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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

1882.

VOLUME XIII.

BY

GUY A. BROWN,
OFFICIAL REPORTER.

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BY GUY A. BROWN, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

CHIEF JUSTICE,

GEORGE B. LAKE.

JUDGES,

AMASA COBB,

SAMUEL MAXWELL,

ATTORNEY GENERAL,

ISAAC POWERS, JR.

CLERK AND REPORTER,

GUY A. BROWN.

DEPUTY,

HILAND H. WHEELER.

DISTRICT COURTS

OF

NEBRASKA.

JUDGES.

S. P. DAVIDSON, . . .	First District.
S. B. POUND, . . .	Second District.
JAMES NEVILLE, . . .	Third District.
GEORGE W. POST, . .	Fourth District.
WILLIAM GASLIN, Jr., . .	Fifth District.
J. B. BARNES, . . .	Sixth District.

DISTRICT ATTORNEYS.

R. W. SABIN, ...	First District.
J. B. STRODE, . . .	Second District.
PARKE GODWIN, . . .	Third District.
THOMAS DARNELL, . .	Fourth District.
W. S. MORLAN, . . .	Fifth District.
WILBUR F. BRYANT, . .	Sixth District.

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E. M. BATTIS, . . .	Fourth District.
F. M. HALLOWELL, . .	Fifth District.
EUGENE MOORE, . . .	Sixth District.

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

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

Acts of various years are cited by a reference to the volume of laws of the year in which they were passed.

The volume of laws quoted as the "Compiled Statutes" or "Comp. Stat.," refers to the edition prepared in 1881, by GUY A. BROWN.

This volume contains a report of all decisions handed down prior to January term, 1883, not previously reported.

The syllabus of each case in this volume was prepared by the judge writing the opinion, in accordance with Rule XIV. All of the judges concurred in the opinion, except where specially noted.

Lincoln, Jan. 1, 1883.

The following amendments to rules have been made by the court:

Rule III.

Whenever a cause is reached in the regular order on trial of cases, and neither party appears in person or by attorney, the cause shall be disposed of as the court shall deem proper, according to the state and condition of the case, unless one or more of the judges of the court have participated in such cause in the court below, as judge or counsel.

Rule XVI.

A motion for a re-hearing may be filed as of course, at any time within forty days from the filing of the opinion of the court in the case. Such motion must specify distinctly the grounds upon which it is based, and be accompanied by a printed brief of the argument of counsel, and the authorities cited in its support. If, upon examination, the court shall think such argument worthy of an answer, it will so indicate, fixing a time for the hearing of the motion, of which due notice in writing shall be served upon the adverse parties, or their attorneys of record, by the party making the motion. Copies of briefs shall also be served as in other cases, so far as practicable.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA,

JULY TERM, 1882.

PRESENT:

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

SMITH & CRITTENDEN, PLAINTIFFS IN ERROR, V. GEORGE W. STEELE AND OTHERS, DEFENDANTS IN ERROR.

Attachment of homestead for debt prior to issuance of patent. S. & C. caused an attachment to be issued and levied upon lands entered by S. as a homestead under the laws of the United States, the debt being contracted before the patent was issued. S. had conveyed before the attachment was levied. Judgment was recovered in the action and the land ordered sold. In a suit to subject the land to the payment of the plaintiffs' judgment, *Held*, That in no event was the land liable to be sold upon execution or attachment for a debt contracted before the patent was issued.

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

F. B Hart, for plaintiffs in error.

The sixth finding of facts by the referee is as follows:

Sixth—That in the summer or early fall of 1876, the defendant, George W. Steele, then the acting manager of the Alexis Mercantile Association, in a conversation at Council Bluffs, Iowa, with A. J. Crittenden, one of the plaintiffs, and others, stated and represented to the said plaintiffs, for the purpose of obtaining an extension of the time of payment of a portion of said indebtedness and obtaining further credit, "that he was a single man and the owner of two hundred and forty acres of land in Butler county, which was liable for the said indebtedness, and was not exempt from an execution for such indebtedness." That the plaintiffs, relying upon such statements, did extend the time of payment upon the indebtedness then due, and did give other credits in the sale of other goods, relying upon such statements. That said defendant, Geo. W. Steele, did not have any real estate other than that mentioned in the pleadings. Said plaintiffs had no other knowledge or means of knowledge to them accessible at that time [the records of said Butler county being over one hundred miles distant] as to defendant George W. Steele's financial condition, than as to them stated above.

To the defense that the land in suit was a government homestead we plead an estoppel predicated upon the above finding. Under the doctrine of estoppel *in pais* this defense should have been sustained. Bigelow on Estoppel, chap. 18. The position, that inasmuch as the statute in express terms exempts homestead property from debts contracted prior to the issuance of the patent therefor, that to apply the doctrine of estoppel would be to abrogate the law above referred to, is untenable. *Nycum v. McAllister*, 33 Iowa, 375. *Cheney v. White*, 5 Neb., 264. *Jones v. Yoakam*, 5 Neb., 265. *Bellinger v. White*, 5 Neb., 399. *Long v. Culp*, 14 Kan., 412.

In connection with the foregoing authorities, we refer the court to the fifth finding of facts, wherein it appears that the defendant, Geo. W. Steele, entered into the occupancy of said tract in the year 1870, and was entitled to make final proof and receive his patent therefor in 1875, one year prior to the contracting of plaintiff's debt.

E. R. Dean, for defendants in error, cited *Derby v. Weyrich*, 8 Neb., 174. Bump on Fraudulent Conveyances, 242. Defendants are not estopped by conversations of Steele, the promise was not to pay his debt but the debt of the association, and was void under the statute of frauds. The property was not liable to attachment for that debt, under any circumstances, being a United States homestead, and the patent therefor not having at that time been issued.

MAXWELL, J.

This is an action in the nature of a creditor's bill to subject certain real estate formerly owned by Steele to the payment of the plaintiffs' judgment. The cause was referred to a referee, who found that on the third day of February, 1877, the plaintiffs caused an attachment to be levied upon the land in controversy in an action pending in the district court of Butler county; that a judgment was rendered thereon in favor of the plaintiffs in December, 1879, and said real estate ordered sold; that prior to the levy of said attachment, Steele had conveyed the land in controversy to his sister without consideration, and with intent to hinder and delay creditors, and that the grantee in the deed had full knowledge of this purpose; that the land in question was a homestead entered under the laws of the United States, the date of settlement being ———, 1870, and the patent being issued February 20, 1878, and after the debt on which judgment was recovered was contracted. There are other findings in the case to which it is unnecessary to refer. The referee found that the land in question was not

liable for the plaintiffs' claim. The court below confirmed the report. The plaintiff brings the cause to this court on a petition in error.

The only question for determination is, is the land in dispute liable upon the plaintiffs' judgment? Section four of the act of Congress of May 20, 1862, granting homesteads on public lands (sec. 2296, Rev. Stat. U. S.), 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 issuing of the patent therefor."

The statute making the grant provides as one of the conditions thereof that in no event shall the land thus granted be liable for debts contracted before the patent was issued—that is, is not liable to be levied upon under an execution or attachment. This being so, the defendant Steele had a right to convey the land in question to whom he pleased, and for such consideration, or no consideration, if he saw fit to do so, and the plaintiffs have no cause of complaint on that ground, and cannot predicate a right of action thereon.

The case of *Bellinger v. White*, 5 Neb., 399, is cited by the plaintiffs to sustain the attachment, but it is not in point. In that case plaintiff made a settlement upon his homestead on the fourth day of November, 1864, and the patent was issued on the first day of October, 1871. In the spring of 1871 the land was assessed, and the land afterwards sold for the taxes levied thereon. The action was brought to enjoin the execution of the tax deed and to have the taxes declared null and void.

The plaintiff in that case sought the aid of a court of equity to be relieved from a cloud upon his title without an offer to do equity. The court held that he was the equitable owner of the land from the time that he was entitled to a patent therefor, and that he could not allege his own failure to obtain the same as a cause for equitable relief. But that

cause has no application to the one at bar. It is very clear that the land in dispute is not liable for the plaintiffs' claim. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

FRIEDHOFF & CO., PLAINTIFFS IN ERROR, V. MARSHALL SMITH, DEFENDANT IN ERROR.

Landlord and Tenant: PAROL LEASE. A parol lease for two years, although void by the statute, yet if the tenant enter into possession, is valid as a lease for one year.

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

Whitmoyer, Gerrard & Post, for plaintiffs in error.

Verbal lease was absolutely void. Comp. Stat., chap. 32, secs. 3, 5. Proofs do not show tenancy from year to year. One essential ingredient in such a tenancy is the agreement to pay an annual rent. *Morrill v. Mackman,* 24 Mich., 286. The rent agreed upon in this case was $40 per month. The statement of the defendant in error that it was $480 per year is at most but a conclusion or computation. In all cases of doubt as to construction, the tenant is most favored by law. Taylor's Landlord and Tenant, 81. The rent being payable monthly, the tenancy was from month to month, and might be terminated on one month's notice. Id., 61. *Anderson v. Prindle,* 23 Wend., 616. *Witt v. Mayor,* 6 Rob., N. Y., 447. *Ellis v. Paige,* 1 Pick., 43.

W. S. Geer, for defendant in error.

The contract was good as a lease for a year. *Morrill v. Mackman,* 24 Mich., 286. *People v. Rickert,* 8 Cow.,

226. *McDowell v. Simpson*, 3 Watts, 129. *Koplitz v. Gustavus*, 48 Wisconsin, 48.

MAXWELL, J.

This is an action brought in the district court of Platte county by Smith against the plaintiffs in error to recover the balance due for the rent of certain premises for one year on a verbal lease. The answer is a general denial and plea of payment. A verdict was rendered in the court below in favor of Smith for the sum of $210, upon which judgment was rendered. The cause is brought into this court by petition in error.

It appears from the evidence that Smith rented a store-room to the plaintiffs in error for the period of two years from the first day of March, 1880, at the rent of $40 per month, payable monthly; that the plaintiffs entered into possession of the premises, and remained in possession until September, 1880, when during Smith's temporary absence from the state they abandoned the premises, leaving the keys with Smith's clerk in an adjoining store. Smith kept the store-room subject to the use and control of the plaintiffs in error until March 1st, 1881, and then demanded the balance of the rent, which the plaintiffs in error refused to pay.

The plaintiffs in error claim that a verbal lease for two years is absolutely void, and no action can be maintained thereon.

Section 5 of chap. 32 Comp. Stat. provides that: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made."

A parol contract for the leasing of land for a longer period than one year is void; that is, there is no authority

to make the lease, but a verbal lease for one year is valid; and if the tenant enter into possession under a lease void by the statute because not in writing, and is to pay rent at stated periods within the statute, the lease may be valid for the length of time the parties had authority to enter into the contract.

Here was a lease for twenty-four months, under which the tenant took possession. The parties had authority to make a lease for twelve months, and it is only the excess that is void, and it is void only because of the limitation upon the power to make the contract, but to the extent of the authority the lease is valid. The lease, therefore, was valid for one year. The question whether the lease was from month to month or by the year was properly submitted to the jury. It is clear that justice has been done, and the judgment is affirmed.

JUDGMENT AFFIRMED.

ELIZA CASEY, ADMINISTRATRIX, PLAINTIFF IN ERROR, V. G. H. PEEBLES, DEFENDANT IN ERROR.

1. **Probate Law:** APPEAL. Under the act approved Feb. 28th, 1881, providing for appeals in certain cases from the decision of a county judge allowing or disallowing a claim against an estate, an appeal may be taken by filing a bond within thirty days from the date of the order appealed from.

2. **Bond on Appeal:** PRACTICE. AMENDMENT. Where the statute requires two sureties upon a bond for an appeal, and a bond containing but one is duly approved, it is not void, but may be amended. And it will be sufficient, unless objected to on the ground that it is signed by but one surety.

ERROR to the district court for Seward county. Heard below before POST, J.

Norval Brothers, for plaintiff in error.

Roberts, Westover and Williams, and *St. Clair & Anderson* for defendant in error.

MAXWELL, J.

On the 16th day of March, 1881, G. H. Peebles filed a claim of $110.00 for medical services rendered to Cornelius Casey against the estate of Cornelius Casey deceased, in the county court of Seward county, and on the 29th of June of that year said court allowed $60.00 thereon. On the 22nd of July, 1881, Peebles filed in said court an undertaking with one surety, which was duly approved, for an appeal to the district court. On the 21st of September of that year, the defendants filed a motion to dismiss the appeal for the following reasons: *First*, Because the appellant did not make his application in writing for an appeal and file the same in the county court within ten days after the entry of the decree. *Second*, Because the appeal was not taken in the time and manner provided by law, and because no lawful bond was filed. The motion was overruled, to which the defendant excepted, and in default of answer judgment was rendered in favor of Peebles for the sum of $110. The cause is brought into this court by petition in error.

The principal error relied on is in overruling the motion to dismiss the appeal. The question to be determined depends upon the construction to be given "an act providing for an appeal from the decision of the county court in certain matters," approved Feb. 28, 1881, which provides that: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court, to the district court, by any person against whom any such order, judgment, or decree may be made, or who may be affected thereby." Comp. Stat., chap. 20, sec. 42.

Section two provides that: "All appeals shall be taken within thirty days after the decision complained of is made."

Section three provides that: "Every party so appealing shall give bond in such sum as the court shall direct, with two or more good and sufficient sureties, to be approved by the court, conditioned that the appellant will prosecute such appeal to effect without unnecessary delay, and pay all debts, damages, and costs that may be adjudged against him. The bond shall be filed within thirty days from the rendition of such decision. But an executor, administrator, guardian, or guardian *ad litem* shall not be required to enter into bond to enable him to take an appeal. If it shall appear to the court that such appeal was taken vexatiously or for delay, the court shall adjudge that the appellant shall pay the costs thereof, including an attorney's fee, to the adverse party, the court to fix the amount thereof, and said bond shall be liable therefor in cases where it is required."

The statute requires two sureties, but a bond with one surety is not void, and is sufficient unless objected to on that ground. Even if objected to, a new bond may be filed, even in the appellate court, to prevent a failure of justice. *O'Dea v. Washington Co.*, 3 Neb., 122. Where a bond is approved by the officer charged with that duty, the presumption is that the security is sufficient, and that the appellee will not be prejudiced by the failure to require more than one surety. But no objection is made in the motion on that ground. In fact the second ground of the motion is too general to be considered. A motion should distinctly point out the grounds of objection, and mere general objections cannot be considered. The statute above quoted allows thirty days in which to take an appeal, and is a complete statute in itself. It was not open to the objection of *Smails v. White*, 4 Neb., 353. *Sovereign v. The State*, 7 Id., 409. The appeal was properly taken, and the judgment is affirmed.

JUDGMENT AFFIRMED.

DANIEL LYDICK, PLAINTIFF IN ERROR, V. LEVI KORNER, DEFENDANT IN ERROR.

1. **Liquor Law:** APPEAL FROM ORDER GRANTING LICENSE. On the third day of October, 1881, the city council of F. overruled a remonstrance against granting a license to L. to sell intoxicating liquors. The parties presenting the remonstrance gave notice of an intention to appeal, but no transcript was filed nor was the case docketed in the district court until December 5th of that year. License was issued October 7th. *Held*, That as the law fixed no time in which to appeal, and as no undertaking was given, the appeal must be taken as soon as with reasonable diligence the transcript could be prepared and filed. And where an appeal was not perfected until sixty days from the date of the order appealed from the appellate court acquired no jurisdiction.

2. ———: LICENSE. A license issued after a reasonable time to take an appeal has elapsed, but before the same is taken, is valid, notwithstanding a notice of intention to appeal.

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

Martin & Gilman, for plaintiff in error.

Amos E. Gantt and *C. Gillespie*, for defendant in error.

MAXWELL, J.

On the seventeenth of August, 1881, the city council of Falls City passed an ordinance authorizing the issuing of licenses to sell intoxicating liquor, the amount required for the license being $500. On the twenty-sixth of that month, the plaintiff filed his petition and bond for license with the city clerk of that place, and paid the defendant, as city treasurer, the sum of $500 for the license. On the third of September a remonstrance was filed with said clerk opposing the issuing of license to the plaintiff. A number of witnesses were examined before the city council in support of the remonstrance, but on the thirtieth of September the

council decided that the remonstrance was not sustained, and overruled the same and decided to grant a license to the plaintiff. Notice was then given and entered on the record that an appeal would be taken to the district court. On the seventh of October the plaintiff's bond was approved and a license issued to him, and the defendant paid the $500 into the school fund. On the fifth day of December the transcript was filed in the district court, and on the sixteenth of that month the judge found in favor of the parties presenting the remonstrance and against the plaintiff. On the same day the plaintiff demanded from the defendant the $500 paid for the license, which was refused. He thereupon brought this action to recover the same.

Section three of "an act to regulate the license and sale of malt, spirituous, and vinous liquors," approved Feb. 25th, 1881, provides that: "If there be any objection, protest, or remonstrance filed in the office where the application is made against the issuance of said license, the county board shall appoint a day for hearing of said case, and if it shall be satisfactorily proven that the applicant for license has been guilty of the violation of any of the provisions of this act within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license." Comp. Stat., chap. 50.

Section four provides that: "On the hearing of any case arising under the provisions of the last two sections, any party interested shall have process to compel the attendance of witnesses, who shall have the same compensation as now provided by law in the district court, to be paid by the party calling said witnesses. The testimony on said hearing shall be reduced to writing and filed in the office of application, and if any party feels himself aggrieved by the decision in said case he may appeal therefrom to the district court, and said testimony shall be transmitted to said district court, and such appeal shall be decided by the judge of such court upon said evidence alone."

There is no provision as to the time within which the appeal is to be taken. In section twenty-eight it is provided that: "In cases arising under this section appeals may be allowed as in cases of ordinary misdemeanor within the jurisdiction of justices of the peace."

In cases of misdemeanor an appeal must be taken immediately upon the rendition of judgment, and the party against whom the judgment is rendered must within twenty-four hours enter into a recognizance to the state in a sum not less than $100, etc. It is evident that this provision is not applicable to a case like that under consideration. Nor are we aware of any statute regulating the procedure in such cases. The question therefore is, where no undertaking is given or required in a case like that under consideration, within what time must an appeal be taken in order to stay the order or judgment of the tribunal granting license? An appeal to this court from a final order or decree of the district court may be taken within six months; from the county court or a justice of the peace to the district court within ten days; from the award of commissioners or the county judge allowing or rejecting a claim against an estate within thirty days; from the assessment of damages for land condemned by a railroad company within sixty days. In all these cases, except the last, where it is sought to stay the judgment the party appealing is required to give adequate security as evidence of his good faith in taking the appeal. And in cases where land is condemned for right of way the company is required to deposit the amount allowed with the county judge for the use of the party entitled thereto, while in cases appealed from a county judge or justice of the peace the execution of an undertaking to the adverse party within the time limited by law is a condition precedent to the right to appeal. In all these cases the statute fixing a certain number of days within which a party may appeal is properly an extension of the time within which an appeal may be taken. And while fixing a limit

within which to perfect the same its primary object is not a limitation but an extension. This being the case an appeal from the decision of a city council overruling a remonstrance against issuing a license to sell liquor must be taken immediately after the order is made. That is, as soon as the transcript can with reasonable diligence be prepared it must be filed in the district court and the case docketed. No undertaking is given to stay the proceedings, and the city council and the party applying for license have a right to know that an appeal has been taken. The testimony taken before the city council must be reduced to writing, and should be certified by the presiding officer as all the testimony taken, as the statute seems to require the judge of the district court to decide the case upon such evidence alone. In this case the transcript was not filed in the district court and the appeal docketed until sixty days after the order appealed from was made. This gave the district court no jurisdiction, and the license having been issued after a reasonable time had elapsed from the time the order appealed from was made and before any appeal was taken, was a valid license, and the mere notice of an intention to appeal without actually taking an appeal did not affect its validity. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WILLIAM W. MILLER, APPELLEE, v. OLIVER P. HURFORD ET AL., AND REDICK & CONNELL, APPELLANTS.

1. **Constitutional Law:** BILLS. Where in the certificate of the president of the senate to a bill not signed by the governor it was stated that "this bill was duly presented to the governor of this state," etc., and in the certificate of the speaker of the house it

was stated "the foregoing bill was duly presented to the acting governor," etc., *Held*, That it will be presumed that the bill was presented to the person discharging the duties of the office.

2. ———: TITLE. The title of an act is not obnoxious to the constitution because it is entitled "An act to amend sections 50, 51, 71, and 105, of an act entitled An act" etc., (giving title and date of approval).

3. Taxes: TAX RECEIPT. A tax receipt is not evidence of the existence of a lien for taxes. Such lien must be proved by the assessment rolls unless from the issue made by the pleadings the tax is admitted.

4. ———: PEADING: EVIDENCE. An answer which admits the several assessments, but claims that the same are illegal for certain causes set forth, shifts the burden of proof as to the assessment to the party charging the illegal acts.

5. Pleading: ILLEGAL BONDS. Where certain bonds of D. county were claimed by defendants to be illegal, *Held*, That the facts showing such illegality must be stated in the answer.

6. Taxes: ASSESSMENT. The law fixes a standard of value for the government of the assessors—the actual value of the property. But an assessment above or below the actual value is not void if the assessor has acted in good faith.

REHEARING of case in 11 Neb., 377, to which reference may be had for any further understanding of the facts.

E. Estabrook and *W. J. Connell*, for appellants.

John D. Howe, for appellee.

MAXWELL, J.

This case was before this court in 1881, and is reported in 11 Neb., 377. A rehearing was granted and the case again heard. The objections presented in the supplemental brief of the defendants will be considered in their order.

The first objection made by the defendants is, that the plaintiff brought an action of ejectment for the premises in question, and on the trial offered no evidence of title, and purposely submitted to a verdict against him. This it is

claimed is sufficient to defeat a recovery in this action. The defendants claim to be the owners of the land. There is no pretense that the plaintiff has any title to it, either by tax deed or otherwise. The position of the defendants, if we understand it, is this—that the plaintiff has no title by his tax deeds, but because on the trial in ejectment he failed to put them in evidence and have the court adjudicate upon their validity or declare them invalid, that therefore he has admitted their invalidity and is precluded from claiming any interest in the premises. If the defendants disclaimed ownership of this land or any interest therein, and alleged in their answer that the tax deeds of the plaintiff were valid, and the court found this to be true, it would defeat a recovery, because it is only when the title acquired by the tax deed fails that an action to foreclose the lien can be maintained. But the answer of the defendants shows beyond question that the tax deeds were invalid. The following are the allegations upon that point: "And these defendants further answering said petition, say that at the time said pretended taxes for the several years mentioned in plaintiff's petition became payable, and subsequently until the dates of said sales, and ever since, the said defendants and each of them owned and had within said county sufficient personal property out of which the amount of said taxes could have been made by distress and sale, yet the county treasurer of said county wholly failed and neglected to so attempt to make said taxes or take any action whatever in this behalf, as said plaintiff at the time of said [illegible] taxes well knew."

Prior to the amendment of 1877 to the revenue law, the possession by the land owner of sufficient personal property in the county in which the taxes were due, from which the treasurer could have collected the amount assessed against the land, would defeat a tax deed, because the land was to be sold only when the treasurer was unable to collect the tax in any other manner. *Pettit v. Black*, 8 Neb., 52. *Wilhelm*

v. Russell, 8 Neb., 120. *Johnson v. Hahn*, 4 Id., 139. The defendants therefore plead the invalidity of the title, and show that the plaintiff did not become the owner of said premises by the tax deeds; and their statement in the brief that "he is by his own showing the owner of the premises, and nobody has disputed it," is not supported by the record.

Considerable stress is laid upon the form of the judgment in ejectment, that, "The defendant go hence without day," etc. A judgment is conclusive only as to the matters put in issue, and the only issue in that action was the title. The lien for taxes was not in issue.

Second. It is claimed that the petition should show *how* the taxes were due. The allegations of the petition are, that "a large amount of delinquent taxes, levied upon said land by the city of Omaha, and said county of Douglas, pursuant to law for city, county and state purposes, had accumulated and were liens upon said lands, and that on or about said date the plaintiff purchased said lands at tax sale," etc. The allegations that the taxes were levied pursuant to law for city, county, and state purposes, and were a lien upon the real estate in controversy, are certainly equivalent to an allegation that the "taxes were regularly and lawfully assessed." But it is said the petition should allege the grounds upon which the tax title has failed. Why should it do so? There is no provision in the statute that the petition shall contain such an allegation, nor is it within the purview of the law. A petition to foreclose a tax lien is to be governed by the same rules as to allegations as any other petition in equity, and a general allegation is sufficient unless the default is of such a character as to require a statement of the facts; but one of the grounds of the invalidity of the deed is set up in the answer, viz.: That the defendants had sufficient personal property to pay the taxes due on said land.

Third. It is said, however, that the act of June 6th,

1877, is invalid because it was never presented to the governor. That question was fully considered when this case was formerly before this court, and we see no reason to change our decision on that point. The governor referred to in the certificate of the president of the senate and speaker of the house, was the person discharging the duties of the office of governor. A person elected to that office who was impeached and deposed from the office, if only temporarily, was not the governor while not discharging the duties of the office. The presumptions of the law are that a public officer performs his duty in the manner required by law, and when the speaker of the house of representatives and president of the senate certify that they presented a bill to the governor for his approval, it will be presumed that they presented such bill to the officer whose approval was necessary in order that the bill might become a law.

Fourth. But it is said that there are several subjects expressed in the title of the act of June 6th, 1871. The title of the act is "To amend sections fifty, fifty-one, seventy-one, and one hundred and five, of an act entitled An act to provide a system of revenue, approved February 15th, 1869, and to make further provisions for collecting the revenue." An act to amend two or more sections which are designated of an act, certainly is not objectionable, and if we reject the latter part as surplusage, the act, so far as it relates to the amendments to the several sections named, is certainly free from objection.

In the case of the *State ex. rel. v. McLaughlin*, 14 Cent. Law Journal, 454, decided by the Supreme court of Missouri in May, 1882, one R. C. Pate was indicted in the St. Louis criminal court for gambling. The defendant filed a plea to the jurisdiction, for the reason that the act of March 9th, 1881, making gambling of certain kinds a felony, * * was unconstitutional and void, because the title of the act does not meet the requirements of sec. 28, art. 4 of the constitution (that no bill shall contain more than one sub-

ject, which shall be clearly expressed in its title,) etc. The title of the act of March 9th, 1881, was as follows: "An act to amend section 1549, of article 8, of the Revised Statutes, relating to offenses against public morals and decency, or the public, police, and miscellaneous offences." The court held the title sufficient and the act valid.

In the case of *The City of Kansas v. Payne*, 71 Mo., 159, the title of the act was as follows: "An act to amend sections two, three, four, five, nine, eleven, fourteen, seventeen, and eighteen, of an act approved April 12th, 1877, * * and repealing sec. 184 of an act * * concerning the assessment and collection of the revenue, approved March 30th, 1872. It was held that so far as the statutes sought to be amended the title was sufficient, but as the section 184 sought to be repealed was an independent matter it was not within the title. See also *State v. Ranson*, 73 Mo., 78. The syllabus to the case of *Comstock v. Judge*, 39 Mich., 195, is as follows: "An act purporting by its title to revise certain enumerated sections of an act entitled," etc., and to add several new sections, contained a section not mentioned in the title but corresponding to a section in the revised act. The constitution requires the purpose of every statute to be expressed in its title. *Held*, that the practice of amending by reference to sections, instead of by reference to subjects or the entire statute, is not a satisfactory compliance with the constitutional requirement, but that where the amendment is plain and can be carried out, it may be held valid even though the section numbers of the original act and of the amendment are in confusion."

The court say (page 197): "As was discovered in *People, ex. rel. Chapoton, v. Common Council of Detroit*, 38 Mich., 636, it is no uncommon thing in our amendatory legislation to number sections wrongly or to append new sections to statutes without repealing others of the same numbers, so that duplicate numbers are often found in the same statute. In such case the latter section may practically repeal older

sections which are not repealed by name. The title to this act, when it refers to revising named sections and adding new sections to the statute, has a very undefined field opened to legislation touching the court in question, and we are not prepared to say that because it may be awkwardly framed it is therefore invalid. Its purpose is plain and we think it may be carried out."

In *Bowman v. Cockrill*, 6 Kan., 311, the title of the act, was "To provide for the assessment and collection of taxes," and a statute of limitation included in the act was sustained, because designed to aid in the collection of taxes.

In *Prescott v. Beebe*, 17 Id., 320, the title of the act was "To provide for the sale of school lands," and it was held that a section declaring the lands subject to taxation after the sale was within the title, because it was a provision as to the terms of sale.

The case of *The State v. Bankers, etc.*, 23 Id., 499, is not in conflict with these decisions. In that case the title was "An act to amend sections two, four, seventeen, forty-one, and fifty-nine of an act entitled"—giving the title of the act of 1871. Section 78 of that act reads as follows: "The provisions of this act shall not apply to life insurance companies organized on the co-operation plan." This section was amended in 1875 as follows: "The provisions of this act shall not be construed so as to prevent any Masonic, Odd Fellow, religious or benevolent society of this state from issuing indemnity to any one against loss by death to any of its members," no reference being made to the section amended in the title. The court held the title sufficient as to the five sections named, but invalid as to section 78. The decision is similar to those of this court in *City of Tecumseh v. Phillips*, 5 Neb., 305, and *White v. The City of Lincoln*, Id., 505, but are not applicable to the case at bar.

Sec. 54 of the act of 1869 made taxes a perpetual lien upon real estate. Sec. 51 related to the payment of taxes.

Now, can it be said that an amendment that merely assigns to a purchaser at tax sale the lien of the state for taxes is so repugnant to the constitution that the court must declare it inhibited? The authorities cited in support of the proposition are all our own, and none of them have gone to that extent. The act of 1875 provides the mode of procedure, and this act applies to all cases to which the lien for taxes had attached prior to Sept. 1, 1879. *Hamilton County v. Bailey*, 12 Neb., 56.

But it is said that the record fails to show a valid assessment. The record shows the following: "The plaintiff offered in evidence the two tax deeds mentioned in the pleadings, to which defendants object as immaterial and incompetent. Objection overruled, to which defendants except," etc. The deeds were properly executed and acknowledged, and no objection is made to them on that ground. *Gregory v. Langdon*, 11 Neb., 166. These deeds were neither incompetent nor immaterial evidence. It was necessary under the statutes for the plaintiff to show that he had obtained a tax deed, or deeds, but that the title had failed under it, or them, in order to assert the lien for taxes. The deeds appear to be in proper form and to state all the facts required by statute, except that it appears that the sale took place in the treasurer's office, and not "at the door of the court house," as required by the statute. *Haller v. Blaco*, 10 Neb., 36. The deeds were admitted generally and not for a special purpose, and were evidence of all the facts provided by statute except as to the place of sale. This defect rendered them defective as a title, but sufficient upon which the plaintiff could predicate his right of action.

The plaintiff also offered certain tax receipts, and after proving the signatures of the several treasurers, offered the same in evidence. They were "objected to as incompetent and immaterial, and because they do not conform to the statute." The objections were overruled, to which the defendants excepted.

A tax receipt is merely evidence of payment. To that extent it is proper and competent evidence; but it is not evidence to prove a lien for taxes paid on land held under a tax title. The existence of such lien must be proved by the assessment rolls, unless from the issue made by the pleadings the existence of the tax is admitted. The following are the allegations of the answer as to the taxes assessed on said land: "The said defendants further admit that on the 29th day of Jan., 1876, the said plaintiff purchased the said land at private tax sale of and from the county treasurer of said county for certain pretended county, state, and city taxes claimed to have been levied for the year 1874, and also at the same time purchased from said treasurer the said land at private tax sale for certain pretended county, city, and state taxes for the year 1873, and also on the 9th day of Nov., 1877, purchased said land at private tax sale from said treasurer for certain pretended state, county, and city taxes, claimed to have been levied for the year 1876. And the said defendants further admit that at the time of said sales the county treasurer of said county executed and delivered to plaintiff the usual certificate of tax sale for each of said sales, and that on or about Feb. 1st, 1878, the said plaintiff surrendered to the county treasurer of said county the two tax certificates dated Jan. 29th, 1876, issued as aforesaid upon sales for taxes of 1873 and 1874, and that thereupon the said treasurer canceled said certificate, and executed, issued, and delivered to said plaintiff tax deeds, as in said petition alleged, and which said deeds were duly recorded, as in said petition set forth." And also the following: "And said defendants, further answering said petition, deny that the taxes mentioned and set forth in said plaintiff's petition, or any portion thereof, were liens upon said land, or that said pretended taxes, or any part thereof, were duly and legally levied, or that by reason of any purchase for or payment of taxes by said plaintiff there is any sum whatever due plaintiff in the premises, or that

he is entitled to any relief whatever herein; and said defendants, further answering said petition, say that for the several years mentioned in said plaintiff's petition, and each thereof, said land was never listed for taxation as required by law, nor was any legal assessment for taxation purposes made for any of said years. That for said years, and each thereof, the assessor within the precinct in which said land was situated never qualified as required by law, and in making his assessments of the real estate and other property within said precinct for each of said years, the said assessor—as well as all the other assessors within said county—valued the property within their respective precincts at from one-third to one-half of the true value of the same, and at from one-third to one-half of the amount at which the said assessors respectively considered the true value of said property to be. And the said defendants further say that not only was the assessment pretended to be made on said land for taxation for said years illegal and void, but that said pretended taxes, both county, state, and city, for each of said years, and all the proceedings relating thereto or connected therewith, are illegal and void."

