided in section 336, chapter 29, of the criminal code of the State of Nebraska, and that the sum of three hundred dollars shall be paid by said petitioner to the city treasurer, and take said treasurer's receipt for said sums of money, and present said receipts to the city council before any license shall be issued; and further, each petitioner shall do and per-

form all the conditions imposed upon him by the city council before any license shall be issued to him," etc.

On the 15th of February, 1869, an act was passed by the legislature, entitled an act "To provide for the incorporation of cities of the second class and to define their powers."

Section 32 of the act provides that "said city council shall have exclusively all the powers of the county commissioners, so far as the same relates to licensing or prohibiting the sale of intoxicating liquors in the city, and may license or prohibit ten-pin alleys and billiard tables. They shall fix the amount at not less than twenty-five dollars per year, which shall be paid into the county treasury for the use of the school fund of the county; and in addition thereto, may require a license of not to exceed five hundred dollars for the sale of intoxicating liquors, and not exceeding fifty dollars for each billiard table and ten-pin alley, which shall be paid into the city treasury and belong thereto, before the license is issued."

On the 1st day of March, 1871, the legislature passed an act entitled an act "To incorporate cities of the second class and to define their powers," which repealed the former act, but which contains no provision similar to that contained in section 32 of the act of 1869.

Section 31 of the act of March 1, 1871, authorizes the corporate authorities to enact ordinances, "to levy and collect taxes for general revenue purposes not to exceed five mills on the dollar valuation in any one year, on all the real, personal and mixed property within the limits of said city, taxable according to the laws of the State of Nebraska, the valuation of such property to be taken from the books or assessment rolls of the precinct assessors of the proper precinct."

The fourth subdivision of the section authorizes the enactment of ordinances to "levy and collect license tax on auctioneers, contractors, druggists, hawkers, peddlers,

bankers, brokers, pawnbrokers, merchants of all kinds, grocers, confectioners, restaurants, butchers, taverns, public boarding houses, dram-shops, saloons, liquor sellers, billiard tables, bowling alleys, and other gaming tables," etc.

Section 336 of Chap. 29 of the Revised Statutes (Gen. Stat. 851), provides that "the county commissioners of any county in this state may, at any regular session of said board of commissioners, grant and issue a license for the sale of malt, spirituous, and vinous liquors," etc.

"The third subdivision of the section provides that the applicant "shall pay into the county treasury for the use of the school fund, to be distributed as other moneys, the sum of not less than twenty-five dollars, nor more than five hundred dollars, at the discretion of the county commissioners, and file the treasurer's receipt therefor in duplicate, with the county clerk, before such license shall be issued."

Section 350 (Gen. Stat. 855, Sec. 586), provides that "all the powers and duties in this chapter devolving upon the county commissioners, shall belong to and be exercised exclusively by the proper authorities of any or all incorporated towns or cities of this state, within the incorporated limits thereof, and the authorities of such towns and cities are hereby empowered to make all needful rules, and pass all necessary ordinances, decrees, or orders to carry out the intent of this chapter. They may determine what municipal officer shall receive the petition, file the bond and receipt, and issue the license as in section 336 required; *provided, however*, that such incorporated cities and towns may require such additional sum as to them may seem best, not to exceed one thousand dollars, which sum, together with the sum herein required to be paid to the county treasurer, may be paid

to the treasurer of the town or city who shall account for the same."

Under this statute, without any question, all the money received for license for the sale of malt, spirituous and vinous liquors, should be paid over to the treasurer of the proper county for the use of the school fund. Has the act to provide for the incorporation of cities of the second class so changed the law as to entitle the defendant to retain money thus collected? It is unnecessary to determine whether the authority to impose a *license tax* upon "dram-shops," "saloons," and "liquor sellers," is necessarily restricted to license for the sale of malt, spirituous and vinous liquors, as that question does not arise in the case, this money having been received by the defendant for licenses to sell intoxicating drinks.

It is a familiar rule in the construction of statutes that the earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to, each other, or unless in the latest statute some express notice is taken of the former, indicating an intention to repeal it. *The People v. Weston*, 3 Neb., 315. And statutes are not considered to be repealed by implication, unless the repugnancy between the new provision and the former statute be plain and unavoidable. *Commonwealth v. Herrick*, 6 Cush., 465.

In this case there is no repugnancy between the two acts. We see nothing in the act providing for the incorporation of cities of the second class that indicates an intention on the part of the legislature to permit such cities to retain any portion of the money received for licenses for the sale of malt, spirituous and vinous liquors. The court, therefore, erred in excluding evidence from the jury showing the entire amount of money received by the defendant for such licenses, and also erred in giving the second and fourth instructions on the part of the defendant. The third and fifth

instructions, given at defendant's request, appear to be predicated upon the supposition that there was testimony tending to show that the money in question had been levied for city and police purposes, and were calculated to mislead the jury.

The third section of an "act to amend an act to incorporate cities of the second class, and to define their powers, approved March 1, 1871, and to equalize certain taxes therein mentioned," approved February 25, 1875, was before this court in the case of *The City of Tecumseh v. Phillips*, *ante*, 305, and was held to be unconstitutional. Formerly the title of an act was regarded as no part of it, but might be considered for the purpose of ascertaining the intention of the legislature when the body of the statute appeared to be in any respect doubtful or ambiguous. Cooley's Con. Lim., 141. *United States v. Palmer*, 3 Wheat., 610. *Burgett v. Burgett*, 1 Ohio, 480. 1 Ld. Raym., 77. But it cannot enlarge or restrain the provisions of the act itself. *Hadden v. Collector*, 5 Wall., 107.

Section nineteen, of article two, of the constitution of 1867, provided that, "No bill shall contain more than one subject, which shall be clearly expressed in its title." In *The People v. Mahaney*, 13 Mich., 494, the supreme court of Michigan in construing a similar provision in the constitution of that state, say: "The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage

secured through legislative bodies whose members were not generally aware of their intention and effect."

The object of this constitutional provision is to prevent surreptitious legislation by incorporating into bills obnoxious provisions, which have no connection with the general object of the bill and of which the title gives no indication. It will be sufficient, however, if the law have but one general object which is fairly expressed in the title of the bill. The third section of the act approved February 25, 1875, provides that "in all cases in which cities of the second class have collected and expended for the use and benefit of such cities, either in works of internal improvement or otherwise, moneys collected for licenses for the sale of intoxicating liquors, such expenditures are hereby declared to be legal, and the same is hereby ratified and confirmed, and such cities of the second class are hereby exonerated from any and all liability therefor."

As there is nothing in the title of the act to indicate the object contemplated by section three of the act, we must hold that section to be void.

It is unnecessary to discuss the question whether the right to license an employment carries with it the right to charge a license fee therefor with a view to raising revenue. A license is issued under the police power of the city, while the exaction of a license fee for the purpose of raising revenue is an exercise of the power of taxation. How far such taxation can be sustained under the act providing for the incorporation of cities of the second class, it is unnecessary to decide, as the question does not arise in this case. For the causes assigned the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

BIRDSALL, SON & CO., PLAINTIFFS IN ERROR, v. J. M. & W. Z. CARTER, DEFENDANTS IN ERROR.

1. **Warranty**: PAROL EVIDENCE CONCERNING. Where, in an action on notes given for a threshing machine, the defendants set up as a defense a breach of warranty, alleging that the warranty was in writing and left with the plaintiffs, the defendants cannot introduce evidence on the trial of the cause to show by parol what the contract was, without first taking the necessary steps to require the plaintiffs or their agent to produce the contract. The original contract must be produced or its absence accounted for, before proof of its contents can be received.

2. ———: CONDITIONS PRECEDENT. Where, in a contract of warranty there are conditions precedent to be performed by the purchaser, he must show a fair, reasonable compliance therewith on his part, in order that he may enforce the contract against the warrantor. *Nichols v. Hail*, 4 Neb., 214, cited and approved.

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

Sprague, Chapman & Wheeler, for plaintiffs in error, cited 1 Greenleaf Evidence, 553, 558. 1 Parsons Contracts, 588. *Predeaux v. Burnett*, 1 C. B. (N. S.),613. *Nichols v. Hail*, 4 Neb., 210.

George S. Smith and *T. M. Marquett*, for defendants in error, cited *Mears v. Nicholls*, 41 Ill. 207. *Leopold v. Van Kirk*, 27 Wis., 152. *Carter v. Black*, 46 Mo., 384. *Richmond v. Greeley*, 38 Iowa, 666. *Hilton v. Dinsmore*, 21 Maine, 412. *Potter v. Hopkins*, 25 Wend., 417.

MAXWELL, J.

The action is founded on two promissory notes, on which plaintiffs claim there is due the sum of $412.50, and interest from August 1, 1870.

The answer alleges that said notes were given in con-

sideration of a certain threshing machine which the plaintiffs sold and delivered to the defendants, and for no other consideration whatever; that said plaintiffs entered into a written contract in which they warranted said machine to these defendants, that it was a first class machine in every respect, that it was to be put up of good material, thresh the grain clean out of the straw, and to thresh as fast and do its work as well as any other threshing machine made, to be light of draft and easy to be managed, and if, upon a thorough trial, the said machine did not give good satisfaction, then the said Birdsall, Son & Co. were to take said machine back and refund the money so paid upon said machine and the notes given in consideration of the same by defendants to the plaintiffs; that they gave said machine *two* separate thorough trials, notifying at each time the agent of plaintiffs that the machine failed to do its work as required by the terms of the written warranty, and that defendants were ready and willing and are now ready to return said machine, etc. Defendants claimed judgment for the sum of $500.00 and costs.

The plaintiffs filed a reply to the answer denying all the facts therein stated.

On the trial of the cause the jury found a verdict for the defendants for the sum of $525.00. The defendants entered a remittitur for the sum of $25.00. A motion for a new trial was overruled, and judgment entered on the verdict. The case is brought into this court by petition in error.

J. M. Carter testified on the trial that: "We left the contract with Doom. We forgot it when we went after the machine, and when we called on him for it he said he had lost it and it could not be found." He further testified that Doom searched among his papers and was unable to find it.

The defendants then, against the objections of the

plaintiffs, were permitted to prove what the contract was by parol testimony. This is assigned for error. Where a written instrument is in the possession of the adverse party, the law has provided at least two modes of obtaining an inspection of it, for the purpose, if desired, of introducing it in evidence on the trial of the cause:

First. By a subpœna *duces tecum*, requiring the witness to bring with him and produce to the court the desired instrument.

Second. Section 394 of the code of civil procedure provides that "either party, or his attorney, may demand of the adverse party an inspection and copy, or permission to take a copy of a book, paper or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein. Such demand shall be in writing, specifying the book, paper or document, with sufficient particularity to enable the other party to distinguish it, and if compliance with the demand within four days be refused, the court or judge, on motion and notice to the adverse party, may, in their discretion, order the adverse party to give the other within a specified time an inspection and copy, or permission to take a copy of such book, paper or document, and on failure to comply with such order the court may exclude the paper or document from being given in evidence, or if wanted by the party applying may direct the jury to presume it to be such as the party by affidavit alleges it to be."

It is not claimed that any notice was served on the plaintiffs to produce the contract; nor was Mr. Doom (the agent) required to produce it, or asked on his examination if it was in his possession. The rule is well settled that if such paper "belong to the custody of certain persons, or is proved or may be presumed to have been in their possession, they must, in general, be called and

sworn to account for it if they are within reach of the process of the court." 1 Greenleaf Ev., Sec. 558. *Ralph v. Brown*, 3 Watts & S., 395.

The law requires the production of the best evidence of which the case in its nature is susceptible. The defense in this case is a breach of warranty. The character of the warranty is in dispute. Therefore the original contract must be produced, or its absence accounted for. The degree of proof required in such a case is merely to establish a reasonable presumption of the loss of the instrument. Where it is apparent that a party has in good faith used reasonable diligence in the prosecution of a search for such paper and has been unable to obtain it, proof of its contents may be given. 1 Greenleaf Ev., Sec. 558. But in this case the defense entirely failed to take the necessary steps to account for the absence of the instrument on the trial, and their failure to produce it. The court, therefore, erred in admitting evidence of its contents.

On the trial the plaintiffs asked the court to instruct the jury "that in case they find the machine as good as the warranty, and that defendants did not comply with the terms of the warranty on their part, then they must find for the plaintiffs," which instruction was refused by the court, to which plaintiffs duly excepted.

In *Nichols v. Hail*, 4 Neb., 214, this court held: "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 instruction asked should have been given by the court.

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

REVERSED AND REMANDED.

EDWIN T. BUTLER, PLAINTIFF IN ERROR, V. ELIZABETH DAVIS, JAMES W. DAVIS AND HENRY M. GOFF.

1. **Deed:** DESCRIPTION OF PROPERTY. Where G. entered at the United States Land Office at Omaha, Nebraska, the south half of the northwest quarter, and the north half of the southwest quarter of section thirty-five, in township fifteen, north of range twelve east, which tracts of land are shown to be in Douglas county; and afterwards by deed executed in this state he conveyed to P., the south half of the northwest quarter and the north half of the southwest quarter of section thirty-five, in township fifteen, north of range twelve east, without designating the county or state in which the lands are situated, it will be presumed that the deed was intended to convey lands situated in this state.

2. **Ejectment.** In ejectment a plaintiff must recover on the strength of his own title, and cannot rely on the weakness of the title of his adversary, unless he can show a superior right in himself.

ERROR to the district court of Douglas county. Tried below before LAKE, CH. J. The case is stated in the opinion.

W. O. Bartholomew, for plaintiff in error.

If the deed from Galligher to Patton fail, the conveyances subsequent to it in the defendants' chain of title fail, and their claim to the property in question is ended. The plaintiff objected to the admission of the deed, because the description in it did not describe the premises in suit; and because it did not describe any property, and was void for uncertainty. While naming a township and range, there was no reference to a meridian, town, city, village, county, or state. If the language employed leave an entire uncertainty as to the whereabouts of the property, the court is not at liberty to make the deed such as in its judgment it ought to have been; all that the court can do is to declare it void. *Worthington v. Hylyer*, 4 Mass., 196. *Bosworth v. Farenholz*, 3 Iowa,

84. *Tollenson v. Gunderson*, 1 Wis., 113. *Jackson v. Rosevelt*, 13 Johns., 96. *Peck v. Mallams*, 10 N. Y., 509. *Brown v. Guice*, 46 Miss., 299. *Thayer v. Torrey*, 37 N. J., L., 339. *Gault v. Woodbridge*, 4 McLean, 329.

The conveyances passed upon in the decisions above quoted from and cited, are those of private persons or of sheriffs. In the following cases, we have tax deeds held to be fatally defective, as tested by the rule laid down by C. J. Parsons. *Haven v. Cram*, 1 N. H., 93. *Larrabee v. Hodgkins*, 58 Me., 412. *Ronkendorff v. Taylor's Lessee*, 4 Peters, 349.

Brown & Thurston, for defendants in error.

There is no doubt but what parol evidence is admissible to apply the description in a deed to its subject matter, or to render the description certain. 2 Phillips on Evidence, 644, note. *Dodge v. Potter*, 18 Barb., 193. *Carnley v. Stanfield* 10 Texas, 546. *Abbott v. Pike*, 33 Maine, 204. *Bates v. Bowers*, 17 Miss., 550.

In this case the ambiguity is clearly a latent one; the description is perfect in itself the same as to deed "black acre;" but by looking outside of the deed we find that perhaps there may be more than one tract with the same description; then evidence is admissible to determine what particular piece of land with that description was intended. *Dougherty v. Purdy*, 18 Ill., 206. *Clark v. Powers*, 45 Ill., 283. *Colcord v. Alexander*, 67 Ill., 581. 2 Hilliard on Real Property, 345. *Mecklem v. Blake*, 19 Wis., 397.

That such a failure of description does not avoid the deed is expressly held in the cases last cited, and also in the following, which are all similar to the one at bar. *Beal v. Blair*, 33 Iowa, 318. *Atwater v. Schenck*, 9 Wis., 160. *Russell v. Sweezey*, 22 Mich., 236.

None of the cases cited by the plaintiff go to disprove

this proposition—most of his cases are in regard to tax deeds, which are to be construed against the grantee in favor of the sovereignty—while an ordinary deed between parties is to be construed against the grantor. *Haven v. Cram*, 1 N. H., 93.

MAXWELL, J.

John H. Galligher entered at the United States land office at Omaha, Nebraska, the south half of the northwest quarter and the north half of the southwest quarter of section thirty-five, in township fifteen, north of range twelve east. The date of the entry does not appear, but a patent was issued therefor to Galligher on the second day of July, 1860.

On the 13th day of May, 1857, Galligher, in Douglas county, Nebraska, executed and delivered to A. M. Patton, of the State of Kentucky, a warranty deed for the tracts of land above described; which deed, on the same day, was filed for record in the office of the register of deeds of Douglas county. In the year 1869, the heirs of Patton sold and conveyed the premises in question to H. O. Jones, who, soon thereafter, sold and conveyed the same to Elizabeth Davis, who is now in possession.

On the 17th day of April, 1860, the plaintiff commenced an action in the district court of Douglas county, against John H. Galligher, to recover the sum of $698.14 and interest thereon, and the lands above described were attached as the property of Galligher. In November of that year, judgment was recovered for the amount of the claim, and the lands in question ordered sold to satisfy the same. The lands were sold under the judgment in the year 1861, to the plaintiff, who received a deed therefor from the sheriff of Douglas county. The plaintiff paid the taxes on the land until the year 1869.

The grounds on which the plaintiff seeks to recover are purely technical. It is clearly shown that Galligher

entered the lands in controversy, and that they are situated in Douglas county; it also appears that on the 13th day of May, 1857, he conveyed the same, by warranty deed, to A. M. Patton. It is true, there is no designation in the deed of the county or state in which the lands are situated; but the deed was signed and acknowledged in Douglas county, and immediately thereafter filed for record in the office of the register of deeds of that county; and the defendants are in possession of the premises, claiming possession to the same under the deed in question.

In *Harding v. Strong*, 42 Ill., 149, the deed offered in evidence described the premises intended to be conveyed as lot five, in block one, in Haley's addition to the city of Monmouth, without stating what state, the court say: "It is first insisted that the court cannot know that the lot in controversy is in the city of Monmouth, Illinois. The court will take notice that the city of Monmouth is in Warren county, in this state. And when the deed was read in evidence, describing a tract of land as lot five, in block one, in Haley's addition to the city of Monmouth, the presumption would be that it was in Monmouth in this state."

The plaintiff introduced in evidence a duly certified copy of the patent from the United States to Galligher, for the lands in controversy. It is but reasonable to suppose that Galligher's deed to Patton was intended to convey these lands, and we must presume such to have been the intention. The deed from Galligher to Patton was, therefore, properly admitted in evidence.

This is decisive of the case. No attempt has been made to impeach the deed from Galligher to Patton. Galligher had no title to the premises, as shown by the records of Douglas county, at the time the attachment was levied. The plaintiff, therefore, acquired no title from the sale under the judgment.

In an action of this kind, the plaintiff must recover on the strength of his own title; and it will not do for him to rely upon the weakness of the title of his adversary, unless he can show a superior right in himself.

Objections were made to the testimony of certain witnesses on the trial. In the view we take of the case, their testimony was not material, and the plaintiff was not injured thereby.

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

JUDGMENT AFFIRMED.

SAMUEL FRIED, PLAINTIFF IN ERROR, v. M. C. REMINGTON, DEFENDANT IN ERROR.

Practice: SETTING ASIDE VERDICT OR FINDING. To justify an interference with the finding of a court or jury, the preponderance of evidence must be clear, obvious and decided; but when the preponderance is so great, it is the duty of the reviewing court to correct the mistake.

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

F. M. Johnson, *W. H. James* and *J. B. Barnes*, for plaintiff in error.

R. F. Stevenson, for defendant in error.

GANTT, J.

The record of this case shows, that on the 24th day of March, 1875, the plaintiff in error executed a note, not negotiable, to C. H. Autzen in the sum of $1,161.17; that on the 24th day of April following, he paid to Autzen, on the note, the sum of $952. The note was

indorsed to T. B. Thurston without date, and afterwards it came into the possession of the defendant in error, who was plaintiff in the court below. This action was brought to recover an alleged unpaid balance on the note. The plaintiff in error pleaded payment of the balance to Autzen, about the first of May, 1875, and avers that Autzen then held and owned the note. A jury was waived and the cause was tried by the court. The main ground of exception to the proceedings is, that the finding and judgment of the court below are not sustained by sufficient evidence and are contrary to law. The testimony of F. Sonnereschine and Charles Beckman very clearly proves the payment of the balance of the note by Samuel Fried to C. H. Autzen about the 10th of May, 1875; that this payment was made upon this note, and not upon an account claimed by Autzen against Fried, and that "Autzen remarked that they should all take notice that this note was paid in full, and then said he would go and get the note and give it to Fried." Samuel Fried, plaintiff in error, testified to the same facts, and that he never owed Autzen on book account. C. H. Autzen was examined as a witness for the defendant in error, and he admits he never had any other note against the plaintiff, but testifies that the payment to him by plaintiff was made upon a book account. His testimony in this regard is in direct conflict with every other witness in the case. Indeed it seems manifest from his own testimony that this pretended book account was a mere invention without any foundation in truth. From the testimony, in the record of the case brought into this court, we have no doubt that Autzen had the note when the payment was made by the plaintiff; that payment was made in full of the balance of the note, and that there is error in the finding and judgment of the court below. No doubt the rule is, that when a case is fairly presented to

a court or jury in order to justify any interference with its finding, the preponderance of evidence against the finding must be clear, obvious and decided.