A party may plead as many defenses as he may have, but the answer will be construed together. If the answer admits the existence of a fact stated in the petition, such as the lien for taxes, but states that the taxes are illegal, the defendant takes upon himself the burden of proof to establish such illegality. And this is what the defendants undertook to do in this case.

In *Dinsmore & Co. v. Stimbert*, 12 Neb., 433, the answer of the defendants stated that "he never signed said note," etc., "nor is his signature attached thereto genuine; but if he did sign said note, or if his signature thereto is genuine, then it was procured through fraud, circumvention," etc., of the payee.

It was held that such answer was a substantial admission of signing the note. So in this case the defendants admit

the existence of the taxes in question, but claim that they are illegal. To sustain the answer they offered in evidence the tax rolls for a number of years; to which various objections are now made, particularly that no oath was attached to the rolls containing the list of real estate. The lists of personal property seem to be kept separate from the lists of real estate, and the oath is attached to the lists of personal property. The case, in that regard, is precisely similar to that of *Hallo v. Helmer*, 12 Neb., 87.

It is claimed that there is no venue to the oath. In the case of *Crowell v. Johnson*, 2 Neb., 146, the affidavit for an attachment levied upon real estate had no venue. The affidavit was sworn to before the clerk of the court in which the action was pending, and this court held that the presumption was that the clerk administered the oath in the proper county. There is no reason why the same presumption should not obtain in this case. The oaths are filed in the proper office and purport to have been taken before an officer authorized to administer the same, and there is no testimony showing that any of the oaths were administered by officers without their jurisdiction.

Objections are made to the legality of the bridge bonds, but there is no issue of that kind made in the answer. A court would not be justified in holding that a quarter of a million dollars of bonds were unauthorized and void unless that question was fully presented in the pleadings. As that question is not raised it will not be discussed.

Objections are made to the descriptions as being indefinite. The testimony of John R. Manchester upon that point would seem to be conclusive. After giving the descriptions for 1873–4–5–6–7 the following questions were asked: "I will ask you whether or not there would be any trouble to any person of average intelligence, familiar with the manner of describing real estate in this county; to know what particular tract of ground is described in each of these books from 1871 to 1877, inclusive?" * * * *

"No, sir; I don't believe there would be any difficulty."

As to the right of the plaintiff to have the taxes paid by him after he purchased the land added to the decree there is no doubt. The case is analogous to that of a mortgagee paying taxes to protect his security. And the same principle would seem to apply to taxes due upon the land antecedent to the purchase.

Objections are made to the assessment for 1870 as being double what it should be, and for other years as being too low. Whatever relief the defendants could obtain in an equitable action upon offering to pay the amount justly due, it is very clear that neither by their pleadings nor proof have they made a case entitling them to relief in this case. It is the duty of an assessor to assess property "at its actual value at the place of listing." In assessing property the assessor acts judicially, and his judgment, although it may be erroneous and unjust, is not void. Cooley says: "It is of the highest importance that they should be protected in the honest exercise of their judgment. Assessors are therefore not liable for an excessive assessment, even though it may be made such by erroneously including in the estimate property not belonging to the party assessed, nor within the district," etc. Cooley on Taxation, 552. The law fixes a standard of value for all assessors by which they are to be guided in making assessments, and must necessarily leave the question of fixing values to them.

In conclusion, we see no reason to change our former decision. It is very clear that justice has been done, and that this property was lawfully assessed and should be liable for the taxes assessed against it. As was said in the case of *Wood v. Helmer*, 10 Neb., 75, "The burden of taxation is intended by the law to be laid equally upon all taxable property in the state. No property, except that specifically excepted, of which this is not a part, is exempt from taxation. All property is protected by the law.

Why should it not contribute its proportion towards the maintenance of the government, unless for some special reasons the tax may be unjust or oppressive?" There is no error in the record, and the judgment is affirmed.

LAKE, CH. J., dissents, on the ground that the plaintiff's title under his tax deeds is not shown to have been adjudged invalid, or that it has failed.

ADAM ZEIGLER, PLAINTIFF IN ERROR, v. C. H. & L. J. MCCORMICK, DEFENDANTS IN ERROR.

Execution: LEVY AND SALE OF WRONG PROPERTY: PRACTICE: NEW EXECUTION. Where a levy has been made on property where the debtor had no title or interest, the property sold, the execution returned satisfied, and afterwards the property is replevied by a third party, to whom it is finally adjudged by the court, the creditor may make application to the court to vacate the levy and satisfaction, and to award a new execution. This application is addressed to the power of the court to correct its own records, and this power may be lawfully exercised by the court, on motion accompanied by affidavits and notice.

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

W. H. Snell, for plaintiff in error.

1. At the time of the sale under the execution Zeigler notified the McCormicks that he had no title to the grain levied on, and warned them not to buy. The judgment was satisfied in full by the McCormicks, so they are not entitled to have that satisfaction set aside and a new execution awarded. The authorities to the contrary mainly imply a warranty at an execution sale or are based upon a statute. We have no statute. The rule of *caveat emptor* applies. *Miller v. Finn*, 1 Neb., 292. Rorer on Judicial

Sales, sec. 489. Freeman on Judgments, sec. 478. *The Monte Allegro*, 9 Wheat., 616. And a return of the purchase money cannot be had on a failure of title. *Friedly v. Scheetz*, 9 Sergt. & Rawle, 156. S. C. 11 Am. Dec., 691, and note p. 699. *Young v. McClung*, 9 Gratt., 336. *Salmon v. Price*, 13 Ohio, 383. Why should the purchaser beware, if on failure of title he can have his money refunded? This is granting relief from mistake of law. Broom's Maxims, p. 192. *Boggs v. Hargraves*, 16 Cal., 562.

2. The proceeding in the court below was an action, and should have been commenced by petition. Code, sec. 62. *Clark v. Hotailing*, 1 Neb., 436. *Nelson v. Brown*, 23 Mo., 13.

Slocumb & Hambel and *S. N. Lindley*, for defendants in error.

1. Sheriff's return on execution shows that the reason the grain levied upon was not sold, was because Zeigler had, "before the day of sale, threshed and disposed of said grain," and the counter affidavits on the part of defendants in error, together with the presumption in favor of the fairness of the sheriff's sale, fully rebut any idea that the machine levied upon was worth more than what it was sold for by the sheriff.

2. The record does not show satisfaction of the judgment by the McCormicks, but simply an entry by the clerk of sheriff's return.

3. While it may be said that there is a conflict of authorities upon the main proposition, yet we think that the weight of authority is in favor of disregarding the mere technicality and doing substantial justice in the premises. *Riter v. Henshaw*, 7 Iowa, 97. *Tudor v. Taylor*, 26 Vermont, 444. *Townsend v. Smith*, 20 Texas, 465. *McGhee v. Ellis*, 4 Littell, 244. *Piper v. Elwood*, 4 Denio, 165. *Magwire v. Marks*, 28 Mo., 193. *Watson v. Reissig*,

24 Ill., 281. *Muir v. Craig*, 3 Blackford, 293. *Ontario Bank v. Lansing*, 2 Wend., 260. *Frasher v. Ingham*, 4 Neb., 536.

COBB, J.

It appears from the record in this case that on the first day of January, 1877, the defendants in error recovered a judgment against the plaintiff in error in the county court of Jefferson county for $135 damages and $18.30 costs of suit. A transcript of such judgment being docketed in the office of the clerk of the district court in and for said county, an execution was issued on the said judgment and placed in the hands of the sheriff, who levied the same upon a quantity of grain in the stack, which he advertised and sold as the property of the plaintiff in error, and which was bid off at said sale by the defendants in error at the sum of $213, $193.33 of which was applied in satisfaction of said judgment, and the balance applied on another judgment against said plaintiff in error, then in the hands of said sheriff. After the satisfaction and return of the said execution the said grain was replevied from the said defendants in error, by William, Charles, and Nelson Drummet, who obtained judgment therefor in the district court, which judgment was affirmed in this court. 9 Neb., 384. On the twenty-fourth of September, 1881, the defendants in error filed their motion in the said district court for an order setting aside the levy and sale of the said property, and to set aside the satisfaction and cancellation of said judgment, and award the issuance of an execution on said judgment, and setting out the grounds of such motion at length. Of this motion the plaintiff in error had due notice, and appeared and resisted the same. Numerous affidavits as well in resistance as in support of the said motion were filed by the respective parties, but no objection seems to have been made to that mode of trial, nor any application to examine or cross-examine

witnesses or affiants in open court. Upon the matter being finally submitted to the court, it made a final order setting aside the levy and sale of the said property, also annulling and setting aside the satisfaction of the said judgment and reinstating the same, and awarding a new execution thereon, to which plaintiff in error excepted, and brings the matter to this court on error.

I fail to distinguish this case from that of *Frasher v. Ingham*, 4 Neb., 531, so far as the principal question is concerned. In that case the wrong land was levied upon and sold by mistake, in fact, as to the surveyor's lines and numbers. The sheriff intended to levy on, appraise, and sell, and at the sale, thought he was selling, and the plaintiff thought he was buying a valuable piece of timber land, when in fact the sheriff was selling and the plaintiff buying a worthless sand bar. In that case the court say: "The intention of the law is that the purchaser shall receive an equivalent for the purchase in the debtor's interest in the property sold. If therefore the debtor have no interest in the land sold, or if the purchaser receive nothing in return for the purchase money, and he has been induced to purchase under an entire misapprehension of the facts in regard to the title or condition of the property, a court of equity will grant relief in a proper case, and the rule of *caveat emptor* has no application."

The case at bar is one which concerns personal property. The defendants in error had a judgment and execution against the plaintiff in error. By mistake of fact they caused the execution to be levied upon the grain of the Drummets, and not upon the property of the execution defendant. After the sale of the grain by the sheriff, and its purchase by the plaintiffs in execution, and the return of the execution satisfied, the Drummets replevied the grain, and held it by the final judgment of this court. So it is equally within the law of the case of *Frasher v. Ingham, supra.* But aside from that case, we think the weight of the author-

ities sustain the right of the defendants in error to relief, and that on general principles of law and of justice they ought to have it.

The only remaining question is as to the remedy. The case of *Frasher v. Ingham, supra,* was brought by original bill. The question as to the character of the remedy was not raised. Had it been, I think that it would have been one of more difficult solution than the main question. But whatever might be the decision of that question, I have no doubt of the correctness of the practice of the district court in this case. The case of *Tudor v. Taylor,* 26 Vermont, 444, is an authority as well upon the point we are now considering as upon the main question involved in this case. In that case the court say: "The proceeding in this case is not instituted upon any statutory provision, but it is an application founded upon common law principles, addressed to the power of the court to correct its own records; a power usually exercised on petition or motion, accompanied with affidavits and notice. The power has been frequently exercised in this state, and we entertain no doubt that such power lawfully exists. * * * * The exercise of this power is inherent in all courts of general jurisdiction for the purpose of revising and correcting their own proceedings. In the language of the court in the case last cited, this power exists to correct their records according to the truth if erroneously made, or relieve a party against the unjust operation of a record, or ascertaining by direct inquiry into the matter that the record ought not to have been made. The proceeding is usually on motion, and the power is exercised in a summary way, whenever the court, in the exercise of a sound discretion, considers that the furtherance of justice requires it."

As a question of practice we consider this mode preferable to that of commencing an original suit. It is more in accordance with the spirit of the reformed system of practice. It saves costs, avoids a multiplicity of actions

and technicalities, and offers a more direct and speedy remedy.

The order of the district court is affirmed.

ORDER AFFIRMED.

GRAN. ENSIGN, PLAINTIFF IN ERROR, V. WILLIAM ROGGENCAMP, DEFENDANT IN ERROR.

Practice: ALIAS SUMMONS. To proceed regularly under the provision of the code, the clerk should not issue an *alias* summons except upon a return of "not summoned" to the prior writ, or an order of the court.

2. ———: ERROR WITHOUT PREJUDICE. But the clerk having issued an *alias* summons without such return, or order, which was duly served upon the defendant, who suffered judgment by default, *Held*, To be error without prejudice, and not ground for a reversal of the judgment.

3. **Mortgagee and Creditor:** FRAUD. Where a creditor of a mortgagor of goods claims them adversely to the mortgagee, on the ground of fraud, he must allege it by proper pleading in order to succeed.

THIS was an action brought in the district court of Lancaster county, by Roggencamp against Ensign, as sheriff of said county. Roggencamp was the mortgagee of certain chattels. P. J. and Mary A. Grant were the mortgagors, and Ensign, as sheriff, levied upon and sold said property to satisfy an execution issued on a judgment against P. J. Grant. Plaintiff claimed judgment for the value of the property and costs, and recovered the same before POUND, J., to reverse which Ensign came here upon a petition in error.

Harwood & Ames and *Mason & Whedon* for plaintiff in error.

1. Petition does not state a cause of action. *Brunswick v. McClay*, 7 Neb., 138. *B. & M. v. Lancaster Co.*, 4 Neb., 307. *Same v. York County*, 7 Neb., 487. The mortgage was void on its face. Mortgagor was in possession at time of levy, and even if the mortgage had been given for a debt not due, the failure of the mortgagee to take possession for an unreasonable time would have rendered the mortgage void *per se*, and what is a reasonable time is a matter of law for the court and not of fact for the jury. A delay of three or four days is unreasonable; unless occasioned by some circumstance rendering it inevitable. *Hanford v. Obrecht*, 49 Ill., 146. *Arnold v. Stock*, 81 Ill., 407. *Chapin v. Whitsett*, 3 Colorado, 315. *Travis v. McCormick*, 1 Montana, 347. *Reese v. Mitchell*, 41 Ill., 365. *Lemen v. Robinson*, 59 Ill., 115.

2. No writ was ever returned "not summoned," so no other writ could issue. Code, section 67.

S. P. Vanatta for defendant in error.

1. This is clearly a case to recover the value of property belonging to defendant in error and taken and converted by plaintiff in error to his own use.

The petition avers that the plaintiff below was the owner of the property; that it was taken by defendant below and converted to his use; that demand was made for the property, which was refused and its value stated at $300.00, the value of the property proved and judgment rendered therefor. The mortgage is referred to in the petition and made a part of it, but it is not necessary to refer to it or prove its existence in order to make a complete case. It is only the evidence of ownership or title. There is no omission of any fact necessary to make a clear case of conversion.

2. If one summons is issued in a cause and returned not legally served, the party has a right to issue and serve *alias* writs until he gets legal service, and all the defendant could ask would be that the costs of the writs not legally served should not be taxed to him.

LAKE, CH. J.

The court obtained jurisdiction of the defendant below by the service of the last of the several writs issued against him. Its issue without an order of the court for an *alias* summons may have been irregular, but it was not void. If the defendant desired to test its regularity he should have appeared in court in obedience to its command and brought his grievance promptly to the attention of the judge. But not having done so, it is now too late to complain. If, perchance, there were a technical error respecting the summons it cannot be said that he was at all prejudiced by it.

Section 67 of the code of civil procedure provides that: "When a writ is returned 'not summoned,' other writs may be issued until the defendant, or defendants, shall be summoned," etc. To proceed regularly under this provision, the clerk, without an order of the court to that effect, ought not to issue an *alias* summons except upon such return having been made to the first one by the proper officer, or person appointed to serve it. "The court," says the code, sec. 145, "in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." The error in question falls clearly within the operation of this provision and must be disregarded.

Another matter urged as error is that the petition does not state facts sufficient to constitute a cause of action. This point is based chiefly upon the want of an averment that the mortgage under which the plaintiff claimed the goods converted by the defendant was made in good faith and without any intent to defraud creditors of the mortgagor. We do not think such averment necessary. Until the *bona fides* of the parties to the instrument is attacked by one claiming adversely the statutory presumption of fraud arising from the retention of possession by the mort-

gagor does not attach. "The question of fraudulent intent in all cases," says the statute, "shall be deemed a question of fact, and not of law," etc. Comp. Stat., 289. Therefore, if the creditor of a mortgagor of goods claim them adversely to the mortgagee, on the ground of fraud, he must allege it by proper pleading in order to succeed. *Turner, Frazer & Co. v. Killian*, 12 Neb., 580. As between the mortgagor and the mortgagee, the petition shows that the latter had good title to the property, and that the title of the mortgagee—the defendant in error—accrued to him long prior to the seizure and conversion by the plaintiff in error under his execution.

JUDGMENT AFFIRMED.

McKAY, MUNGER & WENTZ, PLAINTIFFS IN ERROR, V. C. J. HINMAN, DEFENDANT IN ERROR.

1. **Indorser:** COSTS OF PROTEST. It is only where a protest is necessary in order to fix an indorser's liability that he can be subjected to the costs thereof.

2. **Practice:** INDORSEMENT ON SUMMONS. When the amount for which judgment will be taken is indorsed on the summons, and the defendant fails to appear, it is error to render one for a larger amount, although the excess be made up of the costs of protesting the note on which the action was brought.

3. ———: ERROR: REMITTITUR. Where, in a proceeding for the reversal of a judgment, the only error is that such costs were included in excess of the amount of such indorsement, and the defendant in error files a remittitur to that extent, the judgment should be affirmed as to the residue, but without costs.

4. **Summons:** DESCRIPTION OF PLAINTIFF'S CLAIM. In a joint action against the maker and indorser upon a promissory note, the claim in the summons was "for $75, with ten per cent interest from February 19th, 1880, and ten per cent of amount as attorney fee upon a certain promissory note." *Held*, Sufficient to apprise the indorser "of the nature of the claim against him."

THIS was an action brought in the county court of Hamilton county upon a promissory note executed by L. C. Predmore, payable to the order of C. J. Hinman, and by him transferred to the plaintiffs. Defendants defaulted and judgment was rendered in favor of plaintiffs. Hinman took the cause to the district court on a petition in error, where, on trial before POST, J., the judgment of the county court was reversed. The plaintiffs brought the cause here by petition in error.

Alfred W. Agee, for plaintiffs in error, cited *McPherson v. The Bank*, 12 Neb., 202. *Roggencamp v. Moore*, 9 Neb., 105. *Walker v. Bank*, 15 Ohio, 288. Maxwell's Justice, 43. *Brenner v. Weaver*, 1 Kan., 488. *M., K. & T. R. R. v. Brown*, 14 Kan., 560. The note itself was a sufficient bill of particulars. Comp. Stat., sec. 1100 *a*, p. 658.

J. H. Smith, for defendant in error.

Summons was insufficient. Comp. Stat., sec. 910, p. 633. *King v. Gottschalk*, 21 Iowa, 512. *Jeffrey v. Underwood*, 1 Pike, 108. Bill of particulars did not state a cause of action. Comp. Stat., sec. 952, p. 639. *Curtis & Co. v. Cutler*, 7 Neb., 315.

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The only error committed by the county court was in including the costs of the protest in the judgment. In transferring the note to the plaintiffs the indorser expressly waived demand, notice of non-payment, and protest. Having done this, the protest was unnecessary to fix his liability, and he could not properly be subjected to the expense of making it. It is only where a protest is essential to fix an indorser's liability that he can be subjected to such expense.

And there was still another reason why the inclusion of this expense in the judgment was unwarranted. As the statute requires, the amount for which judgment would be rendered if the defendant failed to appear was indorsed on the summons, and it did not include the costs of protest. The defendant did not appear, but still the judgment exceeded the amount thus indorsed two dollars and thirty-one cents—the notarial charges—and to this extent was erroneous. In the district court, however, and before the judgment of reversal was given, the plaintiff filed a *remittitur* as to this excess, and offered to have the judgment of the county court modified accordingly. This step having been taken, there was no necessity for an absolute reversal, which could result only in unnecessary delay and expense to the parties. The district court ought to have accepted the *remittitur* and affirmed the judgment as to the residue, but without costs.

It is also claimed, and was in the district court, that the summons was defective in not sufficiently describing the plaintiff's cause of action. There was nothing in this point that called for a reversal of the judgment. The summons complied substantially with the requirement of the statute in this particular. In the language of the statute, sec. 910, Comp. Stat., 633, the summons "must describe the plaintiff's cause of action in such general terms as to apprise the defendant of the nature of the claim against him." This summons described the cause of action as being a demand "for $75, with ten per cent interest from February 19th, 1880, and ten per cent of amount as attorney fee, upon a certain promissory note." Under the ruling of this court this description was certainly sufficient. *McPherson v. Bank*, 12 Neb., 202. It showed that the demand was for money only, and upon a promissory note to which the defendant must necessarily be a party. It showed it to be in the nature of assumpsit, and not of tort. The fact that it did not particularize the defendant Hinman

as an indorser was unimportant, although it would have evinced more precision and care to have done so. Defendants should understand that it will not do to disregard the command of a summons to appear at a lawfully designated time to answer a complaint because of some merely technical defect, thus allowing judgment to go by default, and then hope to obtain a reversal on that ground. After judgment thus permitted, such defects will be disregarded.

The objection to the bill of particulars is without any merit whatever. The cause of action is set forth with all the particularity of a petition in the district court. Besides, the note itself was attached thereto, thus showing fully and clearly the ground of the claim against the defendant.

For the reasons thus stated the judgment of the district court must be reversed, and the cause remanded to that court, with direction to enter a judgment in conformity to this opinion.

REVERSED AND REMANDED.

MARGARET MANZY, PLAINTIFF IN ERROR, V. HARVEY W. HARDY, DEFENDANT IN ERROR.

1. **Non-Suit.** If neither the petition nor the evidence adduced upon the trial show the plaintiff to be entitled to any relief whatever, a judgment of non-suit is proper.
2. **Money paid under Mistake—Recovery back.** To authorize the recovery of money paid for a valid consideration, on the ground of its having been paid under a mistake of fact, it must be shown that the party receiving it is in some way responsible for the mistake.

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

J. H. Foxworthy, for plaintiff in error, cited *Woodward*

v. Hill, 6 Wis., 147, 151. *Kingston Bank v. Eltinge*, 40 N. Y. (1 Hand.), 391. *Millett v. Holt*, 60 Maine, 169. *Bank of Com. v. Union Bank*, 3 N. Y. (Com.), 237. *Devine v. Edwards*, 87 Ill., 177. *North v. Bloss*, 30 N. Y. (3 Tif.), 374, 381. *Ellis v. Life Ins. Co.*, 4 O. S., 628. *Rogers v. Weaver*, 5 Ohio, 537. *Billings v. McCoy*, 5 Neb., 190, and cases cited.

N. C. Abbott, for defendant in error, cited *Sheldon v. Harding*, 44 Ill., 68. 4 Wait's Actions and Defenses, 486.

LAKE, CH. J.

Of the several errors formally assigned, the only really important one is, whether the non-suit was properly granted. The ground taken by counsel for the defendant in error in support of the ruling of the district court is, that neither the petition nor the evidence shows that the plaintiff is entitled to any relief whatever. If this be so, of course the case was properly disposed of, and the judgment should be affirmed.

The object of the action was to recover the sum of seventy-five dollars and interest for a short time. The basis of this claim as set out in the petition is, that the plaintiff had paid that amount to the defendant in part payment for a lot in the city of Lincoln, together with "the house thereon." The only mistake mentioned is, that of her "believing that the defendant had a valid deed and title," * * * * "when in fact and reality the said defendant had no legal right whatever to the said lot." This is the whole substance of the complaint, and surely there is nothing here which shows the defendant to have been in the slightest degree responsible for the mistake under which the plaintiff says she made the payment. Even if money be paid to another under a mistake of fact, but for a valid consideration, in order to maintain an action for its recovery the party receiving it must be shown to have been in

some way at fault, and responsible for the mistake. For aught that the petition shows, the conduct of the defendant was commendable in every particular.

But, even if it were shown that the mistake complained of was caused entirely by the defendant, still no cause of action would be stated. It is not necessary that one should be possessed of a "legal title" to property in order to make it a good subject of bargain and sale. An equitable interest would answer the same purpose as a legal one. So, too, would a mere claim of right which might turn out to be no interest at all, either legal or equitable.

Again, the mistake was only as to a part of the property. The purchase, as we have seen, was of a lot and "the house thereon." It is not claimed that any mistake occurred respecting the house, the title to which seems to have been all that was expected, so that, even if there were any failure of consideration, it was only a partial one. We are of opinion that the petition states no cause of action.

But, if we turn to the evidence, the showing there mad by the plaintiff is, if possible, still more unfavorable to a recovery. It shows that the money was paid for a good and valuable consideration, viz., the redemption of the lot from tax sale. The defendant having purchased the lot for delinquent taxes, which it was the duty of the plaintiff to have paid, upon receiving the treasurer's deed took possession and built thereon the house referred to in the petition. Under this tax deed the defendant claimed to own the lot, and the plaintiff being desirous of regaining it, an arrangement was made by which she agreed to pay him the sum of one hundred and thirty dollars, in consideration of which he was to transfer to her all his interest in the property. The money in question was paid to the defendant in part performance of this arrangement, which appears to have been made in good faith by both parties, and respecting which it is not shown that the defendant is in any default. Surely, for money paid under such circumstances,

no recovery can be had. There is no error in the record, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

C. NEIDIG, PLAINTIFF IN ERROR, V. COLE & PILSBURY, DEFENDANTS IN ERROR.

1. **Contract:** IMPLIED AGREEMENT. N., under an agreement with M. B., by which he was to receive certain goods from them, sent his order therefor. Being unable to furnish the goods at that time, M. B. handed the order to C. & P., dealers in such goods, to fill, which they did in their own names, shipping them as directed in the order to N., and at the same time informing him of the price and terms of payment to be made to them. *Held.* That by the acceptance of the goods under these circumstances the law implied an agreement on the part of N. to pay for them according to the terms upon which they were delivered to him
2. **Argument to Jury.** When there is no disputed material fact for the jury to pass upon, it is not error for the court to refuse to permit counsel to address them.

ERROR to the district court for Madison county. Tried below before BARNES, J. The facts are fully set forth in the opinion.

Robertson & Campbell, for plaintiff in error.

Evidence shows that Cole & Pilsbury were agents of Mabie Brothers. Agency may be inferred from acts of parties. 1 Bouvier's Law Dic., 100. *Columbus Company v. Hurford*, 1 Neb., 157. And same defenses can be interposed as if action had been brought by principal. *Taintor v. Prendergast*, 3 Hill, 72. *Huntington v. Knox*, 7 Cush., 371. Counsel should have been allowed to argue cause to jury. *Eaton v. Carruth*, 11 Neb., 231. *Hollenbeck v. Mc-*

Mahon, 25 Ohio State, 1. *Hickman v. Jones*, 9 Wall., 197. *Barney v. Schmeider*, Id., 249.

Marlow & Munger and *E. F. Gray*, for defendants in error.

LAKE, CH. J.

The action in the court below was brought by the defendants in error to recover the price of a quantity of fencing material consisting of iron posts and wire, delivered by them to the plaintiff in error.

It is very questionable whether the facts alleged in the answer are sufficient to constitute a defense to the petition. The defense sought to be made by it was, that the material was delivered in fulfillment of a contract between said Neidig and the firm of Mabie Brothers, acting for and on behalf of the Iowa Central Iron Fence Company, of Marshalltown, Iowa, and for which he had paid in advance, by his promissory note, the sum of one hundred and fifty dollars. It is contended with much reason by counsel for the defendants in error—and it is probably true—that the answer is wanting in omitting to state that Cole & Pilsbury furnished the articles on the credit of the Fence Company, or of Mabie Brothers, from whom Neidig ordered them, thereby conceding the claim and inference that they furnished them on the credit of him to whom they were shipped.

But, even if the answer be accepted as sufficient to admit all of the evidence offered under it, we are nevertheless of opinion that no defense was exhibited upon the trial, and that the court was right in directing a verdict in favor of Cole & Pilsbury for the amount of their demand.

So far as concerns the defendants in error, the transaction out of which this action arose was a very simple one, and about as follows: Neidig having made an agreement with the Iowa Central Iron Fence Company and Mabie Brothers, by which the latter were to furnish to him certain fencing material, sent to them an order in these words:

"MADISON, Neb., April 9, 1879.

"MABIE BROS., Gents: Please send me 300 iron fence posts, and 1200 lbs. of wire. Ship goods to Wisner, Neb.

"Yours truly, C. NEIDIG."

Mabie Brothers received this order, but for some reason, not being able to furnish the articles called for, they turned it over to Cole & Pilsbury to fill, and shortly afterwards notified Neidig of what they had done. This notification was as follows, written upon a postal card, and transmitted by mail:

"FREMONT, 4-29, '79.

"C. NEIDIG, Dear sir; Yours received. Cole & Pilsbury, the dealers here, say that they will fill your order. They do this. The shops here have been changing hands. They fill your orders until things are getting in shape. Send all orders to P. S. Marvin. He fills all orders for the Iowa Central Iron Fencing Co. Posts are a little behind but will be ready soon. Truly yours."

This notice was not signed, but it is admitted by Neidig to have been in the hand-writing of one of the Mabies, and he accepted it as coming from them.

Upon receiving this order, Cole & Pilsbury, in their own name, shipped the goods, with the exception of a portion of the posts, as directed therein, and at the same time sent to Neidig a bill of the items and charges, as follows:

"FREMONT, NEB., April 24th, 1879.

"Mr. C. Neidig, Madison, Neb.: Bought of Cole & Pilsbury, wholesale and retail dealers in hardware," etc. "No. 84 E street, between Fourth and Fifth. Terms cash, 30 days.

612 lbs. single barb steel wire, 8c	$ 48.96
600 lbs. double " " " 9½c	57.00
117 line iron posts	46.80
Drayage	.50
	$153.26

"Balance of posts will follow soon. You will please remit amount of this bill to us as we are doing business for Mabie Bros. Goods were shipped yesterday in good order.

"Yours, COLE & PILSBURY."

Four days afterward the remainder of the posts, eighty-three in number, were shipped, and a similar account rendered, thus showing most conclusively that Neidig was well advised, and must have known when he received the goods that Cole & Pilsbury had filled the order on his credit and looked to him for payment. There was nothing whatever in what Cole & Pilsbury did or said from which Neidig could reasonably have inferred that the shipments were made on the credit of Mabie Brothers, or of the Fence Company. Nor is there any evidence that they ever undertook to fill said order upon the credit of any one but Neidig himself. From these facts the law will imply an agreement on the part of Neidig to pay for the goods according to the terms upon which they were delivered to him. If unwilling to be bound by those terms, he ought to have rejected the goods and notified Cole & Pilsbury accordingly.

A very extended offer of testimony was made, mostly relating to the arrangement between Neidig and the said Fence Company, through Mabie Brothers, which the court rejected. There was no error in this ruling. Besides being very objectionable on account of its including so many separate facts, most of which were mere conclusions, the entire offer was, as the court held, incompetent so long as Cole & Pilsbury were not in any way connected therewith. At the time of this offer not a word of evidence had been produced connecting them in the remotest degree with the business ventures of either the Fence Company or Mabie Brothers.

It is also complained that counsel were not allowed to address the jury. There was no error in this, for the excellent reason there was not a single disputed material fact

for the jury to pass upon. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

DORA DIETRICHS, PLAINTIFF IN ERROR, V. THE LINCOLN & NORTHWESTERN R. R. CO., DEFENDANT IN ERROR.

1. **Report of Referee:** FILING. The mere failure of a referee to file his report within the time fixed in the order of reference does not invalidate it.
2. **Pleading:** CORPORATE EXISTENCE: ANSWER. The existence of a corporation plaintiff is not put in issue by a general denial of an alleged cause of action.
3. **Depositions:** OBJECTIONS. Objections to the admission of depositions in evidence, except for incompetency or irrelevancy, must be "made and filed before the commencement of the trial," or they come too late.
4. **Practice:** QUESTIONS NOT IN RECORD. A question discussed in the brief of counsel, but not raised in the record, will not be considered.

THIS was an action of replevin brought by the Lincoln and Northwestern Railroad Company against Dora Deitrichs in the district court of Platte county, to recover possession of a one-story frame dwelling located on block 66, in the city of Columbus. The cause was sent to a referee, who reported as follows:

First. That the plaintiff was, at the time of the commencement of this action, the owner and entitled to the immediate possession of the property described in plaintiff's petition.

Second. That the said property was unlawfully detained by defendant.

Third. That the plaintiff being the owner of the house

in question, on or about the —— day of May, 1880, moved said house upon lot 5, in block 66, in the city of Columbus.

Fourth. Plaintiff, in moving said house upon said lot, was under the belief that it was being moved upon the land of the plaintiff.

Fifth. That plaintiff moved said house upon said lot for temporary purposes only, and with no intention of affixing the same to the realty.

Sixth. That the ground upon which said house was placed was uneven, and that the same was placed upon wooden blocks, some of which rested upon the surface of the ground and some of which entered into the ground fifteen inches.

Seventh. That said lot was, at the time said building was so moved upon the same, owned by one Barnes, a resident of New York.

Eighth. That said defendant purchased said lot from said Barnes by deed dated the tenth day of November, 1880, for $100.

Ninth. That Barnes did not know that said building was upon said lot until after the commencement of this action.

Tenth. That plaintiff, after placing said house upon said lot, offered and advertised said house for sale.

Eleventh. That in the purchase of said lot by defendant, William Dietrichs, the husband of defendant, conducted the negotiations, and made the purchase for and on behalf of the defendant.

Twelfth. That the said William Dietrichs knew at the time of said purchase that the house was moved on to the same by plaintiff and claimed by plaintiff.