In the case at bar, we think the preponderance of evidence against the finding, is so clear, obvious and decided, that the finding and judgment cannot be sustained upon any principle of right, justice or morality. The judgment of the district court must, therefore, be reversed, and the cause be remanded for trial *de novo*.

REVERSED AND REMANDED.

MERCHANTS' BANK OF LINCOLN, NEBRASKA, PLAINTIFF IN ERROR, v. A. C. RUDOLF AND OTHERS, DEFENDANTS IN ERROR.

1. **Principal and Surety:** RELEASE OF SURETY BY CASHIER OF A BANK. A cashier of a bank, by virtue of his office, is not authorized to release a surety upon a note or bill belonging to the bank without payment.

2. ———: ———. The mere fact that a bank holds other security for the payment of a note, to which it might resort, is no ground for the release of a surety.

3. ———: ———. Statements made by a cashier at casual interviews away from the bank as to payments having been made upon its securities, are not binding upon the bank.

4. ———: ———. If the cashier, on inquiry by a surety who is not an officer of the bank, state that the note upon which he is surety has been paid by the principal, the bank is estopped from denying the truth of such statement, when to do so would entail a loss upon the surety, which he would have guarded against had it not been made.

5. ———: ———. But this rule is not applicable where the surety is one of the directors of the bank, for he has the means of knowledge of the true condition of its affairs, and is conclusively presumed to know whether payment has been made or not.

6. ———: ———. And where a firm is surety, and one of its members is also a member of the board of directors of the bank, all the members of such firm are affected with the notice, which the one who is director is presumed to have.

This was an action upon a joint and several negotiable promissory note, signed by Lewis & Marsh and defendants in error, in their firm names, dated Lincoln, Nebraska, September 8th, 1873, for payment to order of plaintiffs of $5,500.00, at Union National Bank, Chicago, Illinois, in thirty-five days after date, with interest at twelve per centum after due.

Lewis, of the firm of Lewis & Marsh, was of plaintiff's board of directors.

Rudolf, of Rudolf & Co, was of plaintiff's board of directors; was its vice president, and one of its committee on discount and exchange. One George P. Eaton was plaintiff's cashier.

Defendants, L. & M., plead usury; that the note was for the loan of $4,394.25, for thirty-five days only, for which interest was taken and reserved by plaintiff, of $105,75.

L. & M. also plead that certificates of deposit in the sum of $4,347.28 on the Washington bank of Iowa, were by them given plaintiff for collection, with instructions to credit the proceeds on this note, on which certificates the plaintiff collected and realized $4,336.28 that should be credited on such note, and there remains due plaintiff only $1,036.97.

To these defenses there was a denial.

Defendants, R. & Co., plead same defense of usury. These defendants also plead payment; also, that these defendants were sureties only, as plaintiff well knew; that after maturity of the note, L. & M. requested these defendants to become surety on other paper, which they refused to do unless this note had been paid, and for the purpose of ascertaining the fact in that regard, went to

plaintiff's bank, to the cashier there in charge, stating the purpose of the inquiry, and inquired in reference to the payment of the note in suit, and were by the cashier informed, that the note was all paid except a small balance, against which the bank held ample collateral security; and that Eaton, the cashier, at a number of other times, when engaged in the negotiation of business of the bank, to induce these defendants to become surety for L. & M. on other paper, the proceeds of which went to the bank on account of L. & M., said this note had been paid; and that these defendants, in faith of these representations, went upon the paper of L. & M., in the sum of more than $7,692.00, on which they have since been required to pay and have paid sums amounting to $7,692; that these defendants, at the time these representations were made, and for long after, were indebted to L. & M. in the sum of $6,223, from which indebtedness, but for the faith and credit given to such statements, these defendants could and would have saved themselves harmless, and have paid this note; that this indebtedness these defendants paid to L. & M. long before any notice that this note was yet unpaid, and L. & M. before said notice had become utterly insolvent, and these defendants are remediless; that L. & M., after maturity of the note, made large deposits of money and collections with the plaintiff, and that plaintiff took and held ample collateral security from L. & M. for the payment of the note, which might have been by the plaintiff realized and retained, and particularly that just before the note in suit was due L. & M., deposited for collection with the plaintiff certain certificates of deposit of the Washington bank of Iowa, in the sum of $4,347.25, directed to be collected and credited on the note; that plaintiff knew the defendants to be sureties only, and that plaintiff allowed L. & M. to check out their moneys, and also applied the proceeds of the Washington bank certificates

to payment of other indebtedness of L. & M., without consent or knowledge of defendants, and to their prejudice as sureties, depriving them of their right of subrogation; that L. & M. are insolvent and defendants remediless.

Plaintiff replied by denials, and by a special reply alleged a counter estoppel, by reason of Rudolf's official relation to plaintiff.

Upon the trial before WEAVER, J., sitting in the district court for Lancaster county, the following instructions offered by plaintiff in error were refused by the court, and exceptions taken.

"2. The cashier of said Merchants' Bank had a right to receive in payment the money realized from the drafts on the Washington Bank of Iowa; but after the same had been so received by him and applied in part payment of the note in question, the cashier cannot bind the bank merely by what he says in reference to said drafts."

"5. If you find from the evidence that A. C. Rudolf, one of the defendants, was vice-president and director of the Merchants' Bank, and you find by the articles of incorporation of said bank, that the affairs of said bank should be under the control and management of the board of directors, you will find as matter of law that said defendant, A. C. Rudolf, in accepting the office of director assumed a duty to the stockholders and creditors of said bank, to inform himself of what would appear by an inspection of the books of said bank, of which he was one of the ostensible managers, and he cannot plead a want of knowledge as an estoppel. If you find that the books of the bank do not show a payment of said note you will find that the said defendants composing the firm of A. C. Rudolf & Co., cannot set up an estoppel on what George P. Eaton as cashier told them or either of them.

"6. If you find by the evidence that A. C. Rudolf was a director at the time it is claimed that George P. Eaton told defendants that the note was paid, you will find that he is not in a condition to take advantage of an estoppel *in pais*. And you will only allow the defendants such offsets or payments as are actually proved.

"7. A cashier has no power by virtue of his office to bind the bank, by a discharge of its debtors without payment, or to release a security by an agreement that he should not be called upon to pay the note that he was liable on."

"10. As far as defendants A. C. Rudolf and Julian J. Deck are concerned, having admitted or set up in their answer that the amount realized from the drafts on the National Bank of Washington, Iowa, was not applied in payment of the note, you cannot find as a matter of fact in favor of the said defendants that the same was paid.

"11. If you find from the evidence that defendants, Lewis & Marsh, owed other indebtedness than the note in question to the plaintiff, and you further find that the moneys realized from the said drafts on the National Bank of Washington, Iowa, were applied to the said individual indebtedness of the said Lewis & Marsh, you cannot apply them to the note in question, for the bank had a right to apply them to the individual indebtedness of Lewis & Marsh."

At the request of said defendants the court, among others, gave the following instructions to the jury, to the giving of which the plaintiff in error excepted.

"1. If the jury find from the evidence that the proceeds of the certificates of deposit of the Washington National Bank of Iowa were applied upon the note in suit, or were by the plaintiffs or defendants agreed to be so applied then as a matter of law they could not subsequently be applied to the payment of other indebted-

ness of Lewis and Marsh without consent of the defendants (R. & Co). And if the proceeds of the certificates were applied or agreed to be applied upon the note, they will deduct the same from the sum they may find due upon the note in suit, unless they find that the defendants have consented to their being otherwise appropriated."

"3. If you find that the plaintiff, by Eaton its cashier, or otherwise, knew that Rudolf & Co. were sureties upon the note, and if you further find that when the note became due, or at any time thereafter, the plaintiff was the owner of the note, and also had money or securities of the principals, Lewis & Marsh, in its possession or under its control elsewhere, and allowed Lewis & Marsh to check out or remove the money or securities beyond its control, without the consent of Rudolf & Co., then the sureties, Rudolf & Co., are entitled to a credit upon the note for the value of such money or securities; and if the amount or value of such money or securities, at any time in the control of the plaintiff, equal or exceed the amount due upon the note, then you will find for the defendant, Rudolf & Co., and against the plaintiff."

"6. The declarations and admissions of the cashier made in the conduct of the business of the bank, and as a part of the transaction, are evidence against the bank. The weight and credibility of such evidence being for the consideration of the jury."

Upon these instructions, and the evidence, the jury returned a verdict for the defendants Rudolf & Co., and against defendants Lewis & Marsh. Judgment on the verdict. Motion for a new trial overruled, and cause brought here by plaintiffs upon petition in error.

Cobb, Marquett & Moore, for plaintiff in error.

1. A cashier has no power to release a debt of the

bank. *Hodge's Exr. v. National Bank*, 22 Gratt., 51 A., 25 U. S., p. 80, sec. 14. *Olney v. Chadsey*, 7 Rhode Island, 224. *U. S. v. City Bank of Col.*, 21 Howard, 358. *Peninsular Bank v. Hanmer*, 14 Mich., 208. Daniels on Negotiable Notes, 297, 299, sec. 395 and 396, p. 297, sec. 392. *Cochecho National Bank v. Haskell*, 51 N. H., 116.

2. The assurance that the bank had collateral securities and the defendants would not be called upon to pay the debt is in the nature of an agreement to discharge the surety, and is not within the scope of the cashier's authority. *Cochecho National Bank v. Haskell*, 51 N. H., 116. 12 American Reports, 67–74.

3. The court erred in refusing to give the seventh instruction asked for by plaintiff.

4. But for the sake of the argument we will admit that the representations of "Eaton" cashier—that that portion of the debt not claimed to be paid was secured, and that A. C. Rudolf & Co. would not be called upon to pay it, would constitute a defense in favor of a third person who had no knowledge or means of knowledge to the contrary.

5. It is admitted that A. C. Rudolf was vice-president, and was a director in the Merchants' Bank. He had the ready means, and it was his duty to know just how the matters stood between Lewis & Marsh and the bank. *Martin v. Zellerbach*, 38 Cal., 300. *Speck v. Riggin*, 40 Mo., 405. Bigelow on Estoppel, 480. Morse on Banking, 91.

6. As a director of a bank, A. C. Rudolf, on well settled principles of public policy, would not be allowed to hold himself out to the world as a director or manager of an institution, and when sought to be made liable to the people or creditors of the bank, avail himself of his ignorance to repudiate his or his agent's acts. *Carrier v. Hilton*, 1 Curtis C. C. R., 390. *Lefever v. Lefever*, 30

N. Y., 27. *Gillet v. Phillips*, 13 N. Y., 117. Bigelow on Estoppel, 532.

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

Although Rudolf, one of the sureties, was a director and a member of the committee of discount and finance, the relations of both these defendants were that of sureties only. The same principles of law are applicable as to any other customer or creditor of the bank. The surety, Rudolf, is not proven to have aided or counseled the discount in any manner. Having affixed his name to the paper it was taken to the bank by L. & M., it was discounted for L. & M., the proceeds went to their credit. For all the purposes of this paper, Rudolf conducted himself strictly as any outside customer, as was his duty. Morse on Banking, 99.

This being the case, the evidence of the defendants, Rudolf and Deck, was properly admitted, as were the declarations of Eaton, the cashier, for two purposes: *First.* Tending to prove that the note had been paid; and, *Second.* Tending to prove that for some part of the note, $4,337.28 at least, the principals had provided a fund for its payment which, in violation of the rights of the sureties, and without their consent, had been applied to payment of other indebtedness of L. & M., the principals.

The declarations of the cashier, or the president, made in the course of the business of the bank, and pertinent thereto, are admissible against the bank. Morse on Banks, 170 to 180. *Sturges v. Bank of Circleville*, 11 Ohio State, 154. *Harrisburg Bank v. Tyler*, 3 Watts & S., 373. *Bank of Monroe v. Field*, 2 Hill, 445. *Cochecho Bank v. Haskell*, 12 Am., 72. S. C., 51, N. H., 116. *Bank v. Klingensmith*, 7 Watts, 523-24. *Hickok v. Farm. & Merch. Bank*, 35 Vt., 476, 485-6.

These defendants claim that the declarations and proofs contain all the elements of an estoppel.

1. The cashier was not the agent of the defendant, Rudolf, in making them. *First.* Because Rudolf, for the purpose of this paper, was not, and could not be, of the board of directors, as before shown. *Second.* The cashier is not the agent of the board of directors even though they choose him, but is the agent of the bank. *Bissell v. First National Bank*, 69 Penn. State, 415. *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cases, 180. 2 U. S. Dig., 1st Series, 546, § 757.

To defeat an estoppel it is not enough that the party setting it up had means of knowledge, except possibly where the parties stand in the *same relation to the fact.* Bigelow on Estoppel, 467. *Wannell v. Kem*, 57 Mo., 478.

As applicable to the case claiming an estoppel, defendants cite *Merchant's National Bank v. State National Bank*, 10 Wall., 604. Bigelow on Estoppel, 412, and cases cited. *Cochecho National Bank v. Haskell*, 12 Am., 72, and note. If, therefore, the verdict in this case be taken as founded upon an estoppel, and as contrary to the fourth instruction, this court will not therefore set it aside. If the instruction be wrong and the verdict be right, a new trial will not be granted. *Tilman v. Stinger*, 26 Ga., 171. *Vanuxen v. Rose*, 7 Ind., 222. *Cameron v. Watson*, 40 Miss., 191.

LAKE, CH. J.

It is very clear that this judgment is erroneous and should be reversed. According to the most favorable view that could possibly be taken of the case, for the defendants, as made by the pleadings and evidence, the jury should have returned a verdict against the defendants in error for at least the sum of seven hundred dollars.

It was not alleged, nor was there any evidence to show, that any payment had been made upon the note; and the jury, as to Lewis & Marsh, the principals, found there was not. If the note as to Lewis & Marsh had not been paid either in whole or in part, the same was true, also, as to the other defendants. The truth is, that the verdict can be accounted for only on the theory advanced by Rudolf and Deck in their answer, that they were released from their obligation to pay the note by the promise of Eaton, the cashier of the bank, that he would look alone to other securities which he held for payment, and that they "need take no further trouble, and feel no apprehension in reference to said note."

But, conceding that this assurance was given, it cannot avail these defendants. It is well established law, that the cashier of a bank has no authority by virtue of his office to release a surety upon a promissory note or bill, without payment, unless specially empowered to do so. *Cochecho National Bank v. Haskell*, 51 N. H., 116; *Bank of United States v. Dunn*, 6 Pet., 51. And this authority will not be presumed, but must be established by affirmative proof. Therefore, there being no testimony tending to show that Eaton had any such authority from the board of directors, this pretended release was unavailing.

Another theory advanced in support of the verdict is, that Rudolf and Deck were led to believe by the statements of the cashier that the note was paid, whereby they were induced to part with securities which they would otherwise have held on to for their protection. But, unfortunately for the defendants, this theory is not supported by the facts. All that they claim in their answer on this score is that Lewis & Marsh having requested them to become sureties "upon other notes, which these defendants would not do unless said note here in suit had been paid, and inquired of said Eaton,

then being cashier as aforesaid, relative thereto, * * said Eaton informed these defendants that all of said note, but about the sum of seven hundred dollars had been paid by said Lewis & Marsh, and that plaintiff had good collateral security for the balance thereof, to which it would look for payment." Thus, it is clearly conceded, that as to at least the sum of seven hundred dollars the note had not been satisfied; therefore, even upon the theory that the bank is liable for the loss occasioned by the deception practiced by its cashier, still they were liable for the amount which they must have known was unpaid. The fact that the bank held other security, in addition to their indorsement, would not release them from liability for this portion of the amount called for by the note.

But, even under the facts established by the testimony, independently of the defendants' answer, there is no reason why they should be released entirely from liability. Although deprived of the testimony of the cashier, as against the defendants, by reason of his impeachment, still there is nothing in the testimony produced on the part of the defendants themselves, as to the declarations made concerning the payment of the note, which, in reason, could have justified the belief that it had been paid in full.

Rudolf, one of the defendants, first took the witness stand and testified that Lewis & Marsh having told him that the note was paid, in order to satisfy himself of the truth of the statement, he went over to the bank and made inquiry of Eaton, who told him "that Lewis & Marsh had paid into his hands, as cashier of the bank, drafts on the Washington County Bank of Iowa, in the neighborhood of $5,000.00 to be placed on the credit of this note which is now in suit."

Again, on cross-examination, he says: "I asked Geo. P. Eaton whether this first note was paid, and he said it

was; that Lewis & Marsh had handed into him drafts upon the Washington Bank, Iowa, to be placed to the credit of this note. I asked George P. Eaton in these words: Well, Mr. Eaton, that does not liquidate the whole amount? George P. Eaton answered in these words: I have sufficient collaterals in my hands. I think he said mortgages in my hands, sufficient to cover the whole amount of that note." He further testified in answer to the question as to where Eaton got the money. "He did'nt get the money, he only got the drafts. It was during the time of the great financial panic."

This is the substance of the testimony given by Rudolf, who seems to have been the chief actor in this business on the part of the defendants in error. It is clear from this testimony, that they not only had no reason to believe, but that they did not understand at the time *this* conversation took place that the note had been satisfied nor, indeed, that any payment had been actually made thereon. Rudolf was at this time the vice president and one of the directors of the bank, and he must have understood from the conversation, simply, that these Washington County Bank certificates had been received for collection merely, and the proceeds when collected to be credited upon the note on which his firm was surety. At all events this was all he had a right to infer from what he swears Eaton told him.

Mr. Deck, the other defendant, testified on this point that, "On or about the 15th of November, 1873, I went to Mr. Eaton's bank and asked of George P. Eaton, about this note, if it was not paid; and that I wanted to make some arrangement for the payment of the note if it was not paid. He told me the note was all paid except $700.00; that he had perfect security for the payment of the note that was given, and for us to have no fears about the payment of it, and that we would not be called upon to pay the note. I asked him for the note

to see the indorsement, and he said it was not at hand." Again, on cross-examination he said: "I went in there and asked him (Eaton) if the note was paid, and he told me the note was paid except the seven hundred dollars." It is apparent from this that even Mr. Deck understood that his firm was still liable on the note for the balance of seven hundred dollars, but rested easy under the assurance of Eaton that the bank would not look to his firm, but to other securities which it held, for payment. But, as before stated, this was a promise which Eaton had no power to make, and by which the plaintiff was not bound.

Two or three of the witnesses testify of statements made by Eaton, at casual meetings, away from the bank, to the effect that the note was paid, or at least nearly so. But statements of a cashier, under such circumstances, have never been held to bind a bank.

But a still more important and difficult question remains to be disposed of, and that is, whether, under any circumstances, Rudolf and Deck can be released from liability on the note for the full amount that may be found to be due, in consequence of any statements that the cashier made to them.

There is testimony tending strongly to show that, on making inquiry at the bank, of the cashier, they were told by him that all of said note but about the sum of seven hundred dollars was actually paid, and that, in consequence of this assurance, they were induced to go upon other notes, as surety for Lewis & Marsh, to a large amount, which they were compelled to pay. Also, that they surrendered to Lewis & Marsh a large quantity of property from which they would have fully indemnified themselves against loss in consequence of being compelled to pay the note, but for the belief induced by the false statements of the cashier that all but about seven hundred dollars had been paid. Although there is some

conflict in the authorities, it seems to be pretty well established that, in general, under such circumstances, the loss, if any, must fall upon the bank rather than upon the surety. The bank would be estopped from denying the truth of the statement of its cashier, when to do so would entail a loss upon the surety which he would have guarded against had it not been made. *Drew v. Kimball*, 43 N. H., 282. *Claflin v. Farmers' Bank*, 36 Barb., 540.

But while this is conceded to be the general rule, it is urged on the part of the plaintiff that these defendants are not in a situation to claim its protection in consequence of the relations which Rudolf bore to the bank, and also to his co-defendant, Deck. It is insisted that, being the vice-president, and one of the directors of the bank, he was in a situation which required him to *know* the condition of its business, and must be conclusively presumed to have known whether said note had been paid or not. No case directly in point has been cited, but we apprehend that the rule contended for is the correct one. In Morse on Banks and Banking, 90, 91, it is said that "The general control and government of all the affairs and transactions of the bank rest with the board of directors. For such purposes the board constitutes the corporation," and, "uniform usage imposes upon them the general superintendence and active management of the corporate concerns. They are bound to know what is done, beyond the merest matter of daily routine, and they are bound to know the system and rules arranged for its doing." Again, on page 115: "Whatever knowledge a director has, *or ought to have*, officially, he has, or will be conclusively presumed at law to have, as a private individual. In any transactions with the bank, either on his own separate account, or where others are so far jointly interested with him that his knowledge is their knowledge, he and his joint con-

tractors will be affected by this knowledge which he has or which he ought, if he had duly performed his official duties, to have acquired." *Lyman v. United States Bank*, 12 How., 225.

Tested by this rule, how stand these defendants? Rudolf and Deck were co-partners, and as such signed the note in question. It is a settled rule that notice to one member of a firm is sufficient to bind all the other members. Rudolf was also an active member of the board of directors of the bank, and it was his duty to know whether this note was paid or not. The conclusive presumption is that, as a director, he knew it was not paid, and this knowledge is chargeable to him as a private person, and also as a member of the firm of A. C. Rudolf & Co.

When Rudolf testifies that he did not know that this note had not been paid "until the early part of October, 1874," about a year after its maturity, we think he shows an inexcusable carelessness and want of attention on his part, as a member of the board. The books and papers of the bank were subject to his inspection, and a proper examination of these could not have failed to disclose the deplorable condition of its finances, and that this very note was among its uncollected assets.

We are of the opinion, therefore, that any defense founded upon the statements of the cashier, as to the payment of said note, is entirely unavailing to these defendants, and that the several rulings of the district court which conflict with these views are erroneous. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

W. R. TURNER, PLAINTIFF IN ERROR, v. SAMUEL O'BRIEN, DEFENDANT IN ERROR.

1. **Evidence:** MALICIOUS PROSECUTION. In an action for malicious prosecution the defendant is competent to testify as to his belief in the guilt of the plaintiff, when the prosecution was commenced; and, that he instituted the prosecution without malice, or in accordance with the opinion of counsel first obtained.
2. **Malicious Prosecution:** LARCENY. Mere conversion of property is not larceny, and information of such conversion constitutes no grounds of probable cause as a defense to such action.
3. ——: ——. It is the duty of the court to determine whether the proof of certain facts constitute probable cause, and it is error to submit this question to the jury. It is the duty of the jury to say what facts are proved, and to decide on the weight of evidence and the credibility of witnesses.

ERROR to the district court of Dodge county. Tried below before POST, J. It was an action by Turner against O'Brien to recover damages for causing the said Turner to be arrested and imprisoned on a charge of grand larceny. The jury found in favor of the defendant, and Turner brought the cause here by petition in error.

N. H. Bell, for plaintiff in error.

To maintain an action for this injury the plaintiff must prove,

First. That he has been prosecuted by the defendant, either criminally or in a civil suit; and that the prosecution is at an end.

Second. That it was instituted maliciously and without probable cause.

Third. That he has thereby sustained damage. 2 Green. on Ev., Sec. 449.

Malice may be either expressed or implied, and the jury may infer it from a want of probable cause, but they are not bound to do so. Probable cause is a mixed

question of law and fact, and is defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious and prudent man in believing that the party is guilty of the offense charged. *Munns v. Dupont.* 3 Wash C. C. R. 31. And whether probable cause exists depends, not upon the actual facts of the case, but upon the question, whether the person making the charge had reasonable grounds to believe in its truth. *Shaul v. Brown*, 28 Iowa, 37.

W. A. Marlow, for defendant in error.

It is competent for the defendant in an action for malicious prosecution to testify that at the time he commenced the prosecution complained of, he believed the plaintiff was guilty of the charge made against him. Gen. Statutes, Sec. 328, page 581. *White v. Tucker*, 16 Ohio State, 468. *McKown v. Hunter*, 30 N. Y., 625–628. 1 Greenleaf Ev., Sec. 455.

Probable cause does not depend upon the actual guilt or innocence of the accused, but upon the reasonable ground of belief of the prosecutor concerning such guilt or innocence. *Miller v. Milligan*, 48 Barb., 30. *Scanlan v. Cowley*, 2 Hilt., 489.

GANTT, J.

This is an action for a malicious prosecution, and the essential grounds on which it rests, are malice and want of probable cause. Hence, to maintain the action, the plaintiff must prove both these elements, or introduce evidence from which both may be fairly and legitimately inferred; for, notwithstanding the prosecution may be malicious, yet, if there be sufficient probable cause for its institution, the action cannot be sustained. But, if want of probable cause is established by the proofs in

the case, then malice may be, and most commonly is inferred. *Merriman v. Mitchell*, 13 Me., 439. *Hall v. Hawkins*, 5 Humph., 357. *Wood v. Weir*, 5. B. Mon., 544.

The defendant, however, may show the existence of probable cause, the absence of malice, or that he acted under an honest belief, that the plaintiff was guilty of the offense with which he was charged; but this belief must have been founded on such reasonable grounds and circumstances as would have induced a man of ordinary prudence and discretion to believe in the guilt, and expect the conviction of the person charged with the crime. Therefore, the essential elements which constitute grounds of defense, in an action for malicious prosecution, are absence of malice, an honest belief in the guilt of the person charged, and a "reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person is guilty of the offense with which he is charged." And these last two elements must unite; for, good faith, merely, may be based upon mere conjecture—it may be founded upon mere suspicion, unsupported by any act or circumstance tending to show that the accused is guilty, and, hence, belief itself will not protect the prosecution from liability. In *Winebiddle v. Porterfield*, 9 Pa. St., 139, it is said, "that mere belief of the prosecutor is not evidence of probable cause. How are you to test the sincerity of a professed belief, or know that it is not the secret work of a heart to cover malice? There must be some circumstances which would authorize a reasonable man to entertain a belief. If, however, it can fairly be inferred from the circumstances of the case, that the prosecutor was actuated by an honest and fair intent to bring a suspected culprit to justice, on grounds sufficient to authorize the belief of a cautious man, it will remove all grounds for

a just inference of malice, and thus protect the defendant; but his mere professed belief will not."

Now, as the defendant may show absence of malice, belief and circumstances constituting probable cause, and as all these are matters of fact to be submitted to the determination of the jury upon the evidence in the case, is the defendant a competent witness to testify in respect to these subjects of defense? Under the civil code, a party to an action is a competent witness, except when the adverse party is an executor, administrator, or legal representative of a deceased person. If, then, he is a competent witness, upon what principle shall he be excluded from testifying to any fact material to the issue in the case?

Belief is a material issue of fact in an action for a malicious prosecution, and so is malice. *Potter v. Scales*, 8 Cal., 220. The former, together with the circumstances of probable cause, must be established by evidence to sustain the defense of justification, the latter to maintain the action on the part of the plaintiff. These are not mere matters of conclusion, but facts which must be decided by the jury upon the evidence in the case.. And if the defendant is excluded from testifying as to the fact of belief, or malice, upon what principle can he testify as to the circumstances of probable cause, or any other fact material to the issue? The law makes him a competent witness, and draws no line as to what facts, controverted by the pleadings, he may testify, and what he may not; and, therefore, he may testify generally to all such material facts, and the jury must, under all the circumstances of the case, decide upon the credibility of his testimony.

In *McKown v. Hunter*, 30 N. Y., 625, it was held, that a defendant in an action for a malicious prosecution, may testify, that at the time he made the complaint, he

believed the plaintiff was guilty of the charge made against him; and it is said, that he "had the right, when on the stand, to have the benefit of all the inferences which could be legitimately made in his favor before the jury, from testifying to the fact in a direct and positive manner before them, aided by such impressions as would be made upon the jury by his appearance, manner and mode of testifying." In *Kerrains v. The People*, 60 N. Y., 229, in which the offense charged was an assault with a deadly weapon with intent to kill, it is said: "that when the motive of a witness, in performing a particular act, or making a particular declaration, becomes a material issue in a cause, or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled, as coming from the mouth of an interested witness." *White v. Tucker*, 16 Ohio St., 468.

We must conclude, under the law, that there is no error in the admission of the testimony of the defendant, in regard to his belief in the guilt of the plaintiff, when he commenced the prosecution against him, and that he instituted the prosecution without malice. It was properly admitted by the court below.

And for the reasons stated above, the testimony of the defendant, in respect to taking the advice of an attorney in relation to the matter, previous to the commencement of the prosecution, was also properly admitted.

But to repel the imputation of malice, or establish probable cause, by such evidence, it must "appear in proof, that the opinion of counsel was fairly asked upon the real facts, and not upon statements which conceal the truth or misrepresent the cause of action. If the law were otherwise, nothing would be more easy than to shelter the most malicious prosecution under the opinion of

counsel, honestly given, but under a total mistake of the facts." He must not withhold any fact or information from his counsel; but on the contrary, he must fairly, fully and honestly, inform his counsel of all the facts and information known to himself, and then he must pursue the course pointed out by his legal adviser. *Stone v. Swift*, 4 Pick., 389. *Blunt v. Little*, 3 Mason, U. S., 102. *Turner v. Walker*, 3 Gill. & John., 377. And it is properly a question for the jury to decide upon the evidence, whether the prosecutor acted *bona fide* on the opinion given to him by his professional adviser. *Hall v. Suydam*, 6 Barb., 88.

The court charged the jury, that: "If they find from the evidence, that at the time the defendant commenced the prosecution against the plaintiff, on the charge of larceny before the magistrate, he had been informed, that the plaintiff, either alone, or with others, was converting the property, or had converted the property of the defendant, to his own use, and that defendant believed such statements to be true, and if they further find, that such information was of such character as to warrant a cautious man, that is, a man of ordinary prudence, in believing the plaintiff guilty of the offense charged, and that the defendant did so believe, then the defendant would not be liable in this action." I think this charge was error. In *Travis v. Smith*, 1 Pa. St., 237, it is said that, "as the authority to institute a criminal prosecution, and the extent of that authority, are derived from the law, the law must judge of its exercise; it is, therefore, the duty of the court to determine whether the proof of certain facts constitute probable cause, and it is error to submit that question to the jury. The duty of the jury is to say what facts are proved; and for that purpose, they are to decide on the weight of the evidence, the credibility of witnesses, the truth of conflicting allegations. The general question of probable cause is then a

mixed question of law and fact, composing two distinct inquiries, both considered at the same time on a jury trial but yet cognizable before two distinct tribunals, each of which discharges its proper function."

In the instruction, the court stated the nature and character of the fact to be proved, namely, the mere conversion of property, and then threw upon the jury to determine, whether such fact or circumstance constituted probable cause, or in other words, would warrant a man of ordinary prudence to believe the plaintiff was guilty of the offense charged. It is the duty of the court to determine whether such fact, if found, constituted probable cause, or a reasonable ground of suspicion, sufficient to warrant a cautious man in the belief that the plaintiff was guilty of larceny; and it was error to submit this question to the jury.

But suppose the plaintiff had converted to his use property of the defendant, and the defendant had been informed of the fact, would such an act constitute probable cause, or warrant a cautious man in believing the plaintiff to be guilty of larceny?

Mere conversion of property is not larceny. The instruction omits "that important ingredient, that which distinguishes larceny from a simple trespass, viz: the *animus furandi*, without which a taking is no larceny * * * The taking must be with a felonious intent, otherwise there is no larceny." Mere conversion of property, or simply trespass, is no ground of probable cause, nor for belief in the guilt in the party; and, therefore, the instruction was not only erroneous, but was also greatly calculated to mislead the jury. *Thompson v. The State*, 4 Neb., 528.

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

JUDGMENT REVERSED.

CLARK AND FRENCH, PLAINTIFFS IN ERROR, v. A. W. TENNANT, DEFENDANT IN ERROR.

1. **Fraud**: RESCISSION OF SALE ON GROUNDS OF. In order to avoid a sale on the ground of fraudulent representations, they must be of a matter material to the contract, and by which the purchaser was misled or deceived, and but for which the contract would not have been made.

2. ———: ———. Fraud is never presumed but must be clearly proved in order to entitle a party to relief, on the ground that it has been practiced upon him.

3. ———: ———. When a seller of personal property who honestly believed that a mortgage, which he knew had existed against it, had been canceled or suffered to lapse, represents to the purchaser that it is free from incumbrance, but it turns out that he was mistaken, this will not entitle the purchaser to rescind the contract when he has used the property for several months without any molestation, especially if the seller is ready and able to remove the incumbrance at once, or to give ample indemnity against loss.

4. ———: ———: EVIDENCE. When the purchaser of a large quantity of hotel furniture claims the right to rescind the contract and force the property back upon the seller, on the ground of fraud in the sale, it is proper on cross-examination to ask him whether his landlord had not terminated his lease and taken possession of the house about the time of the attempted rescission.

5. ———: ———. If a party has derived a material advantage from a partial performance of a contract, he cannot hold such advantage and rescind the contract, but must seek his remedy in damages.

ERROR to the district court of Douglas county. The facts in the case are substantially as follows: Tennant, the defendant in error, in April, 1874, bought of Clark & French, plaintiffs in error, the furniture of the Wyoming Hotel, in Omaha, for the sum of $7,000. He was to pay in cash at the time of the purchase $1,000. He only paid $350. He gave notes for the balance of $6,000, secured by a chattel mortgage on the goods bought.

The total amount paid on the purchase price by Tennant, with the addition of $35 interest, was $1,385. The remaining notes of $5,000 and $650 due on first payment remained unpaid. Prior to Tennant's purchase, and on the 30th day of January, 1873, F. A. Higby and Ira Higby, who then owned the furniture, mortgaged it to one Paddock for $5,000, and this mortgage with accompanying notes was assigned to Reuben Ross, of New York City, before the purchase by Tennant. The lease of the hotel and the furniture came into the possession of Clark & French, at which time the amount due on the Higby mortgage was $6,000. Prior to December, 1873, considerable payments were made upon the mortgage, the exact amount of which is not shown, but Clark testified he thought it was about $3,000. In December, 1873, Ross, the holder of the mortgage, called upon Clark & French and asked them to indorse their guaranty upon the notes, which they did. In January, 1874, the mortgage was re-filed in the clerk's office by attorneys signing themselves "as agents and attorneys for F. A. Paddock, the mortgagee."

Upon the purchase of the property by Tennant, together with the lease, he entered into possession and run the hotel until November 23, 1874. On that date he served a written notice on Clark & French rescinding the contract and demanding repayment of amount paid and the surrender of his notes, and tendering back the property. Clark & French refused to comply but caused the property to be sold under the chattel mortgage given them by Tennant. The net proceeds of the sale amounted to $759.50. Tennant brought this action to recover damages on account of these transactions.

Upon a trial before SAVAGE, J., the jury returned a verdict against plaintiffs in error for $7,877.16, from which defendant in error remitted $6,112.60 and judgment was rendered for the balance. Motion for a new

trial overruled. Exceptions. Cause brought here upon petition in error.

George W. Doane, for plaintiff in error, reviewed the evidence at length, and in support of instructions asked for on his behalf, and refused by the court, cited the following cases: *Cromwell v. Wilkinson*, 18 Ind., 365. *State v. McCauley*, 15 Cal., 429. *Crossgrove v. Himmelrich*, 54 Pa. St., 203. *Mitchell v. Sherman*, 1 Freem. Ch., 120. 2 Pars. on Contr., 191. *Barnett v. Stanton*, 2 Ala., 181. *Peters v. Gooch*, 4 Blackf., 515. *Teter v. Hinders*, 19 Ind., 93. *Conner v. Henderson*, 15 Mass., 319. *Masson v. Bovet*, 1 Denio, 69. *Brown v. Witter*, 10 Ohio, 142. *Moore v. Bare*, 11 Iowa, 198. *Potter v. Titcome*, 22 Maine, 300. *Shaeffer v. Sleade*, 7 Blackf., 184. *Pettus v. Roberts*, 6 Ala., 811. *Hammond v. Buckmaster*, 22 Vt., 375. Chitty on Contr., 678–752. *Burge v. Cedar Rapids R. R. Co.*, 32 Iowa, 101. *Ripley v. Hazelton*, 3 Daly (N. Y.), 329. *Sanborn v. Batchelder*, 51 N. H., 426. *Gatling v. Newell*, 9 Ind., 578. *Colson v. Smith*, Id., 9. *Underwood v. West*, 52 Ill., 397. *Mullin v. Bloomer*, 11 Iowa, 360. *Moore v. Turbeville*, 2 Bibb, 602. *Saunders v. Hatterman*, 2 Iredell Law, 32. *Farrar v. Alston*, 1 Dev., 69. 1 Story's Eq. Jur., secs. 197 – 200.

J. O. Adams and *E. Wakeley*, for defendants in error, cited: *Smith v. Richards*, 13 Pet., 26. *Hazard v. Irwin*, 18 Pick., 95. *Bennett v. Judson*, 21 N. Y., 238. *Buford v. Caldwell*, 3 Mo., 477. *Thomas v. McCann*, 4 B. Mon., 601. *Morehead v. Eades*, 3 Bush., 121. *Mead v. Bunn*, 32 N. Y., 275. *Litchfield v. Hutchinson*, 117 Mass., 195. *Graves v. National Bank*, 10 Bush., 25. *Wilcox v. University*, 32 Iowa, 367. *Reed v. Divin*, 7 Ind., 189. *McCormick v. Malin*, 5 Blackf., 522. *McClellan v. Scott*, 24 Wis., 81. *Bryant v. Simonean*, 51 Ill., 324. *Knauss v. Shiffert*,

58 Pa. St., 152. *Masson v. Bovet*, 1 Den., 69. *Withner v. Greene*, 9 How., 213, 31. *Shackleford v. Handley*, 1 A. K. Marsh, 497.

LAKE, CH. J.

Tennant's action in the court below depended entirely upon the establishment of *fraud* on the part of Clark & French in the sale of the goods. It was solely on the ground of fraud that he sought to recover. This being the vital point in the case, and the one upon which it must eventually turn, it may be well to consider it at the outset of our examination.

It is an established rule that, to avoid a contract on the ground of fraud in the suppression of the truth, or the suggestion of falsehood, there must be a concealment of something which the seller is bound to communicate to the purchaser, or some misrepresentation on a matter material to the contract which misled or deceived him, or was calculated to do so, and but for which the contract would not have been made.

In the view we take of the case, it is wholly unnecessary to determine whether the steps taken to renew the Higby mortgage were adequate to preserve its lien upon the property in favor of Ross, the assignee, or not. We shall therefore treat it as a subsisting lien for the amount actually due thereon at the time of Tennant's attempted rescission of the contract.

But, notwithstanding this mortgage had not been canceled, and still bound the property which it covered for whatever remained due to Ross, the testimony very clearly establishes the fact that after Clark & French had given their indorsement upon the notes, Ross at once abandoned all idea of relying upon the mortgage for payment, or as a security. And we are satisfied that Clark & French, from what transpired between themselves and Ross, might have reasonably understood and

believed that the mortgage had been permitted to lapse, and at the time of their sale to Tennant had ceased to be a lien upon the property. Let us look to some of the testimony bearing upon this branch of the case.

Mr. Clark testified that, in December preceding the sale to Tennant, Ross called upon Clark & French and informed them that he was the owner of the Higby mortgage. He said it had then "nearly lapsed," and that he would not give the snap of his finger for it. Ross further said to them, "I want you to indorse these notes (the ones secured by the mortgage) to secure me. The mortgage is nearly out, *and I wont bother any more with it.*" An understanding was then come to, Clark & French indorsing the notes, and Ross, in consideration thereof, extended the time of payment for several months longer. Clark, in addition to this, swears positively that he did not know at the time of the sale to Tennant that the mortgage was an existing lien against the property, but supposed it had lapsed by limitation. Clark's version of what took place between them and Ross concerning the mortgage is not denied by any one, but is supported by Ross himself in his deposition. He says: "After Clark & French had bought the goods covered by said mortgage, I made inquiries as to their financial standing and concluded to accept their indorsement to the notes, as I considered the notes good with their indorsement, *without the mortgage.* I may have told them I did not want to have any trouble with the mortgage." And to show that he looked alone to Clark & French for payment, and did not intend to look to the property for security, he says he did not authorize his attorneys to re-file the mortgage, nor did he even think of it.

This transaction with Ross, as before stated, took place in December, 1873, and in view of what was there said and done, and of the additional fact that there was no

question as to their liability on the notes, or of their ability to pay them, Clark & French may have well understood, and really believed, that the mortgage had lapsed and become a nullity, as it certainly would have done as to Tennant, at least, if the course had been pursued respecting it indicated by the declaration of Ross, that he "*would bother no more with it.*" That they did so believe is abundantly shown, *first*, by the uncontradicted testimony of Clark himself to that effect; and *second*, by the great surprise manifested by both Clark & French, as shown by Tennant's own testimony, when informed that the mortgage was still alive. We think that these facts and circumstances of themselves, independently of the positive denial of Clark that he made the statement imputed to him concerning incumbrances, are sufficient to show beyond all doubt that Clark & French acted towards Tennant in the utmost good faith, and with perfect fairness throughout the entire negotiation.

But this is not all. There are other facts which throw additional light on the question, and greatly fortify us in the conclusion that the attempt to fasten fraud upon Clark & French was a signal failure. We will briefly allude to them. Clark & French were, it is conceded, of sufficient financial ability to pay the Ross claim, and were actually doing so as fast as they conveniently could in view of the almost total failure of Tennant to meet his notes, upon which they had greatly depended. They also retained the ownership of Tennant's notes, and notwithstanding they needed the money due thereon, actually let them run past maturity until, at the time of the attempted rescission of the contract, over three thousand dollars—inclusive of a portion of the thousand dollars which should have been paid down—was actually due and unpaid. This sum was more than sufficient to have fully satisfied the balance then due upon the mortgage which

Tennant was so surprised to find upon his goods. In this whole transaction we have failed to discover in the conduct of Clark & French a single one of those ear-marks usually attending the perpetration, or the attempt to perpetrate a fraud, by one person upon another. The commission of fraud is usually with a view to gain; of profit at the expense of him against whom it is directed. But here there is nothing of that sort. Had Clark & French, immediately upon the consummation of the trade, disposed, or endeavored to dispose, of Tennant's notes; or had they pressed them promptly to collection as they became due; or if they had evinced a disposition at any time to cast upon Tennant the burden of advancing his money before the maturity of his notes in order to protect his property from sacrifice, there would have been some excuse for this charge of fraud.