Thirteenth. That the said house is of the value of $350.

Fourteenth. That defendant was the owner of lot 5 in block 66 and in possession thereof, and occupant of said house at the time of the commencement of this action.

As conclusions of law the referee found:

First. That said house was, at the commencement of this action, personal property.

Second. That plaintiff was, at the commencement of this action, the owner and entitled to the immediate possession of said house.

Upon a hearing before POST, J., the report of the referee was confirmed, judgment entered for plaintiff, and defendant brought the cause to this court for a review on a petition in error.

McAllister Brothers, for plaintiff in error.

Report of referee not filed in time. *DeLong v. Stahl*, 13 Kan., 558. *Livingston v. Gidney*, 25 How. Pr., 1. *Gregory v. Cryder*, 10 Abbot N. S., 289. Depositions of Edward and George Barnes were inadmissible, because there was no fact therein competent to prove the house personal property. *Gilleland v. Schuyler*, 9 Kan., 569. *Cropsey v. Averill*, 8 Neb., 152. The lease by the L. & N. W. R. R. to the B. & M. R. R. was improperly excluded. Code, sec. 408. *Tenant v. Rumfield*, 11 Ind., 130. Notice to quit should have been given. *Riewe v. McCormick*, 11 Neb., 261.

Whitmoyer, Gerrard & Post, for defendant in error, on filing of report out of time, cited *Keller v. Sutrick*, 22 Cal., 472. *Foster v. Ryan*, 26 How. Pr., 164. Corporate existence not put in issue by general denial. *National Life Ins. Co. v. Robinson*, 8 Neb., 452. Depositions were admissible. Objections to letter came too late. Code, sec. 390. Case in 11 Neb., 261, is not applicable. She was not entitled to notice to quit. Taylor's Landlord and Tenant, 471, 472.

LAKE, CH. J.

Taking the errors complained of in the order of their assignment, the first one is the refusal of the court to set aside the report of the referee, for the reason that it was not filed within the time named in the order of reference. The ground taken by the plaintiff in error that the mere neglect of the referee to *file* his report on or before the day fixed for him to do so renders his action under the order of reference nugatory, is untenable. The case of *DeLong v. Stahl*, 13 Kan., 558, which her counsel cite in support of that position, does not so hold.

In that case it appeared that the referee did not complete his report, or, in other words, did not perform the judicial duty assigned him within the time limited, but afterwards, wherefore it was held that he was at the time *functus officio*, and his report unauthorized and void. *Robinson v. O'Connor*, 12 Neb., 405. The manual act of handing in or filing of reports by referees is not unfrequently delayed until after the time fixed for this to be done, but we have never known one to be held invalid on that ground. Indeed, in *Keller v. Sutrick*, 22 Cal., 472, it was held that such delay, even where the time for filing the report was fixed by statute, was of no consequence, and sustained a report assailed for that reason.

The second complaint of error is based upon the failure to prove the corporate existence of the defendant in error. This point is not well taken. The existence of the railroad company, and its right to sue, were not in controversy. The answer was a general denial, and while this was sufficient to put in issue the whole matter of complaint, it did not question the due incorporation of the company. *National Life Ins. Co. v. Robinson*, 8 Neb., 452.

There was no error in the admission in evidence of the depositions of Edward and George Barnes. It is contended that the testimony of these two witnesses was

immaterial, but very clearly it was not. The property in controversy was a dwelling house standing upon a lot purchased by plaintiff in error from Edward Barnes through a correspondence had with his brother George. The house, it seems, had been placed upon this lot a very short time before this purchase by the defendant in error, and its character, whether a chattel or a part of the realty, was the principal question to be settled by the trial. Upon this question these depositions were very material, for they show beyond all doubt that Edward Barnes never had nor claimed any right to the house, and in fact did not even know that it was on his lot at the time of the sale to the plaintiff in error. The fact that as between Barnes and the railroad company there was no question as to the right of the latter to the house—it being clearly personal property, together with the full knowledge of the plaintiff in error of the circumstances under which it was placed upon the lot, make it very clear that the finding of the referee was right, and should be sustained.

The referee did not err in overruling the objection to the admission of the letter, purporting to have been written by William Deitrich to George Barnes, respecting the purchase of the lot. The letter was competent evidence, and was duly attached to the deposition of George Barnes as a part of the correspondence by which the sale to Dora Deitrich was effected. Even if the objection, that the genuineness of this letter was not proved, were a good one, it came too late. All objections to depositions, except for incompetency or irrelevancy, to be effectual must be made and filed before the commencement of trial." Code of civil procedure, sec. 390.

Upon the trial the plaintiff in error offered to show that in the removal of the house under the order of replevin, damage was done to certain of her personal effects therein. This offer was wholly immaterial, and in rejecting it the referee ruled correctly. That was a matter that could not

be properly adjudicated in this action, which concerned only the claims of the respective parties to the house.

The lease from the defendant in error to the Burlington and Missouri River Railroad Company was properly rejected. It was wholly immaterial to the defense, and could not possibly have aided the plaintiff in error, for the reason that it expressly provides for the continued use of the corporate name of the lessor by the lessee "in and about any legal proceedings and suits, either at law or in equity."

The question of the want of notice to quit raised by counsel for the plaintiff in error in their brief is not in the record. No reference is made to it in the referee's report, nor in the motion for a new trial, therefore it is not before us. The case appears to have been fairly considered by the referee, and a just conclusion reached.

JUDGMENT AFFIRMED.

ELLEN YOUNG, APPELLANT, V. MORGAN AND GALLAGHER, APPELLEES.

Equity: RELIEF AGAINST A JUDGMENT. The rule is well settled that equity will afford no relief against a judgment to a party who has purposely or negligently omitted to make his defense at law.

APPEAL from the district court for Platte county. Heard below on exceptions to report of referee, by POST, J. Exceptions overruled, and judgment for defendants.

Marlow & Munger, for appellant, cited *Huebschman v. Baker*, 7 Wis., 542.

Whitmoyer, Gerrard & Post, for appellees, cited *Young v. Morgan*, 9 Neb., 171, and authorities there cited.

LAKE, CH. J.

This case comes here by appeal from the district court for Platte county. The action was brought to enjoin the collection of a judgment at law by a sale of real property under execution. The ground upon which equitable relief is sought is, that the judgment was rendered against the appellant in her absence, and upon two promissory notes purporting to have been executed by one John G. Compton and the appellant jointly, but which as to her were forgeries, her name having been signed to them by said Compton without her knowledge or consent.

The court below sent the case to a referee for trial, who found, among other things, upon ample evidence, that the appellant, although posessed of ample information to have enabled her to do so, "was negligent in not interposing her defense to the notes when sued in the county court." In other words, "that she had a complete remedy at law," which, through her own negligence, she had omitted to avail herself of at the proper time. That this finding was fully—indeed the only one—warranted there is not even the shadow of a doubt.

It appears that, on the 15th of December, 1877, John G. Compton, a brother-in-law of the appellant, whose name at that time was Ellen Compton—she having since intermarried with Charles H. Young—being indebted to Morgan & Gallagher in the sum of three hundred and sixty dollars, gave therefor the two notes in question, one for a hundred and sixty, and the other for two hundred dollars, due in sixty and ninety days respectively. On the maturity of the first of these notes, Morgan & Gallagher sent to the appellant a notification in these words, which she received by mail in due time at her home in Columbus:

"OMAHA, NEB., Feb. 16th, 1878.

"*Mrs. Ellen Compton, Columbus, Neb.:*

"The note of $160.00, bearing 12 per cent interest, dated

Dec. 15th, and signed by John G. Compton and Mrs. Ellen Compton is *due this day*, and we look to you for payment of principal and interest. Your immediate attention to same is requested. Yours Truly,

"MORGAN & GALLAGHER."

And afterwards, on the twenty-fifth of March, 1878, the other note then being ten days over-due, a similar notice respecting it was sent to her, which she admits having received.

These two notices were certainly sufficient to fully advise her of the character of Morgan & Gallagher's claim, but she paid no attention to the demand thus made upon her, not even so much as to question to them its correctness in any particular. Thus the matter rested until the twentieth of June, when, the notes still remaining unpaid, Morgan & Gallagher commenced an action thereon in the county court of Platte county, where the appellant then resided. Of this action she was duly notified by summons, which was personally served upon her, as she admits both in her petition and in her testimony given upon the trial. By the summons she was again informed as to the character of the demand, and, although questioning its correctness as to herself, as she says, in a conversation respecting the suit had with John G. Compton immediately after the service of the summons, made no appearance, but suffered judgment to be taken by default for the amount called for by the notes, which was done July 2d, 1878. The only excuse for not making a defense to the action on the notes as given in the petition is, that John G. Compton "then stated that the most of the money had been paid, and that there was not more than one hundred and fifty dollars due, and requested her not to pay any attention to the summons or suit, as that was a form which had to be gone through with before taking a stay." She says that Compton at the same time also told her that one Anderson, who "was owing him" * * * "was going to sign the stay bond with him,

and that would release her." Thus, from her own admissions, we have it established that, in order to gratify the wish of John G. Compton, for whose indebtedness to Morgan & Gallagher the notes were given, the appellant voluntarily permitted the judgment to be rendered in her absence, and without resistance, for the full amount called for by the notes and claimed in the summons served upon her. But even according to the most favorable view for the appellant that it is possible to take of this statement, the only disappointment she could have had respecting the matter of the judgment was as to its amount. In addition to this it was admitted upon the trial that the appellant knew of this judgment on the sixth of July, only four days after it was rendered, which was in time to have enabled her to take an appeal to the district court if she were then dissatisfied with it.

Thus we have presented a succession of facts, showing most conclusively, as we think, that the appellant either purposely or negligently omitted to defend against a recovery on the notes, by reason of which the absolute want of equity in her case is fully established.

The rule is well settled that equity will afford no relief against a judgment in such a case. Story's Equity Jurisprudence, sec. 895. Willard's Equity Jurisprudence, 347. Such being our view of this, the principal and controlling feature of the case, it is unnecessary to look into the record further, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

SCHOOL DISTRICT NO. 8 IN DODGE COUNTY, PLAINTIFF IN ERROR, V. EMMA A. ESTES, DEFENDANT IN ERROR.

1. **Contract:** CONSTRUCTION. As a general rule, a contract must be construed by reference to the provisions contained in it, and not by anything *de hors*; but in some cases the court will look to the subsequent acts of the parties under it.
2. ———: ———. Where both parties to a contract, with a full knowledge of its terms, by their action under it have given it the same construction, it is a safe rule to adopt that construction, where there is a possible doubt as to its meaning, in estimating damages under it.
3. **School Teacher:** CERTIFICATE: WAGES. A proper certificate of qualification is essential to warrant a school board in paying a teacher from the public school funds. The prohibition of the statute, however, is upon the district board, and not upon the teacher; and where, during a part of a term, the teacher was without a certificate, notwithstanding which payment for the time was made, in an action to recover wages due for the last month of the term during all of which the teacher had a certificate, *Held*, That the amount so paid could not be set off against what was due for the last month.

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

William Marshall, for plaintiff in error.

E. F. Gray, for defendant in error.

LAKE, CH. J.

It is evident that the written contract sued upon does not fully express the agreement of the parties to it, and under some circumstances its reformation by suitable action would have been indispensable to entitle the defendant in error to recover wages for her services as teacher at the rate of forty-five dollars per month. As expressed, the sum mentioned would seem to be the compensation for the

entire term of nine months, the language being "that the said Emma Estes shall teach the primary school of said district for the term of nine months, commencing on the 11th day of April, 1880," for which the school board, on behalf of the district, agreed "to pay said Emma Estes" * * * * * "the sum of $45; the same being the amount of wages agreed upon to be paid on or before the first day of April, 1880."

But in her petition the defendant in error construed the contract in this particular, and claimed that this sum expressed the monthly wages which she was to have. And this construction is precisely the same as that adopted and acted upon by the district board in making payments, as is conclusively shown, not only by the evidence, but by their answer as well, wherein it is charged that "between said 12th day of April, A. D. 1880, and the —— day of September, A. D. 1880, the plaintiff taught said school for three months, for which said three months' teaching of said school the defendant paid her the sum of $135.00." Thus it appears that the parties to this contract were in full accord as to the rate of compensation to be paid—that it was forty-five dollars per month, at which rate payment was voluntarily made for the whole time that school was actually taught. Under this state of facts the court was fully warranted in assuming and saying to the jury that the wages under the contract were "$45 per month, and not $45 for the entire term of nine months, as contended by the defendant." It is doubtless true that, in general, a contract must be construed by the provisions contained in it, and not by anything *de hors;* but still, in some cases the court will look to the subsequent acts of the parties. Chitty on Contracts, * 88. It is not even suggested on behalf of the district that any mistake was made in paying at the rate of forty-five dollars per month for the time the school was actually taught; so that the parties themselves, with a full knowledge of the terms of the contract, having united and fully

agreed as to its proper construction, and there being a possible doubt as to its meaning, the court did right in adopting that construction as the proper one in estimating damages for its violation.

One of the grounds of complaint here is that oral testimony was admitted as to whether the forty-five dollars mentioned in the contract was to be paid "by the week or month." An interrogatory of this character was put to the defendant in error while testifying in her own behalf, to which she answered, against the objection that it was incompetent, "by the month." The admission of this testimony was clearly error, and were it not that the acts of the district board and the admission of the answer rendered this testimony entirely superfluous, would necessitate a reversal of the judgment. As the case stood, however, the error was without prejudice to the district, and furnishes no ground for a new trial. The defendant in error was employed, as we have seen, to teach a term of nine months. As to eight months of this time, it is agreed that the contract was duly performed by both parties. The school was taught, and the wages at the rate of forty-five dollars per month paid monthly. The controversy between the parties concerns the last month only of the engagement, which was neither taught nor paid for. The failure to teach this month, as the defendant in error alleged and conclusively established by evidence, was through no fault of hers, but was owing solely to the default of the officers of the district in the performance of their part of the contract by which she was prevented from continuing the school, although she was present, able, and anxious to complete the term. Under these circumstances she is certainly entitled to the same compensation as if she had actually kept the school during that month.

It appears that during three months of the time that school was taught and for which payments were made, the defendant in error was without a certificate of qualification.

She had such certificate at the time of hiring, which however, expired shortly afterwards by limitation, and some three months elapsed before she obtained a renewal. It is now claimed on behalf of the school district that the payments for these three months were unauthorized, and it is sought to set off enough thereof to cancel the damages found in her favor. We think this claim was properly rejected by the district court. It is true that the statute prohibits the school board from paying from the school fund any but qualified teachers, and makes a certificate or diploma, issued in the manner directed, the only evidence of such qualification. The prohibition of the statute is, however, upon the district board, and not upon the teacher. It was the duty of the board to see to it that the teacher possessed the requisite evidence of qualification before making payment; but not having done so, we do not think they should be permitted to recover the money for the district, or to set it off against wages earned during a time when she confessedly had such certificate.

As to the questions of fact discussed by counsel for the plaintiff in error at considerable length, we will pass them with the simple remark that they appear to have been fairly submitted to the jury, with whose decision we see no good reason for interfering.

JUDGMENT AFFIRMED.

JOHN RAY, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

Criminal Law: CONCEALING HORSE THIEF: PRACTICE. At the November term, 1880, of the district court of F. County, T. J. W. was indicted, tried, and convicted of horse stealing. On the same day J. R. was indicted, tried and convicted for having con-

cealed the said T. J. W., shortly after he had stolen the said horse, knowing him to be a horse thief. T. J. W. brought his case to this court on error, where the judgment of the district court against him was reversed, and the cause remanded to the district court, in which last named court the said T. J. W. was discharged on his personal recognizance, to appear at the next term of court. The case of J. R. being also before this court on error, *held*, Without examining the errors assigned, that the judgment of the district court be reversed.

ERROR to the district for Fillmore county.

O. P. Mason and *J. Jensen*, for plaintiff in error.

The Attorney General for the State.

COBB, J.

The plaintiff in error was indicted, tried, convicted, and sentenced for a term of six years in the penitentiary for the offense of concealing Thomas J. Wells, an alleged horse thief. The record is brought to this court on error.

On the same day on which Ray was tried and convicted, Wells was tried and convicted of the crime of stealing a horse, being the same offense of which it is alleged that Ray knew him to be guilty when he concealed him. That case was brought to this court on error, and the judgment of conviction reversed. *Wells v. the State*, 11 Neb., 409. The cause was remanded to the district court, and Wells discharged on his personal recognizance. The spectacle is thus presented of a man serving as a felon in the penitentiary for concealing a horse thief, while by virtue of the judgment of this court the alleged horse thief himself has had the brand of felony removed from him, and is enjoying his liberty.

While there is no bill of exceptions accompanying the record in this case, and so we cannot tell upon what testimony Ray was convicted, yet it will be presumed that the record of Wells' conviction and the judgment against him

was a necessary and indispensable part of it. That record has been pronounced erroneous, and reversed. I therefore conceive it to be the duty of this court, having jurisdiction of the cause by virtue of the petition in error, to reverse the judgment in this case.

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

REVERSED AND REMANDED.

MAXWELL, J., concurs.

THE STATE, EX REL. FORREST L. WHEDON, V. THE BOARD OF COUNTY COMMISSIONERS OF YORK COUNTY.

1. Counties: BIDS FOR SUPPLIES. All bids for books, blanks, and stationery, for supplies for county officers must be filed with the county clerk on or before the first day of January. The commissioners have no authority to consider a bid filed thereafter.

2. ———: ———. Bids must substantially conform to the advertisement, and should specify the price at which articles will be furnished. A bid to furnish articles "at what it cost to lay them down" is too indefinite and no award can be made thereon.

3. ———: ———. The omission of two articles of insignificant value, *held*, Not to invalidate a bid otherwise in proper form.

ORIGINAL application for mandamus.

George B. France, for the relator.

W. T. Scott, for respondents.

MAXWELL, J.

This is an application for a mandamus to compel the de-

fendants to award to the relator the contract for furnishing the county officers of York county with blanks and stationery for the year 1882, upon the ground that he is the lowest bidder therefor.

It appears from the record that in December, 1881, the county clerk of that county published an advertisement, of which the following is a copy:

"County clerk's estimate of books, blanks, and stationery required for the York county officers during the coming year, and which by law are not required to be furnished by the state. This December 14th, 1881.

"BOOKS.

1 docket for office of county judge.
1 index for office of county judge.
2 mortgage records for office of county clerk.
2 deed records for office of county clerk.
1 index chattel mortgages for office of county clerk.

"BLANKS.

1000 full sheet blanks indorsed, for office of clerk of district court.

1000 half sheet blanks indorsed, for office of clerk of district court.

400 full sheets, appraisals, for office of sheriff.

300 full sheets, returns to execution, for office of sheriff.

100 full sheets, orders of sale, for office of sheriff.

50 half sheets, petit jurors, for office of sheriff.

40 half sheets, grand jurors, for office of sheriff.

500 half sheets, summons and subpœna, for office of sheriff.

2000 quarter sheet blanks for office of county judge.

2000 half sheet blanks for office of county judge.

9 sets of poll books for office of county clerk.

"STATIONERY.

4 reams legal cap paper for office of clerk of district court.

1000 letter heads for office of clerk of district court.

500 official envelopes for office of clerk of district court.

500 small envelopes for office of clerk of district court.

2 gross rubber bands assorted, for office of clerk of district court.

4 dozen lead pencils for office of clerk of district court.

1 gallon Arnold's ink for office of clerk of district court,

4 bottles red ink for office of clerk of district court.

12 sheets blotting pad for office of clerk of district court.

2 dozen penholders for office of clerk of district court.

1 rubber eraser for office of clerk of district court.

1 knife eraser for office of clerk of district court.

2 gross of steel pens for office of clerk of district court.

3 bottles of mucilage for office of clerk of district court.

3 boxes McGill's paper fasteners for office of clerk of district court.

500 small envelopes for office of sheriff.

100 official envelopes for office of sheriff.

½ ream legal cap paper for office of sheriff.

¼ ream letter paper for office of sheriff.

½ gallon Arnold's ink for office of sheriff.

1 gross steel pens for office of sheriff.

2 dozen lead pencils for office of sheriff.

1 dozen pen-holders for office of sheriff.

1 rubber eraser for office of sheriff.

1 bottle of mucilage for office of sheriff.

2 reams legal cap paper for office of county judge.

1 dozen lead pencils for office of county judge.

1 dozen pen holders for office of county judge.

½ gallon Arnold's ink for office of county judge.

1 rubber eraser for office of county judge.

1 gross of rubber bands for office of county judge.

2 boxes McGill's paper fasteners No. 2, for office of county judge.

2 boxes eyelets No. 2, for office of county judge.

1 dozen sheets of blotting pads for office of county judge.

2 bottles mucilage for office of county judge.
2 dozen congress ties for office of county judge.
500 court wrappers for office of county judge.
500 small envelopes for office of county judge.
500 official envelopes for office of county judge.
1 inkstand for office of county judge.
2000 small envelopes for office of county treasurer.
1000 official envelopes for office of county treasurer.
1000 letter heads for office of county treasurer.
1 ream legal cap paper for office of county treasurer.
4 reams legal cap paper for office of county clerk.
1000 letter heads for office of county clerk.
500 official envelopes for office of county clerk.
500 six inch envelopes for office of county clerk.
2 gross rubber bands for office of county clerk.
2 dozen pen-holders for office of county clerk.
3 gross steel pens for office of county clerk.
1 gallon Arnold's ink for office of county clerk.
6 bottles red ink for office of county clerk.
12 sheets blotting pads for office of county clerk.
3 gross paper fasteners (McGill's) for office of county clerk.

"The furnishing of the foregoing books, blanks, and stationery will be let in separate contracts to the lowest competent bidder, who shall give bonds for the faithful performance of his contract, with at least two good and sufficient sureties, residents of the state. Said bond to be approved by the county board.

"Separate sealed bids will be received at the office of county clerk up to 4 o'clock P. M., Jan. 1st, 1882. Bids to be endorsed upon the covering, "Bid for books," "Bids for blanks," as the case may be, and the bidder's name. The right to reject any and all bids is reserved.

[L.S.] "J. A. EATHERLAY,
"County clerk."

On the 31st of December, 1881, the relator filed the

following as a sepa-rate and sealed bid with the clerk of said county:

"*To the Board of County Commissioners of York County, Nebraska.*

"GENTLEMEN: Responding to the invitation for bids for furnishing blanks required for the use of the county officers during the ensuing year, as published by the county clerk, of date December 14th, 1881, I hereby agree to furnish York county, Nebraska, with the supplies hereinafter named, in the amount set opposite each item (or so much thereof as shall be required) for the prices set opposite each item. taking as my pay therefor county warrants upon the county general fund, whenever the same may be paid according to law, viz.:

Full sheet blanks, endorsed, per 100	$1.50
Full sheet blanks not endorsed, per 100	1.25
Half sheet blanks endorsed, per 100	1.25
Half sheet blanks not endorsed, per 100	1.00
Quarter sheet blanks endorsed, per 100	1.00
Quarter sheet blanks not endorsed, per 100	75
Nine (9) sets poll books, per set	2.25

Dated this December 31st, 1881.

"F. L. WHEDON."

And also one separate sealed bid for furnishing stationery as follows:

"*To the Board of County Commissioners of York county, Nebraska.*

"GENTLEMEN: Responding to the invitation for bids for furnishing stationery required for the use of the county officers during the year 1882, as published by the county clerk, of date December 14th, 1881, I hereby agree to furnish York county, Nebraska, with supplies hereinafter named, in the amount set opposite each item (or so much thereof as shall be required) for the prices set opposite each item, taking as my pay therefor county warrants upon the

general fund whenever the same may be paid according to law, viz:

Red ink per bottle	$ .25
Rubber erasers each	.10
Official envelopes printed, 10 inch, per 1000	5.00
Envelopes 6 in. or 6½ in., per 1000	3.50
Letter heads printed, 14 lbs. to r'm. per 1000	4.00
Legal cap, 14 lbs. to r'm., per ream	4.50
Rubber bands, assorted, per gross	1.75
Pen-holders, per gross	1.75
Lead pencils, per gross	1.50
Steel pens, per gross	1.00
Arnold's writing fluid, per gallon	4.00
McGill's paper fasteners, per box	.50
Drawer envelopes, each	.25
Congress tie envelopes, each	.15
Court wrappers, per 100	2.00
Note paper, per ream	1.75
Blotting pads, per quire	1.00
Postal cards printed, per 100	1.50
Eyelets, per box	1.00
Mucilage, per bottle	.25

"Dated this December 31st, 1881.

"F. L. WHEDON."

Also the following bid for printing:

"*To the Board of County Commissioners of York County Nebraska,*

"GENTLEMEN: The undersigned, publisher and proprietor of the York Tribune, a newspaper of large circulation in York county, Nebraska, published in the city of York, York county, Nebraska, hereby agrees and offers to publish the full proceedings of the board of county commissioners at one half cent per line; the proceedings of the board of equalization at one half cent per line, and write my own copy. I also agree to publish all notices of election, court

notices, and such other advertisements as the county board may require printed, the copy being furnished me, at two cents per line.

"Dated this December 31st, 1881.

"F. L. WHEDON, Publisher York Tribune."

On the 10th day of Jan., 1882, Morgan, McClellan & Dayton, filed in the office of the clerk of said county, the following propositions:

"YORK, NEBRASKA, Jan. 10, 1882.

"BIDS FOR BLANKS.

1700 full sheet blanks, per hundred $2.25
3590 half sheet blanks, per hundred 1.50
2000 fourth sheet blanks, per hundred 1.00

"We will furnish all other blanks not enumerated in the above list, such as poll books, etc., at just what it costs to lay them down."

"BIDS FOR STATIONERY.

4000 letter heads, per thousand $5.00
2000 official envelopes, per thousand 5.75
4000 commercial envelopes, per thousand 4.00

"We will furnish all other stationery not listed in the above bid, at what it costs to deliver the same to the county. We will print all legal publications at the rate of 5 cents per line for each insertion. We will publish the proceedings of the board of equalization for two cents per line. Provided the above contract is awarded us, we will publish the commissioners' proceedings free of charge.

"MORGAN, MCCLELLAN & DAYTON."

The defendants awarded the contract for furnishing blanks, stationery, and the county printing to Morgan, McClellan & Dayton, and required them to give bond in the sum of $1000.00, which they have done. It is conceded that the cost of furnishing blanks, books, and stationery to the officers of York county per year exceeds the sum of

$200.00. No objection is made to the bond of the parties for the fulfillment of the contract, so that the only question to be determined is the proper construction of the statute requiring the contract to be let to the lowest bidder.

Sec. 149 of "An act concerning counties and county officers," approved March 1, 1879, (Laws of 1879, 392–3) provides that: "In all counties where the cost of furnishing the officers with books, blanks, and stationery shall exceed the sum of $200.00 per year, the supplies for such purposes shall be let in separate contracts to the lowest competent bidder, who shall give bond for the faithful performance of his contract with at least two good and sufficient sureties, resident of the state. The bond required by this section shall be approved by the county board, and the sureties therein shall justify in the same manner as sureties on official bonds."

Sec. 150 provides that: "It shall be the duty of the county clerk, on or before the first day of December, annually to prepare separate estimates of the books, and blanks, and stationery required for the use of the county officers during the coming year, and which by law are not required to be furnished by the state, and during the first week in December he shall publish a brief advertisement in one newspaper published in his county, stating the probable gross number of each item of books, blanks, and stationery required by such county during the year following the first day of January next ensuing, and inviting bids therefor, which bids shall be filed with said clerk on or before the said first day of January."

Sec. 151 provides that: "The county board shall, at their first meeting in January in each year, open said bids, and award the contract for the furnishing of all such books, blanks, and stationery as may be required by county officers, to the lowest bidder competent under the provisions of this subdivision, and who complies with all its provisions: *Provided*, that the county board may reject any and all bids."

Sec. 152 provides that: "The account for books, blanks, and stationery furnished under said contract shall be audited and paid as other accounts against the county, and no county board or other officer shall procure any such books, blanks, and stationery from any person other than the contractor or his assignee, during the existence of such contract, and no account therefor shall be paid by the county."

Bids are to be filed on or before the first day of January. Is this language mandatory or merely directory? The language is: "Shall be filed with said clerk on or before the 1st day of January." We have no doubt the provision is mandatory. It is a limitation upon the right to receive bids, and there is no authority of the clerk to receive, or the commissioners to consider, bids filed after that date.

The bid of Morgan, McClellan & Dayton therefore was filed out of time, and the commissioners had no authority to consider it.

Second. The supplies shall be let in separate contracts to the lowest bidder who shall give bond, etc. That is, there shall be distinct propositions for books, blanks, and stationery. These propositions should distinctly specify the kind and quality desired, and if possible the commissioners should provide samples as a basis on which to make the bids, so that all be made on the same basis. The object of the law is to invite competition and prevent favoritism and fraud. And this can be best accomplished by placing all bidders on equality in making their bids. The bid of Morgan, McClellan & Dayton also fails to respond to the advertisement. After stating what they will furnish full, half, and quarter blanks for per hundred, they say they will furnish all other blanks not enumerated "at just what it costs to lay them down." And in the bids for stationery, after stating what they will furnish envelopes for per thousand they say they will furnish all other stationery not listed "at what it costs to deliver the same to the county." This is too indefinite to justify the commissioners in mak-

ing an award upon it. A bidder must state the price at which he will furnish the articles desired—not to state that he will furnish the articles at cost, but what the cost will be. The bids in question do not conform to the law and should have been rejected on that account.

The bids of the relator substantially comply with the law, The bid for blanks, while not particularly enumerating the several kinds of blanks advertised for, yet covers the entire list. The bid for stationery includes all the articles advertised for, except one knife eraser and bottle of ink. A bid should respond to the advertisement and embrace all the articles therein named; but these articles omitted are insignificant in value and undoubtedly were overlooked in making out the bid; and no particular objection is made by the defendants on that ground. While the presumption is that the defendants acted in good faith in letting the contract in the manner they did, the statute points out their duties and the manner of performing the same, and this mode is exclusive. The object of the law is to protect the public against collusive contracts and prevent favoritism. A peremptory writ of mandamus will issue as prayed, upon the relator executing a good and sufficient bond for the performance of said bids.

JUDGMENT ACCORDINGLY.

D. A. HALE, PLAINTIFF IN ERROR, v. A. B. BENDER, DEFENDANT IN ERROR.

Practice: SETTING ASIDE DEFAULT. A default was taken against a defendant in the district court in May, 1881, and in November following he filed a motion, supported by an affidavit, to set the same aside, but offered no copy of his proposed answer nor set forth any facts showing a defense. *Held*, That the court did not err in overruling the motion.

ERROR to the district court for Madison county. Tried below before BARNES, J.

H. D. Kelly, for plaintiff in error, cited *Blair v. West Point Mfg. Co.*, 7 Neb., 146. *Mills v. Miller*, 3 Neb., 95. *Burbank v. Ellis*, 7 Neb., 156.

Robertson & Campbell, for defendant in error, cited *Orr v. Seaton*, 1 Neb., 107. *Mulhollan v. Scoggin*, 8 Neb., 202. *Hardy v. Miller*, 11 Neb., 395.

MAXWELL, J.

The defendant in error brought an action in the district court of Madison county to recover from the plaintiff in error the value of a yoke of oxen. At the May term, 1881, of said court a default was entered against the defendant in the court below. At the November term of said court, he filed a motion, supported by an affidavit, to have the default set aside. The motion was overruled, and that is the error complained of in this court.

No answer to the petition was submitted to the court on the motion to open the default, but a motion, supported by an affidavit, in which it is stated that the defendant expects to prove that he has paid for said oxen. But there is an entire failure to state that he has paid for them. An affidavit as well as an answer must state facts and not inferences or conclusions. The defendant should have tendered his answer, supported, if desired, by an affidavit showing the cause of delay. But unless the answer states a defense there is no error in refusing to permit it to be filed. But where the proposed answer states a defense, the court must permit it to be filed upon such terms as to costs as may be just. It is very clear that the defendant has failed to set forth any facts showing a defense to the action. There is therefore no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

DAVID RUSSELL, MODERATOR OF SCHOOL DISTRICT NO. 64 OF YORK COUNTY, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, EX REL. E. E. ARMOR, COUNTY SUPERINTENDENT OF YORK COUNTY, DEFENDANT IN ERROR.

Schools: CONTRACT WITH TEACHER. The statute specially authorizes the director of a school district to employ teachers either with the assent of the moderator and treasurer, or one of them, or by their direction. A contract with a teacher therefore, entered into on behalf of the district by the director and treasurer without the assent of or notice to the moderator, is valid.

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

Montgomery & Harlan, for plaintiff in error, cited School Law, subd. VIII, section 4, Comp. Stat., 466. *People, ex rel. Hunter, v. Peters*, 4 Neb., 254. *State, ex rel. Mitchell, v. School District*, 8 Neb., 92. *Kemerer v. The State*, 7 Neb., 130.

Sedgwick & Power, for defendant in error, cited *Everett v. School District*, 30 Mich., 249.

MAXWELL, J.

This action was brought in the district court of York county, by the county superintendent of that county, to compel the plaintiff in error, as moderator of school district No. 64 of York county, to countersign certain school district orders in the sum of $75, drawn by the director of said district in favor of Emma Richards. A peremptory writ was awarded in the court below, from which judgment the moderator brings the cause into this court by petition in error.