The negotiations for this sale occupied several days, and were finally consummated about the 1st day of April, 1874. The notes given for the purchase money bear that date, and we think it is fair to presume that it was then fully agreed upon. The testimony shows that there was a little delay in the delivery of the papers in consequence of the absence of Stevenson, who was expected to sign two of the notes. But this delay was only for a day or so. Now there is nothing in the testimony, not even in that of Tennant himself from which it can be inferred that a single word had been said up to this time, as to there being any incumbrance upon the property by mortgage or otherwise. The first suggestion of this kind came from Stevenson after the negotiations had ended, and the terms of sale were fully agreed upon. On this point Tennant swore that "the question was asked in this way, I think it was asked by Mr. Stevenson, 'What is he getting?' and the answer was, 'All the furniture in the house except the safe and piano.' I

asked if there was any incumbrance on the property, and he said, 'No, it is all clear.'"

Now this is an important circumstance to show that the subject of incumbrances was not thought of until the contract was fully agreed upon, and Stevenson was called in to affix his name to two of the notes. It shows that Tennant was not at all anxious on that subject, or it would not have been left to Stevenson to first broach the matter.

But did he consider it of any importance? In view of his own testimony, and all the surrounding circumstances we think not. The responsibility of Clark & French was well known to him, and he doubtless understood that they were perfectly able to make good the title which their sale to him implied that they had to the property. Indeed when the question was put to him by his counsel, evidently with the expectation that he would give a negative answer, whether he would have bought the property if he had known of the mortgage, he could not answer *directly* that he would not, but he qualified his answer by saying he "would not without assuming the mortgage." It is unquestionably the law, and it should be strictly enforced, that, where any one by willful misrepresentation induces another to enter into a contract under the belief that such representation is true, a fraud is committed which will not be tolerated. It is doubtless a question of much nicety in most cases to determine just what misstatement will, or will not, vitiate the contract. It is safe to say, however, that, in order to avoid a contract on this ground, there must not only have been a misrepresentation of a material fact constituting the basis of the transaction, but the party complaining must have made the contract upon the faith and credit of such representations. "At least he must so far have relied upon them that he would not have made the contract if such representations had not been

made." *Phipps v. Buckman*, 30 Penn. St., 402. *Taylor v. Fleet*, 1 Barb., 471.

Another rule of the law which should not be overlooked is that fraud is never to be presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced upon him. *Howe v. Howe*, 99 Mass., 89. We are of the opinion that in this case there was not only an absolute failure to establish the fraud charged, but, on the other hand, that it was abundantly shown that Clark & French acted throughout the transaction as honest and fair minded men.

As this conclusion will result in a new trial being ordered on the ground that the verdict is clearly against the weight of the evidence, we might perhaps stop here without noticing the other assignments of error. But there are two or three that deserve a passing notice, to which we will allude very briefly.

On his cross-examination, Tennant was asked in substance whether the owner of the hotel which he had been keeping had not taken possession of it before he notified Clark & French of his rescission of the sale. This question was ruled out on the ground of immateriality.

We think the question was a proper one and that it should have been answered. If the house in which Tennant had kept and used these goods, consisting as they did of hotel furniture, had been or was about to be taken from him so that he was under the necessity of seeking another place in which to use or store them, this might furnish a satisfactory clue to his evident anxiety to get rid of them and at the same time to escape paying the notes given on their purchase. He had had the use of them for some six months, had paid but a very small portion of the price, and if the time had come when they could be of no immediate use to him it would be more profitable, doubtless, to crowd them back upon Clark & French at the contract price, than to pay his

notes and sell them at auction or otherwise for what he could get. There was error in refusing to permit this question to be put.

So, too, we think there was error in refusing to permit certain questions to be propounded to the witness Pritchett on his cross-examination. This witness had testified in chief that during the time he had charge of the Higby mortgage he had not heard it had been released or waived. On cross-examination he was asked whether Clark & French, from the first time they learned that steps had been taken to foreclose it, did not claim to him that it had been released and waived? We see no reason why this question was not entirely proper. What the witness had said in chief was calculated to lead the jury to believe that Clark had no idea that the mortgage had been waived by Ross, or else why did he not so claim to his attorneys when they took steps to enforce it? And this, it is evident, was the purpose for which this testimony was called out by Tennant's counsel. Now it is very clear that it was the right of the defendants to show that this was not the fact, and thus prevent the inference that might, and probably would, be drawn from it, if not denied. And in what way could this be so satisfactorily done as on a cross-examination of the same witness if it were successful?

It is claimed also that there was error in certain instructions given to the jury, and likewise in the refusal to instruct on several points as requested on the part of the plaintiffs in error.

As to those given by the court, on its own motion, we discover no fatal objection except in the fifth and fourteenth. The fifth was in these words: "If you believe that Clark & French stated that there was no incumbrance upon the property when there was in fact a mortgage upon it, which mortgage was known to them, and if you believe that such statement was in regard to a

material matter and influenced Tennant in making the contract, then you would be justified in coming to the conclusion that there was a fraudulent statement which would enable Tennant on discovery of the fraud to rescind the contract." This instruction had a direct tendency to cause the jury to disregard entirely the belief of Clark & French, no matter how firmly and honestly impressed upon their minds, that Ross had permitted the mortgage to lapse and intended to look alone to them for payment. It being a conceded fact, not at all denied by Clark & French, that they knew of the Higby mortgage, this instruction brushed away every vestige of their defense and left them nothing whatever to stand upon. We think it was clearly erroneous.

The fourteenth instruction related to the mode of arriving at the damages to be allowed to Tennant in case the jury found that he was entitled to rescind the sale. This instruction was defective in not including in the amount to be deducted from the purchase price, in addition to the unpaid notes, also that portion of the first payment of one thousand dollars which was still in arrear. The whole sum remaining unpaid, upon the basis adopted by the court, should have been taken into the account whether represented by notes or not.

There were several instructions requested by the plaintiffs in error, and refused by the court, which we think ought to have been given. One of them was in these words: "If one party has derived an advantage from a partial performance of a contract, he cannot hold such advantage and rescind the contract, but must seek his remedy in damages." This is undoubtedly the law, and in view of the fact that Tennant had used this property, in running his hotel for over six months, the rule contended for was strictly applicable. Again, to the same point was the following: "And one seeking to rescind

on the ground of fraud must offer to restore benefits" derived from his purchase.

The testimony shows that as soon as Tennant discovered this mortgage on the record, without waiting to ascertain whether the amount which it was intended to secure had been paid, and without any consultation with Clark & French in relation to the matter, he rushed to a lawyer and took steps to secure an immediate rescission. This is not the course that common honesty and fair dealing would have dictated, and it is a strong circumstance to show that Tennant must have known prior to his pretended discovery of the mortgage that it was at least a nominal lien upon the property. It is not every mortgage that is found of record that is a real incumbrance on the property which it covers. It is not unfrequently the case that they are suffered to remain long after the money which they secured has been fully paid. Even in this case the testimony shows that a very considerable portion of what appeared to be due by the records had been paid, and that as to the whole debt it had been materially modified, even if not discharged, by the arrangement between Ross and Clark & French. The testimony also shows that, at the very first mention of the fact to Clark & French that the mortgage had been renewed, they not only expressed great surprise, saying there must be some mistake about it, but they unhesitatingly declared that they would indemnify and protect Tennant against any loss or damage whatever. Several other points were urged upon our attention on the argument, but having touched upon those which we deem the most important and controlling ones, we do not consider it necessary to notice them. For these reasons the judgment of the district court is reversed and a new trial awarded.

REVERSED AND REMANDED.

CLAUDIAS JONES, PLAINTIFF IN ERROR, v. THE COUNTY COMMISSIONERS OF SEWARD COUNTY, DEFENDANTS IN ERROR.

1. **Taxation**: VALUATION OF PROPERTY. Every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, and cannot be compelled to pay a tax greater than in proportion to the value of such property.

2. ——: ASSESSMENT OF PERSONAL PROPERTY. Under the provisions of section twenty-one of the revenue laws, in the assessment of personal property, the taxpayer is entitled to have a deduction of *bona fide* debts owing by him, from the gross amount of his credits.

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

Norval Brothers and *Lowley & Leese*, for plaintiff in error.

Under the revenue statutes of this state the assessor does not fix the value upon all taxable property. The assessor values part and the owner part. The owner values his "moneys and credits" and "stocks or shares in incorporated companies" in every instance, except when the owner fails, neglects, or refuses to list, or to take the prescribed oath, then the assessor determines their value. General Statutes, Chap. 66, secs. 6, 11, 20 and 21. General Statutes, 899, Sec. 9. *Town of Wauwatoso v. Gunyon*, 25 Wis., 271. *White v. City of Appleton*, 22 Wis., 639.

The person assessed has a right in listing his credits to deduct from the gross amount the amount of *bona fide* debts owing by him. He is only required to list the amount of his credits over and above his *good faith* indebtedness. Jones had no credits to list, for the reason that his debts equaled to and exceeded his credits. General Statutes, 903, sec. 21, and 897, sec. 3.

Jones having made out and returned to the assessor under oath, in the time and manner prescribed by law, a list of all his taxable property, this was final and conclusive upon the assessor. The assessor had no authority to increase the items or values of property which the law authorizes the owner to value. *Matheson v. The Town of Mazomanie*, 20 Wis., 191. *Ketchum v. The Town of Mukwa*, 24 Wis., 303. *White v. City of Appleton*, 22 Wis., 639. *K. P. R'y Co. v. Commissioners, etc.*, 16 Kas., 587, 594.

McKillip & Page, for defendant in error.

Is the statement of taxable property, subscribed and sworn to by the person to be assessed, conclusive and final as against the assessor, or against the board of equalization?

First. We maintain that it does not conclude the assessor from adding items omitted from the sworn lists. Cooley on Taxation, 205. General Statutes, Title Revenue, secs. 1, 2, 4, 6, 8, 9, 10, 11, 12, 13, 20, 21, 24, 25, and 27. *Thompson v. Tinkum*, 15 Minn., 295. *State v. Hamilton*, 5 Ind., 318. *Champain Co. Bank v. Smith*, 7 O. S. 49.

The sworn list of persons assessed does not conclude the board of equalization from raising or lowering the valuations of any or all property (except property valued by the state board), or to add to the assessment roll, the description of such property as may have been omitted. General Statutes, 907, Sec. 27. *Robinson v. Ward*, 13 O. S., 297. *People v. Argnello*, 37 Cal., 526.

Second. Jones, by appearing before the board of equalization, which had authority to add omitted descriptions of property, waived informalities (if any) in the return of the assessor. *Nieman v. Shepard*, 27 Ind.,

293. *Merill v. Gorhan*, 6 Cal., 42. *Williard v. Holden*, 4 Wend., 223.

Third. An assessment roll regular on its face, is a public record made under oath of office, and when a person aggrieved at anything therein appears before the board of equalization, presumptions are in favor of its correctness, and it cannot be set aside for any informality, or irregularity of the assessor not appearing on the face of the roll, but can only be set aside by the board upon evidence showing affirmatively that the party is entitled, on the merits of his case, to the relief asked. *People v. Halsey*, 37 N. Y., 346. *Thompson v. Tincom*, 15 Minn., 302. *Barhyte v. Shepherd*, 35 N. Y., 255. *Western R. R. Co. v. Nolan*, 48 N. Y., 513.

GANTT, J.

The plaintiff in error made out under oath, and returned to the assessor, on the 11th day of March, 1876, a statement or list of his taxable property. On the same day, without the knowledge of the plaintiff, the assessor made out another statement or valuation, consisting of "moneys $1,000; mortgage securities $31,245; and corporation stocks $1,000." And on the 10th day of April, in the same year, he made out and delivered to the county clerk an assessment roll, in which was added to the statement of his taxable property made by plaintiff, the above sums, designated as "moneys and credits $32,245," and "corporation stocks $1,000."

The plaintiff at the proper time made application to the county board of equalization to correct this assessment roll, by striking out the sums or valuations, so assessed by the assessor; and on the 19th day of April, 1876, the board made a final order sustaining the additional assessments of valuation made by the assessor as taxable property of the plaintiff, and adding thereto fifty per cent (Gen. Stat., 899) making the total of $49,867.77,

as taxable property of the plaintiff. Upon a review of the case, the district court affirmed the findings and order of the board, and the case is now brought into this court by petition in error.

It seems clear that there was error in adding the fifty per cent to the assessed value of the property of the plaintiff. Section one, article IX of the constitution declares "that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises." This is the fundamental law, and notwithstanding the legislature shall direct the manner in which this value shall be ascertained, yet the levying of the tax must be by valuation; it is the *value* of the property which is to be ascertained, and no citizen can be compelled to pay a tax greater than in proportion to the value of his or her property. Hence, when the value is ascertained, there can be no fifty per cent or other sum added thereto as a tax penalty or otherwise.

But did the board err in sustaining the assessment made out and returned by the assessor, in addition to the list of taxable property made out by the plaintiff? This is a question of fact. The plaintiff admits that he owns real estate in this state valued at forty thousand dollars; that he has mortgage securities or credits to the amount of about thirty-five thousand dollars, and that he owes a debt to exceed that amount, and, therefore, he claims the right to off-set this debt against his mortgage credits in the assessment and valuation of his property. On the hearing of the case the plaintiff presented his evidence. C. W. Barkley, being sworn, says that he is well acquainted with the business of the plaintiff, and knows of his own knowledge that the plaintiff was on the first day of March, 1876, indebted in the sum of $37,395.00. T. E. Sanders, being sworn, says he is book-keeper for plaintiff and is well acquainted with his books, and that

his books show he owes a just debt of $37,395.00 to a person who is not in any manner related to him. As appears from the record, the board did not call a single witness, ask a question or make any further investigation in respect to the subject matter before them. Such omission on the part of the board seems inexplicable. If a proper investigation had been made, it would probably have been shown that some person was liable to pay tax, who was not assessed. But this was not done, and all we can do is to decide upon the facts disclosed by the record before us. Section twenty-one of the revenue act of 1869 provides that "in making up the amount of credits which any person is required to list, he will be entitled to deduct from the gross amount the amount of *bona fide* debts owing by him." Now, according to the rule prescribed by this statute, it seems clear, under the evidence, that the plaintiff is entitled to off-set the *bona fide* debts owing by him, against his credits, whatever they shall be; but as the record very clearly shows very great neglect of duty on the part of the commissioners in not properly investigating the matter then before them, the judgment of the district court is reversed, and the case is remanded to the district court with instructions to direct an issue to be formed and take proofs and try and determine to whom the plaintiff's alleged indebtedness was due, the actual amount thereof, and the actual amount of taxable moneys and credits he was possessed of at the time the assessment was made, and render judgment therein according to this opinion.

REVERSED AND REMANDED.

OPINION OF THE JUDGES.

1. The term "fiscal quarter," as used in section 19, article III of the constitution, means one quarter of a calendar year, for which the legislature is required to make appropriations for the expenses of the government. The above section of the constitution has no reference to legislative appropriations for 1875 and 1876, made prior to the adoption of the constitution: it was intended solely for the guidance of future legislatures.
2. A requisition for the salary of an officer should show on its face for what month or quarter and year the same was earned.
3. All necessary expenses of the government for the years 1875–1876, should be paid out of the appropriations for such years. Unexpended balances thereof lapse into the treasury, and cannot be drawn out for expenses incurred during the years 1877–1878; nor can the appropriations for 1877–1878 be resorted to for the purpose of supplying deficiencies of 1875–1876.
4. Proceeds of "convict labor" uncollected for the year 1876 may properly be applied in payment of outstanding indebtedness for support of convicts incurred during that year.
5. In the absence of a repealing act, or an act of limitation, it does not matter how long after the money provided for in an appropriation act is earned that it is applied for. As to *it* the act will continue in force and operation until the money is drawn from the treasury.
6. By section 30 of the constitution of 1867, provision for the support of the government by the legislature was limited to two years. The money might not have been actually drawn during that time, but the expense must have been incurred or the salary earned, during the two years for which the appropriation was made.

At the adjourned January Term of court held on the 13th of March, 1877, the following communication was received from the officers of the Executive Department, which with the reply thereto is, at their request, published for the benefit of all concerned:

LINCOLN, NEBRASKA, MARCH 13, 1877.

To the Supreme Court of Nebraska:

WE, the undersigned, would respectfully represent that much doubt and uncertainty exists in regard to the correct construction of the provisions of appropriation laws, passed by the eleventh session under the old constitution, in connection with the acts making appropriations under the new constitution, and if not inconsistent with the duties of your Honorable Court, and in order to further a proper execution of the laws, we would respectfully solicit an opinion upon the following questions:

1. What calendar date is understood in the term "fiscal quarter," as found in section 19, article III of the new constitution? Does the language "and all appropriations shall end with such fiscal quarter," contained in said section, apply to appropriations made by the eleventh session? Are the appropriations of the eleventh session continued in force until the expiration of said fiscal quarter?

2. Reference being had to appropriation bill, approved February 23, 1875, Session Laws, page 219, and a copy of an act hereto attached, approved February 15, 1877, marked Exhibit "A," and requisition for a warrant for the "Normal School," marked Exhibit "B," it will be observed that the act of February 15, 1877, makes appropriations for normal school expenses, and this requisition is made February 20, 1877. Is this requisition subject to warrant out of unexpended balance of appropriation of 1875?

3. Are unexpended balances of appropriations made for incidental expenses to the executive state officers by act of February 23, 1875, subject to a warrant upon an application made February 23, 1877, for the outstanding balance in gross, to be accounted for to the finance committee of the legislature under provisions of said acts, February 23, 1875, and February 15, 1877?

4. Referring to page 225, Session Laws of 1875, appropriation act, approved February 23, 1875, the proceeds of convict labor were appropriated for the "care and support of state prisoners." During the year 1876, there remains uncollected, on account of convict labor, the sum of $2,515.70. There are also outstanding debts accruing in 1876 for maintenance of state prisoners. Under existing laws can said proceeds for convict labor, after payment thereof shall have been made into the state treasury, be disbursed on Auditor's warrants in payment of such outstanding indebtedness?

5. Are applications for warrants on outstanding balances for appropriations of 1875, accompanied by requisite voucher, subject to warrant, if such applications are made within two years of date of such appropriation? Are such applications subject to warrant if made before expiration of "first fiscal quarter?"

6. What is the construction of section 30, article II of the old constitution, in case the appropriation has been earned during the two years, but not drawn—can it be drawn after expiration of two years from date of appropriation?

Respectfully submitted.

SILAS GARBER, *Governor.*
BRUNO TZSCHUCK, *Secretary of State.*
J. B. WESTON, *Auditor of Public Accounts.*

To a further understanding of the questions above propounded and the reply thereto, it may be stated that the eleventh session of the legislature was held under the constitution then in force, in January and February, 1875. Section 30, article II of that constitution, provides: "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law; and no appropriations shall be made for a longer period than two years."

Appropriations were made at that session for the "cur-

rent expenses of the years 1875 and 1876." It included appropriations for "normal school," referred to in question two, and also provided that each state officer should "keep an itemized account of the incidental expenses pertaining to his office, and report the same with proper vouchers to the finance committee of the next general session of the legislature."

On the first day of November, 1875, the present constitution went into operation. Section 19, article III, provides: "Each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter. And whenever it is deemed necessary to make further appropriations for deficiencies, the same shall require a two-thirds vote of all the members elected to each house, and shall not exceed the amount of revenue authorized by law to be raised in such time. Bills making appropriations for the pay of members and officers of the legislature, and for the salaries of the officers of the government, shall contain no provision on any other subject."

The first *regular* session of the legislature under this constitution, and the next in order of time to the eleventh session of 1875, was held in January and February, 1877. On the 15th of the latter month it passed an act referred to in question two as exhibit "A," "making appropriations for the current expenses of the government for the years 1877 and 1878, and first fiscal quarter of the year 1879."

It is upon a construction of these constitutional and statutory provisions that these questions were asked, and the following reply given thereto:

To His Excellency, Silas Garber, Governor, Bruno Tzschuck, Secretary of State, and J. B. Weston, Auditor of Public Accounts.

Gentlemen:—Your communication addressed to the

supreme court came duly to hand, but the questions propounded are not presented in such manner that, as a court, we could answer them. But, in view of the great importance of the main question involved in your inquiries, not so much by reason of the amount involved at this time, which we understand is not considerable, as in the establishment of a practice which shall be in harmony with the constitution, and the laws passed in pursuance thereof, we have thought it best to give you very briefly, our individual views. We do this the more readily for the reason that we do not see how there can be a difference of opinion among men accustomed to the construction of statutes. We shall not take the time to enter upon any extended argument of the matter, but briefly answer the questions in the order you have presented them.