It appears from the record that no motion for a new trial was made in the court below, and this being an action

at law the cause cannot be reviewed. We might therefore affirm the judgment without an examination of the record; but inasmuch as the question raised is one of considerable importance, it will be considered. It appears from the record that Miss Richards was a qualified teacher, and that in the summer of 1881 she taught the school in question for three months at $25 per month; that the orders in question were regularly drawn and duly presented to the moderator for his signature, and that he refused to countersign the same, his excuse being that the teacher in question was employed by the director and treasurer without his consent, and without his receiving notice that such contract was about to be made. The question involved requires a construction to be given to section 11, sub. IV of the school law of 1881, which reads as follows: "The director, with the consent and advice of the moderator and treasurer, or one of them, or under their direction, if he shall not concur, shall contract with and hire qualified teachers for and in the name of the district, which contract shall be in writing and shall have the consent of the moderator and treasurer, or one of them, endorsed thereon, and shall specify the wages per week or month as agreed by the parties, and a duplicate thereof shall be filed in his office: *Provided*, that if a director shall refuse to make and sign such contract when directed so to do by the moderator and treasurer, then it may be made and signed by the moderator and treasurer." Comp. Stat., 460.

The director, with the assent of either the moderator or treasurer, may hire teachers, or if the moderator and treasurer agree upon a teacher they may require the director to employ the person agreed upon, or in case of his refusal undoubtedly may themselves employ such person. In order to secure harmony in the district, it is desirable that all those entrusted with the duty of hiring teachers should agree upon the person to be employed, but it is not necessary to the validity of the contract. The law imposes upon

the director the duty of hiring, either at the request of his colleagues or with the assent of one of them. The law having specially authorized the director to perform this duty, it is not necessary to the validity of the contract that there should be a meeting of the school board or even that all the members thereof should be consulted in relation thereto or notified of the employment.

The rule as stated in *The People, ex rel. Hunter, v. Peters*, 4 Neb., 254, as to the ordinary action of a school district board in making a contract on behalf of the district, that there must be notice to or participation in making the contract by all members of the board, is correct. But in the employment of teachers this is unnecessary.

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

JUDGMENT AFFIRMED.

C. H. & L. J. MCCORMICK, PLAINTIFFS IN ERROR, v. R. F. STEVENSON, DEFENDANT IN ERROR.

1. **Vendor and Vendee:** TITLE. A contract that the title to personal property shall not pass to the vendee until the purchase money is paid is valid between the parties, even though the contract, or a copy thereof, is not filed in the clerk's office. And a party purchasing with notice that the debtor is not the owner of the property is not protected.

2 **Conversion.** A person who aids in the conversion of property is responsible to the owner for its value.

ERROR to the district court for Cuming county. Tried below before BARNES, J.

J. C. Crawford, for plaintiffs in error, cited 6th Wait's Actions and Defenses, 163, *et seq.*

R. F. Stevenson, pro se.

The notes were made in Illinois, and the laws of that state govern this case. Under those laws the machine would be liable to execution or attachment against the maker of the notes. *McCormick v. Hadden*, 37 Ill., 370. *Murch v. Wright*, 46 Id., 487. *Latham v. Sumner*, 89 Id., 233.

MAXWELL, J.

This is an action to recover for the alleged conversion by the defendant of certain property belonging to the plaintiffs. A verdict was rendered in the court below in favor of the defendant, upon which judgment was rendered. The plaintiffs bring the cause into this court by petition in error. It appears from the record that in July, 1877, the plaintiffs sold to J. A. Nason, of West Point, Neb., an Advance reaper and mower for the sum of $180.00, taking three notes therefor, each for the sum of $60.00, with interest from date. The first of said notes was due on the first day of January, 1878; the second, on the first day of January, 1879, and the third on the first day of January, 1880. Each note contained the following provision: "The express condition of the sale and purchase of the 1876 Advance for which this note is given is such that the title, ownership, or possession does not pass from the said C. H. & L. J. McCormick until the note and interest is paid in full, and the said C. H. & J. L. McCormick have full power to declare this note due and take possession of said Advance whenever they deem themselves insecure, even before the maturity of this note."

In October, 1877, one Gould, an agent for plaintiffs, submitted these notes to the defendant. There is a conflict in the testimony as to whether Mr. Stevenson actually took the notes in his hands, but there is no doubt that he knew

their contents. He informed Gould that he did not think the notes were very good, and advised him to have certified copies of the same filed with the county clerk as security under the law of 1877. This was not done. In January, 1875, one J. B. Thomson recovered a judgment against Nason for the sum of $55.33 and costs. In October, 1877, and after Gould had called on the defendant, an execution was issued and levied upon the reaper in question, which was bid in by the defendant as attorney for Thomson. And this is the conversion complained of. Two questions are presented by the record:

First. Did the plaintiffs have a lien upon the property in question?

Second. Do the acts of the defendant, as shown by the testimony, amount to conversion?

First. In the case of *Aultman v. Mallory*, 5 Neb., 178, this court held that a sale and delivery of goods on condition that the property was not to vest in the purchaser until the purchase money was paid did not pass the title to the vendee until the condition was performed. That decision is sustained by the clear weight of authority, and in the absence of a statute changing the rule, is undoubtedly the law. In 1877 the legislature passed an act to protect *bona fide* purchasers and creditors. Laws 1877, 170. The statute did not change the rights of parties to the transaction, but was designed to protect innocent purchasers and creditors. As to those, the possession of the property by the debtor was *prima facie* evidence of ownership, and a perfect title would pass by the sale. But if the party purchasing knew that the property did not belong to the debtor he is not protected as a purchaser in good faith. The testimony in this case clearly shows that the defendant knew that Nason was not the owner of the machine in question and had paid nothing thereon. He was not a *bona fide* purchaser therefore.

Second. Did the purchase of the machine by the de-

fendant render him liable in an action of *trover?* The action of *trover* and conversion was originally an action of trespass on the case for the recovery of damages against a person who had found the goods of another and refused to deliver them on demand, but converted them to his own use. 3 Black. Com., 152. The fact of the finding, or *trover*, is now wholly immaterial, and the action lies against any one who had in his possession the goods of another and sold or used them without the consent of the owner, or refused to deliver them upon demand. And if any person aid in the conversion of property he is responsible to the owner for all the damages sustained by him. See cases cited in 6 Wait's Actions and Defenses, page 140. But it is unnecessary to cite authorities. The defendant purchased the property in question with knowledge that it belonged to the plaintiffs, and thereby deprived them of it. He is therefore liable for its value. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

S. H. RANSOM & CO., PLAINTIFFS IN ERROR, v. FERDINAND SCHMELA, ADMINISTRATOR, DEFENDANT IN ERROR.

1. **Chattel Mortgage:** REFILING AND RECORDING. After the repeal of sec. 74, ch. 43, Rev. Stat., by the act "to amend sections seventy-three," etc., the refiling and recording of chattel mortgages was rendered unnecessary thereafter for the protection of the interests of mortgagees.

2. ———: MORTGAGEES IN GOOD FAITH. To be a mortgagee *in good faith* under that section, one must be without actual notice of the prior incumbrance.

3. ———: QUESTION OF FRAUD: CREDITORS PURCHASERS. Under sec. 70, ch. 43, Rev. Stat.—Comp. Stat., sec. 11., ch. 32—the question of fraud can be raised only by creditors and purchasers. Creditors can not raise it without first obtaining a judgment, or process of some sort, against the property. And purchasers can not without first establishing their own good faith.

4. **Witness**: COMPETENCY. One who has a direct legal interest in the result of a cause, in which the adverse party is administrator of a deceased person, is not a competent witness therein; liability for the costs of the action is such an interest.

ERROR to the district court of Cuming county. Tried below before BARNES, J.

J. C. Crawford, for plaintiff in error.

The life of Bergtold's mortgage having limited in advance to one year it ceased to be of any force whatever as against the plaintiffs in error after that time, and the repeal of the law under which it was recorded could not have operated to give it new life, as its life had been limited to one year, unless, etc., and the policy of our law has been to require such instruments to be recorded. The Bergtold mortgage died at the end of one year of the date of record, so far as we are concerned, or it lives forever. Even if Bergtold took his mortgage *bona fide* and not fraudulent as to creditors, etc., he lost his priority of lien as against Ransom & Co., unless he showed that Ransom & Co. took their mortgage with actual notice of the existence of the Bergtold mortgage. Constructive notice is not sufficient. *Day et al. v. Munson et al.*, 14 Ohio State, 488. Unless refiled, absolutely void as to subsequent mortgages, etc. *Seaman v. Eager*, 16 Id., 209. Where registration is required, no notice of a mortgage, however full or formal, will supply registration. Herman on Chattel Mortgages, p. 179. Under Ohio and New York statutes actual notice of prior mortgage will not affect subsequent creditors, etc. Id., p. 181. The statutes of these states do not contain the words

without notice, as do the statutes of some other states. Id., p. 181. There having been no change of possession, it devolved upon the plaintiff in the court below (defendant in error) to show that his mortgage was made in good faith, and not fraudulent. *Brunswick v. McClay*, 7 Neb., 137. Gen. Stat., p. 393, sec. 11. Herman on Chattel Mortgages, p. 156. And having failed to do so, it was the duty of the court to instruct the jury to find for the defendants as requested; and this court should now render such a judgment as should have been rendered by the court below—that the goods and chattels replevied be returned to the defendants, or that they recover the value thereof. *McCurdy v. Brown*, 1 Ohio, 101.

R. F. Stevenson, for defendant in error, cited Jones on Chattel Mortgages, p. 242, sec. 292. *Latmer v. Wheeler*, 30 Barb., 485, *Meech v. Patchin*, 14 N. Y., 71. *Wray v. Fedderke*, 43 N. Y. Superior Court, 335. S. H. Ransom & Co., having taken their mortgage prior to the expiration of a year in which to refile, can not take advantage of it. *Thompson v. Van Vechten*, 5 Abb. Pr., 458. *Wiles v. Clapp*, 41 Barb., 645. *Manning v. Monaghan*, 23 N. Y., 539. *Lewis v. Palmer*, 28 N. Y., 271. *National Bank v. Sprague*, 21 New Jersey Eq., 530.

LAKE, CH. J.

The action in the district court was brought by the defendant in error to recover possession of certain personal property claimed by him under a chattel mortgage executed to his intestate by one Andrew Herman. The plaintiffs in error, who on their own motion were made parties defendant in the court below, also claim the property by virtue of a subsequent mortgage from the same party. The first of these mortgages was given January 26th, 1877, and the other January 15th, 1878. The one represented by the defendant in error, therefore, was prior

in point of time, and a first lien upon the property. Being the first lien, it follows that the defendant in error was entitled to have and hold the property for its satisfaction, unless, for some reason urged by the plaintiffs in error, that lien has been either lost or rendered subject to their mortgage.

It is claimed on behalf of the plaintiff in error that the first mortgage was subordinated to the second one by reason of it not having been refiled and recorded "with a statement exhibiting the interest of the mortgagee in the property mortgaged," as directed by sec. 74, ch. 43, Rev. Statutes. But this claim is not sustained for at least two good reasons, one of which is, that the section referred to, although in force when the mortgage was executed, had ceased to be operative before this step could have been taken according to its terms, it having been repealed by the act "to amend sections seventy-three," etc., approved February 15th, 1877. Laws 1877, 51. By this repeal, such re-filing and recording was rendered unnecessary thereafter for the protection of the interest of mortgagees.

The other reason is that, even if this section had continued in full force, the plaintiffs in error have not shown themselves to be entitled to its aid, which was intended only for creditors of mortgagors, and subsequent purchasers and mortgagees *in good faith.* They are subsequent mortgagees it is true, but there is nothing in the record to show that they were not well advised of the existence of the prior mortgage when they took theirs. The want of notice is a fact to be alleged, and, when not admitted, proved by evidence, like any other disputed fact in a case. And the burden of proof rests upon him who would establish the character of a mortgagee in good faith. There is no presumption of law to aid him in the absence of evidence.

In *Gregory v. Thomas,* 20 Wend., 17, the court, in commenting on a provision of statute similar to our own, said

that "actual notice of the existence of an unpaid prior mortgage of personal property destroys the preference which a second mortgagee would otherwise be entitled to claim, in consequence * * * * of the omission of the first mortgagee to re-file his mortgage within the period prescribed by statute." The same rule is found in *Hill v. Beebe*, 13 N. Y., 556, and in *Paine et al. v. Mason et al.*, 7 Ohio St., 198.

It is contended that the mortgage under which the defendant in error claimed the property was erroneously admitted in evidence. This contention is based upon sec. 70, chap. 4, Rev. Stat.—Comp. Stat., sec. 11, chap, 32, which provides, in substance, that without an actual and continued change of possession of the property, a chattel mortgage will be presumed fraudulent as to creditors of the mortgagor and "subsequent purchasers in good faith," and conclusively so "unless it shall be made to appear that it was made in good faith and without any intent to defraud such creditors or purchasers."

It will be noticed that but two classes of persons are mentioned in this section as entitled to its benefits, viz., creditors and purchasers. To which class, if either, do the plaintiffs in error belong? Clearly not to the former as that term is here used. As mere creditors of the mortgagor they could not raise the question of fraud without first obtaining a judgment or process of some sort against the property. Jones on Chattel Mortgages, sec. 245, and cases there cited. Having acquired the lien or right which they are asserting by a voluntary transfer from the mortgagor, they are in the attitude of purchasers, and as such cannot invoke the aid of this provision without first establishing their own good faith, which they have neither done nor even attempted to do.

As to the witness Herman, the exclusion of whose testimony is assigned for error, he was clearly incompetent. He was the original party defendant, and, notwithstanding

his disclaimer, was interested at least to the extent of the costs that might be adjudged against him. In the language of the statute he had a direct legal interest in the result of the cause, and the adverse party was an administrator of a deceased person. Code of civil procedure, sec. 329. *Wamsley et al. v. Crook and Hall*, 3 Neb., 344. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. CHARLES S. GREGORY, V. SCHOOL DISTRICT NO. 24 IN ADAMS COUNTY.

1. **School District Bonds.** Under the power given by sec. 30 of the general school law, Gen. Statutes, 966, to school districts, "to borrow money," the authority to do this by the issue and sale of its negotiable bonds is implied.

2. ———: ORGANIZATION OF SCHOOL DISTRICTS: IRREGULARITIES IN, NO DEFENSE. Irregularities in the organization of a school district are no defense to an application for a writ of mandamus to compel the payment of its bonds.

3. ———: ———: LEGAL ORGANIZATION PRESUMED. After a school district has exercised the franchises and privileges "thereof for the term of one year" its legal organization will be presumed as to all of its corporate acts.

ORIGINAL application for a mandamus to compel the levy of a tax to pay school district bonds placed on market and sold to plaintiff a *bona fide* purchaser for value.

Harwood & Ames, for relator.

Copps & Tanner, for respondent.

LAKE CH. J.

Two grounds are taken by counsel for the respondent against the allowance of a peremptory writ. The first of these is that when the election was held at which the bonds in question were voted, said district had not yet been fully organized, and was therefore incapable of authorizing its officers to issue them.

It must be conceded that considerable irregularity attended the organization of this district, but there is nothing to show that there was any bad faith on the part of any one connected therewith. The principal irregularity was in the election of the district officers. This ought to have been attended to at the first meeting, held October 15th, 1872, which was called by the county superintendent for that particular purpose, but for some undisclosed reason was postponed to the 6th of November following. This was certainly a plain disregard of the direction of the statute on the subject, as will be seen by reference to secs. 3 and 12 of the general school law then in force. Gen. Statutes, 962, 963.

But we are of the opinion that this irregularity is now of no consequence. Nobody objected at the time to the course pursued; all seemed to have been satisfied, and objection now comes too late. As a body politic this school district had its inception in these irregular steps, and has continued an existence then begun until now. Having given to the district its life, the effectiveness of these steps ought not now, after the lapse of over nine years, to be called in question.

Although the statute points out minutely and clearly the steps to be taken in the orderly formation and organization of school districts, its framers evidently anticipated that there would be instances of failure to observe them fully, and therefore provided that "every school district

shall in all cases be presumed to have been legally organized when it shall have exercised the franchises and privileges of a school district for the term of one year." Sec. 16, Gen. Statutes, 964.

This section is exceedingly comprehensive. Its terms are sweeping. It applies, as its language clearly imports, "in all cases" wherein the doings of a district, as such, are called in question or in any way involved, as well to acts during the first year, and from which this presumption arises, as to those performed afterwards. So far, therefore, as concerns the capability of the district to take upon itself the obligation of a borrower of money, its complete organization at the time it assumed to do so must be indisputably presumed.

The second ground taken is, that even if the district at the time in question had the power to borrow money with which to build a school-house, it could not lawfully do so by the issue and sale of bonds, as was done in this case. The propriety of raising money by the method adopted by this school district may well be doubted. But the legality of doing so is a different thing altogether.

By sec. 30 of the school law, Gen. Statutes, 966, it is provided that: "Any school district shall have power and authority to borrow money to pay for the sites for school-houses, and to erect buildings thereon, and to furnish the same, by a vote of the qualified voters of said district present at any annual meeting, or special meeting; *Provided*, that a special meeting for such purpose shall be upon notice given by the director of such district at least twenty days prior to the day of such meeting, and that the whole debt of any such district at any one time, for money thus borrowed, shall not exceed five thousand dollars."

It is a matter of general notoriety in this state that from the enactment of this section in 1869 to the present time, the method usually if not always adopted for raising money under it has been the sale of school district bonds

at various rates of discount. And this has been done, not only without question by the people of the districts themselves, who were of course the ones chiefly interested in the matter, but also with the acquiescence and evident approval of the legislative authority of the state; for, although indulged in excessively in some localities, the practice was permitted to continue without interference until by the passage of the act of February 26th, 1879, "to provide for the issuing and payment of school-district bonds," which, in addition to expressly authorizing it as a mode of obtaining money for school-house purposes, does little more than, by suitable provisions, to guard against abuses that had before obtained.

In addition to these considerations, which of themselves would constrain us to hold that the issue of these bonds was a lawful mode of borrowing money by the district, the practice, under similar authority, has the approval of several adjudged cases, prominent among which is that of *Rogers v. Burlington*, 3 Wall., 654, in which it was held that as a means of borrowing money to aid a railroad company a municipal corporation might issue its bonds, to be sold by the company for that purpose. And similar in principle is the ruling in *Police Jury v. Britton*, 15 Wall., 566, and in *Kelly v. Mayor*, 4 Hill, 263. The power "to borrow money" having been expressly given, without direction or restraint as to the mode of doing it, everything necessary to make that power effectual or requisite to attain the end in view is implied.

Being of opinion that the bonds in question are valid, and that it is the duty of the school district to pay them, a peremptory writ must be awarded as prayed.

WRIT AWARDED.

THE STATE OF NEBRASKA, EX REL. JOHN F. KIMBALL, v. SCHOOL DISTRICT NO. 4 OF ADAMS COUNTY.

1. **School District Bonds.** Where a special meeting of the electors of a school district was held in pursuance of the written request of five residents and voters of the district, and bonds were voted, issued, and sold and the avails used by the district, *Held*, That on an application for a mandamus to compel the officers of the district to report the amount of the debt, the court will not inquire into the qualifications of the persons signing the request.

2. ———: QUALIFICATIONS OF VOTERS. Where a special election was held in a school district for the purpose of voting bonds to erect and furnish a school-house therein, and it appeared that the election was held in good faith, in pursuance of notice, by *bona fide* residents of the district, and the bonds having been declared carried, and were thereafter issued and sold, and the proceeds used by the district, *Held*, That the court in a collateral proceeding will not inquire into the qualifications of some of the voters at said election.

3. ———: CONSTRUCTION OF STATUTE. The power given to school districts by section 30 of the act of 1869 to "borrow money" necessarily carries with it the authority to determine the time of payment and to issue bonds or other evidence of indebtedness therefor.

4. ———; ———. The word "borrow," as used in the statute means power to make a contract for the use of money.

ORIGINAL application for mandamus.

S. J. Tuttle, for relator.

T. D. Scofield, for respondents.

MAXWELL, J.

The relator, in his application for a writ of mandamus, alleges among other things that School District No. 4 of Adams county, in the state of Nebraska, is duly organized and existing under the laws of the state, and was organ-

ized as follows: That on the sixth day of January, A.D. 1872, the superintendent of public instruction of said county delivered to L. G. King, a taxable inhabitant of said district, a notice in writing of the formation of the same, giving the boundaries thereof, and naming therein the twentieth day of January of that year, and also designating the time and place of holding the first meeting of electors in said district; and also in said notice directed the said L. G. King to notify every qualified voter in said district, either personally or by leaving a written notice at his place of residence, of the time and place of holding said meeting at least five days prior to the time of holding the same; that the said L. G. King, as required by said notice, did so notify the voters in said district and endorsed on said notice a statement in writing showing such notification, and delivered the notice with the endorsement thereon to the person chosen chairman of said meeting; that at said meeting so held as aforesaid, and at the time and place mentioned in said notice and pursuant thereto, Charles G. Wilson was chosen director, Charles Bird moderator, and Benjamin F. Noll treasurer of said district, who within ten days thereafter filed their several acceptances in writing of said several offices; that subsequently, upon the written request of five electors of said district, directed to the said school district officers requesting a special meeting to be called of the electors of said district for the purpose of voting upon a proposition to borrow money for the purpose of building and furnishing a school-house in said district, said officers did call a meeting for the purpose aforesaid, and caused to be given due notice of the object of said meeting and the time and place of holding the same by posting up notices thereof in three of the most public places in said district, said notices particularly stating the object of said meeting and the time and place of holding the same; that at the time and place therein stated came the electors of said district, and the whole

thereof, and then and there resolved by a vote, then and there had, to borrow the sum of fifteen hundred dollars for the purpose of building and furnishing a school-house for said district, and authorized and directed said officers to issue and place on the market for sale the bonds described in the application; that on the tenth day of September next thereafter, pursuant to said direction and authorization, the said officers did issue the bonds of said district, the same being two bonds, each for the sum of five hundred dollars, dated September 10th, 1872, and to become due September 10th, 1877, and to draw interest at the rate of ten per cent per annum, payable semi-annually, and for which coupons were attached thereto and still remain, except those maturing the first and second years, which have been paid by said district; that said bonds recited among other things on their face that they were issued for the purpose of building and furnishing a school-house in said district, and so issued pursuant to an act of the legislature of the state of Nebraska, approved February 15th, 1869, and acts amendatory of and supplemental thereto; that said bonds were signed by Charles G. Wilson, director, Charles Bird, moderator, and Benjamin F. Noll, treasurer, and by them placed upon the market and sold, and the proceeds derived therefrom used for the purpose of building and furnishing a school-house in said district; that the officers of said district have often been requested to pay the same, but have refused, and will not take any steps or measures for the payment of said indebtedness. The prayer is to require the officers of said district to report the amount of said bonded indebtedness to the county clerk, and to require the county commissioners to levy the necessary taxes to pay the same. To this application the defendant has interposed a general denial of each and every allegation therein contained, and has specifically denied each one of the same.

When a defendant controverts all the facts stated in

a pleading he may do so by a general denial. He He then denies the truth of all the allegations stated in the pleading. Does it add any force to this denial to again deny specifically the truth of these allegations? That it does not will readily be seen. A general denial puts in issue the truth of all the allegations denied, and imposes the burden of proof upon the party making the allegations; and special denials require no additional proof to be given of those facts. Special denials, therefore, are superfluous in such cases, and a party should be required to elect between a general and special denial, and should not be permitted to cumber the record with both. But no objection is made on behalf of the relator upon this ground, and it is therefore waived.

The questions presented by the record are:

First. Was the school district in question duly organized in January, 1872?

Second. Did five legal voters of said district make a request in writing for a special school meeting in said district for the purpose of voting upon the question of borrowing money for said district as stated in the application?

Third. Did a majority of all the qualified voters at said meeting authorize said school board to issue and sell the bonds and coupons in question?

Fourth. Were the officers of said district authorized under the statute in force at that time to issue and sell said bonds?

The testimony shows that the school district in question was organized in the winter or early spring of 1872, and that that organization has continued to the present time. It also appears that about July, 1872, one C. G. Wilson was appointed by the county superintendent director of said district, and accepted said office, and exercised the duties of the same, and that one Charles Bird was moderator, but the office of treasurer seems to have been vacant. That the district in question was organized before the special

meeting was called to vote upon the question of borrowing money we think is clearly established.

Second. It is clearly proved that a written request, signed by five persons reputed to be legal voters of said district, was presented to said director, requesting him to call a special meeting of the voters of said district for the purpose of borrowing money to erect and furnish a schoolhouse therein; and that in pursuance of said request said director called a special meeting, and posted notices of the same for at least twenty days prior thereto, in which notices the object of the meeting was stated. Quite an effort has been made on behalf of the defendant to show that some of those signing the request had not been residing in the district a sufficient length of time to make them legal voters therein? Whatever we might hold as to the qualifications of such persons in a direct proceeding to annul their action, or where it was clear that the parties signing the request, and voting at the meeting which they were instrumental in calling, were not residents of the district, but that the whole proceeding was a fraudulent device to issue bonds, yet where the proceedings have been conducted in good faith, and a request, properly signed by the requisite number, has been acted upon by the officer or officers upon whom the law imposes the duty of calling such meeting, and the meeting has been held and the object of the request endorsed by the legal voters of the district, we will not in a collateral proceeding enquire whether all the persons signing said request had resided in the district a sufficient length of time to entitle them to vote therein or not. If they had not, any taxpayer of the district could enjoin the issuing of bonds, because unauthorized; but after the meeting has been held in pursuance of the notice, the bonds issued and sold, and the district has received the avails, it is too late to raise the objection.

In the case of the *State v. School District No. 9 of Buckolls Co.*, 10 Neb., 544, there were but three legal vo-

ters in the district at the time the request was made, and two of these did not sign it, and it was held that there was no authority to call a special meeting for the purpose of voting bonds; in other words, that a request, signed by five legal voters of the district, is a condition precedent to the right of an officer to call a special meeting. And we adhere to that decision, but it has no application to this case. Here the request was properly signed by parties who were residents and regarded as legal voters in the district, and as no objection to their qualification was made then or since until the district is called upon to pay the bonds issued by it to erect a school-house, we think the objection is unavailing.

Third. It is very clearly proved that the election was participated in by all or nearly all of the electors of the district. A number of those voting had homesteads in that district, and some of them reside there still. The meeting was properly called, the notices properly given, and the election was legal. Those permitted to vote at such an election are presumed to be legal voters, and the court will not, in a collateral proceeding after the result is declared, and the district has received the benefits derived from such vote, enquire into the qualifications of the persons voting thereat. In the case of the *County of Warren v. March*, 7 Otto, 96, the supreme court of the United States states the rule as follows: "If a municipal body has lawful power to issue bonds or other negotiable securities dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the bonds themselves by the authorities whose primary duty it is to ascertain it." This would not authorize a body not authorized by the requisite vote to issue bonds; but where an election is legally held and the authority given, it is not open to collateral attack. But the power to issue bonds is

a proceeding under a special power, and the authority must actually exist in order that recitals in the instrument may be binding. There is no doubt that a majority of all the votes cast at the election in question was in favor of borrowing money and issuing bonds.

Fourth. Sec. 30 of "An act to establish a system of public instruction for the State of Nebraska," approved Feb. 15th, 1869, was as follows: "Any school district shall have power and authority to borrow money to pay for the sites for school-houses, and to erect buildings thereon, and to furnish the same, by a vote of a majority of the qualified voters of said district present at any annual or special meeting: *Provided*, that a special meeting for such purpose shall be upon a notice given by the director of such district at least twenty days prior to the day of such meeting, and that the whole debt of any such district at any one time for money thus borrowed shall not exceed five thousand dollars."

Among the definitions of the word "borrow" given by Webster, are: 1—"To take or receive from another on trust with the intention returning or giving an equivalent for." 2—"To take from another for one's own use; to adopt from a foreign service; to appropriate; to assume." The word is often used in the sense of returning the thing borrowed in specie, as to borrow a book, or any other thing to be returned again. But it is evident that where money is borrowed the identical money loaned is not to be returned, because if this was so, the borrower would derive no benefit from the loan. In the broad sense of the term it means a contract for the use of money, and this is the sense in which the word is used in the statute. School districts, therefore, were authorized to make contracts for the use of money. The power to borrow necessarily implies authority to determine the time of payment and the character of the evidence of indebtedness that will be issued, whether in the form of notes or bonds payable in the future. The fact

that the bonds were sold on the market, instead of being given to the person furnishing the money, does not make them illegal. The object of the law was to enable school districts to raise means to build school-houses therein. This being the object it was to be attained in the best practicable method. These districts, many of them on the frontier, with but little taxable property therein, and no capital to be invested in loans, would have been unable for years to have effected a loan unless they had pursued the course adopted in this case, namely, issued their bonds. The policy of authorizing school districts to borrow money may perhaps be questioned; but so long as the laws grant the authority, and districts thereby obtain the necessary means to erect school-houses, common honesty requires its repayment.

In the case of the appeal of *The Phila. Reading R. R. Co.*, 13 Reporter, 475, the supreme court of Penn. held that the legal signification of the word "borrow" did not necessarily imply an undertaking to return the sum or thing borrowed.

In the case of the *E., I. & C. R. R. Co., v. Evansville*, 15 Ind., 395, it was held that where the city was expressly authorized to borrow money to pay for stock subscribed, the power to determine the time of payment and to issue bonds and other evidences of indebtedness was necessarily implied. See also Dillon on Mun. Cor., Sec. 84.

A peremptory writ is awarded against the officers of the school district as prayed; but as the county commissioners do not appear to be in default, the writ as to them is denied.

JUDGMENT ACCORDINGLY.

WILLIAM GERHOLD, PLAINTIFF IN ERROR, V. JOSEPHINE WYSS, DEFENDANT IN ERROR.

Marriage: FORMAL BUT VOID: COHABITATION: SUPPORT. A man formally married to a woman, who, because of her insanity, which he discovered very soon afterwards, was incapable of entering into the marriage contract, and continuing thereafter voluntarily to cohabit with her as his wife, is under a legal obligation to support her. And having furnished such support, he cannot, upon a decree of separation on the ground of the invalidity of the marriage, make the same a charge against her separate estate.

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

John G. Higgins and *Whitmoyer, Gerrard & Post*, for plaintiff in error.

Byron Millett, for defendant in error.

LAKE, CH. J.

The question to be decided in this case is simply whether the plaintiff is entitled to compensation out of the defendant's estate for his support of her while they cohabited as husband and wife.

Upon the issue as to cohabitation after the plaintiff had discovered that the defendant was insane, and therefore unable to enter into a marriage contract, the referee made no finding; therefore, that they did so cohabit will be presumed. The plaintiff learned of the defendant's insanity within a very few days after they were formally married, which was "in September or October, 1867," yet he voluntarily continued the cohabitation, for aught that appears, up to the very time of the decree of separation in September, 1881.

Under such circumstances the plaintiff surely stands in

no more favorable attitude than he would if he had lived with her ostensibly as his wife, without the performance of any marriage ceremony at all. And it seems to be an established rule that if a man live with a woman, holding her out as his wife, he renders himself liable for necessaries furnished her by others upon the strength of her conjugal rights. 3 Wait's Actions and Defenses, 649, and cases there cited.

We are of opinion that upon the solemnization of the marriage between these parties in 1867, the relation of husband and wife *prima facie* was established and that, as to the plaintiff, so long as he voluntarily continued this relation, he thereby subjected himself to the attendant obligation of providing the defendant with a suitable support, and having furnished such support he cannot, upon a decree of separation, make the same a charge upon her separate estate. We find nothing in the record that calls for correction, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

MIRANDA ELLIS, APPELLEE, v. WILLIAM ELLIS, APPELLANT.

1. **Divorce:** DECREE: SERVICE OF NOTICE. A final decree for divorce and alimony was rendered against the defendant on the seventeenth day of September, 1880, on which day the court adjourned for the term. On the twenty-eighth day of March, 1881, the plaintiff issued a notice to the defendant that she would, on the nineteenth day of May following, apply to the said court to set aside the said decree, so far as the same related to the conveyance of the real estate mentioned in said decree, and to correct and amend the same so as to allow the plaintiff a certain sum of money, etc. Said notice was served on W. S. G., who had acted as attorney for the defendant in said cause. *Held*, That such service was not sufficient to bring the defendant into court.

2. ———: ———: APPEARANCE BY ATTORNEY. At the hearing and decision by the court of the motion and application referred to in the said notice, the said attorney, W. S. G., on behalf of the defendant, applied to the court for and obtained an extension of time in which to prepare and serve a bill of exceptions. *Held*, To be a general appearance in the case, and to waive all defects in the said notice, and the service thereof.

3. ———: ———: DISCRETION OF COURT. The decree required the defendant to convey to the plaintiff certain real estate as alimony. At the rehearing upon the notice above referred to, the same was revised and modified so as to vacate the decree as to the conveyance by the defendant to the plaintiff of the real estate therein described, and in lieu thereof to require the defendant to pay the plaintiff the sum of fifteen hundred dollars. *Held*, To be within the power of the court as conferred by statute, and no abuse of discretion.