I. By "fiscal quarter," as used in section 19, Article III, of the new constitution, was evidently meant one quarter of a calendar year for which the legislature is required to make provision for the expenses of the several departments of the state government. The first clause of this section is directory merely, and it was evidently intended thereby that there should be no period of time when the different departments are not provided for in advance of their financial wants. The language employed, if strictly construed, would seem to indicate an intention to designate the second quarter of the third year as the one to which the appropriation should extend —that is, the full quarter next after the one in which the regular session of the legislature is held. The language is, "*until the expiration of the first fiscal quarter after the adjournment of the next regular session.*" But the legislature recently in session having construed these words to mean the quarter in which the session is to be held, and as this construction accomplishes, to all intents and purposes, all that was expected of the pro-

vision, it should perhaps be accepted as the correct construction of the language employed. At all events, it is a construction which must stand, and which no one can question, so far, at least, as the last act of appropriation is concerned. This section has no reference whatever to the act of the eleventh session of the legislature, making appropriations for the current expenses of the years 1875 and 1876, but was intended solely for the guidance of future legislatures. It confers no authority whatever to use any portion of the appropriations for 1875–6 to defray the expenses of any other year, or portion of a year.

II. The requisition for a warrant for the salary of a teacher in the "Normal School," marked "Exhibit B," is defective in not showing when the salary was earned. If it were earned in 1876, then of course it is chargeable to the appropriation of the eleventh session; but if earned during the present year, then it is provided for in, and can legally be paid only out of, the appropriation of 1877; but it is impossible for the auditor to know from "Exhibit B" out of what appropriation it is payable. The requisition should show upon its face in what month and year the services were performed, for the guidance of this officer.

III. To your third interrogatory, we answer — No! When it so happens that there are unexpended balances remaining after all the expenses for the time named in the act of appropriation have been paid, these balances are no longer subject to order, but may, perhaps, properly be said to *lapse*, or fall back again to the particular fund from which it was, at most, only nominally separated by the act of appropriation. In reality, it can hardly be said to have been separated at all; for by the very terms of the act, *only so much as is necessary* for a particular period of time is appropriated. If the legislature had intended those balances should have been used for the years 1877 and 1878, they would have said so in

unmistakable language. This, however, they did not do; but, on the contrary, definite sums are named, limiting the amount that may be drawn for the use of the different departments of the public service, and for a definite time. The appropriations for 1877–78 cannot be resorted to for the purpose of supplying any deficiency in that for 1875–76, nor can they be increased by the addition of the unexpended balance of former years. When all of the expenses legitimately incurred in the years 1875–76 are paid, the whole object of the act of appropriation of 1875 is accomplished, and nothing more can be legally done under it. That this was the intention of the legislature in passing the act, there can be no doubt whatever. The language used is, "That the following sums of money, or *so much thereof as may be necessary*, be and the same hereby is appropriated," etc. Under this authority when all the money *necessary* for the expenses of *these years* has been drawn from the treasury, not another farthing can be lawfully taken.

IV. As to the expenses referred to in this question, we think they may be properly paid out of the moneys uncollected, and due for convict labor, when collected, unless the legislature has otherwise provided. If, however, provision for payment has been made out of any other fund, or if this money has been diverted to some other object by the legislature, then of course they cannot.

V. In the absence of a repealing act, or of an act of limitation, it does not matter how long after the money provided for in an appropriation act is earned, that it is applied for. As to *it*, the act will continue in force and operation until the money is drawn from the treasury.

VI. This section means simply this: that provision for the support of the government by any one legislature must be limited to two years. It does not require the money appropriated to be actually drawn from the treas-

ury during that time, but the expense must be incurred or the salary earned, during the two years for which the appropriation was made.

Yours respectfully,

GEORGE B. LAKE.

I concur in the above answers to the questions propounded.

D. GANTT.

I fully concur in the several answers of Judge LAKE to the questions propounded.

SAMUEL MAXWELL.

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See PROBATE COURT.

COUNTY SEAT.

1. **Election:** DESIGNATION ON BALLOTS. In an election for the relocation of a county seat, where three points only can be voted for, designated as "Fairfield, Sutton, or Harvard," and ballots voted for the first are entitled "Fairfield ticket," describing accurately a sub-division of land within the limits of the town site of Fairfield: *Held*, that such ballots must be counted for Fairfield. *The State v. Dinsmore*..... 145

See MANDAMUS.

COUNTY TREASURER.

1. **Fees for Collecting Taxes.** Under the revenue laws, a collector of taxes has not the right to demand and receive from the taxpayer the commissions and five per cent penalties, unless he has made a "distress and sale" of the taxpayer's property in payment of his taxes. A mere levy and payment without sale do not entitle the officer to these penalties. *Kane v. U. P. R. R*..... 105

2. **Action for Fees.** When a county treasurer sells lands for delinquent taxes, but fails to collect the amount bid from the purchaser, he cannot maintain an action against the purchaser for the additional fee, provided by the statute, of five per cent in cases of *actual sales*. *Miles v. Miller*..... 269

3. **Action for License Moneys.** When license moneys collected by the corporate authorities of towns and cities of the second class are not paid over to the county treasurer, voluntarily, it is his duty to enforce payment, and he may do so by an ordinary civil action. *City of Tecumseh v. Phillips*.... 305

4. ———. The authority to bring such action by the treasurer, although not expressly given, is clearly implied from the obligation he is under to make the collection. *Id*.... 305

See CONSTITUTIONAL LAW. 7.

COVENANT.

See DEED, 3.

CRIMINAL LAW.

1. **Adultery**: EVIDENCE. Upon a charge of adultery in an indictment, evidence of improper familiarities between the parties, both anterior and subsequent to the time the offense is charged, may be received as corroborating proof, after evidence has been offered tending to prove the offense charged. *The State v. Way*..... 283

2. ———: ———. The statutory offense of wantonly cohabiting with a woman in a state of adultery, is one continued offense, and may be properly charged as having been committed between certain points of time; and proof of such cohabitation during any portion of the time alleged will be sufficient to establish the commission of the offense. *Id*..... 283

3. ———: SUFFICIENCY OF INDICTMENT. If part of the time charged in such case, is prior to the passage of the act constituting and defining the offense, such prior time may be treated as surplusage, as time is not of the essence of the offense, and the indictment may be held good as charging the offense from the time of the passage of the law, until the last point of time alleged in the indictment. *Id*..... 283

4. **Murder**: EVIDENCE: PRESUMPTION. Where the fact of killing is shown, and no explanatory circumstance is proven, malice is presumed, and the crime of murder in the second degree is established. *Preuit v. People*..... 378

5. **Assault with Intent to Murder.** Under the statute, an assault with intent to murder is but one offense, and if the indictment contains no other, a general verdict of guilty is good and valid. *Curry v. The State*..... 413

See EVIDENCE. PRACTICE IN CRIMINAL CASES. STATUTES.

DAMAGES.

1. **Excavation in Public Street.** The owner of a lot abutting on a public street, contracted for the erection of a building thereon. G. fell into an excavation left open and un-

guarded, by the contractors, in front of the lot, was injured. and recovered judgment against the city. *Held*, that the owner was liable to the city for the amount of the judgment. *Palmer v. City of Lincoln*..... 136

2. **Seed Contract.** Where a party has knowledge of the inferior character of seed before he sows the same, the party furnishing the seed is not liable for damages resulting to either the crop or land in consequence of the use of such inferior seed. *Oliver v. Hawley*..... 439

3. **In Action of Replevin.** Under the code, in an action of replevin, if the jury find in favor of the defendant, they must assess for him such damages as they shall think just and proper, whether he pleads a general denial, new matter as a defense or a demand for damages. *School District v. Shoemaker*..... 36
Creighton v. Forbes..... 100

4. **It seems,** that a city is liable for injuries sustained on account of defective sidewalks; and in this case a verdict for $5,500 was not disturbed. *Omaha v. Olmstead*..... 446

See BANKS AND BANKING. CLERK DISTRICT COURT. CONTRACT. OFFICIAL BONDS. ROADS.

DEBTOR AND CREDITOR.

See LIMITATION OF ACTIONS. PRINCIPAL AND SURETY.

DECEDENT.

See MORTGAGE, 9, 10, 11.

DEEDS.

1. **Execution and Acknowledgment.** A deed of conveyance of land must be executed and acknowledged as directed by the statutes of the state in which the land is situated; if the deed is executed in another state and the statute provides that it shall be executed and acknowledged according to the laws of such state, it must be so executed. *Roode v. The State*..... 174

2. ——: OF FEME COVERT. An instrument, purporting to be the deed of a feme covert, without her acknowledgment, is void as to her. It is no deed. *Id*..... 174

3. **Covenants:** TAXES. Where it appears that a mortgage security was given in part payment of the land mortgaged, and that the same land was sold and conveyed to the mortgagor with covenants against all incumbrances thereon, unpaid

taxes, due at the time of the sale, constitute an incumbrance on the land, and in a foreclosure suit may be pleaded as an off-set *pro tanto*. *Nesbitt v. Campbell*..... 429

4. Description of Property. Where G. entered at the United States Land Office at Omaha, Nebraska, the south half of the northwest quarter, and the north half of the southwest quarter of section thirty-five, in township fifteen, north of range twelve east, which tracts of land are shown to be in Douglas county; and afterwards by deed executed in this state he conveyed to P., the south half of the northwest quarter and the north half of the southwest quarter of section thirty-five, in township fifteen, north of range twelve east, without designating the county or state in which the lands are situated, it will be presumed that the deed was intended to convey lands situated in this state. *Butler v. Davis*..... 521

See EJECTMENT. FORGERY. MORTGAGE.

DEMURRER.

See PLEADING.

EJECTMENT.

1. In Ejectment, the plaintiff must recover on the strength of his own title and cannot rely on the weakness of the title of his adversary, unless he can show a superior right in himself. *Butler v. Davis*..... 521

See FORCIBLE ENTRY AND DETENTION OF REAL PROPERTY.

ELECTIONS.

1. County Seat: DESIGNATION ON BALLOTS. In an election for the relocation of a county seat, where three points only can be voted for, designated as "Fairfield, Sutton, or Harvard," and ballots voted for the first are entitled "Fairfield ticket," describing accurately a sub-division of land within the limits of the town site of Fairfield: *Held*, that such ballots must be counted for Fairfield. *State v. Dinsmore*..... 145

2. Intention of Voter. Where the intention of the voter is clearly ascertainable from the ballot, with the aid of extrinsic facts of a public nature connected with the election, the law will require his vote to be counted. *Id*..... 145

3. Mandamus. If the canvassers of the vote of an election neglect or refuse to count all the votes and fully perform their duty, they may be compelled by mandamus to discharge that duty. *Id*..... 145

4. Designation of Office on Ballots. A ballot voted at a legal election without any designation of an office, and also a ballot voted with two or more names on it, when the tenure of the office is limited to one person only, are illegal and void. *The State ex rel. Valentine v. Griffey*..... 161

5. Evidence to Correct Mistake in Canvass of Vote. Extrinsic evidence of a public nature, including the circumstances surrounding an election, may be received in evidence to correct a mistake in the return of the canvassers of the vote, in respect to the designation of an office voted for at such election; and such evidence is applied according to the rules of law in relation to mistakes in other writings. *Id*... 161

6. Illegal Votes. Under facts stated, *held* that certain persons residing in unorganized counties, illegally voted in adjoining organized counties. *Id*..... 161

7. U. S. Military Post. The military post in Valley county is not a military reservation reserved by the United States on the admission of Nebraska as a state, nor as land ceded by the state to the United States since its admission, but is a part of and subject to the operation of the laws of the state; and persons who with their families removed to the post *sine animo revertendi*, became residents of the county, and were entitled to the right of suffrage therein. *Id*..... 162

EQUITY.

1. Jurisdiction. A court of equity will grant relief against judgments obtained by fraud, surprise or mistake, or when from any cause manifest injustice has been done. *Horn v. Queen*..... 472

See JURISDICTION, 3, 4. NEW TRIAL. PRACTICE, 11. TAXES, 4, 6.

ERROR.

1. Reversal of Judgment. It is not every error that calls for a reversal of a judgment. To have this effect the error must appear to have been prejudicial to the party seeking to take advantage of it. *Dillon v. Russell & Holmes*..... 484

See JUDGMENT, 4, 5, 12. NEGOTIABLE INSTRUMENTS, 4. PRACTICE, 9, 10, 16, 30. PRACTICE IN CRIMINAL CASES, 8, 13. PRACTICE IN SUPREME COURT, 1, 2. MALICIOUS PROSECUTION.

ESCHEAT.

1. Escheat. Upon the death of a tenant in fee with defect of

heirs, the title and right of possession to the lands, and also to his personal estate, *eo instanti* vest in the state, and by the operation of the laws of this state all such estate, real and personal, immediately becomes and constitutes a part of the general school fund of the state. *The State ex rel. Roberts v. Reeder*. 203

2. ———: TITLE OF ADMINISTRATOR. The administrator of the estate of such decedent can convey no title to such lands, and has no right of possession to the same to deliver. *Id*..... 203

EVIDENCE.

1. **Proof of Handwriting.** A witness who is acquainted with the handwriting of a person whose signature is in dispute, although not an expert in judging of handwriting, is competent to give his opinion as to its genuineness. *First National Bank v. Lierman*..... 247

2. ———. But a witness who is not an expert, and who has no knowledge either of the handwriting or the signature. is not competent to give such an opinion from a comparison of hands. *Id*..... 247

3. ———: SIGNATURE FALSELY OBTAINED. If the signature of an illiterate person be obtained to a promissory note by fraudulently inducing him to believe that he is signing a different instrument, with no fault on his part, such note will be void even in the hands of a *bona fide* holder. *Id* 247

4. ———: ———: EVIDENCE IN SUCH CASE. In determining whether the signature was so obtained, it is proper for the jury to take into consideration all the facts and circumstances attending the transaction in which the signature was obtained. *Id*..... 247

5. **Adultery:** EVIDENCE. Upon a charge of adultery in an indictment, evidence of improper familiarities between the parties, both anterior and subsequent to the time the offense is charged, may be received as corroborating proof, after evidence has been offered tending to prove the offense charged. *State v. Way*..... 283

6. ———: ———. The statutory offense of wantonly cohabiting with a woman in a state of adultery is one continued offense, and may be properly charged as having been committed between certain points of time; and proof of such cohabitation during any portion of the time alleged will be sufficient to establish the commission of the offense. *Id*..... 283

7. **County Road:** EVIDENCE. Testimony showing a survey,

and plat of a road is immaterial, unless it be shown that the requisite notice had been given, and petition for the road filed. *Robinson v. Mathwick*..... 252

8. **Interested Witnesses.** Where informers, detectives or other persons employed to hunt up testimony against an accused person, are called on to testify against him, greater care should be exercised in weighing their evidence, than in the case of witnesses who are wholly disinterested. *Preuit v. The People*..... 377

9. **Murder:** PRESUMPTION. Where the fact of killing is shown, and no explanatory circumstance is proven, malice is presumed, and the crime of murder in the second degree is established. *Id*..... 377

10. **Pleading:** EFFECT OF GENERAL DENIAL. Upon a general denial the simple inquiry is, has the plaintiff proved what he has alleged in his petition; and under such issue nothing can be given in evidence which does not tend to prove or disprove the facts stated in his petition. *School District v. Shoemaker* 36

11. **New Matter in Defense.** All new matter, constituting an entire or partial defense to a cause of action, must be concisely and distinctly set up in the answer, and is not admissible under a general denial. *A. & N. R. R. v. Washburn*. 117

12. ———: ADMISSIONS. The plaintiff requested an instruction to the jury "that any allegation" in the petition not denied by the answer "must be taken as admitted, and true." This was refused. *Held*, error, there being material allegations in the petition not denied by the answer. *Steele v. Russell*.. 212

13. **Election:** EVIDENCE TO CORRECT MISTAKE IN CANVASS OF VOTE. Extrinsic evidence of a public nature, including the circumstances surrounding an election, may be received in evidence to correct a mistake in the return of the canvassers of the vote, in respect to the designation of an office voted for at such election; and such evidence is applied according to the rules of law in relation to mistakes in other writings. *State ex rel. Valentine v. Griffey*..... 161

14. **Assault with Intent to Murder:** EVIDENCE. In prosecution for an assault with intent to murder, physicians and surgeons may be allowed to testify what in their opinion would be the natural and probable results of injuries inflicted by the accused upon the person assaulted. *Curry v. The State*..... 412

15. **Action on Promissory Note.** Where a note is given for a pre-existing debt, and the original cause of action is

sued on, the plaintiff must produce the new note on the trial, or satisfactorily show that it is lost or destroyed. *Young v. Hibbs*..... 433

16. **Contract:** FRAUD: EVIDENCE. Where the purchaser of a large quantity of hotel furniture claims the right to rescind the contract and force the property back upon the seller, on the ground of fraud in the sale, it is proper on cross-examination to ask him whether his landlord had not terminated his lease and taken possession of the house about the time of the attempted rescission. *Clark & French v. Tennant*..... 549

17. **Malicious Prosecution.** In an action for malicious prosecution the defendant is competent to testify as to his belief in the guilt of the plaintiff, when the prosecution was commenced; and, that he instituted the prosecution without malice, or in accordance with the opinion of counsel first obtained. *Turner v. O'Brien*..... 542

18. **Warranty:** PAROL EVIDENCE. In an action on a note given for a threshing machine, the defense relied upon a breach of warranty, alleging that it was in writing, and left with the agent of the plaintiff: *Held*, that parol evidence of the contents of the warranty was inadmissible, no steps being taken to require the plaintiff or his agent to produce the contract. The original contract must be produced or its absence accounted for, before parol proof of its contents can be received. *Birdsall, Son & Co. v. Carter*..... 517

See BANKS AND BANKING. CONTRACT, 9. COUNTY SEAT. JUDGMENT, 4, 5. JUDICIAL SALE, 11. PLEADING, 8, 9. PRACTICE IN CRIMINAL CASES, 2, 3, 5.

EXCEPTIONS.

See PRACTICE, 13, 20, 24, 26, 30. PRACTICE IN SUPREME COURT, 1

EXECUTION.

1. **Sale:** DISPOSAL OF PROCEEDS. Under the statute (civil code, sec. 484) the money raised on an execution sale of a debtor's land can be apportioned *pro rata* only to judgment creditors of such debtor, who have executions issued during the term at which the judgments were rendered or within ten days thereafter, or where two or more executions are issued and placed in the hands of the officer on the same day, and in the latter case preferable liens shall not be affected by such apportionment. *Hibbard v. Weil & Kahn*..... 41

2. **Statutory Construction.** The clause in the statute, "In all other cases, the writ of execution first delivered to the officer shall be first satisfied," must be construed as relating to executions in the hands of the officer at the time of the sale, and not to any executions returned by the officer with or without a levy thereon. *Id*..... 41

3. **Rights of Purchaser.** A sale upon execution vests in the purchaser all the rights of the judgment debtor to the property, but that right is subject to all liens prior to the lien of the judgment on which the execution sale is made. *Id*..... 42

4. **Lien of Judgment.** Under the act of February 27, 1873, (Gen. Stat., 613), the lien of a judgment, whether rendered prior or subsequent to its passage, is preserved for the period of five years after its rendition, and it is sufficient if the execution is taken out and levied at any time before the expiration of five years next after the rendition of the judgment. *Id*..... 42

See HOMESTEAD. PRACTICE, 4, 33.

EXEMPTIONS.

See HOMESTEAD. TAXES, 4, 6.

FEES.

See COUNTY TREASURER. SHERIFF.

FINDINGS.

See PRACTICE, 2, 3.

FORCIBLE ENTRY AND DETENTION OF REAL PROPERTY.

1. **Gravamen of the Action.** In a proceeding for forcible entry into property, the gravamen of the action is, the unlawful and forcible entry into and detention of real property, in the trial of which title to real estate cannot be drawn in question. *Myers v. Koenig*..... 419

FORECLOSURE.

See MORTGAGE, 1, 8. TAXES, 3.

FORGERY.

1. **If an Instrument** does not purport on the face of it to be good and valid for the purpose for which it was created, it cannot legally be the subject of forgery, if not genuine. *Roode v. The State*..... 174

FRAUD.

1. **Rescission of Sale on Grounds of.** In order to avoid a sale on the ground of fraudulent representations, they must be of a matter material to the contract, and by which the purchaser was misled or deceived, and but for which the contract would not have been made. *Clark and French v. Tennant.* 549

2. ——: ——. Fraud is never presumed but must be clearly proved in order to entitle a party to relief, on the ground that it has been practiced upon him. *Id.*..... 549

3. ——: ——. When a seller of personal property who honestly believed that a mortgage, which he knew had existed against it, had been canceled or suffered to lapse, represents to the purchaser that it is free from incumbrance, but it turns out that he was mistaken, this will not entitle the purchaser to rescind the contract when he has used the property for several months without any molestation, especially if the seller is ready and able to remove the incumbrance at once, or to give ample indemnity against loss. *Id.*..... 549

See BANKRUPTCY. VENDOR AND VENDEE.

GARNISHMENT.

See ATTACHMENT.

GRAND JURY.

1. **Practice in Criminal Cases.** Where the record shows that the court ordered vacancies in the panel of grand jurors to be filled by certain persons named by the judge: *Held*, error, and that a motion to quash the indictment for that reason should have been sustained. *Preuit v. People*..... 377

2. ——. The duty of making the selection of persons to fill vacancies in the panel is confined to the sheriff alone, but when so selected, the court may pass upon their qualifications to serve. *Id.*..... 377

GRANT.

See RAILROAD, 4. TAXES, 5.

GUARANTOR.

See NEGOTIABLE INSTRUMENTS

HIGHWAYS.

See ROADS.

HOMESTEAD.