THIS was an appeal from a supplemental decree rendered in the district court of Madison county by BARNES, J., as follows:

And now, on this day, this cause coming on to be heard, upon the application of the plaintiff to revise and alter the decree made and entered at the last term of this court, in this cause, to-wit: to vacate and set aside that part of said decree requiring the defendant to convey to the plaintiff the real estate mentioned and described in said decree, and to allow the plaintiff a sum certain of alimony in lieu of said real estate, and that said application and petition therefor being in due form of law, and the defendant having been duly and legally notified that said application would be made on the first day of the May, 1881, term of this court, and the court, after hearing the evidence and being fully advised in the premises, grants said application, and sustains the motion of the plaintiff herein; and it is therefore ordered, adjudged, and decreed by the court here that the said decree, made and entered in this cause, be revised and altered in this, to-wit: that the same be vacated as to the conveyance by the defendant to the plaintiff of the real estate therein described, *they not having*

complied with any part of the order and decree of this court, made and entertained at the last term thereof; it is further ordered, adjudged, and decreed by the court here that the defendant pay to the plaintiff in this cause, or to Robertson & Campbell, her attorneys, the sum of one thousand five hundred ($1500) dollars and in default of such payment, execution issue therefor. The said amount of alimony allowed by this decree *being in lieu* of the said real estate.

This decree was based upon a motion, of which the following is a copy:

And now comes the said plaintiff, by Robertson & Campbell, her attorneys, and moves the court here to revise and alter the decree of the court entered at the last term of the same in this cause, so far as the same relates to the conveyance by the defendant to the plaintiff of the real estate described in the said decree, and to allow the plaintiff a sum certain of alimony in lieu of the said real estate, and to subject the personal property of the said defendant to the payment of the said alimony, and for causes therefor state:

That the defendant has failed, neglected, and refused to obey or perform any part of the said decree of the court, and has refused to make the conveyance of said real estate, or make any conveyance of the same to the said plaintiff, nor has the defendant paid any part of the alimony mentioned in the said decree, but absolutely refuses so to do, nor has the defendant given any bond, as by the order of this court he was required to do, but has absolutely refused and neglected to do or perform any part of the order or decree of the court in this cause.

And in support of this motion the plaintiff offers the affidavits hereto attached.

This motion was served on W. S. Geer, attorney for the defendant in the original suit.

George B. Fletcher and *W. S. Geer*, for appellant.

1. The court had no jurisdiction over the subject matter. Code, sec. 602. Freeman on Judgments, sec. 495. Decree can only be changed on "petition." Comp. Stat., chap. 25, sec. 27.

2. The court had no jurisdiction over the person of defendant. Service of notice on attorney insufficient. Authority ceases on entry of judgment. *Butler v. Knight*, Law Reports, 2 Exch., 109. *Lovegrove v. White*, Law Rep., 6 C. P., 440. *Portis v. Ennis*, 27 Tex., 574.

3. Original judgment was conclusive. It could not be changed or revised, except first granting a new trial, and any subsequent attempt to produce this revision is *res adjudicata*. Wells, sec. 6. *Hollister v. Abbott*, 11 Foster, 448. Neither a final judgment nor a final decree, pronounced upon a hearing on the merits, can be set aside after the term, upon motion, for any errors into which the court may have fallen. The law does not permit any judicial tribunal to exercise a revisory power over its own adjudications after they have, in contemplation of the law passed out of the "breasts of the judges." Neither is an error, or misapprehension of the parties, nor of their counsel, any justification for vacating the judgment, although the counsel consented to it, because deceived by fraudulent misrepresentations of third parties. Freeman on Judgt's, sec. 101, and cases cited. *Carman v. Charman*, 16 Ves. Jr., 115. *Assignees v. Dorsey*, 2 Wash. C. C., 433. *Bank of U. S. v. Moss*, 6 How. U. S., 31. *Peake v. Redd*, 14 Mo., 79. *Green v. Hamilton*, 16 Md., 317. *Murphy v. Merritt*, 53 N. C., 502. *Harbor v. Pacific R. R. Co.*, 32 Mo., 423.

Robertson & Campbell, for appellee.

Defendant was properly in court. *Cropsey v. Wiggenhorn*, 3 Neb., 108. *Crowell v. Galloway*, Id., 215. The

original papers in the cause presenting all of the issues and facts in the case are before the court, and it would seem that the question of revising or altering the original decree can he presented to the court in either way, the *form* not being material. 2 Bishop's Marriage and Divorce, pp. 443, b., 487, 489, 490, 491, 492, and 493. *Bauman v. Bauman*, 18 Ark., 320. *McGee v. McGee*, 10 Georgia, 477. *Roseberry v. Roseberry*, 17 Georgia, 139. *Swearingen v. Swearingen*, 19 Georgia, 265.

COBB, J.

There can be no doubt of the power of the court to make the order or supplemental decree appealed from.

Section 27 of chap. 25, Comp. Stat., p. 255, is in the following words: "After a decree for alimony, or other allowance for the wife and children, or either of them, and also after a decree for the appointment of trustees to receive and hold any property for the use of the wife or children as before provided, the court may, from time to time, on the petition of either of the parties, revise and alter such decree respecting the amount of such alimony or allowance, or the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any decree respecting any of the said matters which such court might have made in the original suit."

This was a revision and alteration of the original decree respecting the payment of alimony, and is within the language of the statute. In decreeing the conveyance of the land, the court exceeded its powers under the statute; yet, had the defendant seen fit to make the conveyance according to the decree, it would have been a full discharge thereof. He, not having done so, it was within the power of the court, upon proper notice, to revise and alter such decree in respect to the payment of such alimony or allow-

ance, this supplemental or revised decree being one which "such court might have made in the original suit."

Upon the rendition of the original decree, except for some special purposes, the parties were out of court. In this case a petition was necessary, and doubtless it was necessary that a summons in the nature of a subpœna in chancery should also issue and be served on the defendant the same as in the original case, and such summons could no more be legally served on the person who acted as attorney for the defendant in the former suit than could the original or first summons have been so served. But it was quite competent for the defendant, after service of the informal notice of the application of the plaintiff upon the attorney who had represented him in the original action, to waive all irregularities as well in the form of the notice or summons as in the manner of its service. This we think he has done. It appears from the record that upon the making of the final order or supplemental decree appealed from the defendant appeared by attorney and made application for an extension of time to forty days in which to prepare a bill of exceptions in the case. *Porter v. C. & N. W. R. R.*, 1 Neb., 15. Such bill of exceptions was not necessary for the purpose of testing the jurisdiction of the court or the sufficiency of the service of the notice. These questions would arise as well upon the record without a bill of exceptions.

The appellant complains that there was not sufficient evidence before the court to sustain the judgment. As I view the case, all of the facts upon which the original judgment was rendered were still before the court when the order or modification of the judgment was made. The same state of facts which would justify the court in decreeing the conveyance of real estate worth fifteen hundred dollars, if the court had the power to decree such conveyance in the case before it, might, and for anything made to appear in this case did, justify it in rendering a personal

judgment for that sum. The original judgment is not appealed from. In matters of divorce and alimony a large discretion is necessarily lodged in the district court. There is no abuse of such discretion shown to exist in this case; on the contrary, I think that justice has been done.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

JULIUS KRUGER, PLAINTIFF AND APPELLANT, V. THE ADAMS AND FRENCH HARVESTER COMPANY AND WELLS, DEFENDANTS AND APPELLEES.

Homestead: LIEN OF JUDGMENT. W. was the owner of a tract of land acquired by him from the United States under the provisions of the homestead law of congress. A judgment in favor of the A. & F. H. Co., and against W., rendered upon a cause of action which accrued before the issuance of a patent for said lands was docketed in the proper office. W. conveyed the land to K. Afterwards the A. & F. H. Co. caused an execution to issue on their judgment against W. and levied on the land. K. brought action *quia timet* and injunction against the A. & F. H. Co. W. intervened as a defendant. Trial to referee, who found that when W. executed the conveyance to K., K. knew of the judgment and retained the amount of the face value of said judgment, and that it was then understood and agreed by and between said K. and W. that he (K.) was to pay and apply said sum upon said judgment and satisfy the same. Also, that after the execution of the deed and the agreement mentioned in findings 4 and 5, said W. authorized certain attorneys to bring an action to remove the cloud caused by the said judgment from the land, and agreed to pay them for their services in so doing the money belonging to W. then retained by and in the hands of K. *Held*, That the two above findings, taken together and viewed in the light of the testimony upon which they were severally made, show no lien upon the part of the A. & F. H. Co. upon the land in question, nor any personal cause of action against K.

APPEAL by plaintiff from a decree of the district court of Platte county, POST, J., presiding.

Byron Millett, for appellant.

1. The judgment not being a lien on the land when Wells conveyed the same to Kruger, he had a right to make whatever application of the purchase money he pleased.

2. The agreement was not champertous. 4 Bl. Com., *135. *Putney v. Farnham*, 27 Wis., 187. *Nebraska City v. Gas Company*, 9 Neb., 339. *Stearns v. Felker*, 28 Wis., 597.

Whitmoyer, Gerrard & Post, for appellees.

1. The land became a fund in plaintiff's hands for the satisfaction of the judgment, and he can not restrain the sale without first paying over the money. *Fuller v. Hunt*, 12 Western Jurist, 263. *Crawford v. Edwards*, 33 Mich., 354. *Miller v. Thompson*, 34 Id., 10. *Manwaring v. Powell*, 40 Id., 371.

2. The contract is void for champerty. *Backus v. Byron*, 4 Mich, 535. *Baker v. Baker*, 14 Wis., 131. *Key v. Vattier*, 1 Ohio, 132. *Elliott v. McClelland*, 17 Ala., 206. *Thompson v. Warren*, 8 B. Mon., 488. *Lathrop v. Amherst Bk.*, 9 Metc., 489. *Brown v. Beauchamp*, 5 T. B. Mon., 413. *Ross v. Scobey*, 13 Ind., 117. *Lafferty v. Jelly*, 22 Id., 471. *Arden v. Patterson*, 5 Johns. Ch., 48. *Stearns v. Felker*, 28 Wis., 596. *Thurston v. Percival*, 1 Pick., 406.

COBB, J.

For a more ready understanding of this case we refer to the error case between the same parties, 9 Neb., 526. The result of our decision was a new trial of the cause in

the district court. Such trial was had before a referee, upon whose report and findings of fact and of law a decree was entered in favor of the defendant company, and the plaintiff brings the cause to this court by appeal.

In that opinion the court say: "The petition demurred to substantially avers that Kruger, in consideration of the sale of the land by Wells to him at a certain price agreed upon, agreed to pay off the judgment of the harvester company against Wells. This allegation must, for the purposes of this case in the present state of the pleadings, be taken as admitted. Upon this promise the harvester company could have maintained an action against Kruger. * * * If it is true that Kruger agreed with Wells, in consideration of the said conveyance, to pay off the said judgment * * * then he cannot be said to have done equity in the premises either in respect to the rights of Wells or to those of the defendants in error when he comes into court to enjoin the collection of the judgment out of said lands without first paying off the judgment according to his agreement."

On the new trial the refereee made twenty separate findings of fact, among them the following:

"4th. That on the twentieth day of August, 1877, the said W. H. Wells and wife conveyed by warranty deed to Julius Kruger the south-west quarter of section 20, township 20, range one west of 6th p. m., the same upon which W. H. Wells made homestead entry November 8, 1872, and upon which said land a patent was issued to the said Wells by the United States, May 1, 1877, under the act of Congress approved May 20, 1862.

"5th. That Julius Kruger (the plaintiff herein) at the time he purchased the said land from the said Wells knew of the judgment mentioned in finding No. 2, and retained of the purchase price of said land $266.20, the amount of said judgment, and it was understood and agreed by and between Kruger and Wells at the time said $266.20 was

by said Kruger retained, that he, Kruger, was to pay and apply said sum upon said judgment of Adams & French Havester Co. v. Wells et al., and that he, Kruger, was to satisfy said judgment out of said $266.20."

These findings would be conclusive of the case were they standing alone. There are numerous decisions as well as authorities of text books to the effect that where a purchaser buys a piece of real property upon which there is an incumbrance, and he buys it expressly subject to such incumbrance, the property in the hands of such purchaser is held to be a fund for the payment of such incumbrance. The facts in such cases generally showing, and when not shown they will be presumed, that the amount of such incumbrance was deducted from the agreed value of the property and retained by the purchaser, so that the vendor, having in fact paid off the incumbrance with his property, it would be inequitable to leave the debt standing against him as a personal obligation.

But in all of the cases cited, as well as others which I have examined, there was an incumbrance upon the land, and that seems to be the central idea of them all. I have looked in vain for a case where, as between vendee and vendor, lands were held to be a fund for the payment of a debt of the vendor, not a lawful lien upon the land. The answer of the defendant company admits that the land in question was acquired by Wells under the provisions of the United States homestead law, that the patent therefor to him was issued and dated on or about the first day of May, 1877, and that the judgment in favor of defendant company was rendered on two notes of the said Wells, executed by him on the twentieth day of July, 1875. These admitted facts, taken in connection with the provisions of the United States homestead law, leave it clear that the judgment of defendant company was no lien on the land. The land then, not being a fund for the payment of defendant's judgment while in the hands of Wells, it was not after it

passed to the hands of Kruger, unless it was by virtue of a contract. The fifth finding of fact, taken alone, would establish such a contract, but it must be taken in connection with the eleventh finding of fact, which is as follows:

"11th. That after the execution of the deed and the agreement mentioned in findings Nos. 4 and 5, said Wells authorized Millett & Son and A. E. Pinckney to bring an action as attorneys to remove the cloud from the title to said land occasioned by said judgment, and agreed to pay them for their services in so doing the $266.20 belonging to said Wells, and then in plaintiff's hands."

It will be observed that this finding does not state how long after the execution of the deed from Wells to Kruger it was that Wells employed attorneys to remove the said judgment as a cloud from the title of the land; nor indeed whether it was before or after the delivery of the deed. But, if we look into the testimony upon which these findings were made, we will see that the employment of these attorneys, so far as they were ever employed by Wells, was before the execution or delivery of the deed. The testimony of Kruger, Millett, and Pinckney leave no doubt on this point. As to the testimony of Wells, he absolutely and repeatedly (in his deposition) denies ever having employed Millett or Pinckney, or even having conversed with either of them on the subject. So that in making the eleventh finding of fact the referee must have, as I think he ought, rejected the testimony of Wells as untrue. This finding, taken in connection with all the testimony upon which it was made, neutralizes the fifth finding, as it shows that it was not the understanding or desire of Wells that either the land which he sold or the purchaser personally should be held liable to the defendant company for the amount of the judgment, but that the money remaining in Kruger's hands should be devoted to litigating it. And that the said money was, at Wells' request and by his di-

rection, paid to Millett and Pinckney for their services in procuring the decree of court declaring the said judgment no lien on the land. Upon this state of facts we know of no rule of equity or principle of justice which Wells can invoke either as against Kruger or the land.

As to the defendant company, it is difficult to see upon what point it can base its claim for relief. It had no lien upon the land which it could lose or which could be affected by the transfer of the title from Wells to Kruger. While the retention of purchase money by Kruger might have been a good consideration for a promise on his part to pay them the face of the judgment, yet taking all the findings together and viewing them by the light of the testimony on which they were made, it is obvious that he did not retain any portion of the purchase money, but that he paid it out and disbursed it in strict accordance with the request and direction of Wells.

A point is made, and urged, and apparently regarded by counsel on both sides as a controlling one, upon the character of the contract entered into between Kruger on the one part and Millett & Son and A. E. Pinckney on the other for the prosecution of this case; it being urged by counsel for the defendants that such contract is void for champerty, etc. Were this an action between the parties to said contract, or even in this case, if any claim of either party was predicated upon it as an unexecuted contract, it might be deemed necessary to examine the question raised; but viewing it as we do, it makes no difference whether such contract was open to the objection of champerty or not. Indeed the said contract as an instrument of evidence in the case is entirely irrelevant. The only purpose for which it could be material would be to show the application which was made of the said balance of purchase money by Wells, and that was abundantly proved by living witnesses.

The decree of the district court is reversed, and a decree entered in favor of the plaintiff appellant in accordance

with the prayer of his petition, and making the injunction perpetual.

DECREE ACCORDINGLY.

JAMES VAN SICKEL, ET AL, PLAINTIFFS IN ERROR, V. THE COUNTY OF BUFFALO, DEFENDANT IN ERROR.

County Treasurer: LIABILITY OF SURETIES ON OFFICIAL BOND DEFENSE: EVIDENCE. A county treasurer who had been elected three successive terms proved to be a defaulter. Suit was brought by the county on his third bond. *Held*, 1. That the sureties might prove that the entire defalcation was committed before the giving of the bond sued on and before the commencement of the term of office covered by it, in which case they would not be liable. 2. That statements made by said treasurer to the board of commissioners of the amount of money on hand at the commencement of his third term of office were not conclusive upon the sureties, nor were they estopped from denying, impeaching, or contradicting the same.

ACTION on the bond of Van Sickel, county treasurer of Buffalo County. Judgment below before GASLIN, J., for the amount claimed, and the sureties brought the case here for review on a petition in error. The opinion states the facts.

C. J. Dilworth, Hamer & Conner, and *Sam. L. Savidge*, for plaintiffs in error, cited: *Vivan v. Otis*, 24 Wis., 518. *County of Mahaska v. Ingalls*, 16 Iowa, 81. *Bessinger v. Dickerson*, 20 Iowa, 261. *Warren Co. v. Warde*, 21 Iowa, 88. *Board of Supervisors of Jefferson Co. v. Jones*, 19 Wis., 61. *Rochester v. Randal*, 105 *Mass.*, 295. *State v. Rhodes*, 6 Nev., 352. *Detroit v. Weber*, 29 Mich., 24. *Bissell v. Saxton*, 66 New York, 55. *Patterson v. Inhabitants*, 38 New Jersey Law, 256.

E. C. Calkins, with whom was *A. J. Poppleton*, for defendant in error, cited *Baker v. Preston*, 1 Gilmers (Va.), 235. *Morley v. Town of Metomora*, 78 Ill., 394. *Gage v. City of Chicago*, 2 Bradwell (Ill.), 332. *Patterson's Appeal*, 48 Pa. St., 345. *McCabe v. Rainey*, 32 Ind., 309. *Leavee v. Young*, 16 Vt., 658. *Charles v. Haskin*, 14 Ia., 471. *Townsend v. Everette*, 4 Ala., 607. *Cook v. State*, 13 Ind., 154. *Sandwich v. Fish*, 2 Gray (Mass.), 298. *Gen. Stat.*, 925, sec. 77.

COBB, J.

The controlling question in this case is presented as well by the instructions given in charge to the jury and those prayed by the defendants and refused, as by testimony offered by the defendants at the trial and excluded by the court.

The fourth instruction given at the request of the plaintiff below is as follows: "The jury are instructed that the several official statements made by the said defendant Van Sickel to the board of county commissioners of Buffalo county, of the amount of money on hand at the several dates thereof are binding and conclusive on all the defendants who signed and executed said bond. That said defendants are estopped from denying, impeaching, or contradicting the same; that the jury must find a verdict against said defendants for the amount appearing in said statements to have been in defendant Van Sickel's hands as treasurer, at the close of his term of office, which was not accounted for, and paid over to his successor in office, and in ascertaining said amount they must have recourse alone to the said official statements."

Van Sickel was elected county treasurer of Buffalo county for three consecutive terms, for each of which he gave bond. The bond upon which this suit was brought was his third and last. It bears date January 14, and was approved and

filed January 21, 1878. The condition of the bond is as follows: "The condition of the above obligation is: That whereas the above bound James Van Sickel was, on the sixth day of November, 1877, duly elected to the office of county treasurer in and for said county and state, for the term of two years from the date last above written and until his successor in office is duly elected and qualified, now if the said James Van Sickel shall render a true account of his office and his doings therein to the proper authority when required thereby or by law, and shall promptly pay over to the person or officer entitled thereto all money which may come into his hands by virtue of his said office; and shall faithfully account for all balances of money remaining in his hands at the termination of his office, and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers, and securities or other property appertaining to his said office, and deliver them to his successor or to any other person authorized to receive the same; and if he shall faithfully and impartially, without fear, favor, fraud, or oppression, discharge all other duties now or hereafter required of his office by law, then this bond to be void," etc.

Upon the trial there was introduced and read as testimony on the part of the plaintiff a paper entitled, "Statement of county treasurer of funds collected and disbursed up to and including January 19, 1878." It is also endorsed as follows: "Examined and found correct this twenty-third day of January, 1878," signed by two of the county commissioners and attested by the county clerk. This paper contains a statement of the condition of the various funds in the county treasury on the first day of October, 1877, and of the receipts and disbursements of such fund up to January 19, 1878. Also a *resume* or summary of cash balance in the treasury, showing a total of $12,567.18, signed "J. Van Sickel," without date.

There was also introduced in evidence on the part of the

plaintiff the record of the proceedings of the board of county commissioners of said county under the date of Jan. 23d, 1878, as follows: "The board then proceeded to settle with the county treasurer, James Van Sickel, at the close of his term of office. Whereupon said treasurer presented his statement of accounts, which said statement was compared with the clerk's ledger and found to agree therewith. Said treasurer also presented his vouchers (as in said statement set forth), which vouchers were duly examined, counted, and after deducting the amount of said vouchers from the total amount of collections as found charged in the clerk's cash book and ledger against said treasurer, there was found to remain in the hands of the treasurer in the respective funds the amount of cash as in said statement shown. * * * * Total cash in treasury, $1,267.18." There were also several other reports made by the said treasurer, and settlements between him and the county board; so that, quoting from the brief of plaintiff's attorney: "These reports were continued and showed that he had on hand, and was chargeable with, at the expiration of his office, $12,374.53 more than he turned over to his successor." So that the sum which he reported as in his hands at the commencement of the term for which the bond sued on was given and that for which he finally proved a defaulter are nearly identical.

The defendants below (the sureties) by their answer in several and various forms denied that the said Van Sickel made any default during the term for which they were sureties, alleged that said Van Sickel duly accounted for and paid over all the county funds which came into his hands for and during the term covered by the bond on which they were sureties, and that the said Van Sickel was a defaulter to the amount of twelve thousand five hundred sixty-seven dollars and eighteen cents at the close of his second term of office, and when he entered upon his third term and the giving of the said bond, etc.

On the trial the defendants—the bondsmen (Van Sickel having been defaulted for the want of an answer)—offered testimony to prove each of the above allegations of their answer, but such testimony was ruled out by the court.

But the whole question may be considered as turning upon the instruction above set out. Are the official statements or any statements made by the defendant Van Sickel to the county commissioners of the amount of county money in his hands at the several dates thereof binding and conclusive on all the defendants who executed said bond?

I do not doubt that it is within the power of the legislature to enact a law making it the duty of county treasurers to make official statements, and to make such statements conclusive evidence of the facts therein contained. But so far as I have been able to ascertain, no such statute has been passed, or had not at the date of the transactions here under consideration. I have not examined the revenue law of 1879. The only statute cited by the defendant in error as bearing on this point, and it doubtless was the only one then in force, is that found on page 925 General Statutes, section 77, which is as follows: "The county treasurer shall settle with the county commissioners on or before the first Monday of May, and on the first Monday of October. *Provided, however*, That the county commissioners may require the county treasurer to settle with them at any time. The treasurer is to be charged with the amount of all tax lists placed in his hands for collection, and credited with the amounts collected thereon and the delinquent lists; he shall leave his vouchers with the commissioners, to be retained by them for evidence of his settlement. If the treasurer's accounts are correct, the commissioners shall certify the same; if not, he shall be liable on his bonds."

I quote section 42, p. 239, Gen. Stats., as having a bearing on this subject: "The county clerk shall keep a distinct account with the treasurer of the county for each sev-

eral term for which the treasurer may be elected, in a book to be provided for that purpose, commencing from the day on which the treasurer shall assume the duties of his office and continuing until the same or another person is qualified as treasurer, in which account he shall charge the treasurer with all sums paid him and for all sums for which the said treasurer is accountable to the county, and he shall credit him with all orders returned and canceled, with all moneys paid, and with all vouchers presented by him, and with all matters with which the treasurer is to be credited in account."

I think that a proper consideration of these two sections must lead to the conclusion that the measure of the accountability of the county treasurer, nor of his bondsmen, depends in the least degree upon any statement of such treasurer, official or otherwise. Indeed, he is nowhere required to make any statement, nor do I find any authority for dignifying any voluntary statement of his as official. The first of the above-quoted sections requires the county treasurers to settle with the county commissioners twice in each year, and whenever the county commissioners may require, and it points out what such settlements shall be upon —the tax list, the delinquent list, and the treasurer's vouchers. No statement of the treasurer is given any standing, official or otherwise, in these settlements. True, the law speaks of the treasurer's accounts. But it clearly refers to the actual state of his account. "If the treasurer's accounts are correct the commissioners shall certify the same; if not, he shall be liable on his bonds." Does this mean that if the treasurer makes out and presents a statement showing a certain balance in his hands, whether he has the funds to balance it or not, the county commissioners shall certify the account as correct, and he shall not be held on his bonds (or his bondsmen shall not be held), but if he has not filled out a blank statement correctly his bondsmen shall be held? I think not. But that it means

that the treasurer shall make a fair exhibit of the condition of his office upon the basis pointed out in the section, much as the cashier of a bank is required to exhibit the affairs of his bank—on the one side, the capital stock, the circulation, the deposits, etc.; on the other side, the bills receivable, exchange, etc., and *the cash to balance.*

But the statute nowhere makes these settlements conclusive. Nor do I think that it would be safe to do so. I know that in some cases, under somewhat different statutes, courts have held that treasurers, as well as their bondsmen, are estopped to deny the correctness of statements or reports made by treasurers to settling or auditing boards, etc. But it is of the essence of an estoppel that it be mutual. If the county treasurer and his bondsmen are estopped—in the language of the instruction—"from denying, impeaching, or contradicting" the correctness of such settlement, then the public authorities, present and future, are equally estopped. Would not the establishment of such a rule expose the public to great loss from the hasty, not always well-advised action of these boards, to say nothing of the premium it would offer to the crafty and unscrupulous, if it be true that such ever successfully aspire to official position?

Taking the two sections together, the law provides for keeping the accounts of the treasurer so that about all that the county commissioners have to do in these settlements, as it appears to me, is to examine the treasurer's vouchers and count the money on hand, and this is, or used to be, the all but universal custom.

While my examination of this case has brought me to the conclusion above indicated, it is not to be denied that there is an irreconcilable conflict of authority in the cases applicable to it, many cases holding that both principal and securities on an official bond are estopped to deny the statements, settlements, or books of the principal showing money in his hands at any specified time. But these cases, all of

them in fact and most of them professedly, follow the majority opinion in the case of *Baker (treasurer), for the Commonwealth, v. Preston and others,* 1 Virginia (Gilmer), 235. This case certainly does go to the full extent of holding that the report of a state treasurer of Virginia to the legislature of that state, which report was referred to a joint committee of the two houses of said legislature, and a report thereon made to the said two houses, and by them adopted, was conclusive both as to the treasurer and his securities. Also, that the books kept by the state treasurer, and the entries made therein by the treasurer and his clerks, were conclusive against the treasurer and his securities. While I consider this a much stronger case than the case at bar, yet it is an apt illustration of the saying among lawyers that "hard cases make bad precedents." It seems from a reading of this case, which is a very long one, extending over seventy pages of the printed report, that John Preston was, by the legislature of Virginia, elected to the office of state treasurer to serve for the term of one year, and until his successor should be elected and qualified, and he was annually re-elected for a similar term nine times in succession. For the first nine years he gave no bond at all, but upon entering upon his tenth term he was required, by the provisions of the code then lately adopted, to give a bond, and he entered into one with sureties in the penal sum of one million dollars. Shortly after giving this bond, Preston executed a deed of trust to his bondsmen, nine in number, to indemnify them against loss as his sureties, of all of his property, supposed to be amply sufficient indemnity against the defalcation then supposed and afterwards known to exist. This deed was recorded in the hustings court of the city of Richmond, and afterwards delivered to Francis Preston, brother to and one of the bondsmen of John Preston, and by him sent away to be recorded in several distant counties where portions of the lands conveyed were situated On the seventeenth day

of August, 1818, Preston, the treasurer, received from the United States a draft on the Bank of the United States at Philadelphia for $146,500, which he converted to his own use. After his re-election and giving of the bond sued on, he conveyed all of his property, as above stated, to his bondsmen, in view of and to indemnify them against his impending defalcation, caused by the conversion of the said draft.

Before the commencement of the trial the plaintiff notified Francis Preston, one of the bondsmen, to produce the original deed at the trial, and offered, if necessary, to postpone the trial to enable him to produce it. The original deed not being produced, the plaintiff offered in evidence a copy from the record certified by the clerk of the hustings court, where the same was recorded, and also proved that the original deed was, about eight months before the trial, delivered by the clerk of said court to the said Francis Preston; and proved by the oath of said clerk that the same was a correct copy, and that the trustees under the said deed, and one of the defendants, had acted under the said deed, by authorizing and effecting sales of property therein specified, etc., whereupon the said copy was excluded from going in evidence to the jury. The plaintiff offered and gave in evidence the several reports made by the said John Preston to the two houses of the legislature, from the —— day of January, 1809, to the thirteenth day of January, 1819, inclusive, and the annual reports of the joint committees of both houses of the assembly, from the said —— day of January, 1809, to the said thirteenth day of January, 1819, exclusive; and the books of the treasury department, during the whole period during which John Preston was treasurer of the commonwealth, by virtue of his successive annual elections aforesaid. And according to said annual reports and the said books of the treasury department, it appeared that on first of October, 1818 (being the end of that fiscal year),

there ought to have been a balance in the treasury of $390,702.95, and on the eighteenth day of January, 1819, being the date of the bond sued on, and the day of the commencement of John Preston's last term of office, there ought to have been a balance in the treasury of $648,412.23, and on the seventeenth day of January, 1820, when the said John Preston resigned his said office, there ought to have been a balance in the treasury of $333,297.07. But the plaintiff proved that on the said seventeenth day of January, 1820, there was but $250,197.77, so that there was a difference and defalcation of $83,099.30.

The defendants proved the receipt by the said John Preston on the seventeenth day of August, 1818, from the United States of the said sum of $146,500, "which sum * * * was passed by the said John Preston on the same day to the credit of the commonwealth, on the books of the treasury department, but the said John Preston on the same day did not deposit the same at the bank to his credit as treasurer, on official account, but did deposit the same to his own individual credit at the Bank of Virginia on his individual private account, blending the same with his private funds at his credit at said bank," etc.

Under the rulings and instructions of the court the jury found in favor of the sureties, and only *one cent damages against Preston himself.*

Under the practice of that early day a special court of appeals was summoned to try the case on error. Judge Roane delivered the opinion of the court, and after finding error in the action of the general court in excluding the copy of the deed from the jury as evidence that the bondsmen had received the conveyance of property and accepted the same as an indemnity against loss by reason of the defalcation then in suit, and deciding to grant a new trial on account of such error, he proceeds to discuss the other question, and laid down the law as hereinbefore stated.

It is quite obvious that all the equities of this case were with the plaintiff. The state treasurer being without a bond or sureties had misappropriated a large sum of public money and invested it in real estate. He afterwards gave a bond, with his brother and others as his securities. Being about to go out of office a defaulter, he conveyed through trustees to his bondsmen all of his property, including, doubtless, the identical property bought with the state's money, to indemnify them against loss by reason of his said defalcation. His actual defalcation amounted to over eighty-three thousand dollars, at that time an enormous sum of money, and the jury, under the instructions of the general court, had found for the defendants. The court of appeals most undoubtedly did right in granting a new trial for error of the general court in ruling out the record of the deed of trust. That was all that was necessary in the case. The deed once in evidence, together with evidence of its acceptance by the bondsmen, which was proved on the trial, would have been sufficient to estop the sureties to deny their liability on the bond, the default under their bond being recited as the consideration in the deed, so that I think all else in the opinion but *obiter dicta.*

The Indiana and Illinois cases cited by counsel for defendant in error, but follow *Baker v. Preston, supra.*

On the other hand, in the case of *Inhabitants of Rochester v. Randall,* 105 Mass., 295, the supreme court of Massachusetts held (I quote syllabus): "The same person was chosen treasurer of a town five consecutive years. In the first four he served without a bond, and in the fifth he gave a bond conditioned that whereas he had been chosen to the office for that year, if he should well and faithfully perform all of the duties of his said office, the bond should be void. *Held,* That the sureties were not liable for his appropriation to his own use during the first year of money of the town which he falsely credited himself in his account of that year as having been

officially disbursed by him, and never entered on his subsequent account."

I also quote from the opinion: "But it is obvious that the misappropriation of the money was complete in 1862, and that if the town had taken a bond for that year the defalcation would have been covered by it. There is no evidence that the specific money remained in his hands after the close of that year. He did not account for it in 1863, and was not required to do so. The same is true as to the next two years. The town has always objected to the entry in his account, which implies that it was known to them; but its claim to the money has not been enforced prior to his procurement of securities in 1866. But the cause of action against him arose in 1862 when he rendered his account, and the town is entitled to recover interest against him from the time of the misappropriation. We cannot regard the defendants' bond as applying to it."

This case, although it does not mention, in effect overrules *Sandwich v. Fish and others*, 2 Gray, 298, cited by counsel of defendants in error, in which the same court held that, "where a town yearly for four successive years charges a collector of taxes in account with the amount of taxes entrusted to him for collection, and with the balance of the previous year's account, and credits him with the money received from him, and with the balance carried to the next year's account, and no other appropriation of the sums paid by him is made by either party, they will be applied to the extinguishment of the earliest charges and the balance of each year's account except the last; being thus extinguished the town may recover the final balance of him and his sureties in an action on his bond for the fourth year."