1. **Lien of Judgment.** The judgment of a probate court becomes a lien upon the homestead of the debtor by filing a transcript in the office of the clerk of the district court, and entering the same upon the judgment record. *Eaton v. Ryan*, 47

2 ———. But such lien cannot be enforced by execution while the homestead is *owned* and *occupied* by the judgment debtor. *Id.*..... 47

3. **Sale by Owner.** A sale of such homestead by the debtor is a relinquishment of the protection afforded by the homestead act, and renders the lien capable of immediate enforcement by execution. *Id.*..... 47

4. **Sale of, upon Execution.** A homestead although composed of different parcels taken from distinct lots, but adjoining each other, may be sold as one tract. *Id.*..... 47

5. **United States Homestead Act.** Where a claimant of land under the United States homestead act has made proof at the proper land office of having done everything required to entitle him to a patent, he can execute a valid mortgage of the land although the patent be not issued. *Cheney v. White*..... 261
See also *Jones v. Yoakam*..... 265

6. ———: TAXES. A homestead becomes liable to taxation as soon as the owner has the right to make final proof and complete his title. *Bellinger v. White*..... 399

See UNITED STATES HOMESTEAD ACT.

HOMICIDE.

See CRIMINAL LAW, 4, 5.

HUSBAND AND WIFE.

See MARRIED WOMEN.

INDICTMENT.

1. **Adultery.** The statutory offense of wantonly cohabiting with a woman in a state of adultery, is one continued offense, and may be properly charged as having been committed between certain points of time; and proof of such cohabitation during any portion of the time alleged will be sufficient to establish the commission of the offense. *State v. Way*..... 283

2. **Sufficiency of Indictment.** If part of the time charged in such case, is prior to the passage of the act constituting

and defining the offense, such prior time may be treated as surplusage, as time is not of the essence of the offense, and the indictment may be held good as charging the offense from the time of the passage of the law, until the last point of time alleged in the indictment. *Id*..... 283

3. **Change of Venue.** On a change of venue in a criminal case, the original indictment must be transmitted to the clerk of the court to which the venue is changed. *Preuit v. The People*..... 377

4. **Indorsement of Plea upon Indictment.** The statute directing the entry of the prisoner's plea on the back of the indictment is not mandatory, but directory merely, and the failure to so enter it is no ground for a reversal of the judgment, when the plea is contained in another part of the record *Id*..... 377

INDORSER.

See BANKS AND BANKING. NEGOTIABLE INSTRUMENTS.

INJUNCTION.

See JUDICIAL SALE, 5. JURISDICTION, 3, 4. TAXES, 6.

INTOXICATING LIQUORS.

See LIQUOR SELLING.

JAIL.

See COUNTIES. SHERIFF.

JOINT DEBTORS.

1. **Statute of Limitations.** A promise by one joint debtor will not take a debt out of the statute of limitations as to his co-contractors, unless he is specially and severally authorized by them for that purpose. *Mayberry v. Willoughby*..... 369

See PARTNERSHIP, 1.

JUDGMENT.

1. **Lien of.** Under the act of February 27, 1873 (Gen. Stat., 613), the lien of a judgment, whether rendered prior or subsequent to its passage, is preserved for the period of five years after its rendition, and it is sufficient if the execution is taken out and levied at any time before the expiration of five years next after the rendition of the judgment. *Hibbard v. Weil & Kahn*..... 41

2. ———: UPON HOMESTEAD. The judgment of a probate court becomes a lien upon the homestead of the debtor by filing a transcript in the office of the clerk of the district court, and entering the same upon the judgment record. *Eaton v. Ryan*..... 47

3. ———: ———. But such lien cannot be enforced by execution while the homestead is *owned* and *occupied* by the judgment debtor. *Id*..... 47

4. **Evidence.** A mere difference of opinion as to the weight of evidence between a reviewing court and the court which tried the cause, is not sufficient to reverse a judgment. To do so, the preponderance of evidence must be clear, obvious and decided, or so great as to indicate prejudice, partiality or corruption. *A. & N. R. R. v. Washburn*..... 117

5. **Reversal of.** A judgment will not be reversed on the ground that the finding or verdict is contrary to the evidence unless it manifestly is so; and the reviewing court will always hesitate to reverse when doubts as to its propriety arise out of a conflict in oral evidence. *Id*..... 117

6. **Lien.** Where the legal title to real estate is in the name of the judgment debtor, and such real estate is in the possession of another party, the lien of the judgment attaches only to the interest of the debtor therein. *Uhl v. May*..... 157

7. **Vacation of Judgment.** The power given to courts of record by section 602 of the civil code, to vacate or modify their own judgments or orders after the term at which they are made, does not confer original jurisdiction. *Iler v. Darnell*..... 192

8. ———. The power thus conferred is only that of further proceedings, for the causes enumerated, in an action after judgment; and are therefore merely special proceedings *in* an action, and are not an original action, and therefore not appealable. *Id*..... 192

9. **Final Judgment.** A judgment upon the verdict of a jury finding for defendant, for costs only, is not a final judgment. *Nichols v. Hail*..... 194

10. **In Criminal Case.** In recording the judgment in a criminal case, the clerk should follow, substantially, the formal language of the court in pronouncing it. *Preuit v. The People*..... 377

11. **Final Judgment.** Where the judgment of a justice of the peace is taken on error to the district court and reversed,

and the original case retained for trial in that court, such judgment of reversal is a final judgment, and may be reviewed by the supreme court without waiting for the final disposition of the original case in the district court. *Banks v. Uhl*..... 240

12 **Waiver of Error.** The failure to except to such judgment of reversal, and to take steps to set it aside until after the original case has proceeded to final judgment, will be deemed a waiver of all errors committed in its rendition. *Id.* 240

See EXECUTION, 4. MARRIED WOMEN, 2. PRACTICE, 1, 5, 6, 9, 10, 17, 18, 32, 36, 37, 38.

JUDICIAL SALE.

1. **Rights of Purchaser.** A sale upon execution vests in the purchaser all the rights of the judgment debtor to the property, but that right is subject to all liens prior to the lien of the judgment on which the execution sale is made. *Hibbard v. Weil & Kahn*..... 42

2. **Of Homestead.** A sale of a homestead by a judgment debtor is a relinquishment of the protection afforded by the homestead act, and renders the lien of the judgment capable of immediate enforcement by execution. *Eaton v. Ryan*... 47

3. ——: IN PARCELS. A homestead, although composed of different parcels taken from distinct lots, but adjoining each other, may be sold as one tract. *Id*..... 47

4. **Rights of Purchaser.** A purchaser at a sale under an execution is protected to the same extent as a purchaser at a private sale, from claims of third persons previously acquired from the debtor, of which he had no notice. *Uhl v. May*... 157

5. **Enjoining Sale.** Where a conveyance would pass no title, but would result only in casting a cloud on the title of the plaintiff, the sale will be restrained. *Id*..... 157

6. **Lien upon the Property.** A purchaser at judicial sale, under a decree of foreclosure, takes the property subject to whatever liens may exist thereon at that time. *Vaughn v. Clark*..... 238

7. ——: TAXES. And if such purchaser, after the sale, pay delinquent taxes that have accumulated thereon, he is not entitled to be reimbursed out of the purchase money as against the lien of a junior mortgagee. *Id*..... 238

8. **Duties of Sheriff.** Under the act of 1875, providing "for the more equitable appraisement of real property under judi-

cial sale," it is not error for the sheriff to neglect to take steps to ascertain what liens, prior to the order of sale, there were upon the land, it not being shown that any such liens in fact existed. *La Flume v. Jones*..... 256

9. **Oath of Appraisers.** In such case where the oath of the appraisers was "impartially to appraise the property to be sold," instead of the "interest" of the defendant therein, inasmuch as there could be no interest greater than the entire value of the land, it was not an error for which the sale should be set aside. *Id*..... 256

10. **Copy of Appraisement Deposited.** When the record is silent as to when the copy of the appraisement was deposited, it will be presumed that the sheriff did his duty and deposited it in due time. It may be deposited any time before sale. *Id*..... 256

11. **Conspiracy to Prevent Competition:** PROOF OF. Affidavits containing merely hearsay statements, are not sufficient to establish the charge of conspiracy to prevent competition in bidding at judicial sale. *Id*..... 256

See JUDGMENT. SALE. TAXES.

JURISDICTION.

1. **Of Probate Court.** The probate court, under the provisions of section 7-11 of the act approved March 3, 1873, in relation to powers and jurisdiction of probate courts, has a distinct jurisdiction, as to the amounts authorized to be recovered, from that of a justice of the peace; its jurisdiction extends to cases where the amount *claimed* in the petition or bill of particulars exceeds one hundred dollars. *Beach v. Cramer*..... 98

2. ———: HOW DETERMINED: COSTS. The amount claimed in the petition or bill of particulars determines the jurisdiction, yet if the verdict is for less than one hundred dollars the plaintiff is entitled to judgment thereon, but the court can render no judgment for costs in his favor. *Geere v. Sweet*, 2 Neb., 77, cited and approved. *Id*..... 98

3. **Of Courts of Equity:** MUTUAL ACCOUNTS. Under the code, discovery has ceased to be one of the objects sought in a court of equity. Jurisdiction, therefore, in cases of mutual accounts between the parties, cannot be maintained on that ground, and is restricted to cases which have their origin in intimate or confidential relations of the parties, and does not extend to ordinary cases of mutual accounts between creditor and debtor. *Lamaster v. Scofield*..... 143

4. ———: IN ACTIONS TO RESTRAIN COLLECTION OF TAXES. He who seeks the interposition of a court of equity to restrain the collection of a tax on his real estate, on account of its alleged illegality, must bring himself clearly within some recognized rule of equity jurisdiction; and will not be permitted to allege his own failure to perfect his title, as a ground on which to base a claim for relief. *Bellinger v. White*..... 399

5. **Appearance of Defendant.** In an action against a public officer, brought in a different county from that in which he resides and holds his office, for a wrongful act done by him under color of his office, if he voluntarily appears and pleads to the merits of the case he thereby waives all objections to the jurisdiction of the court. *Kane v U. P. R. R.*... 105

See FORCIBLE ENTRY, 1. PRACTICE, 8.

JURY AND JURORS.

See GRAND JURY. MALICIOUS PROSECUTION, 2. MUNICIPAL CORPORATIONS, 3. NEGOTIABLE INSTRUMENTS, 4. PRACTICE. PRACTICE IN CRIMINAL CASES, 1, 3, 5, 6, 7, 14, 15, 18, 19, WITNESSES, 2, 4.

JUSTICES OF THE PEACE.

See FORCIBLE ENTRY AND DETENTION OF REAL PROPERTY. PRACTICE, 29, 30.

LANDLORD AND TENANT.

1. **General Relations.** The relation of landlord and tenant requires good faith between the parties. The policy of the law will not permit the tenant to avail himself of the advantages of his possession to purchase incumbrances on the leasehold property for the purpose of speculation. *Thrall v. Omaha Hotel*..... 295

2. ———: PURCHASING OUTSTANDING INCUMBRANCE. But, if while in possession, under the lease, the tenant purchase such incumbrance, the presumption is that he did it for the only purpose permitted by law, that is, to protect his possession; and if the tenancy is for years, the landlord must account to him for what he actually paid for such incumbrance. *Id.*... 295

LARCENY.

See MALICIOUS PROSECUTION.

LICENSE.

See LIQUOR SELLING.

LIEN.

See ATTORNEYS, 1, 2, 3. JUDGMENT, 1, 2, 3, 6. TAXES, 2, 3, 6.

LIMITATION OF ACTIONS.

1. **Mortgage.** A mortgage is not a "specialty" within the meaning of our statute of limitations. *Seymour v. Street*... 85

2. **Absence.** It was the intention of the legislature to give a creditor five full years in which 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 is not to be computed as any part of the time within which an action may be brought. *Blodgett v. Utley*, 4 Neb., 26, cited and approved. *Id*..... 85

3. ———. Where a man, having a wife and family, went to Colorado in the spring of 1861, and was elected and served as a member of the territorial legislature in the years 1862 and 1863, and in the years 1865 and 1866 held the office of judge of the district and supreme courts of the territory, his wife and a portion of his family continuing to reside at Nebraska City in this state; *held*, that the place of residence of his wife was not his usual place of residence during such absence. *Id*..... 85

4. **Construction of the Statute.** The statute of limitations must not be construed as merely raising a presumption of payment, but as a statute of repose. *Mayberry v. Willoughby*..... 368

5. **Acknowledgment of Debt.** To take a debt out of the statute, there must be an unqualified acknowledgment of the debt as originally due, and a promise to pay it; and if the promise is conditional, the condition must be performed before an action can be maintained on the promise. *Id*..... 368

6. **Joint Debtors.** A promise by one joint debtor will not take a debt out of the statute of limitations as to his co-contractors, unless he is specially and severally authorized by them for that purpose. *Id*..... 369

7. **Demurrer.** When it appears on the face of the petition that the cause of action arose at such a period, that under the statute of limitations no action can be maintained thereon, the defendant may demur to the petition, on the ground that the facts stated therein are not sufficient to constitute a cause of action. *Peters v. Dunnells*..... 460

8. **Note and Mortgage.** If an action upon a note secured by mortgage is barred by the statute of limitations, an action for foreclosure of the mortgage is also barred. *Id.*..... 460

9. **Mortgage Against Estate of Decedent.** An action to foreclose a mortgage against estate of decedent is not barred, by a failure to present it to the probate court for allowance as a claim against the estate. *Null v. Jones*..... 500

LIQUOR SELLING.

1. **License Moneys.** Moneys collected by the corporate authorities of towns and cities of the second class, for license to sell intoxicating liquors, belong to the school fund of the county, and when collected should be paid over to the county treasurer. *City of Tecumseh v. Phillips*..... 305

See also *White v. City of Lincoln*..... 505

2. **License to Sell Intoxicating Liquors.** The authority of the county commissioners to license the sale of intoxicating liquors is confined to those portions of the county lying outside the limits of incorporated towns and cities. *Phillips v. City of Tecumseh*..... 312

3. ———. Within such towns and cities the proper authorities thereof are invested with exclusive authority over the whole subject, without regard to what is charged by the county commissioners for licenses issued by them. *Id.*..... 312

See ACTION.

MALICIOUS PROSECUTION.

1. **Larceny.** Mere conversion of property is not larceny, and information of such conversion constitutes no grounds of probable cause as a defense to an action for a malicious prosecution. *Turner v. O'Brien*..... 542

2. ———: ———. It is the duty of the court to determine whether the proof of certain facts constitute probable cause, and it is error to submit this question to the jury. It is the duty of the jury to say what facts are proved, and to decide on the weight of evidence and the credibility of witnesses. *Id.*..... 542

See EVIDENCE.

MANDAMUS.

1. **Practice:** AFFIDAVIT FOR CONTINUANCE. A party who charges that an election for the re-location of the county seat of M. county was carried in favor of M. by fraudulent

means, must state the facts on which he bases his charge; and an affidavit for a continuance of an application for a peremptory writ of *mandamus* to compel the removal of the county records and offices to M., the place declared by the county commissioners to be the county seat, is not sufficient where it merely states that the affiant is informed and *believes* that a greater number of fraudulent votes were cast in one of the precincts of said county in favor of M. than the entire majority in favor of that place, and that certain votes were cast in favor of B. that were not counted. *The State ex rel. Barnes v. Thatch*..... 94

2. ——: ——. If it should be clearly made to appear that the number of fraudulent votes cast in favor of M. were sufficient to give that place a majority, it would be sufficient grounds to refuse relief. *Id*..... 94

3. **Canvass of Election.** If the canvassers of the vote of an election neglect or refuse to count all the votes and fully perform their duty, they may be compelled by *mandamus* to discharge that duty. *The State v. Dinsmore*..... 145

MARRIED WOMEN.

1. **Deed of.** An instrument, purporting to be the deed of a *feme covert*, without her acknowledgment, is void as to her. It is no deed. *Roode v. The State*..... 174

2. **Contracts of.** By our statute relating to the rights of married women, the common law doctrine relative to a *feme covert* is materially changed. The statute *legalizes* her contracts, and enables her to *legally* contract and deal in reference to her separate property as she pleases, and to bind it by general engagements; and further, it enables her legally to sue, and makes her liable to be sued "in the same manner as if she were unmarried"—as though she were a *feme sole*. *Davis v. First National Bank*..... 240

3. ——. All such contracts and general engagements of a married woman should, however, be with reference to and upon the faith and credit of her separate property. *Id*..... 240

MASTER AND SERVANT.

1. **Liability of Master for Negligent Acts of Servant.** Where an obstruction in a street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results *directly* from the

acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do the work is equally liable to the injured party. *Palmer v. City of Lincoln*..... 136

See DAMAGES, 1. PRINCIPAL AND AGENT.

MORTGAGE.

1. **Foreclosure:** PARTIES. All persons materially interested in the mortgaged premises should be made parties to a suit to foreclose a mortgage, in order that a perfect title may pass by a sale under the decree, as a purchaser takes only the title of the parties to the suit; but a person claiming adversely to the title of the mortgagor and prior to the execution of the mortgage, cannot properly be made a party for the purpose of trying the validity of such adverse claim of title. But where a defendant answers, claiming title to the mortgaged premises, and also that he has a mortgage thereon for a certain sum, and prays that in case the court finds his title invalid that he may have a decree for the amount due on the mortgage, it is the duty of the court to adjudicate upon the validity of such title, and, if found invalid, to render a decree on the mortgage for such sum as may be equitably due. *Shellenbarger v. Biser*..... 195

2. ———: ———. Such defenses are inconsistent, and had objection been made at the proper time, it would have been the duty of the court to require the defendant to elect on which he would rely. *Id*..... 195

3. **United States Homestead Act.** A mortgage executed by a settler upon public lands under the homestead act, after making his proof of compliance with all the requirements of the law, so as to entitle him to a patent, is valid, notwithstanding the patent has not been issued. *Jones v. Yoakam*. 265

4. ———. It is no objection to the validity of such mortgage that it was given to secure a debt contracted before such proof was made. *Id*..... 265

5. ———. Section four of said act does not prohibit the owner of the homestead from pledging the same voluntarily to secure a pre-existing debt. Its only effect is to protect him against a compulsory payment of such demand out of the land. *Id*..... 265

6. **Proceedings in Rem.** An action to subject mortgaged property to the payment of the mortgage debt is a proceeding *in rem*. *Peters v. Dunnells*..... 460

7. **Limitation of Action:** CONSTRUCTION OF STATUTE. The proviso to Sec. 17 of the code of civil procedure, that the absence from the state, death or other disability of a non-resident, shall not operate to extend the time within which actions *in rem* shall be commenced by, and against, such non-residents, applies to mortgages. *Id*... 460

8. ———: NOTE AND MORTGAGE. If an action on a note secured by a mortgage is barred by the statute of limitations, an action for the foreclosure of the mortgage is also barred. *Id* 460

9. **Foreclosure Against Estate of Decedent.** Under our statute, an action to foreclose a mortgage executed by the deceased in his life-time, may be brought and prosecuted to final judgment, within the time fixed by the court for the payment of debts by the administrator. *Null v. Jones*..... 500

10. ———. Such mortgage is not barred by a failure to present it to the court for allowance as a claim against the estate. *Id* 500

11. ———. But unless so presented the holder is confined to the mortgaged property, and cannot share in the general assets of the estate. *Id*..... 500

See DEED. FRAUD.

MUNICIPAL CORPORATIONS.

1. **Incorporation of Cities.** An act providing for the incorporation of a city must be accepted as a whole; and the city in accepting the benefits derived therefrom, must perform the duties required by law. *Omaha v. Olmstead*..... 446

2. ———. The corporate franchise is a valuable privilege and is a sufficient consideration for the duties which the law imposes. *Id*..... 446

3. **Jurors in Cases in which a Municipal Corporation is a Party.** The mere interest of a tax payer and resident of a city is not in itself, under ordinary circumstances, sufficient to disqualify him from acting as a juror in a case in which the city is interested. *Id*..... 446

4. **It seems** that a city is liable for injuries caused by reason of defective sidewalks; and i this case a verdict for $5,500 on account of injuries sustained by the plaintiff was not disturbed. *Id*..... 446

See DAMAGES, 1. MASTER AND SERVANT, 1.

NEGLIGENCE.

1. **Common Carriers.** An incorporated railroad company is a

common carrier as to all property within the scope of its chartered powers, and it cannot by special agreement divest itself of such character, and therefore it is liable for the negligence of its servants. *A. & N. R. R. v. Washburn*..... 117

NEGOTIABLE INSTRUMENTS.