The old supreme court of the state of New York certainly did not regard a settlement between a county treasurer and the county board as being beyond the reach of reinvestigation. The case of *Supervisors of Chenango v.*

Birdsall and others, 4 Wend., 453, was an action brought in 1828 by the board of supervisors against a former county treasurer and his bondsmen, on their bond executed in October, 1812, for interest claimed to be due on certain moneys held by said treasurer, and which it was claimed had been wrongfully remitted to him by a former board. In the opinion the court, by MARCY, J., say: "There was an error in the calculation of the commissioners, and although plaintiffs might have discovered it by a careful examination of the accounts, yet it does not appear that it was known to them. I do not believe that because they passed these accounts without debiting the error, having the means to do so, they are precluded from setting the matter right when the mistake is discovered. The plaintiffs, acting as public agents in the settlement of the accounts of the defendant, Birdsall, also a public agent, in whom they had full confidence, and who knew better than they possibly could the state of the accounts, ought not to be held to the same strictness applied to individuals in the settlement of accounts relating to their private affairs."

The case of *Bissell v. Saxton*, 66 N. Y., 557, decided by the present court of appeals, is squarely with the plaintiffs in error. I quote from the syllabus: "The sureties upon the bond of a public officer are liable thereon only for the defaults of their principal committed after the commencement of the term of office for which they became his sureties. Although their principal held the office for a preceding term, they are not liable for a defalcation which then occurred. In such case, those who were sureties for the officer for the prior term must be looked to. In an action upon a bond of an officer his official reports are not conclusive as against his sureties, but mere admissions of the principal, subject to explanation." The judgment, which was for the plaintiff, was reversed.

The case of *Supervisors of Jefferson County v. Jones et al.*, 19 Wis., 51, cited by counsel for plaintiffs in error, came

before the supreme court on a question quite like that involved in this case. Jones being county treasurer, made a settlement in full, as was claimed and supposed, with the board of county supervisors. Afterwards it was discovered that a mistake had been made in such settlement, and that there were several specified sums justly chargeable to him, but with which he was not charged in such settlement, etc. Suit was brought for these sums against Jones and his bondsmen. On demurrer to the petition, which was sustained, and error, the supreme court, per DIXON, C. J., held that such settlement could be opened. I quote from the opinion: "The facts are fully sufficient to authorize a recovery, unless the plaintiff is precluded from taking advantage of the alleged mistakes upon which the action proceeds. This seems to be the substance of the objections principally urged in support of the demurrer. In transactions between individuals there can be no doubt that the injured party would have his remedy in such case. The settlement or account stated would be only *prima facie* evidence of its correctness. No reason is perceived why the accounts of public officers should be excluded from the operation of the same rule. Indeed it has been held that the same strictness is not applied to public officers as is applied to individuals; and that a mistake in a settlement between them will be allowed to be rectified which would not be allowed as between individuals." Citing, with approval, *Supervisors of Chenango v. Birdsall, supra.*

The case of *Vivian, Treasurer, etc., v. Otis and others,* 24 Wis., 518, also cited by counsel for plaintiffs in error, is quite in point. Otis was clerk of the board of supervisors, an office answering pretty much to our county clerk. Under their system this officer has the custody of certain public moneys, called redemption money, for which he is required to give bond. Otis was elected his own successor. He gave a bond for each term, an entirely different set of securities going on his last one. At the close of his second

term he proved a defaulter. A suit was brought against him and his sureties on the second bond. The amount of his defalcation was $3,571.97. Judgment was rendered against him and his said second sureties for only $1,412. The county appealed to the supreme court. I quote from the opinion of the court by COLE, J., the present chief justice: "On the trial Otis was sworn as a witness on behalf of the defendants, and was allowed to testify, against the objection of the plaintiff, that when he made his settlement with the board in January, 1867, instead of having in his hands the sum he reported and charged himself with at the time, he in fact had only $950 or $960. There is no controversy but that the sum of $3,571.97 is due the county from Otis, and the only question is whether the sureties on the second bond are liable for the whole deficiency.

On the part of the county it is claimed that under the circumstances the sureties on the second bond are liable for this entire amount; that as the law required the clerk to pay over to his successor in office all redemption money in his hands, and as he was his own successor, to whom he was to pay over, the sureties on the second bond became responsible for his receiving from himself the accumulated receipts of the former term and for his having in his possession the amount by him reported as in his hands, as well as for the faithful disbursement of that amount during his second term. The court below negatived this view of the liability of the sureties upon the second bond, in effect holding in the various instructions given the jury that the sureties upon that bond were only responsible for the amount of defalcation occurring during the term for which they became surety; that while the settlement made by Otis at the end of his first term showed that he was then owing the county the sum of $3,119.97, yet the sureties might reduce that amount by showing that Otis was a defaulter at that time and had appropriated and converted a portion of that sum to his own use, and that whatever sum he had thus

appropriated and converted should be subtracted from the amount for which they were sued. It appears to us that this was a correct statement of the principles of law applicable to the facts of the case. * * * The sureties on the second bond became liable for the faithful performance of the duties of the office by their principal for the second term, and that he would pay over all moneys remaining in his hands when the bond was executed, or which might come into his hands. So far the court below held them answerable, and a recovery has been had for a breach of that duty. If Otis had not the money in his hands which he reported January 7, 1867, it was because he had previously misapplied it in violation of his duty as clerk. And the question is: Shall the sureties on this bond be held liable for defaults which occurred in the former term? Or must the sureties in the different bonds be responsible for the misconduct and defalcation for each period for which they obligated themselves? It is a familiar principle 'that the obligation of a surety is a matter of strict law, and can never arise by implication. The bond must speak for itself, and its language can never be extended or altered to the injury of the surety.' * * * It would be a violation of this elementary principle to hold the sureties on the last bond liable for the defaults of the first as well as the second term." The judgment was affirmed. In other and later cases before the same court the law of this case has been adhered to.

The supreme court of Nevada decided the same point in the same way in *State v. Rhoades*, 6 Nev., 352. This was an action on the second bond of a deceased state treasurer, who had been elected his own successor. I quote from the syllabus: "On a trial against the sureties on the official bond of a state treasurer to recover for defalcation claimed to have taken place within the period covered by the instrument, it is competent for the defendant to show that the defalcation occurred previous to the giving of the bond,

and any testimony tending to support such defense is relevant and pertinent. Where, in an action against the sureties on the official bond of a state treasurer for defalcation, defendant's counsel asked a witness as to the condition of the treasury at a time previous to that covered by the bond, and upon objection, on the ground of irrelevancy, counsel stated that he proposed to show that the defalcation complained of took place before the bond was given, and that to show such fact it was necessary to show the condition of the treasury as asked, *Held*, That the exclusion of the question and proposed testimony was error."

The Iowa, Michigan, Missouri, New Jersey, and United States circuit court cases cited by counsel for plaintiffs in error, as well as the late case of *Thomas v. Blake*, 126 Mass. R., 320, and many cases in the supreme court of the United States; *Miller v. Stewart*, 9 Wheat., 680; *Farrar v. U. S.*, 5 Pet., 373; *U. S. v. Boyd*, 15 Pet., 187; *U. S. v. Linn*, 1 How., 104; and *Bruce v. U. S.*, 17 How., 437, all hold the same way.

I close the citation of authorities by quoting from a recent text-book: "The general rule, that the liability of a surety is measured by the terms of his contract, applies in its full force to contracts of suretyship entered into in the form of official bonds. It is a clear proposition on principle and authority that the sureties on the bond of a public officer, are liable only for defaults committed by him after the commencement of the term of office for which they become his sureties, and that if it should so happen that the same individual had previously held the same office under a prior appointment, and had committed defaults during the term of that appointment, those who were his sureties on such prior appointment must be looked to for such defaults, and not those who signed his bond on his re-appointment. Their engagement is for his future, and not his past conduct; and it would be a gross imposition upon them, in the absence of a special stipulation to that

effect, to impart into their undertaking responsibility for prior delinquencies. Baylees on Sureties and Guarantors, p. 150, sec. 9.

In the case at bar, the date of Van Sickel's defalcation is the central fact upon which the liability of the plaintiffs in error turns. Why could it not be proved the same as any other fact? Under the law as it now stands here, and in all the code states, no witness is excluded on account of his interest in the result of the trial. But were this not so, Van Sickel had no legal interest in the result. He had suffered default, and in any event judgment must go against him. He had not been convicted, or even indicted, so far as we know, for the embezzlement of this money. There was then no legal objection to the testimony, or to the person offered as a witness.

I therefore reach the conclusion that in giving the instruction set out at the commencement of this opinion and others of like tenor, as well as in refusing to give instruction No. 1, as prayed by counsel for plaintiffs in error; also, in refusing to allow plaintiffs in error to prove, on the trial, that the defalcation of Van Sickel, for which they were sued, was committed within a prior term, and before they became his sureties, the district court erred.

There are other and technical reasons why the said judgment cannot stand. The principal defendant, Van Sickel, made default; his default was entered, but no judgment is rendered against him. In any event, the sureties have a right to insist that judgment shall go against their principal, if living, as soon as it goes against them.

Again, Lewis H. Cramer and Charles Yoder seem to have been dropped out of the case without any explanation, probably by mistake of the clerk of the district court, and a general jndgment is rendered against George Meisner as administrator of Casper Meisner, deceased.

The judgment of the district court is reversed. and the

cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

BONORDEN & RANCK, APPELLANTS, V. JOSEPH KRIZ AND OTHERS, APPELLEES.

Constitutional Law: TITLE OF ACT. Under the title of an act "To exempt homesteads from judicial sale," it is competent for the legislature to provide that "a conveyance or incumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument," and a mortgage upon the homestead signed by the husband alone is void.

APPEAL from the district court of Dodge county. Heard below before POST, J.

W. H. Munger, for appellants, cited *B. & M. R. R. v. Saunders County*, 9 Neb., 511. *State, ex rel. Jones, v. Lancaster County*, 6 Neb., 485. *Gee v. Moore*, 14 Cal., 473. *Smith v. Provin*, 4 Allen, 516. *Doyle v. Coburn*, 6 Allen, 71. *McDonald v. Crandall*, 43 Ill., 231. *Hewitt v. Templeton*, 48 Ill., 369.

J. E. Frick, *G. L. Loomis* and *E. F. Gray*, for appellees, cited *inter alia* Dillon on Mun. Corp., sec. 18. *People v. Mahaney*, 13 Mich., 494. Cooley Const., Lim., 144. *Pleuler v. The State*, 11 Neb., 547. *Haight v. Houle*, 19 Wis., 472. *McCabe v. Mazzuchelli*, 13 Wis.. 534. *Phelps v. Rooney*, 9 Wis., 70. *White v. Clarke*, 36 Ill., 288. *Leiz v. Diabler*, 12 Cal., 327. *Higby v. Willard*, 45 Iowa, 586.

MAXWELL, J.

This is an action to foreclose a mortgage on real estate.

The mortgage was executed on the eighth day of October, 1877, by F. J. Kriz to Joseph Kriz, and by him assigned to the plaintiffs after maturity. F. J. Kriz died in January, 1878. Minnie Kerkow in her answer states that at the time the mortgage in question was executed she was the wife of F. J. Kriz, and that the premises so mortgaged were at the time occupied by her husband and herself as a homestead, and that the same was of less value than $2,000 and that the mortgage was not signed by her. She also alleges that the mortgage was given without consideration. The reply denies that the premises were a homestead, but that objection seems to be abandoned. The court below found in favor of the defendants and dismissed the action. The plaintiffs appeal to this court.

The question to be determined turns upon the construction given to section 3 of "An act to exempt homestead from judicial sale," approved February 19th, 1877, which reads as follows: "A conveyance or encumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument."

The attorney for the plaintiffs contends that this section is unconstitutional because its provisions are not within the title of the act, and therefore contravene sec. 11, art. 3 of the constitution, which provides that: "No bill shall contain more than one subject, which shall be clearly expressed in its title." The authorities cited to sustain this position are *The State, ex rel. Jones, v. Lancaster County*, 6 Neb., 485, and the *B. & M. R. R. Co. v. Saunders Co.*, 9 Id., 511.

In the case cited from 6 Neb. the title of the act was, "An act to provide for township organization." Under this title the act provided for county organization and defined its corporate powers, and provided for the election of county officers, defined their duties and fixed the terms of office. It was held that the act was void.

In the case of the *B. & M. R. R. Co. v. Saunders Co.*,

9 Neb., 505, the title of the act was, "An act to amend an act to provide for the registration of precinct or township or school district bonds." The court say (page 511): "The title to the act in question is very restrictive, much more so than necessary; but the legislature, having thus set bounds for themselves, they could not lawfully overstep them. No one will for a moment contend that the raising of money by taxation to meet a bonded indebtedness has the least necessary connection with the subject of bond registration. Doubtless a title might have been framed of so broad a scope as to have included both of these matters as means for securing a desired result. Here, however, we have registration of certain bonds as the ulterior—in fact the only expressed—object to be accomplished. Now, while registration might very properly be made a step in providing for the payment of bonds, it is very clear that taxation cannot possibly be a step toward nor incident to their registration."

The title was held to be too restrictive to authorize the levying of a tax for the payment of school district bonds. We adhere to those decisions because the objects sought to be accomplished in each case were entirely beyond the scope of the title of the act.

The attorney for the plaintiffs has made a very plausible and ingenious argument in support of the proposition that the third section of the act of 1877 is not within the title of the act. In the case of *Barton v. Drake*, 21 Minn, 299, the same objection was made. The court say (page 303): "The second section of the homestead act (Gen. Stat., ch. 68): provides that any mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same," etc. It is objected that this section is not germane to the subject of the act, which is, to provide for the exemption of a homestead from seizure and sale on execution or other process; and that in respect to this section the act is repugnant to sec.

27, art. 4 of the constitution, which provides that: "No law shall embrace more than one subject, which shall be expressed in its title." But chap. 68, Gen. Stat., is identical with the law of 1858 before referred to, except that the original act contained additional provisions relating to the exemption of personal property, and in *Tuttle v. Strout*, 7 Minn., 465, the act of 1858 was held to be not open to objection on this ground.

Under the title to exempt the homestead, the legislature may make any provision in relation to protecting such homestead that it sees fit. And so long as such legislation is confined to exempting the homestead from forced sale, whether upon execution or upon a mortgage declared to be void by the statute, it can make no difference. It certainly is just as important that the wife should be protected from a mortgage executed by the husband alone, as that she should be permitted to claim the exemption in case of failure of her husband to do so. The law proceeds upon the theory that both husband and wife are entitled to the benefit of the homestead act, and this right cannot be waived except by the consent of both. The law therefore requires the assent of both to a conveyance or incumbrance of the homestead. In our opinion, sec. 3 is not in conflict with the constitution. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

CLAUDIUS JONES, A TAX-PAYER, SUING IN BEHALF OF HIMSELF AND ALL OTHERS IN LIKE SITUATION, APPELLEE, v. GEORGE F. HURLBURT, LEVI D. BATES, GEORGE C. MCKAY, COUNTY COMMISSIONERS OF SEWARD COUNTY, THE LINCOLN & NORTHWESTERN RAILROAD COMPANY AND OTHERS, APPELLANTS.

1. **Internal Improvements:** DONATIONS OF COUNTY. In this case, *Held*, That in ascertaining the amount of donations already made by a county, including its subdivisions, to railroads or other works of internal improvement, for the purpose of seeing whether another proposed donation aggregated with those already made would be within the statutory and constitutional limit of ten per cent of the assessed valuation of the county, unpaid interest due on such previous donations should not be considered.

2. ——: ——: PROPOSITION FOR SUBMISSION OF QUESTION TO VOTE. The proposition submitted to the legal voters of Seward county for the issuance and donation of $36,000 of its bonds to aid in the construction of the railroad therein named, contained the following provision: "*Provided* said county commissioners shall be authorized by a two-thirds vote of the legal voters of said county of Seward to issue and give thirty-six thousand dollars of Seward county bonds to aid the construction of said line of railroad, and be also authorized by a two-thirds vote of the legal voters of the precincts through which said line of railroad shall be located, to issue and give thirty-nine thousand dollars to aid the construction of said line of railroad, which amount of precinct bonds shall be made up as follows: 'P' precinct, three thousand dollars," etc. *Held*, To vitiate the election, and the issuance and delivery of the bonds voted thereon enjoined.

3. ——: ——: ——. Proposition to several precincts of S. county in the following form: "Shall the county commissioners of the said county of S. be authorized to issue and give to the Lincoln & Northwestern Railroad Company, or the Blue Valley Railroad Company, six thousand dollars of the bonds of said C precinct, * * * said bonds to be issued and delivered to either of said railroad companies upon the following conditions and none other: That said railroad companies, or either of them, shall construct a line of railroad from

some point on the east or south line of S. county, running thence west or north through said S. county to a point on the valley of the Blue river within the distance of one-half mile of the town of M.; thence north-west along the Blue valley to the north line of S. county," etc. The election *held*, ineffectual to pass title to the bonds, and their delivery enjoined.

4. ———: ———: ———. The proposition submitted to the legal vôters of I. precinct was open to none of the above objections, and the company therein named constructed the road therein described, in strict conformity to the said proposition, which was carried by the requisite majority. But before the issuance of the bonds the members of the board of county commissioners, becoming apprehensive that they might be enjoined, but before any writ had been served or issued, and without knowledge or information on the part of any of them, or of the railroad company that an injunction had been allowed, went to an adjoining county, taking with them a deputy clerk and the county seal, where said bonds were signed by the chairman and the impress of the seal placed thereon. Upon said commissioners returning to S. county, and before the delivery of the bonds to the railroad company, an injunction was served on them. *Held*, That said I. precinct bonds should be delivered to the railroad company.

APPEAL by defendant, The Lincoln & Northwestern Railroad from a decree of the district court for Seward county, POST, J. presiding, enjoining the delivery of certain county and precinct bonds to said defendant.

O. P. Mason, for appellant.

A precinct can issue its bonds in excess of the limitation of ten per cent to which a county is restricted. *State v. Lancaster County*, 6 Neb., 214. This is settled, and where propositions are submitted to a vote of several precincts, and at the same time and on the same day a proposition is submitted to vote county aid for the same purpose, the precinct aid for which the propositions are submitted at that election should not be aggregated with the amount proposed to be voted by the county in fixing the limit of its capacity to vote at the same election. To hold otherwise would be

an unseemly thing. There is nothing in the constitution which prohibits the vote on the same day. The vote on the county proposition is entirely independent of the precinct propositions.

The propositions contemplated the building of a single line of road. But one road was to be constructed. The propositions are plain. They are not susceptible of two constructions. They are that one or the other of the companies named shall build a line of railroad to Milford, and thence to Seward, and from Seward northward through Seward county. If the Blue Valley Railroad built the contemplated line of road the same was to enter Seward county on the south line thereof, and run to Milford. If the Lincoln & Northwestern company built the contemplated line of road, it was to enter Seward on the east line of said county and run to Milford. From Milford the lines were identical, whichever company constructed the road. It is difficult to see how this proposition can be truthfully named a "a log-rolling scheme," a "fraudulent scheme," or alternative proposition.

J. R. Webster and *Norval Brothers*, for appellee.

Interest should be considered as part of the debt. 1 Jones on Mortgages, sec. 652. The county bonds are in excess because $39,000 of precinct bonds were voted at the same time, and these latter must be aggregated with the county proposition and its former indebtedness. The propositions carry vice on their face. 1. The grant is to one of two railroad companies, or in the alternative. *People v. Tazewell Co.*, 22 Ill., 147, 157. *McMillan v. Lee Co.*, 3 Iowa, 311, 318. *Lewis v. Com'rs*, 12 Kan., 186, 213. *Garragus v. Comr's Polk Co.*, 39 Ind., 66. *I. B. & W. Ry. Co. v. Fountain Co.*, 39 Ind., 215. *Bamberg v. Com'rs*, 41 Ind., 502. *Clark v. Supervisors*, 27 Ill., 310. *Supervisors v. M. & W. R. R. Co.*, 21 Ill., 373. *Gulf R. R.*

Co. v. Marshall Co., 12 Kan., 230. 2. The lines were different. *Marsh v. Fulton Co.*, 10 Wall., 676. *Monadnock R. R. Co. v. Peterborough*, 49 New Hamp., 281. 3. The county proposition contained the proviso making the obligation of the company to construct its road dependent on the popular assent to each precinct proposition, burdening each elector with the necessity to favor two propositions, instead of presenting each separately to his judgment. An elector might see reason to favor either alone or to reject either, but to reject the one was to reject both. 4. A provision unauthorized by statute was engrafted on the propositions. The propositions required the levy of a sinking fund from ten years after their issue, while the bonds were not subject to call until twenty years after their date. The accumulation of a great fund in the treasury for a long period before it is necessary is certainly inexpedient and improvident, and, being unauthorized by law, is vicious. The bonds were executed in violation of the injunction. No right can be obtained through or based upon such violation. It is immaterial that no personal service had yet been had on the defendants. If a party merely has notice of an injunction, though it has not been served on him, it is sufficient to require his obedience, and if he do not obey, the injured party is entitled to remedy for its breach. *Waffle v. Vanderhyden*, 8 Paige, 45. *Hammond v. Fulton*, 1 Paige, 197. *Ramstock v. Roth*, 18 Wis., 522. *Thebant v. Canora*, 11 Ala., 143. *Fowler v. Farnsworth*, 1 Swan (Tenn.), 1. *Cumberland, &c., v. Hoffman*, 39 Barb., 16. *Taylor v. Hopkins*, 40 Ill., 442. *Murdock's Case*, 2 Bland., 461. *In re Chilles*, 22 Wall., 157. High Injcs., 2d Ed., secs. 1422, 1461. No corporate act can be done by the board of county commissioners outside of their county, nor yet away from the county seat. *Merrick County v. Batty*, 10 Neb., 176. Dillon on Mun. Corp., sec. 197.

COBB, J.

Section 2, of article XII, of our state constitution, provides that no city, county, town, or precinct, municipality, or other subdivision of the state shall ever make donations to any railroad or other work of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof at an election by authority of law, with a proviso that such donations of a county, with the donations of such subdivisions in the aggregate, shall not exceed ten per cent of the assessed valuation of such county.

The first point made by the appellee to sustain the decree in this case is that the court found that at the date of the submission and vote upon the question of making the donations involved in this case, the county of Seward was indebted for bonds donated to the Midland Pacific Railroad, the sum of one hundred thousand dollars; for unpaid interest due on said bonds, twenty-nine thousand eight hundred and nineteen dollars, and that Seward precinct, now constituting G and F precincts, was indebted for bonds issued to the Midland Pacific Railroad twenty-five thousand dollars, and for unpaid interest due thereon, three thousand and eighty-one dollars, making an aggregate county and precinct debt of one hundred and fifty-seven thousand nine hundred dollars, and no money in the treasury. That the assessed valuation of the county was not to exceed one million six hundred twenty-nine thousand three hundred forty-four dollars. Ten per cent of this assessed valuation only, amounting to one hundred and sixty-two thousand nine hundred and thirty-four dollars and forty cents, left a margin of only five thousand thirty-four dollars and forty cents between the donations already made by said county and its subdivisions to railroads and the limit of ten per cent on the assessed valuation of said county. If this

proposition could be sustained, it would be conclusive of the case. But I do not think that the language of either the provision of the statute or of the constitution warrants us in taking into consideration the unpaid interest now due on the county or precinct bonds in arriving at the amount of donations already made by the county and its subdivisions to railroads and other works of internal improvement. If the county had had the money on hand there can be but little doubt but she could have donated it, instead of her bonds, to the Midland Pacific Railroad, in which case the promoters of that work would have had the use of the money, and of course returned no interest to Seward county. She did not have the money, so she agreed to pay interest for a term of years for the use of money to donate to that promising work, and finally to pay the principal. She did not donate the interest in any sense. Nor do I think that the district court, by its general finding, could have intended to embrace that proposition. Therefore in arriving at the sum which the county had already donated to railroads or other works of internal improvement in order to see what sum she might still donate to such purposes, we must reject the items of unpaid interest. And the question whether the county had or had not money on hand to pay such interest is irrelevant. But the county had donated one hundred thousand dollars, and one subdivision thereof, to-wit, Seward precinct, now precincts F and G, had donated twenty-five thousand dollars, making "such donation of a county, with the donations of such subdivision, in the aggregate" amounting to one hundred and twenty-five thousand dollars, while upon the assessed valuation of the county, such donations under the constitutional and statutory limitation might reach the amount of one hundred and sixty-two thousand nine hundred and thirty-four dollars. Thus leaving a margin of thirty-seven thousand nine hundred and thirty-four dollars. So we see that the constitutional limitation was not exceeded

by the voting of an additional county donation of thirty-six thousand dollars, there still remaining after that was voted a margin of nearly two thousand dollars.

In the case of the *State, ex rel. A. & N. R. R., v. County Commissioners of Lancaster County*, 6 Neb., 214, this court held (I quote from the syllabus): "The limitation in section two, art. XII of the constitution, prohibiting counties, except on a two-thirds vote, from issuing its bonds in excess of ten per cent of the valuation, does not prohibit a precinct from issuing its bonds in addition to the amount which may be issued by a county."

While as an individual member I am inclined to doubt the correctness of that decision, I know of no disposition on the part of the majority of the court to reconsider it. So for the purposes of this case it must be considered as the law of this court.

The appellee makes the further point against the county bonds that they are in excess of the limitation, for the reason that at the same time of the submission of the question of the county indebtedness there were also submitted questions of precinct indebtedness amounting in the aggregate to thirty-nine thousand dollars. Without questioning the premises of counsel, that the bond is not the indebtedness but is only the evidence of it in negotiable form, that the obligation accrues at the date of the popular assent, I do not think that it leads to the conclusion which he seeks to establish, but the contrary. The argument says, were it not for these precinct bonds the county bonds might lawfully be voted. But there are no precinct bonds, nor obligation to issue or pay them, until the very moment of time when, by reason of the same vote, the obligation to issue and pay the county bonds becomes perfect. Can it be said that that which has no existence can stand in the way and prevent that which were otherwise lawful?

The proposition to make the donation of the county bonds, as submitted to the voters of Seward county, con-

tains at least four distinct conditions, but one of which, however, it is deemed important to notice. It is in the following words: "Provided said county commissioners shall be authorized * * * and also be authorized by a two-thirds vote of the legal voters of the precinct through which said line of railroad shall be located to issue and give thirty-nine thousand dollars of precinct bonds to aid the construction of said line of railroad, which amount of precinct bonds shall be made up as follows: P precinct, three thousand dollars; I precinct, three thousand dollars; O precinct, twelve thousand dollars; J precinct, five thousand dollars; G precinct, ten thousand dollars, and C precinct, six thousand dollars * * * "

It is doubtful whether any other thing may be attached as a condition precedent to the taking effect of a vote of the people upon a proposition which by positive law is made dependent upon such vote alone. But possibly by analogy to the law which requires a person elected to a public office to take an oath and give a bond before entering upon the duties of such office, it may be that a condition, such as the construction of the whole or a part of a certain work of internal improvement, or possibly the giving of a bond with security for such construction, may be attached to a proposition to vote a donation to such work. But I do not think that a condition such as the result of a vote on another and distinct proposition submitted to the same or another constituency can be properly attached to any such proposition. It may be objected to this view that in such case the condition would be rejected and not the proposition to which it had been improperly attached. This objection would be good if the condition affected the proposition alone. But, on the contrary, its mischief goes to the vote itself, and is designed so to do. When a proposition is submitted to a vote of the people, free of all conditions and combinations, the voter may take his choice without embarrassment between the affirmative and the negative. But such may

not be the case when the question is enveloped by conditions and qualifications. There are voters who would resist the persuasions and personal magnetism of interested parties, if they knew that the result of an affirmative vote would take money out of their pockets, in the form of taxes, who would otherwise yield, depending for their protection upon some condition which has been artfully spread before their credulous eyes. It is a cheapening and belittling of the elective franchise to make the carrying out of the will of the people, as solemnly expressed at an election, depend upon the vote of another people upon another and different question. I therefore, and upon the above considerations, reach the conclusion that the proposition to donate the bonds of Seward county was insufficient, by reason of the above quoted condition or proviso, to sustain the vote for such donation.

We now reach the question which seems to be chiefly relied upon by the appellee as showing an inherent insufficiency in the propositions. The propositions all of them, except that to the voters of I precinct, contain the following language: "Shall the county commissioners of the county of Seward be authorized to issue and give to the Lincoln & Northwestern Railroad Company, or the Blue Valley Railroad Company," etc., and again, "Said bonds to be issued and delivered to either of said railroad companies upon the following conditions and none other: that said railroad companies, or either of them, shall construct a line of railroad from some point on the east or south line of Seward county, running thence west or north to a point on the valley of the Blue river, within the distance of one-half mile of the town of Milford; thence north-west along the Blue valley to the north line of Seward county," etc.

This proposition speaks of two separate companies, one of which is to be the recipient of this donation, upon its constructing one of two distinct lines of railroad.

Upon this point we are cited to eleven cases—three of Illinois, three of Indiana, two of Kansas, one of Iowa, one of New Hampshire, and one of the supreme court of the United States. These cases, nearly or quite all of them, arose out of transactions in which two or more railroad companies, in most of the cases, constructing lines of railroad crossing each other, entered into a pool, and caused propositions to be presented to the voters to donate so much to one and so much to the other, both to be carried as an indivisible proposition. These have been not inaptly called "log-rolling schemes," and the decisions have been uniformly against their legality. While it must be readily seen that the principle involved in these cases is not exactly applicable to the case at bar, yet some of them are not entirely without value in considering it, for the purpose of illustration.

In the case of *Monadnock Railroad v. Peterborough* and *Peterborough Railroad v. Peterborough*, 49 N. H., 281, it seems, in March, 1867, the town of Peterborough voted a gratuity of five per cent of its valuation, and appropriated the same to aid in the construction of "a railroad from the Manchester & North Weare Railroad at or near Parker's Station, through Peterborough Center village to the Cheshire railroad at or near State Line Station. Nothing was done under this vote, and it would appear that the railroad to which this gratuity was thus appropriated had been abandoned in the two years following 1867; for in March, 1869, an article was inserted in the warrant to see if the town will vote to appropriate the gratuity of five per cent of its valuation (raised by a vote at the annual meeting in March, 1867), upon the same conditions and limitations, specified in said vote as a gift or gratuity to any railroad corporation that will construct a road to or through Peterborough Center village, and will authorize and instruct the town railroad committee to elect for the town to what railroad corporation, and in aid to the con-

struction of what line of railroad said gratuity shall be given and applied. * * * At the town meeting, the above article was adopted. * * * The town committee soon met, and voted to appropriate said gratuity to the Monadnock Railroad, notified said road of that fact, which accepted the same and commenced negotiations to contract the building of their road. June 11th, said committee, or a majority of them, had another meeting and reconsidered their former vote, and notified the officers of the Monadnock road of such reconsideration; and August 7th said committee, or a majority of the same, voted to appropriate this gratuity to the Peterborough Railroad Company, which company soon after accepted the same, and both companies have given sufficient guarantees that they will perform on their part the conditions required by the vote of the town. * * * Both the Monadnock and the Peterborough railroads claim this gratuity, and have each brought a suit to recover it, and the town resists both suits. * * * Can the town delegate this power of appropriating the money to a particular road to any committee?

The town could not raise the money by a committee; that must be done by the voters present, and voting at the town meeting. How must it be appropriated? The law provides that 'any city or town may, *at a legal meeting*, duly notified and holden, * * * *raise by tax or loan* such sums of money, * * * *and may appropriate the same* to aid in the construction of any railroad, * * * *in such manner as they shall deem proper; Provided*, that two-thirds of the legal voters present and voting at such meeting shall vote therefor.'"

Finally the court say: "We think the vote of the town should designate the particular road to aid which the money is appropriated. There are many considerations of public policy that would bear upon this question. If there were rival routes, as in this case, the friends of one would

naturally oppose the other; but if through the interest of the railroads the town had got a railroad committee already appointed that was understood to be very evenly divided between these two or more rival routes, the friends of all these routes would likely be united in voting to refer the matter of electing the road to that committee (each trusting to his influence with the members of the committee), and thus carry a two-thirds vote for that measure, when if either route was brought directly and specifically before the town at its legal meeting, the required vote of two-thirds could not be obtained in its favor. * * * We think the town can no more appropriate this money by a committee than they could raise it by the same committee; that the electing which of two or more roads should receive this gratuity would be, in fact, appropriating it, and that this can only be done, as the statute has provided, at the legal meetings of the town, and by the legal voters present and voting at such meetings." The judgment was for the defense in both cases.

The language of our constitution is: "No city, county, town, precinct, municipality, or other subdivision of the state, shall ever make donations to any railroad or other works of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof at an election by authority of law." There cannot be a donation without a donee, and there can be no doubt of this proposition, that a grant to two persons or corporations in the alternative is insufficient to pass title in the thing granted unless there is power somewhere to elect between such two persons or corporations as to which shall receive it. Here is a donation, in terms, to "the Lincoln and Northwestern railroad company, or the Blue Valley and Northwestern railroad company." Who has the power to choose between these two corporations? Certainly not the county commissioners, for, as in the New Hampshire case, the voters of the precinct could no more delegate this

power to the county commissioners than they could the power to make the donation in the first instance. Indeed, in the case at bar there is no claim that power to designate which one of these corporations shall be the recipient of this donation has been delegated to or lodged in any one. The voters certainly have not designated who shall be the donee of their bounty. And hence the conclusion is irresistible that the grant remains imperfect and abortive for the want of a specific and certain grantee.

It may be said that under the language of our constitution, as well as of our statute, it is not the corporation that is the donee of city, county, precinct, or municipal aid, but the work itself. But if we look into these propositions we will find that all of them, except that to "I" precinct, designate the work to be performed as a condition precedent to the delivery of said bonds, as one of two separate and distinct roads, in the alternative. So that the same difficulty follows us to whatever point of view we may turn.

The proposition submitted to the voters of "I" precinct was free from either of the objections found or urged against the others, and as we have seen, neither the county bonds nor those of either of the other precincts can be sustained, it cannot be claimed that the county donation to the Midland Pacific railroad, the precinct donation to the same road aggregated, with the three thousand dollars voted to the Lincoln and Northwestern railroad company by "I" precinct, exceeds the constitutional limitation of ten per cent of the assessed valuation. It appears from the record of the proceedings of the county commissioners, at their meeting of June 9, 1879, that the vote on said proposition to issue the bonds of "I" precinct in aid of the construction of the Lincoln and Northwestern railroad was duly canvassed by the county clerk and two disinterested freeholders by him chosen for that purpose, and that said proposition was by such canvass declared carried by a vote of 54 yeas to 17 nays. It also appears from the stipulation

of facts signed by counsel for the respective parties that the line of railway from the east line of Seward county, by way of Milford and Seward, to the north line of Seward county, was constructed by the Lincoln and Northwestern railroad company, defendant, on the line proposed in said proposition for special election submitted to the electors of I precinct, and that such line was constructed in all respects as required by said proposition as a first-class western railroad, and within the time by said proposition conditioned and required, and such line so constructed has been by said company and its lessee ever since maintained and operated as by said proposition required. It therefore seems to be conclusively shown that precinct bonds to the amount of three thousand dollars were lawfully voted and donated by I precinct to the Lincoln and Northwestern railroad company, and that said company has earned the same by a strict compliance with all the terms and conditions upon its part to be performed according to the proposition and vote.

This brings us to the consideration of the last point made by counsel for appellee, which I understand to be that although all the preceding points as to any or the whole of said bonds be found in favor of their legality, yet, as the bonds were executed in violation of the injunction, that the decree of the district court perpetually enjoining the same and directing that they be canceled and destroyed should be affirmed. Counsel say in their brief: "So that, as we insist, even were the appellant entitled to this amount of bonds, or a portion of these subsidies, it could not on appeal in this case obtain *these* bonds so issued. These bonds, issued in violation of the process of the courts, must be canceled and the parties left to seek their remedies as if these bonds had not been signed, and these bonds, fraudulently signed and executed, must be destroyed." There is no doubt upon the authorities cited, and others, that when a party has actual notice that a writ

of injunction has been issued against him, or ordered to be issued, either in writing by an officer authorized to order its issuance or orally by a judge on the bench, he is as much bound to obey its commands as he is after the writ has been actually served on him. But this is as far as any of the cases go. The evidence is to the effect that the county commissioners, or some of them, and Mr. Galey "expected to have an injunction" according to the witness Sperk's testimony, according to that of Squire McCay "as I understood the object, there had been an injunction served on them, or they stated they expected one." Whatever may be said of the spectacle of a board of county commissioners with a deputy clerk and the county seal levanting to a neighboring county for the purpose of discharging official business—and we do not think that such conduct on the part of any of the actors in it has been or is likely to be too severely condemned—yet it neither amounted to a contempt of court nor the violation of an injunction of which none of the parties had knowledge or information as to its issuance or allowance.

The alleged infirmity in these I precinct bonds, then, is reduced to this, that they were in fact signed by the chairman and impressed with the county seal at a place outside of Seward county.

The case of *Town of Weyauwega v. Ayling*, 99 U. S. Supreme Court, 112, seems to be somewhat in point. That was an action at law wherein the holder of unpaid coupons, for interest due on certain bonds issued by said town to aid the construction of the Wisconsin Central Railroad, recovered a judgment thereon, and the town took the case to the supreme court on error. The chief justice delivered the opinion of the court, in which he says: " * * The legal voters of the town, by a vote duly taken pursuant to authority for that purpose, directed the issue of the negotiable bonds in controversy. As soon as this vote was given, it became the duty of the chairman of the board of super-

visors, and the clerk of the town, to cause the bonds to be made out and delivered to the railroad company. Such was the requirement of the statute under which the vote of the town was taken. The designated officers had no discretion in the premises. After the vote an appropriate form of bond and coupons was lithographed and printed, with blanks in the bond for the signatures of the chairman and clerk. As printed, the bonds bore date June 1, 1871. At that time Fenelon was chairman and Verke clerk. The signatures of these officers were lithographed and printed on the coupons. Before the bonds were actually signed by Verke he had resigned his office and moved out of the town. Another clerk had been appointed and qualified in his place. Apparently to save the expense of a new lithograph and another printing of the bonds, Verke, after going out of office, affixed his signature to those bonds which had been printed. These bonds, so signed by Verke and by Fenelon, who actually was chairman at the time, were taken by Fenelon and delivered to the railroad company. This having been done, Ayling, the defendant in error, purchased the bonds, to which the coupons sued on were attached, and paid their full value, without notice of any claim of defence to their due execution. Under these circumstances we think the town is estopped from proving that Verke in fact signed the bonds after he went out of office. If Ayling had put himself upon enquiry when he made his purchase he would have found, 1, that the town had authority to vote the bonds; 2, that the necessary vote had been given; 3, that at the date of the bonds Verke was clerk and Fenelon chairman; 4, that their signatures were genuine; and 5, that the bonds had actually been delivered to the railroad company by Fenelon who was at that time chairman * * * There is no pretence that the obligation of these bonds is other or different from that authorized by the voters. So far as the record shows, the town has received and retains the consideration for which

they were voted * * * " The judgment was affirmed.

The above authority is quoted for the purpose of showing that it is not deemed of importance when or where the mere mechanical work of preparing the bonds for delivery, in accordance with a vote taken pursuant to law, is performed. Here was an action at law on a coupon, the signatures to which were produced by a mechanical contrivance, out of the town, and out of the state in which the town is situated. And the bond itself, which gave vitality to the coupon, was signed by the town clerk outside of the town whose bond it was, and more than forty days after he had gone out of office. Yet none of these objections were deemed of any importance. The only two important points were declared to be, that the bonds had been voted at a legal election under competent authority on a fair proposition legally submitted, and bonds of the kind, denomination, and character voted had been delivered by the competent authority to the corporation to which they were voted.

If I am not wrong in the above conclusion, then it would appear both idle and wasteful to cancel or destroy the I precinct bonds, because upon their cremation it would immediately become the duty of the board of county commissioners of Seward county to prepare others the exact counterpart of them and deliver them to the Lincoln & Northwestern Railroad Company. Courts of equity look to the substance rather than to the form. They will not follow a circuitous path when the desired point may be reached by a straight road.

It is a well-known rule that a court of equity, having obtained jurisdiction of a cause for the purpose of an accounting, will retain it for the purpose of rendering full and entire justice between the parties, etc. I think that it is within the spirit of our code to apply this rule to all cases of equity jurisdiction. It tends to prevent a mul-

tiplicity of actions, to a saving of unnecessary costs, and to more speedy justice.

The decree of the district court is therefore affirmed, except that in so far as the same in any manner relates to the bonds voted by I precinct, of said county of Seward, the said decree is modified so that it shall be the duty of the clerk of the district court of Seward county to forthwith deliver the said three thousand dollars in bonds voted by said I precinct to the board of county commissioners of Seward county. And immediately upon the receipt of said bonds by said board, it shall be the duty of said board and of the chairman thereof to deliver the said bonds to the defendant, the Lincoln & Northwestern Railroad Company.

And the said decree is further modified in this, that defendant shall pay six-sevenths of the costs of said action as well in this court as in the court below, and the plaintiff shall pay one-seventh of all such costs.

DECREE ACCORDINGLY.

ELIZA PETTIT ET AL., PLAINTIFFS IN ERROR, v. ROBERT W. BLACK, DEFENDANT IN ERROR.

1. **Will:** EVIDENCE OF TITLE. A will is not admissible as evidence of title to real estate, unless it has been admitted to probate; but in case of open, exclusive, adverse possession for more than ten years, it may be sufficient as a claim of right under the statute.

2. **Forcible Entry and Detention:** JURISDICTION. In an action of forcible entry and detention the mere filing by the defendants of an answer claiming title to the premises will not deprive a justice of the peace or county judge of jurisdiction; but if it should appear from the evidence that the question involved was one of title and not for possession of the premises, the case must be dismissed.

3. **Exceptions.** Unless exceptions have been taken in the trial court to the admission or refusal to admit testimony, no error can be predicated thereon.

4. **Evidence** examined and held to sustain the judgment.

ERROR to the district court for Cass county, where the cause was heard before POUND, J. The facts appear in the opinion.

C. A. Baldwin, for plaintiffs in error.

The rights of Mrs. Pettit to the land were not determined in the case of *Pettit v. Black*, 8 Neb., 52. She was not a party, and is not bound. *Brown v. Wyncoop*, 2 Blackf., 230. *Lenox v. Netrobe*, Hump., 251. *Ex parte Howard*, 9 Wall., 175. Freeman on Judgments, sec. 171 *a*. The mortgages referred to do not in any manner affect this action. The land was not sold under the mortgages. A proceeding *in rem.* is against the thing itself. The case in 8 Neb., 52, was an action to quiet title. It was a proceeding *in personam.* It was not a suit against the land. The land was not even in default to the state of its taxes. Mrs. Pettit is not estopped. *Parker v. Barker*, 2 Met., 423.

George W. Covell and *Sam M. Chapman*, for defendant in error.

The adjudication was a proceeding *in rem.* The land was condemned to pay the claim of the state, or John Black, who was subrogated to all the rights of the state. It was a transaction between the court and the purchaser. *Hurt v. Stull*, 4 Md. Ch., 391. *Iglehart v. Anniger*, 1 Bland, 527. *Forman v. Hunt*, 3 Dana, 622. *Campbell v. Johnson*, 4 Dana, 186. Robert Black does not claim the title of the Pettits; he claims one paramount—the paramount right of the state to seize and dispose of the property in default of the owner, whoever he or she may

be. *More v. Schultz*, 13 Penn. State, 102. *Beauregard v. New Orleans*, 18 How., 502. Mrs. Pettit is estopped, and cannot call in question the title of Robert Black in a colatteral proceeding. *Gregg v. Wells*, 10 Ad. & E., 90. *Whitman v. Bolling*, 47 Ga., 125. *Basher v. Wolfe*, 59 Ill., 470. *Treadway v. The Sioux City & Pacific R. R.*, 39 Iowa, 663.

MAXWELL, J.

This is an action of forcible detention. It was brought in the county court of Cass county, and judgment rendered in favor of the defendant. The case was taken on error to the district court, where the judgment was affirmed. The plaintiffs bring the case into this court by petition in error. The errors assigned in the district court were the following:

1. The court had no jurisdiction to try and determine the case.

2. "The judgment was not according to law, but was in express and open violation of law.

3. "The court erred in the admission of certain testimony against the objection and exceptions made at the time by these plaintiffs.

4. "The court erred in refusing to admit certain evidence offered on the part of and in behalf of these plaintiffs.

5. "The judgment was against these plaintiffs, when by the law of the land it should have been for them and against said Black.

6. "There are many and manifest errors existing and appearing of record in said case."

The question to be determined in this court is, did the district court err in overruling these assignments of error?

This case grew out of that of *Pettit v. Black*, 8 Neb., 52. That was an action by H. H. Pettit, the husband of Eliza Pettit, and one of the plaintiffs in error in this case, to

have certain tax deeds to John Black declared invalid for various causes, which were set forth with great particularity in the petition, the principal ground being that the plaintiff, "during all of the years 1870, 1871, and 1872, the years in which the taxes for which the land was sold became delinquent, resided on said lands with his family, and owned and had in his possession on said real estate sufficient personal property out of which the said treasurer could have made said taxes by seizure and sale, but that said treasurer made no attempt or effort to collect said taxes out of said personal property." *Pettit v. Black*, 8 Neb., 57. Black, in his answer in that case, denied the ownership of Pettit in the real estate in question, and denied that Pettit had sufficient personal property out of which the taxes could have been collected by seizure and sale, and claimed that he (Black) was the owner of said premises by virtue of said tax deeds, but prayed the court to decree, in case the tax deeds were declared invalid, that he have a lien upon said land for the purchase money and interest, together with subsequent taxes paid on said land, and that the same be foreclosed. The district court found one-third of said real estate, and no more, belonged to H. H. Pettit, and entered a decree setting aside said tax deeds of Black as to one undivided third part of said premises, and no more. Both parties appealed to this court.

In that case there was testimony tending to show that Pettit was the owner of this land, and his wife was called by him as a witness, and testified that during a portion or all of the time that said taxes were due, her husband had sufficient personal property in Cass county out of which the county treasurer could have collected the taxes in question. Black objected in that action that Mrs. Pettit was not made a party. The court in considering that question say (page 59): "While she does not join in this action as a party plaintiff, she will be presumed to have acquiesced in the same as being brought for her benefit, as well as that

of her husband. The title of the plaintiff is good to the whole of said real estate, as against the defendant, and for the purposes of this action."

In that action it was not alleged or claimed that Mrs. Pettit had any personal property out of which the taxes could have been collected, and but for the fact that H. H. Pettit had personal property within the county from which the treasurer could have collected the taxes for which the land was sold, the tax deeds would have conveyed the title. The court, therefore, following the case of *Johnson v. Hahn*, 4 Neb., 139, finding from the evidence in the record that H. H. Pettit had such personal property, set the tax deeds aside and permitted the parties to redeem within six months by paying the purchase money and twelve per cent interest, the decree being entered in this court.

As the reason for the decree, the court say (pages 61–2): "As between John Black and the county of Cass, the case is different. The county was possessed of a lien upon the lands of Pettit for taxes; the county treasurer, acting in a capacity quite analogous to that of agent of the county, sold the lands to Black. Now while this sale was inoperative to pass even an inchoate title to the lands, together with the receipt and retention of the money from Black, it was sufficient as the foundation for the ratification by the county of the sale and transfer of its lien for these taxes to him. It will be presumed that the county treasurer paid the money received from Black into the county treasury, and that the county, having retained the same for several years, has ratified the acts of her officer in respect to the same. Black will therefore be subrogated to all the rights of the county in the premises." A mandate was sent from this court to the district court of Cass county to carry the decree into effect. The premises not being redeemed, a sale was had, and the premises sold to Robert W. Black. The sale was reported to the court and confirmed, and a deed ordered,

and the sheriff was ordered to put the purchaser in possession. A deed was duly made by the sheriff to the defendant, but as the plaintiffs herein refused to give possession this action was brought.

On the trial of the case in the county court, Black, to maintain the issues on his part, introduced in evidence the decree, as follows: "Upon consideration whereof, the court finds the title of all the lands described in the petition to be in plaintiff. That the advertisement, sale, and conveyance of said lands for taxes are null and void and of none effect; that the defendant is entitled to a lien for the amounts paid in the petition, together with interest thereon from the time the same severally became delinquent on the first day of May each year respectively, at the rate of twelve per cent per annum as follows, to-wit: For the year 1870, $29.60; for the year 1871, $28.79; for the year 1872, $28.53; for the year 1873, $21.77; for the year 1874, $39.31; for the year 1875, $62.92; for the year 1876, $25.82; for the year 1877, $38.98. It is therefore considered adjudged and decreed by the court that, in case said plaintiff fail for the period of six months from the date of this decree to pay into the hands of the clerk of this court the said several sums of money, with interest thereon as aforesaid, that an order issue commanding the sheriff of Cass county to appraise and sell the lands described in the petition, to-wit: The north-east quarter of section nine, town twelve, and also the south half of the south-east quarter of section four, town twelve, all in range thirteen, east of the sixth principal meridian, in manner provided by law for sale of real estate upon the foreclosure of a mortgage." Also, the journal entry in the same case in the district court of Cass county, from which it appears that the amount of taxes due May 1st, 1879, was $447.43. And that in case of the non-payment of said sum the district court directed an order of sale to issue on the seventh day of May, 1879, requiring the sheriff to appraise, advertise, and

sell said land as upon foreclosure of mortgage, etc. Black also introduced in evidence a journal entry of said court showing a confirmation of the sale, and an order to the sheriff to make a deed and put the purchaser in possession of the premises. Also, the sheriff's deed. The deed contains the following, among other recitals: "And, whereas, the said sheriff as aforesaid, under and by virtue of said order of sale did, on the eleventh day of August, A.D. 1879, at the south door of the court-house in said county of Cass, that being the place where the last term of the district court was held, having first summoned two disinterested freeholders, residents of said Cass county, and having administered to them an oath impartially to appraise said lands and tenements upon actual view thereof, and the said sheriff, together with the said freeholders, having made an appraisement in writing of said lands and tenements, and having first given due and legal notice of the time and place of said sale for not less than thirty days prior thereto in the Nebraska *Herald*, a newspaper printed in and in general circulation in said county of Cass, did sell the said lands and tenements at public auction to Robert W. Black, for the sum of fifteen hundred and eighty-five dollars, he being the highest bidder therefor, and said last mentioned sum being not less than two-thirds of the appraised value thereof, which sale was afterward, at the November term of said district court, A.D. 1879, examined and confirmed by the said court, and the said R. W. Hyers, sheriff of Cass county, ordered by the said court to make a deed of the said lands and tenements to the said Robert W. Black."

There were also certain orders of sale upon the foreclosure of mortgages in the hands of the sheriff which are not involved in this case, but will explain why more land than sufficient to satisfy the amount of taxes due was sold. Black also introduced other evidence tending to show his right to the possession of the land, and that the plaintiffs

in error kept him out of the possession. H. H. Pettit filed an answer disclaiming title. Eliza-Pettit filed the following answer:

"And now comes the said Eliza Pettit, one of the above named defendants, and says that she is now and ever since the year 1858 has been in the actual, open, and notorious possession of the premises in plaintiff's complaint filed herein. That she is now, and ever since the date last named above mentioned, has had the legal and equitable title to the undivided one-third of said premises; that her said title is of record in the records of said county; that her said title and interest are now in full force and operation, and she at no time has parted with her said interest and title, nor has the same been determined against her by the decision of any court; that her claim to said premises, and her said title to the same are now pending in the district court of this county in a suit wherein she is plaintiff, and Robert W. Black, this plaintiff, and others are defendants; that said suit was pending and commenced long before the commencement of this action. Wherefore she says this court has not jurisdiction to try and determine this matter, and she prays this suit be dismissed."

To sustain the answer the plaintiffs in error offered in evidence a copy of the will of A. J. Todd, dated January 7th, 1858. This instrument was indorsed as follows:

"In probate court this fourteenth July, 1858, came Charles H. Wolcot, and being sworn, says that the above writing is the will of A. J. Todd, and that he saw the said deceased write his name thereto. Therefore, this will by me approved as the will of A. J. Todd, of Cass county, N. T."

There is no signature to this indorsement, nor anything to show by whom it was written. The will was objected to on behalf of Black because it was not proven or admitted to probate, and no foundation was laid for its introduction, and there was no legal will. The objections were overruled, and the copy of the will admitted. H. H. Pettit

also testified that he married Eliza Todd in 1861, and had lived with her on the place since that time, and that no proceedings had been against her to recover possession of the premises.

There is also the following stipulation in the record: "It is hereby stipulated that the decree in proceedings in suit of *Rob. G. Doom v. H. H. Pettit and Eliza Pettit* in the district court during the year 18..., and the decree in foreclosure in favor of John Fitzgerald in the district court of Cass county, rendered in ..... 187.., at the ..... term of said district court, in which H. H. Pettit and Eliza Pettit were defendants, in which mortgage deeds in favor of said plaintiffs, R. G. Doom and John Fitzgerald, executed by said H. H. Pettit and Eliza Pettit, were foreclosed, upon the real estate in controversy in this suit, were subsisting liens upon said real estate, for the possession of which this action is brought, and that orders of sale were issued upon said decrees, and were in the hands of the sheriff of Cass county at the date of the sale of said premises to plaintiff, Robert Black."

Sec. 143 of chap. 17 of the General Statutes provides that: "No will shall be effectual to pass either real or personal estate unless it shall have been duly proved and allowed in the probate court, as provided in this chapter, or on appeal in the district court, and the probate of the will of real or personal estate as above mentioned shall be conclusive as to its due execution."

Sec. 160 provides that: "Every will, when proved as provided in this subdivision, shall have a certificate of such proof indorsed thereon or annexed thereto, signed by the judge of probate and attested by his seal; and every will so certified, and the record thereof or a transcript of such record, certified by the judge of probate and attested by his seal, may be read in evidence in all courts within this state without further proof."

Sec. 161 provides that: "An attested copy of every will

devising lands, or any interest in lands, and of the probate thereof, shall be recorded in the registry of deeds of the county in which the lands thereby devised are situated."

The county court having admitted a copy of the purported will in evidence over Black's objection, and as he is not here complaining, the case will stand precisely as though the loss of the original had been proved and the copy rightfully admitted in evidence. But the copy can have no greater force than the original as evidence of title under our statute, where it had not been admitted to probate.

Probate of a will is defined to be: "The proof before an officer authorized by law that an instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be." 2 Bouv. Law Dict., 378. In other words, probate is proving the instrument purporting to be a will to have been signed by the testator in the presence of at least two witnesses, who at his request signed the same as witnesses; and that the testator, at the time of the execution thereof, was of sound mind. The statute provides that notice of the time of proving the will shall be given to all persons interested in the estate, and thus an opportunity given to all persons interested therein to appear and contest the same.

Sec. 141 of the chapter entitled "decedents" provides that: "If no person shall appear to contest the probate of a will at the time appointed for that purpose, the court may, in its discretion, grant probate thereof on the testimony of one of the subscribing witnesses only, if such a witness shall testify that such will was executed in all particulars as required in this chapter, and that the testator was of sound mind at the time of the execution thereof."

Sec. 142 provides that: "If none of the subscribing witnesses shall reside in this state at the time appointed for proving the will, the court may, in its discretion, grant

probate thereof, admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will, and, as evidence of the execution of the will, may admit proof of the handwriting of the testator, and of the subscribing witnesses."

The statute has provided a special tribunal and conferred upon it original jurisdiction in the probate of wills, and has provided what proof, and the degree thereof, required to establish the validity of the execution of the instrument and the sanity of the testator, and has provided that upon this proof the probate court may admit a will to probate, and declares that "no will shall be effectual to pass either real or personal estate unless it shall have been duly proved and allowed in the probate court." Now, will an instrument which has not been proved, that bears upon its face no evidence whatever of validity, have the effect of a valid instrument duly proved? If so, the law relating to the probate of wills provides for a needless proceeding.

In *Rex v. Inh.*, 4 T. R., 258, Lord Kenyon said: "We cannot receive any other evidence of there being a will in this case than such as would be sufficient in all other cases where titles are derived under a will; and nothing but the probate or letters of administration, with the will annexed, are legal evidence of the will." This language was repeated and approved by the supreme court of the United States in *Armstrong v. Lear*, 12 Wheat., 175–6.

A will, therefore, which has not been admitted to probate is not evidence of title. The reason is, the statute has provided the mode of establishing the validity of the will and the court to determine the same, and until such court has declared it a valid will it is not evidence in favor of the party claiming under it. And these provisions are reasonable, as they provide the mode to establish the authenticity of the instrument and the sanity of the testator, and make the will a matter of public record.

But it is said that the will, if ineffectual to pass the title,

is still sufficient for a title by adverse possession. This is true if her possession has been of such a character as to constitute adverse possession. The only proof upon that point is that of H. H. Pettit, who testifies: "I lived with her on the place since 1861." To constitute adverse possession there must have been open, visible, notorious, exclusive, adverse possession of the premises for ten years before the commencement of the action. At the time of the marriage of the plaintiffs in error in 1861 the common law as to the rights of husband and wife prevailed in this state, except in a few particulars, of which this is not one. At common law, if the wife is seized of an estate in lands the husband, upon the marriage, becomes seized of the freehold *jure uxoris*, and he takes the rents and profits during their joint lives. And where the wife at the time of marriage has an estate for her life, or the life of another person, her husband becomes seized of such estate by right of his wife, and is entitled to the profits during marriage. 2 Kent Com., 134. And the husband upon marriage becomes possessed of the chattels real of the wife, as leases for years, and the law gives him power without her, to sell, assign, mortgage, or otherwise dispose of the same as he pleases by any act of his in his lifetime. Id. The common law continued in force until 1871, and until that time at least the possession of the wife was the possession of the husband. Here the adverse possession is sought to be set up against the husband; but there is a failure of proof upon that point. Neither does the answer of Eliza Pettit constitute a defense to this action.

The answer purports to set up three defenses: *First*, Adverse possession; *Second*, Record title; *Third*, Another action pending. It does not state an interest by adverse possession, because there are no allegations that the possession was adverse and exclusive. And the statement that she had the legal and equitable title to one undivided third part of the premises, as shown by the records, and that she

has not parted with her interest, nor has the same been determined against her by the decision of any court, is an evasion of the questions at issue. This answer, as shown by the record, was filed after Black had introduced his evidence of title and right of possession. This evidence consisted of the mandate of this court containing the decree for the sale of the land for the taxes due thereon, the proceedings in the district court of Cass county by which the sale was effected and confirmed and the deed ordered, and the deed itself, and all this testimony was admitted without objection. Now the land was sold to enforce the lien due for taxes thereon. This lien was not created by the parties, but by operation of law, and it extended to and included every portion of the real estate upon which it operated. The right of a party at most would be to redeem by paying or tendering the amount due, and thus releasing the land from the operation of the tax. It is a proceeding *in rem*, the recovery being limited to the land, and cannot be enforced against the person. Now, is it any answer to this state of facts to say that she has not parted with the title, or that there has been no adjudication against her? There is no denial of the jurisdiction of the court or of the conclusiveness of the judgment actually rendered, nor is any issue raised upon those questions. And the fact that an action is pending against Black is no defense unless it will defeat his right to the possession. The suit might, for aught that appears, be dismissed the next moment. But suppose the answer did state facts sufficient to show that Mrs. Pettit had an undivided third interest in the premises, would the mere filing of the answer oust the court of jurisdiction? Clearly not; because the answer is a mere statement of the facts which the party filing it expects to prove, but it is not evidence. If, however, on the trial it should appear that the action is not in fact for the recovery of the possession of the premises, but to determine a question of title, the court will have no authority to proceed,

and the case must be dismissed. In other words, where the question to be determined is one of title, it will oust the court of jurisdiction. But the court has authority to proceed with the hearing of the cause until this fact is clearly established.

In the case of *The People v. Nelson*, 13 John., 343, it is said: "Whatever must be proved (to enable the plaintiff to recover) may be disproved, and it follows naturally that though the defendant shall not justify the force by showing a title in himself derived from an independent source, or even from the relator himself, he may controvert the facts by which the relator attempts to make out his estate, and may show that he has not such estate as would enable him to maintain the prosecution." As there was no issue raised upon the title of Black to the land in question, the first assignment of error was not well taken.

The second assignment seems to be based on the first, and is untenable.

The third, fourth, and sixth assignments may be considered together. We find no exceptions taken on behalf of Mrs. Pettit to any of the evidence introduced. The question of error in the admission of evidence is therefore not before the court, and all the evidence offered on her behalf seems to have been admitted.

The fifth assignment is not well taken, as the judgment is sustained by the clear weight of the evidence.

In the discussion of the case we have examined only the rights derived from the sale under the decree for taxes. But it is very clear from the stipulation in the case that additional grounds exist for sustaining the title of Black. It is stipulated that the foreclosure records should be given in evidence, and that orders of sale upon the decrees of foreclosure against Pettit and wife were in the hands of the officer at the time he made the sale in question, and it appears that the court in confirming the sale made the fol-

lowing order: "The balance of the proceeds of said sale, to-wit: the sum of $975.43 over and above the amount applicable upon the claim and judgment of said John Black for taxes; and it appearing to the court that Robert G. Doom and John Fitzgerald are judgment creditors of said Henry H. Pettit, and now have valid and subsisting lien and judgment decrees in foreclosure remaining unsatisfied and in full force upon the records of this court against the identical lands and premises of said Henry H. Pettit, the proceeds of said sale of which are now here reported to the court, and that said sheriff of Cass county had at the date of said sale, and ever since, in his hands valid and lawful orders of sale or execution against the identical lands and premises sold, commanding him to sell said premises to satisfy the said decrees and judgments of said Robert G. Doom and John Fitzgerald, which are valid liens upon said premises," etc. No complaint is made to any of these liens, and being admitted in evidence by stipulation they were undoubtedly valid. Now being valid liens, and orders of sale being in the hands of the officer for their enforcement at the time of the sale, it was the duty of the officer to sell under the senior lien, and the proceeds would be applied in the order of priority. *Steele v. Hannah*, 8 Blackf., 326. *State v. Salyers*, 19 Ind., 432. *Bagby v. Reeves*, 20 Ala., 427. *Lawson v. Jordan*, 19 Ark., 297. *Thompson v. McCordel*, 27 Ga., 273. *Newton v. Nunnally*, 4 Ga., 356. And the order of the court making distribution of the proceeds of sale is a protection to the officer, and unless appealed from is final and conclusive upon the parties. *Noble v. Cope*, 50 Penn. St., 17–20.

Now, when Mrs. Pettit or her attorney stipulates that orders of sale upon the decrees in question to which she was a party were in the hands of the officer, and the record shows that $975.00 of the proceeds of the sale were applied upon those orders by the court, and no appeal is shown to have been taken from such order, it is certainly

conclusive in this collateral proceeding. A sale transfers the entire title to the purchaser. But it is unnecessary to enter into an examination of that question. If there are facts existing which do not appear in this record that would entitle Mrs. Petit to redeem a portion of this land, she has an adequate remedy by bill to redeem by paying or offering to pay the amount justly due. But it is clear that the purchaser is entitled to the possession of the premises, and that there is no error in the record. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

LAKE, CH. J., dissented from so much of this opinion as holds that Mrs. Pettit's rights were affected by the sale under the decree in favor of Black, she not being a party to it.

NEW ENGLAND MORTGAGE SECURITY CO., APPELLANT, v. HENRY HENDRICKSON ET AL., APPELLEES.

Usury. Where an agent entrusted with the money of his principal to loan exacts a bonus or commission from the borrower in addition to lawful interest the contract will be tainted with usury.

APPEAL from the district court for York county.

Hull & Stearns, for appellant.

Montgomery & Harlan, for appellees.

MAXWELL, J.

This is an action to foreclose a mortgage. It is alleged in the petition that on the twenty-fifth day of November, 1876, the defendant Hendrickson executed and delivered

to the plaintiff his promissory note for the sum or $250, due in five years, with interest from date at ten per cent per annum; and to secure the payment of the same executed a mortgage to the plaintiff on the west one-half of the south-west one-fourth of section eight, town eleven, range one, west of the sixth principal meridian. The prayer is for a decree of foreclosure and sale of the mortgaged premises. The answer admits the execution of the note and mortgage, but states that the plaintiff, through its agent, Frederick W. Liedtke, made the loan in question to the defendant, and actually loaned to the defendant only the sum of $200, and that he has paid thereon the sum of of $46.18. The case was referred to a referee, who found that the amount of money actually received by the defendant from the plaintiff was the sum of $189, which was the sole consideration for said note and mortgage, and that the defendant has paid thereon the sum of $46.18. The plaintiff filed a motion to set aside the report, which was overruled, and a decree of foreclosure and sale was rendered in its favor for the sum of $153.82. The plaintiff appeals to this court.

The question involved in this case is the liability of the principal for the acts of his agent in exacting usurious interest in making the loan.

Sec. 2 of ch. 28 of the Revised Statutes of 1866, which was in force at the time this loan was effected, provided that: "Interest upon the loan or forbearance of money, goods, or things in action, shall be at the rate of ten dollars per year upon one hundred dollars, unless a greater rate, not exceeding twelve per cent per annum, be contracted for by the parties."

The question to be determined is, is a principal who insists upon the validity of a contract made for him by an agent bound by the acts of this agent in making the contract? As a general rule the adoption of the agency in part adopts as a whole, because the principal is not per-

mitted to accept and confirm so much of a contract made by one purporting to be his agent, as he shall think beneficial to him, and reject the remainder. 1 Parsons on Contr., 5th Ed., 51–2. *Wilson v. Poulter*, 2 Strange, 859. *Smith v. Hodson*, 4 T. R., 211. *Hovil v. Pack*, 7 East., 164. *Brewer v. Sparrow*, 7 B. & C., 310. *Wright v. Crookes*, 1 Scott, N. R., 685. *Hovey v. Blanchard*, 13 N. H., 145. *Farmers' Loan Co. v. Walworth*, 1 Comst., 447 *N. E. Marine Ins. Co. v. De Wolf*, 8 Pick., 56. *Culver v. Ashley*, 18 Id., 300. *Bigelow v. Denison*, 23 Vt., 565. *Hodnet v. Tatum*, 9 Geo., 70. *Elam v. Carruth*, 2 La. Ann., 275. *Cook v. The Bank of Louisiana*, Id., 324. This principle is admitted, but it is said that it does not apply to a loan of money made by an agent for his principal.