1. **Promissory Notes**: LIABILITY OF ASSIGNOR. A., being the payee of a promissory note, assigned the same to T., in payment for a house and lot, and to secure the payment of the note at maturity gave a mortgage on the same property, in which it was provided, that if A. should pay the note at maturity, the mortgage should be void, but "otherwise to be of full force and effect." In an action to foreclose the mortgage: *held*, that the promise of A. to pay the note was unconditional, and that he was not released by a failure to demand payment of the makers. *Albright v. Russell*..... 207

2. **Alteration of Negotiable Instrument.** A memorandum written under a negotiable instrument and qualifying it, is to be taken as a part of the contract. *Palmer v. Largent*... 223

3. ———. The fraudulent removal of such a memorandum vitiates the instrument, even in the hands of a *bona fide* holder; but where the words alleged to have been removed were, "this note is given upon condition," and there being nothing to show what the condition was; *held*, that it did not vitiate the instrument inasmuch as they were entirely immaterial. *Id*..... 223

4. ———. Where the defense, in an action upon a promissory note is based upon an alleged alteration of the instrument, it is the duty of the court to determine whether such alteration is material, and it is error to submit the question of materiality to the jury. *Id*..... 223

5. ———: SIGNATURE FALSELY OBTAINED. If the signature of an illiterate person be obtained to a promissory note by fraudulently inducing him to believe that he is signing a different instrument, with no fault on his part, such note will be void even in the hands of a *bona fide* holder *First National Bank v. Lierman*..... 247

6. **Promissory Notes.** A note taken for a pre-existing debt will not discharge the original cause of action, unless it is by express agreement taken in payment of such prior debt and at the risk of the creditor. *Young v. Hibbs*..... 433

7. ———: EVIDENCE. When the original debt is sued on, the

plaintiff must produce the new note on the trial, or satisfactorily show that it is lost or destroyed. *Id*..... 433

See BANKS AND BANKING. PRINCIPAL AND SURETY.

NEW TRIAL.

1. **The motion** for a new trial must be filed in the court below in order to obtain a review of the case in the supreme court. *Creighton v. Forbes*, 100. *Gibson v. Arnold*, 186. And to obtain a review of the decision of a referee, such motion is necessary. *Simpson v. Gregg*..... 237

2. **It is not** the number of witnesses produced by a party, nor their language alone, that should be looked to in determining whether a new trial should be granted, but all the circumstances should be taken into the account and given due weight. *Blackburn v. Ostrander*..... 219

3. **Powers of Court of Equity.** A court of equity will grant relief against a judgment obtained by default, if there is a good defense, where defendant was necessarily and unavoidably prevented by illness in his own family, and by his own illness from attending to the suit. *Horn v. Queen*..... 472

NUISANCE.

See COUNTIES.

OFFICERS.

1. **Salary.** A requisition for the salary of an officer should show on its face for what month or quarter and year the same was earned. *Opinion of Judges*..... 566

See CLERK DISTRICT COURT. COUNTY COMMISSIONERS. COUNTY TREASURER. PRACTICE, 8. SHERIFF.

OFFICIAL BONDS.

1. **Liability of Principal and Sureties.** The liability of both principal and sureties on an official bond, is original and primary; and the action lies against both without having first sued the officer for the tort. *Kane v. U. P. R. R.*..... 105

2. **Breach.** The exaction of illegal fees by an officer, under color of his office, is a breach of a condition in his bond providing that he shall faithfully and impartially, without fear, favor or oppression, discharge the duties required of his office by law. *Id*..... 105

PAYMENT.

1. **A Voluntary Payment** made under a mistake as to facts may be recovered back; and it is not necessary to authorize a recovery in such a case that the mistake should have been caused by the wrongful act of the defendant. *Billings v. McCoy* 187

PARTIES.

See MORTGAGE, 1.

PARTNERSHIP.

1. **Acts of Partner which will bind Firm.** The act of one partner, during the existence of the partnership, and within the legitimate scope of the partnership business, will bind the other partners; but, upon the dissolution of the partnership, and a notice thereof, such agency, as well as the relations of partners, cease to exist, and the authority to create new contracts is revoked, and the relation of partners to their creditors then becomes that of joint debtors. *Mayberry v. Willoughby* 368

2. ———. Where a firm is surety on a note, and one of the partners is a member of the board of directors of the bank holding the note, all the partners are affected with the notice, which the one who is director is presumed to have, of whether payment has been made or not. *Merchants' Bank v. Rudolf*. 527

PERFORMANCE.

See SALE.

PERSONAL PROPERTY.

See SALE.

PETITION.

See PLEADING.

PLEADING.

1. **General Rule.** Pleadings should present a certain, specific issue, and such issue is the only subject matter on which the jury have to pass. *School District v. Shoemaker* 36

2. **Effect of General Denial.** Upon a general denial the simple inquiry is, has the plaintiff proved what he has alleged in his petition; and under such issue nothing can be given in evidence which does not tend to prove or disprove the facts stated in his petition. *Id* 36

3. In Actions of Replevin. But under the code, in an action of repleven, if the jury find in favor of the defendant, they must assess for him such damages as they shall think just and proper, whether he pleads a general denial, new matter as a defense, or a demand for damages. *Id.*..... 36

See also *Creighton v. Forbes*..... 100

4. In Actions upon Contract: AVERMENTS OF PETITION. In an action upon a contract containing a condition precedent, the plaintiff must aver performance to show a cause of action against the defendant. *Livesey v. Omaha Hotel*..... 50

5. ———: ———. To maintain an action upon such contract without performance, the plaintiff must aver all the facts necessary to show a waiver of the condition precedent, and fix the defendant's liability without such performance. *Id.*. 50

See also *Estabrook v Omaha Hotel*..... 76

Boehme v. Omaha Hotel 80

6. New Matter in Defense. All new matter, constituting an entire or partial defense to a cause of action, must be concisely and distinctly set up in the answer, and is not admissible under a general denial. *A. & N. R. R. v. Washburn*..... 117

7. Admissions. The plaintiff requested an instruction to the jury "that any allegation" in the petition not denied by the answer "must be taken as admitted, and true." This was refused. *Held*, error, there being material allegations in the petition not denied by the answer. *Steele v. Russell*..... 212

8. Allegata et Probata. Relief under a general prayer must be conformable to the case made by the petition, and not different or inconsistent with it. The court can only adjudge upon the issues raised by the pleading, and the *allegata et probata* must agree. *Clarke v. O. & S. W. R. R.*..... 314

9. Defense. Every defense to an action, whether partial or entire, must be set up in the answer. *Peet v. O'Brien*..... 360

10. Demurrer to Answer. A general demurrer to an answer admits as true all new matter pleaded therein, which constitutes a defense. *Nesbitt v. Campbell*..... 429

11. Foreclosure of Mortgage: DEFENSE. In a foreclosure suit, an answer setting up a garnishment of the money in the hands of the mortgagor by a creditor of the mortgagee, and averring that an assignment of such mortgage and note was collusive, without consideration, and for the sole purpose of defrauding the creditor of the mortgagee, constitutes a good defense, if true. *Id.*..... 429

12. **Undertaking in Attachment:** ACTION ON. In an action on an undertaking in attachment the petition should allege that the order of attachment was *wrongfully* sued out, or obtained. *Eaton v. Bartscherer*..... 469

13. ———: ———. It is not enough to state in the petition that the attachment was quashed, and the property released by proceedings in error. *Id*..... 469

14. **Answer.** When an answer contains an allegation that one of several defendants, joint makers of a promissory note, was in reality only a surety thereon, to which allegation there was no reply, it will be taken as true. *Dillon v. Russell & Holmes*..... 484

15. ———: INSTRUCTIONS TO JURY. And if the court on request refuse to instruct the jury to this effect it is error. *Id*. 484

16. **Demurrer to Amended Petition.** In determining whether a demurrer should be sustained to an amended petition, which covers the entire ground of the original, and takes its place, the court will not look beyond the pleading against which the demurrer is directed. *Null v. Jones*..... 500

17. ———. The fact that the amended petition predicates the right to recover upon a fact which did not exist when the original petition was filed, is not ground for demurrer. *Id*.. 500

18. ———. Where facts which have arisen since the bringing of the action, and therefore could be properly brought into the case by supplemental petition, are included in an amended petition, it is no ground of demurrer but should be taken advantage of, if at all, by motion. *Id*..... 500

See LIMITATION OF ACTION. PRACTICE.

POWER OF ATTORNEY.

See PRINCIPAL AND AGENT.

PRACTICE.

1. **Appeals.** A party appealing from a judgment of a probate judge has ten days within which to give the undertaking in appeal, and until the second day of the term next thereafter to deliver the transcript to the clerk of the appellate court. *Bruner & Neligh v. Folk*..... 84

2. **The Findings of a Court,** when substituted for a jury, are entitled to the same weight as the verdict of the latter. *Seymour v. Street* 85

3. **Where a Verdict** or finding is *clearly wrong*, it should be

set aside; but if there is only doubt as to its correctness it will not be disturbed. *Id.* 85
See also, *Storms v. Eaton* 454

4. **Taking Stay of Execution** prior to the act of February 23, 1875, is not a waiver of the right to prosecute proceedings in error. *White v. Blum*, 4 Neb., 558, cited and approved. *Id.* 85

5. **Jurisdiction of Probate Court** extends to cases where the amount *claimed* in the petition or bill of particulars exceeds one hundred dollars; but if the verdict is for less than one hundred dollars, the plaintiff is not entitled to a judgment for costs. *Beach v. Cramer* 98

6. **Motion for New Trial.** To obtain the review of a case in the supreme court, a party dissatisfied with either the verdict or judgment in such case, must file the proper motion and in this way present the questions of law fairly and fully to the court below. *Creighton v. Forbes*, 100. *Gibson v. Arnold* 186

7. **Pleading:** REPLEVIN. Under the statute, upon a plea of general denial, in actions of replevin, the defendant may have affirmative relief in damages. *Id.* 100

8. **Appearance of Defendant.** In an action against a public officer, brought in a different county from that in which he resides and holds his office, for a wrongful act done by him under color of his office, if he voluntarily appears and pleads to the merits of the case he thereby waives all objections to the jurisdiction of the court. *Kane v. U. P. R. R.* 105

9. **Evidence.** A mere difference of opinion as to the weight of evidence between a reviewing court and the court which tried the cause, is not sufficient to reverse a judgment. To do so, the preponderance of evidence must be clear, obvious, and decided, or so great as to indicate prejudice, partiality, or corruption. *A. & N. R. R. v. Washburn* 117

10. **Reversal of Judgment.** A judgment will not be reversed on the ground that the finding or verdict is contrary to the evidence, unless it manifestly is so; and the reviewing court will always hesitate to reverse when doubts as to its propriety arise out of a conflict in oral evidence. *Id.*, 117. But where the preponderance against the finding is clear, obvious and decided, it is the duty of the reviewing court to correct the mistake. *Fried v. Remington* 525

11. **Reference of Causes.** A purely legal action cannot be referred, except by consent of the parties, as neither party

can be deprived of the right to a trial by jury in such cases. *Mills v. Miller*, 3 Neb., 94. cited and approved. *Lamaster v. Scofield*..... 148

12. **Oath of Referee.** The failure of a referee to take the oath required by law is a mere irregularity, that is waived by the parties proceeding to trial without objection on that ground. *Id*..... 148
See also *A. & N. R. R. v. Washburn*..... 117

13. **An Exception** taken in the court below must not be so indefinite as to leave it uncertain as to what it is intended to apply. *Gibson v. Arnold*..... 186

14. **Continuance.** An application for a continuance is addressed to the sound discretion of the court, and its action will not be reversed, unless there has been such an abuse of discretion as has operated to the prejudice of the party in the final determination of the case. *Billings v. McCoy Bro's*... 187

15. **Instructions** should be given with direct reference to the testimony in each particular case, and the attention of the jury directed to the questions at issue. *Id*..... 188

16. ———. Where instructions are asked by either party before the jury retire, which are unobjectionable, pertinent to the issue, and necessary for the jury to consider in making up their verdict, they should be given by the court, notwithstanding a rule requiring *all* instructions to be submitted before the commencement of the argument. *Id*..... 188

17. **Review of Judgment.** Section 584 of the civil code provides that proceedings to review a judgment of the district court, in the cases mentioned in section 581, shall be by petition in error. *Iler v. Darnell*..... 192

18. **Final Judgment.** To obtain the review of a case in the supreme court there must be a final judgment upon the merits of the case, in the court below. *Nichols v. Hail*..... 194

19. **Instructions to Jury.** *An instruction* not warranted by the pleadings, even if it state the law correctly, will require the reversal of the judgment, if it have a tendency to mislead the jury. *Steele v. Russell*..... 211

20. **Bill of Exceptions.** In vacation a judge has no authority to allow a bill of exceptions. And if the record disclose that it was so allowed, it will not be considered. *Mewis v. Johnson Harvester*..... 217

21. **Setting Aside Verdict.** An order of the court below overruling a motion for a new trial, for the reason that the

verdict of the jury was against the weight of evidence, will not be disturbed, unless it be very clearly so. *Blackburn v. Ostrander*..... 219

22. ———: PREPONDERANCE OF EVIDENCE. Mere preponderance of testimony against the verdict is not enough to warrant the court in disturbing it. *Id*..... 219

23. ———: ———. It is not the number of witnesses produced by a party, nor their language alone, that should be looked to in determining whether a new trial should be granted, but all the surrounding circumstances should be taken into the account and given due weight. *Id*..... 219

24. **Rejection of Evidence.** To obtain a review of the action of the court in excluding evidence from the jury, the testimony offered, and the ground of its exclusion, should be preserved by bill of exceptions. *Commissioners of Kearney County v. Kent*..... 227

25. **Referee:** NEW TRIAL. To obtain a review of the decision of a referee, a motion for a new trial is necessary. *Simpson v. Gregg*..... 237

26. ———: ———: EXCEPTIONS. Where the motion for a new trial is based upon errors in the admission or rejection of testimony, or the ruling of the referee upon other questions of law arising before him, it should appear that exceptions were taken at the time the errors occurred. *Id*..... 237

27. ———: ———: ———. When, in such case, no motion for a new trial is made, the alleged errors will not be considered, but the judgment will be affirmed. *Id*..... 237

28. **Credibility of Witnesses.** In case of a conflict in testimony, the jury must judge of the credibility of witnesses. *Young v. Hibbs*..... 433

29. **Final Judgment.** Where the judgment of a justice of the peace is taken on error to the district court and reversed, and the original case retained for trial in that court, such judgment of reversal is a final judgment, and may be reviewed by the supreme court without waiting for the final disposition of the original case in the district court. *Banks v. Uhl*..... 240

30. **Waiver of Error.** The failure to except to such judgment of reversal, and to take steps to set it aside until after the original case has proceeded to final judgment, will be deemed a waiver of all errors committed in its rendition. *Id*..... 240

31. **Alteration in Contracts.** It is the duty of the court to determine as a question of law whether an alteration in a contract is material. It is error to submit such question to the jury. *Oliver v. Hawley*..... 439

32. **Trial of Right of Property.** Where goods are levied upon by a sheriff under execution, and such goods are claimed by a person other than the one designated as defendant in the execution, a trial of the right of property can be had in the mode prescribed by sections 486, 487 and 488 of the code of civil procedure only at the instance of the claimant of such goods. A sheriff has no authority to institute such proceedings without the consent of the claimant. *Storms v. Eaton*..... 453

33. ———: ACTION BY CLAIMANT AGAINST OFFICER. In such proceedings if the jury find against the claimant he cannot afterwards maintain an action against the officer; while if the jury find in favor of the claimant, the plaintiff in execution may tender the undertaking provided for by Sec. 488, and require the sale to proceed; and the officer in such case will not be liable to the claimant, his remedy being upon the undertaking. *Id*..... 453

34. **Undertaking in Attachment:** ACTION ON. In an action on an undertaking in attachment the petition should allege that the order of attachment was *wrongfully* sued out, or obtained. *Eaton v. Bartscherer*..... 469

35. ———: ———. It is not enough to state in the petition that the attachment was quashed, and the property released by proceedings in error. *Id*..... 469

36. **Pleading:** ANSWER. When an answer contains an allegation that one of several defendants, joint makers of a promissory note, was in reality only a surety thereon, to which allegation there was no reply, it will be taken as true. *Dillon v. Russell & Holmes*..... 484

37. ———: ———. INSTRUCTIONS TO JURY. And if the court on request refuse to instruct the jury to this effect it is error. *Id*..... 484

38. **Error:** REVERSAL OF JUDGMENT. But it is not every error that calls for a reversal of a judgment. To have this effect the error must appear to have been prejudicial to the party seeking to take advantage of it. *Id*..... 484

39. **Attachment:** AMENDMENT. An affidavit for the issuance of an attachment may be amended by leave of the court,

even after a motion to quash the proceedings is filed, because of that particular defect. *Struthers v. McDowell*..... 491

40. ———. It is not error for the court to permit the officer before whom the affidavit was made to attach a venue, according to the fact, even after a motion has been filed to dismiss the attachment, on the ground of its omission. *Id*..... 491

See APPEAL. ATTACHMENT. ELECTIONS. EQUITY. JUDGMENT. MANDAMUS. PLEADING.

PRACTICE IN CRIMINAL CASES.

1. **Qualification of Jurors.** It appearing that a person called as a juror had formed an opinion as to the guilt or innocence of the accused from reading reports of the testimony of witnesses, he is incompetent to sit in the case, although he might be willing to swear that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence. *Carroll v. The State*..... 31
Smith v. State..... 181

2. **Witnesses.** When separate trials are awarded to parties jointly indicted, each is a competent witness for the state upon the trial of the other, without being first acquitted or convicted, and without a *nolle prosequi* being first entered upon the indictment. *Id*..... 31

3. **Jury Viewing Scene of the Crime.** Whenever the court makes an order that the jury view the place in which any material fact in relation to the trial may have occurred, such view should be made in the presence of the prisoner, unless he waive that privilege. *Id*..... 32

4. **Examination of Witnesses.** A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. *Smith v. The State*..... 181

5. **Instructions to Jury** should be given with reference to the evidence in each particular case. *Id*..... 181

6. **Opinion of Jurors.** To render a juror incompetent in a criminal case on the ground of an opinion formed or expressed, it must distinctly appear that such opinion was in reference to the guilt or innocence of the defendant. *Fillion v. The State*..... 351

7. ———. If the ground of objection to the juror is, that he heard testimony, it must appear that it was in reference to the case in which the defendant is charged with the crime. *Id.* 351

8. **Error:** PRESUMPTIONS. To obtain a review in the supreme court, error must affirmatively appear in the record. The rule is, that whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be presumed that the court acted properly and all things were rightly done. *Id*..... 351

9. **Grand Jury.** Where the record shows that the court ordered vacancies in the panel of grand jurors to be filled by certain persons named by the judge: *Held*, error, and that a motion to quash the indictment for that reason should have been sustained. *Preuit v. The People*..... 377

10. ———. The duty of making the selection of persons to fill vacancies in the panel is confided to the sheriff alone, but when so selected, the court may pass upon their qualifications to serve. *Id*..... 377

11. **Change of Venue.** On a change of venue in a criminal case, the original indictment must be transmitted to the clerk of the court to which the venue is changed. *Id*..... 377

12. **Indorsement of Plea upon Indictment.** The statute directing the entry of the prisoner's plea on the back of the indictment is not mandatory, but directory merely, and the failure to so enter it is no ground for a reversal of the judgment, when the plea is contained in another part of the record. *Id*..... 377

13. **Short-hand Reporter.** The refusal of the court to appoint a short-hand reporter to take down the testimony, is not error. This is a matter resting entirely in the discretion of the court. *Id*..... 377

14. **Verdict.** A verdict in these words: "We, the jury, selected, impaneled and sworn in the above entitled cause, do find the defendant, William M. Preuit, guilty of murder in the first degree," is sufficient, without adding "in manner and form," etc. *Id*..... 377

15. ———. Where the highest degree of homicide is charged and the verdict is guilty, nothing more is required than to specify the degree which the jury find. *Id*..... 377

16. **Judgment.** In recording the judgment, the clerk should follow, substantially, the formal language of the court in pronouncing it. *Id*..... 377

17. **Interested Witnesses.** Where informers, detectives, or other persons employed to hunt up testimony against the accused, are called to testify against him, greater care should

be exercised in weighing their evidence than in the case of witnesses who are wholly disinterested. *Id*..... 377

18. **Qualification of Jurors.** If, upon examination of a juror, it is shown that he has an opinion, founded upon rumor, newspaper reports, or hearsay, and it shall satisfactorily appear that the character of such opinion is such that it will not interfere with his rendering an impartial verdict, it is not error to admit him to the jury. Loose and unguarded expressions made by persons at the time the offense is committed and not thought of afterwards, are entitled to very little, if any, weight, as objections to a juror. *Curry v. The State*..... 412

19. **Instructions to Jury.** When instructions requested are substantially given in the charge prepared by the court on its own motion, it is not error to refuse to repeat them, though expressed in language different from that used by the court. *Id*..... 412

See CRIMINAL LAW.

PRACTICE IN SUPREME COURT.

1. **A Motion to strike** a petition in error from the files on the ground that what purports to be a bill of exceptions cannot so be considered, will not be entertained. This objection must be taken either by a motion to quash the exceptions, or on the final hearing. *Mewis v. Johnson Harvester*..... 217

2. **Reviewing Judgments.** The only mode of reviewing in this court the judgment of inferior courts, and tribunals exercising judicial power, in civil cases, is by appeal or petition in error. *Furnas v. Nemaha County*..... 367

3. ———. This court will not review a decision of the county commissioners, made while acting as a board of equalization, on an agreed statement of facts, when none of the statutory steps have been taken to bring the case here. *Id*..... 367

4. **Appeal.** An appeal will lie to the supreme court from the final judgment of the district court, in an action brought to set aside a judgment of a justice of the peace, and to obtain a new trial. *Horn v. Queen*..... 472

See APPEAL. PRACTICE.

PRESUMPTIONS.

See CRIMINAL LAW, 4. EVIDENCE, 9, 13. PRACTICE IN CRIMINAL CASES, 8.

PRINCIPAL AND AGENT.

1. **Power of Attorney.** A power of attorney, which in terms authorized an agent simply to sign the name of his principal to a mortgage, confers no authority on such agent to execute a promissory note in the name of his principal, and then to negotiate both note and mortgage as collateral security for a loan to himself. *Cones v. Neligh*..... 302

2. ———. The power of attorney, being of record, is notice to those dealing with the agent of the extent of his authority to bind the principal under it. *Id*..... 302

See BANKS AND BANKING. MASTER AND SERVANT. PRINCIPAL AND SURETY.

PRINCIPAL AND SURETY.

1. **Release of Surety.** Where the defense to an action on a promissory note depended upon showing in addition to the fact of suretyship, the fact of an extension of the time of payment to the principal, which was alleged but not proved, the refusal of the court to instruct the jury that such allegation should be taken as true because the plaintiff had filed no reply thereto, is no ground for reversal of the judgment. *Dillon v. Russell & Holmes*..... 484

2. **Extension of Time to Principal.** An extension of time to the principal for the payment will not have the effect to release the surety, unless the agreement to extend the time be such as will bind the holder of the note, and bar his action against the principal for some definite time. *Id*..... 484

3. ———: ———: ———. A mere voluntary forbearance on the part of the creditor, enlarging the time of payment, without consideration, will not work a discharge of the surety. Nor will such extension, if there be no definite time agreed upon, have the effect to release him. *Id*..... 484

4. As to release of surety by cashier of a bank, see BANKS AND BANKING.

PROBATE COURT.

1. **The Jurisdiction of Probate Courts** (now county courts) extends to cases where the amount *claimed* in the petition or bill of particulars exceeds one hundred dollars. This jurisdiction is distinct, as to the amounts authorized to be recovered, from that of a justice of the peace; yet if the verdict is for less than one hundred dollars, the plaintiff is not entitled to a judgment for costs. *Beach v. Cramer*..... 98

See MORTGAGE, 9, 10, 11.

PROMISSORY NOTES.

See BANKS AND BANKING. LIMITATION OF ACTIONS, 5, 6, 8. NEGOTIABLE INSTRUMENTS. POWER OF ATTORNEY.

PROTEST.

1. **Promissory Notes:** LIABILITY OF ASSIGNOR. A., being the payee of a promissory note, assigned the same to T., in payment for a house and lot, and to secure the payment of the note at maturity gave a mortgage on the same property, in which it was provided, that if A. should pay the note at maturity, the mortgage should be void, but "otherwise to be of full force and effect." In an action to foreclose the mortgage: *Held*, that the promise of A. to pay the note was unconditional, and that there was no necessity for any demand, or protest in order to fix his liability to pay the note. *Albright v. Russell*..... 207

PUBLIC POLICY.

See CONTRACT, 4.

PURCHASER.

See JUDICIAL SALE. VENDOR AND VENDEE.

RAILROADS.

1. **Common Carriers.** An incorporated railroad company is a common carrier, as to all property within the scope of its chartered powers, and it cannot by special agreement divest itself of such character, and therefore it is liable for the negligence of its servants. *A. & N. R. R. v. Washburn*..... 117

2. ———. When such company undertakes to carry live stock for hire, the fact that it does so establishes its relation as a common carrier, with the duties and obligations which grow out of it. *Id*..... 117

3. **Sale of Franchise.** A contract to sell and transfer the rights, franchises and property of a railroad company, before it has its road constructed, is against public policy, and cannot be enforced by legal proceedings. *Clarke v. O. & S. W. R. R*..... 314

4. **Government Grant.** Under section 20, of the act of Congress, approved July 2, 1864, providing that when "the Burlington and Missouri River Railroad Company shall have completed twenty consecutive miles of its road, the President of the United States shall appoint three commissioners to

examine and report to him in relation thereto, and if it shall appear to him that twenty miles of said road have been completed as required by law, then, upon certificates of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company," etc: *Held*, that until such certificate was issued the company did not become the equitable owner of such lands, and the lands in suit were not subject to state taxation. *White v. B. & M. R. R.*..... 393

See CORPORATION.

REAL PROPERTY.

1. **Possession of Land** is notice to all the world, not only of the possession itself, but of the right, title, and interest, whatever it may be, of the possessor. *Uhl v. May*..... 157

See DEED. EJECTMENT. FORCIBLE ENTRY. HOMESTEAD. MORTGAGE.

REFEREE.

See PRACTICE, 11, 12, 25, 26.

REPLEVIN.

1. **Pleading.** Under the code, in an action of replevin, if the jury find in favor of the defendant, they must assess for him such damages as they shall think just and proper, whether he pleads a general denial, new matter as a defense, or a demand for damages. *School District v. Shoemaker*..... 36
See, also, *Creighton v. Forbes*..... 100

2. **Conditional Sale.** A vendor, who has sold property with conditions, and afterwards waives his right to the title of the property sold, he cannot maintain an action of replevin to recover possession thereof. *Aultman v. Mallory*..... 178

RESCISSION.

1. **Of Contract.** If a party has derived a material advantage from a partial performance of a contract, he cannot hold such advantage and rescind the contract, but must seek his remedy in damages. *Clark & French v. Tennant*..... 549

See FRAUD.

RESPONDEAT SUPERIOR.

See DAMAGES, 1. MASTER AND SERVANT.

REVENUE.

See TAXES.

ROADS.

1. **County Road:** LOCATION OF. In the location of a county road the first steps to be taken are the giving of notice, and filing a petition therefor, as provided in section 19, Chap. 47, R. S. 1866. *Robinson v. Mathwick*..... 252

2. ———: JURISDICTION OF COUNTY COMISSIONERS. Unless such petition be presented to the county commissioners, after due notice has been given, they have no jurisdiction in the location of a county road. *Id*..... 252

3. ———: ———. If the county commissioners act without such notice being given, and petition filed, signed by at least ten resident land owners of the county, the location would be void. *Id*..... 252

4. ———: TRESPASS. Where the location of a county road over the *locus in quo* is plead in justification of an alleged trespass, it is necessary that these preliminary jurisdictional steps be established, or the defense will fail. *Id*..... 252

5. ———: ———: EVIDENCE. Testimony showing a survey, and plat of a road, is immaterial, unless it be shown that the requisite notice had been given, and petition for the road filed. *Id*..... 252

6. **Duties of Supervisors:** ACTION AGAINST. The duties of a supervisor of public roads are of a general public nature, and he acts for the public at large, and therefore an action, at the common law, will not lie against him by an individual for an injury occasioned to his person or property, by reason of a defect in a public road or bridge. *McConnell v. Dewey*..... 385

7. ———: ———. It is alone within the province of the legislature to define and regulate the duties and responsibilities of such public officer. *Id*..... 385

SALARY.

See OFFICER.

SALE.

1. **Conditional Sale.** A sale and delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee until the condition is performed *Aultman v. Mallory*..... 178

2. ———. No one can sell a greater interest in property than he possesses, unless the real owner so far encourages and sanctions the sale as to be estopped from asserting title to the property sold. *Id*..... 178

3. **Possession of Property.** In sales of property, unless otherwise expressed, it is implied that the seller may retain the possession until the price is paid. *Horacek v. Keebler*.. 355

4. **Performance.** Where a day certain is fixed within which the consideration is to be paid, performance or a tender thereof must be made within the time, or the seller will not be bound. *Id*..... 355

See CONTRACT. FRAUD. JUDICIAL SALE. RESCISSION. TAXES, 2, 3. WARRANTY.

SCHOOL FUND.

1. **Constitutional Law.** Sections three and four, Article VIII, of the Constitution, must be construed so as to apply the rents of unsold school lands to the support and maintenance of common schools throughout the state, and not to be vested in the permanent school fund. *State v. McBride*. 102

2. **Escheated Estates.** Upon the death of a tenant in fee with defect of heirs, the title and right of possession to the lands, and also to his personal estate, *eo instanti* vest in the state, and by the operation of the laws of this state all such estate, real and personal, immediately becomes and constitutes a part of the general school fund of the state. *State ex rel. Roberts v. Reeder*..... 203

SCHOOL LANDS.

1. **Failure to Pay Interest.** The mere failure of a purchaser to pay the interest due on school lands purchased from the state on credit, does not of itself work a forfeiture of his interest in such lands. *Smith v. White*..... 405

2. ———: STATUTORY REQUIREMENTS. Sec. 18, Chap. 70, General Statutes, provides that notice shall be given by the county treasurer to the purchaser, stating the delinquency complained of, and requiring the removal thereof by the fulfillment of the covenants of the bond and contract; and until such notice has been given, in the manner required by law, a purchaser cannot be divested of his interest in such lands. *Id*..... 405

SET-OFF.

1. **Set-off.** The insolvency of a party against whom a set-off

is claimed, is a sufficient ground for a court of chancery to decree such set-off in cases not provided for by statute. *Thrall v. Omaha Hotel* 295

See LANDLORD AND TENANT.

SHERIFF.

1. **Compensation for Keeping Prisoners.** Where a sheriff has the custody of two prisoners from different counties for safe keeping, the compensation is no greater than if they belonged to the same county. *James v. Lincoln County* 38

2. ———. The expense in such case should be borne by the two counties in equal proportions. *Id.* 38

3. ———. In a suit by the sheriff against one of the counties to recover for such services, he is only entitled to one-half the whole amount. *Id.* 38

See JUDICIAL SALE, 8, 9, 10.

SIDEWALKS.

See MUNICIPAL CORPORATIONS.

STATUTES.

1. **Construction.** The clause in the statute (civil code, sec. 484), "in all other cases the writ of execution first delivered to the officer must be first satisfied," must be construed as relating to executions in the hands of the officer at the time of the sale, and not to any executions returned by the officer with or without a levy thereon. *Hibbard v. Weil & Kahn*.. 41

2. ———. The words "usual place of residence" mean the place of abode at the time of service. *Seymour v. Street*... 85

3. ———. A mortgage is not a "specialty" within the meaning of the statute of limitations. *Id.* 85

4. ———. The words "all county officers" in the first section (subdivision "Removal from Office." Gen. Stat., 250) do not include county commissioners. *Hutchinson v. Ashburn*, 402

5. ———. The proviso to section seventeen of the civil code, relative to "proceedings *in rem*" applies to mortgages. *Peters v. Dunnells* 460

6. ———. In the construction of statutes, the earliest continues in force, unless the two are clearly inconsistent with, and repugnant to each other. *White v. City of Lincoln*..... 505

7. ———. There is no repugnancy between the provisions of

section 350, chapter 29 of the criminal code of the Revised Statutes [Gen. Stat., 855], and the act entitled "an act to incorporate cities of the second class and to define their powers." Approved March 1, 1871. *Id.* 505

See APPROPRIATIONS. CONSTITUTIONAL LAW. CORPORATIONS. COUNTY COMMISSIONERS. EXECUTION, 2. HOMESTEAD. MORTGAGE.

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" " p. 107. *Peet v. O'Brien*..... 365

SUNDAY.

See CONTRACT, 8.

TAXES.

1. Penalty Attached to Delinquent Taxes. An act which

provides that a penalty shall attach to and become a part of a delinquent tax is void. *Ryan v. The State*..... 276

2. **Lien of Purchaser at Tax Sale.** The tax lien given to the purchaser at a tax sale by section 61 of the act of 1869, does not extend beyond the time limited by law to redeem the land. *Peet v. O'Brien*..... 360

3. **Foreclosure of Tax Lien.** An action to foreclose, by a purchaser of land at a tax sale, will not lie until the expiration of the two years allowed the owner to redeem the land, nor until there is a failure of the title acquired by him under the law. *Id*..... 360

4. **Upon Railroad Lands.** Lands donated to the B. & M. R. R. Co., of which they are in equity the owners, are taxable, notwithstanding the failure of the company to pay certain costs and charges required by act of congress. But until the certificate required by section 20 of the act of congress, approved July 2, 1864 was issued, the company did not become the equitable owners of the lands in suit, and they were not, therefore, subject to taxation by the state. *White v. B. & M. R. R.*..... 393
See also *Bellinger v. White*..... 401

5. ———. The question of the taxation of lands, where there is no exemption in the grant, is governed by the laws of the state. *White v. B. & M. R. R.*..... 393

6. **Upon Homesteads.** A homestead acquired under the act of congress becomes liable to state taxation, as soon as the owner has the right to make his final proof and complete his title; and an action to restrain the collection of such taxes will not lie. *Bellinger v. White*..... 399

7. **Deed:** COVENANTS. Where it appears that a mortgage security was given in part payment of the land mortgaged, and that the same land was sold and conveyed to the mortgagor with covenants against all incumbrances thereon, unpaid taxes, due at the time of the sale, constitute an incumbrance on the land, and in a foreclosure suit may be pleaded as an off-set *pro tanto*. *Nesbitt v. Campbell*..... 429

8. **Valuation of Property.** Every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, and cannot be compelled to pay a tax greater than in proportion to the value of such property. *Jones v. Commissioners*..... 561

9. **Assessment of Personal Property.** Under the provisions of section twenty-one of the revenue laws, in the

assessment of personal property, the taxpayer is entitled to have a deduction of *bona fide* debts owing by him, from the gross amount of his credits. *Id.* 561

See COUNTY TREASURER, 1, 2. JUDICIAL SALE, 7.

TITLE.

See CONSTITUTIONAL LAW. DEED. EJECTMENT. FORCIBLE ENTRY. JUDICIAL SALE. REAL PROPERTY. SALE.

TOWNS.

See LIQUOR SELLING. MUNICIPAL CORPORATION.

TRIAL.

See PRACTICE, 6, 11, 25. WITNESSES.

TRIAL OF RIGHT OF PROPERTY.

See PRACTICE, 32, 33.

TRESPASS.

1. **Where the Location** of a county road over the *locus in quo* is plead in justification of an alleged trespass, the preliminary jurisdictional steps by which the road was located must be first established or the defense will fail. *Robinson v. Mathwick*.... 252

TRUSTS.

1. **Trusts.** B. was authorized by H. to obtain a loan of a certain sum of money on his credit, and with it purchase land for him. B. obtained the loan as authorized and with it purchased the land—taking the title in his own name. H. repaid the loan so obtained on his credit. *Held*, that B. held the title to the land in trust for H., and must convey it to him. *Hoehne v. Breitkreitz*..... 110

See ACTION, 1.

UNITED STATES

See ELECTIONS, 7.

UNITED STATES HOMESTEAD ACT.

1. **Mortgage Upon.** A mortgage executed by a settler upon public lands under the homestead act, after making his proof of compliance with all the requirements of the law, so as to entitle him to a patent, is valid, notwithstanding the patent has not been issued. *Jones v. Yoakam*..... 265

2. ———. It is no objection to the validity of such mortgage that it was given to secure a debt contracted before such proof was made. *Id*..... 265

3. ———. Section four of said act does not prohibit the owner of the homestead from pledging the same voluntarily to secure a pre-existing debt. Its only effect is to protect him against a compulsory payment of such demand out of the land. *Id*..... 265

4. **Death of Occupant.** Where a settler on the public lands under the homestead act dies before the completion of the required residence, his widow, by completing the residence and cultivation so begun, is entitled to a patent for the land in her own right to the exclusion of the heirs of such settler. *Perry v. Ashby*..... 291

5. ———: WIDOW MAY COMMUTE. Under section eight of said act, the widow may obtain the title before the completion of such residence, by making proof of settlement and cultivation as required of pre-emptors, and paying the minimum or graduated price. *Id*..... 291

6. ———: ———: HOLDS TITLE IN HER OWN RIGHT. In obtaining title under section eight, the widow forfeits no right, but holds the land divested of all claim of the heirs of the settler. *Id*..... 291

7. **Taxation of Homesteads.** A homestead becomes liable to state taxation as soon as the owner has the right to make his final proof and complete his title. *Bellinger v. White*.. 399

See HOMESTEADS. MORTGAGE.

UNIVERSITY.

1. **The Regents of the Universtiy of Nebraska,** as such corporation, may sue and be sued in matters over which express authority is given to such corporation. *Regents v. McConnell*..... 423

2. ———. The creation of such public corporation by legislative authority is not repugnant to the constitution. *Id* 423

3. ———. Such public corporation is but part of the machinery employed in carrying on the affairs of state, and is subject to be changed, modified, restrained or destroyed, as the general interests and public exigencies may require, without infringing private rights. *Id*..... 423

4. ———. Under the legislative acts of 1869 and 1875, the state treasurer is made the custodian of all the university funds, to

be disbursed by him upon warrants drawn by the state auditor. *Id*..... 423

5. ———. The university corporation acts simply by delegated authority, and can exercise only such powers as are expressly given to it; and not having corporate power over the university funds, it has no authority to bring and maintain an action to recover such funds. *Id*..... 423

USURY.

1. **If a person** employ another as his agent to loan money, and puts the funds in his hands for that purpose, if the agent charge unlawful interest, or even receives from the borrower a bonus for such loan the transaction is usurious. *Cheney v. White*..... 261

2. ———. In such case the usury may be plead in an action by the principal although he had no knowledge of the unlawful agreement, and derived no advantage therefrom. The case of *Philo v. Butterfield*. 3 Neb., 256 cited with approval. *Id*... 261

VENDOR AND VENDEE.

1. **Conditional Sale.** A sale and delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee until the condition is performed. *Aultman v. Mallory*. 178

2. ———: WAIVER. If the vendor makes a sale with conditions, and afterwards waives his right to the title of the property sold, he cannot maintain an action of replevin to recover the possession; but the question of waiver when put in issue is one of fact for the jury. *Id*..... 180

3. **Possession by Vendor.** In sales of property, unless otherwise expressed, it is implied that the vendor may retain possession until the price is paid. *Horacek v. Keebler*..... 355

4. ———: PERFORMANCE. And where a day certain is fixed within which the consideration is to be paid, performance or a tender thereof must be made within the time or the vendor will not be bound. *Id*..... 355

See CONTRACT. FRAUD. SALE.

VENUE.

See ATTACHMENT. PRACTICE IN CRIMINAL CASES, 11.

VERDICT.

1. **In Criminal Cases.** A verdict in these words: "We, the

jury, selected, impaneled and sworn in the above entitled cause, do find the defendant, William M. Preuit, guilty of murder in the first degree," is sufficient, without adding "in manner and form," etc. *Preuit v. The People*..... 377

2. ———. Where the highest degree of homicide is charged, and the verdict is guilty, nothing more is required than to specify the degree which the jury find. *Id*..... 377

3. As to setting aside verdict on the ground of being against the weight of evidence, see *Seymour v. Street*, 85; *A. & N. R. R. v. Washburn*, 117; *Blackburn v. Ostrander*, 219. See, also, *Storms v. Eaton*, 454.

4. **Assault with Intent to Murder.** Under the statute, an assault with intent to murder is but one offense, and if the indictment contains no other, a general verdict of guilty is good and valid. *Curry v. The State*..... 413

WAIVER.

1. **Contract:** CONDITIONS PRECEDENT. If waiver of the condition precedent in a contract by defendant is pleaded, then the question whether the defendant has or has not waived his legal rights, and by his own acts become estopped from denying his liability under the contract, is a question of fact, which is alone within the province of the jury to determine upon the testimony in the case, under proper instructions by the court, defining what constitutes such waiver. *Boehme v. Omaha Hotel*..... 80

2. ———: VENDOR AND VENDEE. If a vendor deliver property to a vendee conditionally, and afterwards waives his right to the title of the property sold, the question of waiver when put in issue is one of fact for the jury. *Aultman v. Mallory*, 180

See JUDGMENT, 12.

WARRANTY.

1. **Conditions Precedent.** When the soundness of a piece of machinery is guaranteed by a warranty, one of the conditions of which is that in case of a defect being discovered in any portion of it, the seller shall be liable only on condition of the production of the defective piece at the manufactory, or to the agent by whom it was sold, this is a condition precedent, and must be complied with, or there can be no recovery. *Miller v. Nichols*..... 478

2. ———. Where the very defect complained of is fully and clearly covered by the warranty, no liability can be estab-

lished against the seller on the ground of fraud in not disclosing the defect if known by him at the time of the sale. In such case the purchaser must rely on the contract of warranty. *Id*..... 478

3. ———. When in a contract of warranty there are conditions precedent to be performed by the purchaser, he must show a fair, reasonable compliance therewith on his part, in order that he may be permitted to enforce against the warrantor. *Birdsall, Son & Co. v. Carter*..... 517

WITNESSES.

1. **In Criminal Cases.** When separate trials are awarded to parties jointly indicted, each is a competent witness for the state upon the trial of the other, without being first acquitted or convicted, and without a *nolle prosequi* being first entered upon the indictment. *Carroll v. The State*.... 31

2. ———: INTERESTED WITNESSES. Where informers, detectives, or other persons employed to hunt up testimony against the accused, are called to testify against him, greater care should be exercised in weighing their evidence than in the case of witnesses who are wholly disinterested. *Preuit v. The People*..... 377

3. **Examination of Witnesses.** A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. *Smith v. The State*..... 181

4. **Credibility of Witnesses.** In case of conflict of testimony the jury must judge of the credibility of witnesses, and determine the weight due to that of each witness. *Young v. Hibbs*..... 433

See EVIDENCE.

WORDS AND PHRASES.

See CONSTITUTIONAL LAW. GOUNTY COMMISSIONERS, 5. STATUTES.