In the case of *Acheson v. Chase*, 28 Minn., 211, decided by the supreme court of Minnesota, one Chase, a resident of New York, authorized one Alley, a resident of Minnesota, to loan money for him at twelve per cent interest, upon land security to be taken in Chase's name, Alley to receive no compensation from Chase for his services, but was authorized by him to charge and collect from the borrower a reasonable compensation for making the loan. Acheson applied to one Parsons, a resident of Minnesota, for a loan of $500. Parsons promised to secure the money at twelve per cent, he to retain $65 for his services in effecting the loan. Parsons then applied to Alley for a loan of the desired amount, and promised him $50. With very much circumlocution in procuring the money, which has a very suspicious appearance, $500, less $68, was delivered to Acheson, $50 of this sum being paid to Alley and $18 to Parsons.

The court held that the principal was not affected by the act of the agent in making the loan. The court say (page 735): "Was the taking of the $50 by Alley a taking of defendant of a rate of interest greater than twelve per cent,

the rate allowed by law when the loan in this case was made? We think not. The $50 may be considered either as a bonus, or as in part bonus and in part compensation for Alley's services in and about making the loan. If it was all bonus—that is to say, a gratuity without consideration—the taking of it was wholly the act of Alley done upon his own responsibility. The defendant in no way authorized it. He knew nothing of it until after the loan was consummated and the money and papers had passed."

In *Condit v. Baldwin*, 21 N. Y., 219, the plaintiff, a resident of New Jersey, placed in the hands of one Williams, an attorney at law in Wayne county, N. Y., $400 to invest for her at lawful interest. One Baldwin, a resident of Wayne county, applied to one Mills, a resident of that county, to procure a loan for him of $400 for two years on his note. Mills applied to Williams for the loan. Williams stated that he preferred to loan the money on bond and mortgage, as in that event he would be paid for drawing the same and for examining the title. An arrangement was then entered into whereby Mills promised to pay Williams $25 as attorney's fees. Mills then received $400 from Williams and paid it to Baldwin, and charged him $40 for his (Mills') services. Of this sum Mills paid $25 to Williams. It was held by a divided court that this did not constitute usury. It is said (page 224): "It is undeniable that Williams took and received the $25 paid for alleged services rendered by him. If he took and received it as the plaintiff's agent, then he took and received it for her and as her money." The decision is placed upon the ground that the plaintiff had not authorized the taking of usurious interest, and had not received the same nor had any knowledge that it was received. Comstock, Denio, and Wells dissented. In the able dissenting opinion of Judge Comstock it is said (page 229): "I think it material next to observe that only one contract was made,

which embraced the whole transaction. There was no agreement between the plaintiff, through her agent and the borrower, to lend $400 at lawful interest, and then a separate and distinct agreement between the agent and the borrower for the extra $25. It was all included in one contract. The agent said in substance, 'I will lend you the $400 if, besides the legal interest which you pay to my principal, you will pay to me the sum of $25.' This was a single indivisible proposition, and as such it was accepted by the borrower. In consideration of the loan he agreed to repay it at a certain day with interest, and he agreed, also, to pay $25 more to the lender's agent. Here was one consideration and one agreement. That agreement might all have been expressed in one or in two writings, or it might have been without any writing. In fact, one of these promises was evidenced by a promissory note, the other rested in parol. These circumstances are immaterial. There was but one original agreement, which included the whole subject. Where there is usury at the root of a transaction, it has never before been thought that the merely formal separation of the borrower's contract into different parts could take the case out of the statute. If the business had not been done through an agent, not a doubt would be entertained, because nothing is clearer in principle or better settled by authority than that contracts are equally usurious, whether the excessive interest be paid down or only agreed to be paid, and whether the payment be promised in the same instrument with the principal debt or in a collateral agreement, oral or written. The test question always is, whether the agreement for the loan includes more than lawful interest to be reserved or taken in any manner whatsoever." This case was followed in *Bell v. Day*, 32 N. Y., 165, and *Estevez v. Purdy*, 66 Id., 446, as stated in the opinions upon the principle of stare decisis.

In *Algur v. Gardener*, 54 Id., 360, it was held that

where the extra sum paid to the agent was a part of the contract of loan—that is, where there was not an independent agreement for the benefit of the agent—but the sum charged for the use of the money was in excess of legal interest, it tainted the transaction with usury.

In *Gokey v. Knapp*, 44 Iowa, 32, it was held that where an agent for the loaning of money lent it at usurious rates, it would not be presumed that he had authority to make the loan at usurious rates so as to affect his principal.

In the case of *Payne v. Newcomb*, 100 Ill., 611, one Payne being the owner of about four hundred acres of land in Livingston county, applied to one Newcomb, a loan agent in Chicago, for a loan of money. Various sums were loaned by Newcomb to Payne, amounting in the aggregate to the sum of $6630, the notes being made payable to Herrick Stevens, and a trust deed to secure the same being made to one Pierce. When each loan was made, Newcomb deducted from the amount five per cent, which he claimed as commission for procuring the loan. There were several extensions of the time for payment, and when they were made he charged two and a half per cent for procuring them. When interest was not promptly paid it was compounded at the rate the notes bore. Payne paid in all $5800 on the indebtedness, but Newcomb claimed there was still due $11967.17. On a bill being filed for an account, and to enjoin a sale under the trust deed, it was insisted that Newcomb was not the agent of Stevens when the several loans were made, but was the agent of the plaintiff in error (Payne), and had a legal right to charge for his services in procuring the loans. The court say: "This evidence of Newcomb's establishes the fact that he was Stevens' agent beyond all dispute. He, however, says he was the agent of Payne before the loan, and of Stevens afterward; that an agent has to find the money, know the situation of the property, and ascertain the title, see to collecting the principal, interest, etc.;

that if the title proves defective, or the property is valued too high and loss ensues, it is understood that the agent renders himself personally responsible. We may ask, liable to whom? To his principal, of course. If the agent of the borrower, when making the valuation and examining the title, overvalues the property, or the title proves defective, what possible loss can result to the borrower? Then he must be liable to the lender, and if so, it can only be because he is his agent. And he proves this by his own testimony. He says he had to submit the application to Stevens, and if he made any mistakes in examining the title, that Stevens would have held him liable. Why should Stevens hold him liable for such losses if he was the agent of Payne until the loan was completed, and the agent of Stevens afterward, as he testifies? If liable to Stevens for such mistakes, it was because and only because he was his agent, and that he was, in the examination of the property, fixing its value and determining the character of the title, we entertain no doubt. It would be absurd to suppose Stevens would loan his money on the valuation fixed and the title reported by Payne's agent. From all this testimony we are compelled to believe that Newcomb was the agent of Stevens from the time the application was made for the loan. The whole transaction is not susceptible of any other construction. It is apparent that Stevens regarded and relied on Newcomb as his agent, and would have held him liable for loss growing out of neglect of duty. Newcomb testifies that Stevens would have held him liable for a mistake in examining the title. If so, then he was Stevens' agent as well before as after the loans were made, and no such distinction can be reasonably drawn as that Newcomb was Payne's agent before, and Stevens' after the loans were made. Did Stevens know that Newcomb was charging for his service and collecting it from the borrower? Newcomb says that it was the understanding that he was to get it from the bor-

rower, and that establishes the fact beyond all cavil. Were these payments of commission of benefit or profit to Stevens? They unquestionably were, as they paid his agent for long continued and valuable services rendered by Newcomb for him. No one will believe that Newcomb thus incurred liability to Stevens, and rendered skillful and valuable services for him for more than twenty years as a mere gratuity. It was not so understood, but Newcomb says he was to get his pay from the borrower. Stevens then paid what he owed to Newcomb by requiring the agent to impose it on the persons to whom loans were made. The arrangement amounted to no more nor less than requiring the agent to loan for a per cent sufficiently high to yield Stevens the highest rate allowed by law, and to pay the agent for his responsibility, labor, skill, and trouble." The court held that the principal was bound by the acts of the agent, and that the loans were usurious. CRAIG, CH. J., did not concur, but upon what ground does not appear.

In the case of *Rogers v. Buckingham*, 33 Conn., 81, it is said: "This would unquestionably have been an usurious loan if made by David Bulkley. It was, in fact, made by his son as his agent; the question in the case is therefore one of authority. * * * Such authority will not be presumed when the agency is special and limited to a single transaction. It may be presumed, where the agency is general and embraces the business of making, managing, and collecting the loans of a moneyed man, and the facts found show such an agency in this case."

In all these cases the rule is recognized that if the commission paid to the agent was authorized or assented to by the principal, the loan will be tainted with usury. The case cited from Minnesota seems to go further and hold that even if an agent receives a bonus in excess of lawful interest it does not render the loan usurious.

The law regulating interest fixes the maximum rate and

declares that "if a greater rate of interest than is hereinbefore allowed shall be contracted for or received, or reserved, the contract shall not therefore be void; but if in any action on such contract proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid," etc. Rev. Stat., 241.

The statute applies to all loans of money, whether made personally by a principal or through the intervention of an agent. If the sum exacted for the loan is in excess of the maximum fixed by law the contract is thereby rendered usurious, whether the unlawful interest was contracted for by the principal himself or paid as a commission to his agent for his services in making loans. If this was not so, a father could employ his son to make loans for him, or a business man one of his clerks, and these persons would be authorized to charge the borrower the highest rate of interest allowed by law, and in addition such commission to the agents as the necessities of the debtor would compel him to pay. Such ruling would, in effect, repeal the law. It would change the plain, unambiguous language of the statute fixing the highest rate of interest allowed in any case so as to impose no restriction whatever; because, if loans made by an agent are not restricted or controlled by the statute, all that is necessary to evade the law is to employ an agent to make the loan.

It is said, however, that the principal is not bound by the acts of the agent where he exceeds his authority—that is, where he charges more than lawful interest, or retains a portion of the principal, as in this case, as a bonus. It is a sufficient answer to this objection to say that the agent is selected by the principal for the purpose of loaning its funds. The principal may require such security and im-

pose such conditions upon such agent as it sees fit, and has the means at hand to protect itself from the illegal acts of its own employees.

In this case it is claimed that the agent of the lender was the agent of the borrower for the purpose of procuring the loan—that is, that Hendrickson made the Corbin Banking Co. his agent for the purpose of procuring the loan. The loan seems to have been effected through A. W. Ocobock, who appears to have been an agent of the Corbin Banking Co., and the Banking Co. seem to have been acting as agent of the plaintiff. We are aware that there are strong denials of these facts in the testimony, but the conduct of the parties is conclusive on those points.

In conclusion, we hold that where an agent is engaged in the business of loaning money for his principal at the highest rate allowed by law, and contracts for a bonus or commissions from the borrower in excess of lawful interest, the contract will be tainted with usury. The whole transaction is but one contract, and being within the scope of the agency the lender is bound by it. *Olmsted v. N. E. Mtg. Security Co.*, 11 Neb., 487. *Cheney v. Woodruff*, 6 Id., 151. *Cheney v. White*, 5 Id., 261. *Philo v. Butterfield*, 3 Id., 259.

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

JUDGMENT AFFIRMED.

SCHOOL DISTRICT NO. 6, HAMILTON COUNTY, PLAINTIFF IN ERROR, V. SCHOOL DISTRICT NO. 9, OF HAMILTON COUNTY, ET AL., DEFENDANTS IN ERROR.

1. **School Districts:** DIVISION: TAXES. In February, 1872, school district No. 6, of Hamilton county, was formed, con-

taining one-half township of land. A few days before the first annual meeting two and a half townships were added to the district, and at the annual meeting taxes to the amount of 15 mills on the dollar valuation were voted. A few days after the annual meeting the portion added was stricken off from 6 and formed into district 9, neither district having any building or property. Notwithstanding the division of the district, the taxes voted by No. 6 were levied upon No. 9, of which, in the year 1875, more than $1000.00 was paid into the county treasury and appropriated by No. 6. *Held*, That an action would lie in favor of No. 9 to recover the same, and that as between No. 9 and districts formed out of it, the money was to be divided in the same proportion as it was raised.

2. Practice: REMANDING CAUSE: FURTHER PROCEEDINGS. Where the issues have been fully presented in a former case and a decision had upon the merits, and the cause remanded with directions in what manner to render judgment, and there has been a substantial compliance therewith, the judgment will be sustained.

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

E. J. Hainer and *George B. France*, for plaintiff in error.

1. Where a corporation is divided and a new corporation is formed out of a part thereof, the remaining part of the original corporation, in the absence of statute or agreement to the contrary, retains the name, property, powers, rights, and privileges, and remains subject to all its obligations and duties. *Town of Depere v. Town of Bellevue*, 31 Wis., 120. *Hampshire v. Franklin*, 16 Mass., 78. *North Yarmouth v. Skillings*, 45 Me., 133. *Morgan v. Beloit City and Town*, 7 Wall., 613. *Richland Co. v. Lawrence*, 12 Ill., 1. *State, ex rel. Mitchell, v. School Dist.*, 8 Neb., 92.

2. The vote of the district is the real levy of school taxes. The duty of commissioners is merely ministerial. The assessment having been completed and the rolls re-

turned when No. 9 was formed, that district could not vote a tax for that year after its formation. The formation of a new district out of a part of the old is simply removing out of the district a part of the taxables, nothing more nor less; and such removal cannot on principle affect any lien of taxes. The tax in question being a subsisting lien upon the lands of the district before the same was divided, No. 6 had a vested interest therein, which, in the absence of agreement to the contrary, remained a credit belonging to No. 6 after the division. *Board of Com'rs Morgan Co. v. Board of Com'rs Hendricks Co.*, 32 Ind., 234. *Moss v. Shear*, 25 Cal., 38. *Harman v. Inhabitants New Marlborough*, 9 Cash., 525.

3. All districts which derived a benefit from the tax should be joined as defendants. This was not done. No. 6 has, subsequent to the payment of this tax, been three times divided and three new districts formed. These districts in the division of property received their proportionate share of this tax, and are therefore necessary parties to this new and equitable (?) method of settling litigations. Bliss on Code Pleading, 97.

Alfred W. Agee, M. H. Sessions and *Austin J. Rittenhouse*, for defendants in error, to the point that the voting of tax by No. 6 created no debt or lien in favor of that district, cited *Waldron v. Lee*, 5 Pick., 323–335. *Wells v. Smyth*, 55 Penn. St., 159. *Whittemore v. Smith et al.*, 17 Mass., 347. The voting of a tax is not a grant of money, but simply a resolve to raise money, and may be rescinded by a vote at any time before the levy. *Pond v. Negus et al.*, 3 Mass., 230. Therefore the vote is not "the real levy of a school tax."

MAXWELL, J.

This case was before the court in 1879, and is reported

in the 9th volume of the Reports, page 331. In that case the issues were fairly presented as to the matter in dispute, and it was held (page 337) that "School District No. 6 has no interest whatever in the money in question." The judgment of the district court in favor of District No. 6 was reversed and the cause was remanded. And the court on its own motion, directed that the money should be distributed to the several districts from which it had been raised on the basis of the assessment of 1872. The effect of the decision was a direction to the district court to render judgment in favor of No. 9 and divide the money upon the basis upon which it was collected. The cause being remanded, No. 9 amended its petition before the judgment was rendered, when No. 6 again interposed the same defenses previously determined. The court overruled those defenses and rendered judgment as directed by this court. The plaintiff brings the cause into this court by petition in error.

No motion for a rehearing was filed. We might therefore affirm the judgment without further examination. But inasmuch as the attorneys for the plaintiff have filed elaborate briefs, in which they particularly insist that No. 9 being formed from No. 6, the latter district is entitled to all the corporate property, we will therefore review that question.

In the case of *North Hempstead v. Hempstead*, 2 Wend., 109, it was held that on the division of a town, or public corporation possessing corporate property, into two separate towns, each, in the absence of legislation regulating the matter, is entitled to hold in severalty the public property which fell within its limits.

In the case of *Windham v. Portland*, 4 Mass., 384, it was held that where a new corporation was created out of part of the territory of an old corporation, the latter, in the absence of legislation in respect to the matter, is entitled to all the property and is solely answerable for all

the debts of the old corporation. See also *Richards v. Daggett*, 4 Id., 539. *Hampshire v. Franklin*, 16 Id., 76. *Richland Co. v. Lawrence*, 12 Ill., 1. *Blackstone v. Taft*, 4 Gray, 250. *North Yarmouth v. Skillings*, 45 Me., 133. And in the absence of any legislative provision in regard to the matter there is no doubt that the old corporation is entitled to the corporate property and will be answerable for the corporate debts. But this law has no application to the case at bar, for reasons stated hereafter.

Sec. 7 of the act approved Feb. 15, 1869 (G. S., 962), which was in force when this school district was formed, provided that: "When a new district is formed in whole or in part from one or more districts possessed of a school-house or other property, the county superintendent at the time of forming such new district, or as soon thereafter as may be, shall ascertain and determine the amount justly due to such new district from any district or districts out of which it may have been in whole or in part formed, which amount shall be ascertained and determined according to the relative value of the taxable property in the respective parts of such former district or districts at the time of such division."

Sec. 8 provided that: "The amount of such proportion, when so ascertained and determined, shall be certified by the county superintendent to the county clerk, who shall present the said amount to the county commissioners at the July session next succeeding, whose duty it shall be to assess the same upon the taxable property of the district retaining the school-house or other property of the former district in the same manner as if the same had been authorized by a vote of such district, and the money so assessed shall be placed to the credit of the taxable property taken from the former district, and shall be in reduction of any tax imposed in the new district on said taxable property for school district purposes."

Sec. 9 provided that: "When collected, such amount

shall be paid over to the treasurer of the new district to be applied to the use thereof in the same manner, under the direction of its proper officers, as if such sum had been voted and raised by said district for building a school-house, or other district purposes."

It will be seen at once that the special provisions of the statute were designed to require the old district retaining the corporate property to pay to the new district the fair proportion of its value. If a school-house has been built, or other property has been acquired by the old corporation, it is not to be permitted to retain the same without compensation, but must pay to the new district such sum as the county superintendent shall find to be just. The rule of law cited by the plaintiff has been changed by the statute of this state and has no application. Suppose no change had been made in the boundaries of No. 6 until after the tax in question had been collected and the money thus raised had been expended in building a school-house in that district, upon a division of the district could No. 6 have retained the school-house without making any compensation to No. 9, from which the money was collected? Clearly not; because under the statute No. 6 must pay to No. 9 a fair proportion of the value of the corporate property.

But the rule contended for has no application for another reason. In all of the cases cited the corporation which was divided, and a portion set off to form a new corporation, had been an actual corporation, having erected buildings or acquired property, incurred obligations which would remain as a debt against the old corporation.

Take the case of *Morgan Co. v. Hendricks*, 32 Ind., 235, as an illustration. In that case Morgan county had existed for many years. It was exercising corporate powers. A division was made, leaving it responsible for the debts, and the court, treating the assessment and the levy of taxes as property, decided that it was entitled to the same.

And in the case of *Depere v. Bellevue et al.*, 31 Wis., 120, the action was for contribution. It was alleged in the petition that prior to April 2, 1853, and until July 1, 1854, they had but one corporate existence, and were known as the town of Depere, and voted to issue bonds in aid of a plank road, and the same were issued on or about July 1, 1854, payable in twenty years, with interest; and that the present town of Depere had paid the interest on said bonds for seventeen years, and the defendants had paid nothing; and after stating the valuation of each and the proportion each ought to pay, there was a prayer that the defendants be required to contribute according to such proportion. The opinion of the court was delivered by COLE, J., who says (page 125), quoting the language of PARKER, CH. J., in the case of *Hampshire v. Franklin*, 16 Mass., 76–86: "By general principles of law as well as by judicial construction of statutes, if a part of the territory and inhabitants of a town are separated from it by annexation to another or by the creation of a new corporation, the remaining part of the town, or the former corporation, retains all its property, powers, rights, and privileges, and remains subject to all its obligations and duties unless some express provision to the contrary should be made by the act authorizing the separation." It was held that in the absence of a statute providing for contribution, no action of that kind could be maintained.

In the case of *Morgan v. Beloit*, 7 Wall, 613, the action was brought by a creditor in equity against the city and town of Beloit to compel the two corporations to pay certain judgments in the proportion which each ought to pay. The town of Beloit had subscribed for stock in a railroad company and issued bonds to pay therefor. Afterwards the city was created and organized from a portion of the territory which had constituted the town. In the city charter there was a provision that the principal and interest on all bonds which had been issued by the town should

be paid when they became due by the city and town in the same proportions as if the town and city had not been dissolved. Under these provisions of the statute it was held that the action could be maintained.

The plaintiff's case, however, is not within any one of these decisions. Here was a new corporation organized less than two months, without property, and having done no corporate act apparently, except to hold the annual meeting on the first Monday in April. This corporation on paper, covering one-half of a township, had added to its territory a week before the annual meeting two and one-half townships, which were stricken off and formed into No. 9 a week afterwards.

The attorneys for the plaintiff very strenuously insist that the act of voting taxes by a school district is equivalent to a levy of the same, and that therefore the taxes were actually levied at the time of the division of the districts. That this proposition cannot be maintained will readily be seen. The act of voting taxes by a school district is an important prerequisite to the right to levy, as no tax that requires the affirmative vote of the district to give it validity can be imposed without such action. But the act of voting taxes is not a levy. It is merely determining the amount that shall be levied. As the law stood at the time these taxes were voted the vote was taken in April, and the taxes levied by the county commissioners in July, three months afterwards. Now suppose that No. 6 had possessed a school-house and other property, and that the county superintendent, upon dividing the district, had assigned to No. 9 its proportion of the value of the school-house, would this sum have been levied upon the territory of No. 9? The statute says it shall be assessed "upon the taxable property of the district retaining the school-house or other property of the former district." This, then, determines upon what territory such tax is to be levied. The levy is to be limited to the district voting the tax.

Had it been supposed at that time that No. 6 was entitled to all taxes voted by it in the territory set off as No. 9, the county superintendent would have charged to No. 6 the aggregate of the taxes voted by it in that territory, and that amount would have been levied on the taxable property of No. 6 for the use of No. 9. So that in no event was No. 6 entitled to receive property or taxes without paying therefor.

The case of *Morgan Co. v. Hendricks Co.*, 32 Ind., 234, was decided, as we have heretofore said, largely upon the construction given to the statute. The facts were as follows: "A majority of the legal voters residing in territory constituting a part of Morgan county, abutting upon Hendricks, petitioned the boards of commissioners of these counties for such change in the boundaries thereof that said territory should be detached from Morgan and annexed to Hendricks. The order granting the change was made by the commissioners of Morgan county on the eighth, and by the commissioners of Hendricks county on the ninth of June, 1868. The rate of taxation was fixed by the commissioners of Morgan county on the ninth, and by the commissioners of Hendricks on the eleventh of June, 1868. Prior to the making of any of said orders, the assessors of the townships of Morgan county embracing the detached territory had made their enlistments and returned their lists of taxables to the auditor of Morgan county, who placed all the persons and property on the 'tax duplicate' for the year 1868. At the proper time this duplicate was placed in the hands of the treasurer of Morgan county, who proceeded to collect the taxes thus assessed from the persons residing in said detached territory. Upon these facts the parties submitted the legal questions involved to the court below." The court say: "The statute provides, that 'all liens, either by judgment, by mortgage, or otherwise, shall continue in full force in all respects, as if no change had been made in the bound-

aries of said counties; and all taxes that shall be levied and assessed at the time such change shall be made shall be collected in the same manner as if no change had been made in the boundaries of said counties." The act for the valuation and assessment of the real and personal property and the collection of taxes in this state provides that: Every person shall be listed in the township where he resides when the enlistment is made for all personal estate owned by him on the first day of January of the year in which the enlistment is made, including all personal estate in his possession, or under his control as trustee, guardian, executor, or administrator. Every person shall be listed in the township where he resides when the enlistment is made for all lands by him owned within such township, on the first day of January in which the enlistment is made, and occupied by him or wholly unoccupied, including all such real estate owned or held by him as trustee. I. G. & H., 71, secs. 13 and 14. This enlistment is required to be made between the first day of January and the first day of May in each year (I. G. & H., 72, sec. 22), and returned to the county auditor on or before the fourth Monday of May. I. G. & H., 87, sec. 13. The lien for taxes on real estate attaches on the first day of January. I. G. & H., 99, 100, sec. 112. *Harman v. The Inhabitants of New Marlborough*, 9 Cush., 525, is in point. Under the statutes of that state the taxes attached on the first day of January; between that time and the fourth Monday of May the enlistment was required to be made and returned. No change in the county boundary after that time could affect the liability of the taxpayer in the detached territory."

"We must give the words 'levied and assessed' a reasonable construction in view of the entire provisions of the act authorizing the change of county boundaries. Hendricks county could not, under the law, have made the enlistment after the ninth of June. There is an entire absence of any

provision for making a transfer of any portion of the tax duplicate from one county to the other. A change of residence after the enlistment is made would certainly not discharge the liability for the taxes of the current year."

In the case of *Moss v. Shear*, 25 Cal., 38, it was held that a change of county boundaries, made after land had been assessed for taxes, did not divest the lien of the tax, and the tax collector of the old county might enforce the collection of the tax on land by a sale; and *Harman v. New Marlborough*, 9 Cush., 525, was of similar import. These cases were all examined when this case was formerly before this court, and were then not considered applicable. As great stress was laid upon them by the attorneys for the plaintiff, we have again carefully examined them, and we are fully convinced that our former decision is correct.

The division of school districts in this state is regulated by statute, and this statute contains an express provision that the district retaining the school-house or other property shall pay to the new district such proportion of the value of the same as may be "*justly due.*" This is the statutory mode by which a school district can retain a school-house, or other property erected or purchased at joint expense. But there is no pretense that any portion of the money in dispute was collected from the territory of No. 6. The entire sum was raised from the territory set off as No. 9. It is in no sense a joint property, nor has No. 6 any legal or equitable right to the same. Whatever may have been the object in attaching two and one-half townships of land to No. 6 immediately preceding the annual meeting, thus forming a district eighteen miles in length by six in width, the practice of forming such large districts, apparently for the sole purpose of taxation, is very objectionable. It may be said that the object is a meritorious one, and the county being sparsely settled and but little taxable property therein it is necessary to make the districts very large in order to raise a sufficient amount of

money to sustain a school. But this position is untenable. However desirable it may be to raise sufficient funds by taxation or otherwise to properly support schools in sparsely settled neighborhoods, this necessity would not justify a resort to unlawful or unjust modes of raising such funds. The district would not be justified in seizing the property of A or B and selling it for the purpose of raising means to meet its obligations. The object of creating a school district is to have a school taught therein for the education of such persons between the ages of five and twenty-one years residing in the district as desire to attend. A district six miles in length by three in width would seem to be very large, and one eighteen miles in length by six in width would impose the burden of taxation on those remote from the school-house without any equivalent whatever, and is wholly unjustifiable. The state imposes general taxes for the support of schools and permits school districts to raise special taxes, but such taxes should be imposed on those alone who receive the benefits, either personally or to their property.

In 9 Neb., 337, when this case was formerly before the court, it is said: "Each district being thus required to raise its own taxes, school district No. 6 has no interest in the money in question. This money was raised upon the taxable property of district No. 9 for school purposes, and it should be applied in the district to the purposes for which it was raised. District No. 9 has therefore an equitable right to the money in question." This was the finding. The judgment of the court was that the "judgment of the district court is reversed; and for the purpose of doing complete justice between parties and ending the litigation, it appearing probable that other districts have been formed in the large extent of territory originally comprising No. 9, the case is remanded to the district court with instructions to permit all the school districts now formed in the original territory of district No. 9 to join as plain-

tiffs, and to divide the money in question among said districts upon the basis of the assessment of 1872." No objection was made to this judgment nor any attempt made to have it modified. It decided the issues in favor of No. 9 and directed how the money should be divided. It would seem then that all that the district court had to do was to render judgment as directed by this court and divide the money in the mode pointed out. This it has done. The intention was that the district court should render judgment as directed and then permit the districts formed from No. 9 claiming the fund to interplead and apportion it in the way pointed out. This procedure was not strictly followed out. The petition was amended before judgment. But this was an error without prejudice, as this court had directed that judgment be rendered against No. 6. But it is said new issues have been formed, but this is not so, as the questions involved were set up as a defense in the former case. Perhaps the directions of this court as to the procedure were not as definite as they should have been, but there has been a substantial compliance with the judgment of this court, and the judgment is affirmed.

JUDGMENT AFFIRMED.

JAMES MATHEWS, TOOTLE & MAULE AND W. V. MORSE & CO., PLAINTIFFS IN ERROR, v. SMITH & CRITTENDEN AND KELLOGG & BARRETT, DEFENDANTS IN ERROR.

1. **Garnishment.** The Code provides for service of notice of garnishment upon two classes, viz., persons and corporations. If served on a person, it must be served upon him personally or by leaving a copy at his usual place of residence; if upon a corporation, then upon its president, etc., or managing agent.

2. ———: NOTICE. Certain goods were taken possession of by a non-resident firm under a chattel mortgage, and while in possession of an agent notice of garnishment was served upon him by name. *Held*, That the notice was sufficient, and that the attachment created a trust in the property in his possession, and that notice to the agent of the trust was notice to the principal.

ERROR to the district court for Polk county. The facts appear in the report of the referee set forth in opinion.

E. Wakeley and *Groff & Montgomery*, for plaintiffs in error.

The mortgage to Smith & Crittenden was invalid on its face because it provided that the goods should be sold at "private sale without notice, as required by the General Statutes of Nebraska." The statute (Comp. Stat., 82, Gen. Stat., 481), is mandatory. *Hurford v. Omaha*, 4 Neb., 350. If not invalid on its face it was fraudulent as to creditors. Consider Crittenden's promise; consider large difference between the debt ($1,800) and the value of the goods ($6,000); consider terms of note and mortgage, note payable "on demand without grace," mortgage providing for "private sale." Herman on Chattel Mortgages, 249, 257, 258. The attachments were legally levied. Code, secs. 201, 205, 209, 929, 931. *Davidson v. Kuhn*, 1 Disney, 405, 410. On question of garnishment see Comp. Stat., 535. *Rutledge v. Corbin*, 10 Ohio State, 478. *Morgan & Co. v. Spangler*, 20 Ohio State, 38. *Armstrong v. McAlpin*, 18 Ohio State, 184. *Faulkner v. Meyers*, 6 Neb., 418. Bliss on Code Pleading, sec. 383.

F. B. Hart, for Smith & Crittenden, defendants in error.

The power in the mortgage was to sell at "private sale" or at public auction. The mortgagor had a right to contract with reference to the mode of foreclosure. Herman

on Chattel Mortgages, secs. 206, 209, 211. 2 Jones on Mortgages, sec. 1778. Mortgage was valid, mortgagees were in possession and mortgagor had no property therein subject to levy or sale. *Campbell v. Leonard*, 11 Iowa, 489. *Gordon v. Hardin*, 33 Iowa, 550. The garnishee process was invalid.

Norval Brothers, for Kellogg & Barrett, defendants in error.

Priority of attachments and garnishments cannot be determined in this action of replevin. Sole question is as to S. & C.'s right to goods, etc. Property was not subject to attachment. Drake on Attachment, secs. 267, 269, 538, 539. *Badlam v. Tucker*, 1 Pick., 389. *Doane v. Garretson*, 24 Iowa, 351. Kellogg & Barrett, having garnisheed after all the property was converted into money, have the first lien on the surplus. Drake on Attachment, sec. 667. *Williams v. A. & K. R. R.*, 36 Me., 201.

MAXWELL, J.

This case was referred to a referee, who found as follows:

First. That on the twenty-third of December, 1878, the firm of Beaty & Woods engaged in the business of general merchandise at Osceola, Polk county, Nebraska, were indebted to the plaintiffs in the sum of $1852.29, and on the same day, to secure the payment of the same, executed and delivered to plaintiffs a note and chattel mortgage for the sum of $1776.29, which chattel mortgage was upon a stock of goods of general merchandise of the value of $4500.00. That the sum of $76.00 then due plaintiffs from said Beaty & Woods was omitted from the amount of said note and mortgage by mistake.

Second. That in the taking of said mortgage plaintiffs acted in good faith and for the sole and only purpose of securing the payment of the debt due them.

Third. That said chattel mortgage was on the twenty-third of December, 1878, filed and indexed in the office of the county clerk of said Polk county.

Fourth. That said chattel mortgage provided that said sum of $1776.29 should be paid on demand without grace.

Fifth. That said mortgage provides that in case of default in the payment of said money thereby secured said mortgagee could take immediate possession thereof and sell the same at private sale without notice.

Sixth. That said mortgage provided upon a sale of the property the proceeds should be applied to pay the amount due, or to become due, with all reasonable costs pertaining to the taking, keeping, advertising, and selling of said property.

(The *seventh* relates to the form of the chattel mortgage.)

Eighth. That on the same day that said mortgage was executed and delivered to plaintiffs, the plaintiffs made a demand for and took possession of the property mentioned in said mortgage, under the promises of said mortgage, Beaty & Woods consenting to such possession.

Ninth. That upon taking possession of said property, plaintiffs commenced to sell the same at private sale, and continued to sell at private sale until after the same was taken in attachment by defendant, James Mathews. (The aggregate of such sales is $898.77).

Tenth. That after plaintiffs obtained possession of said goods under the writ of replevin in this action they advertised and sold at public sale, under the provisions of the statute relative to the sale of property under chattel mortgage, for the sum of $2000.

Eleventh. That plaintiffs received from the total sales of said goods the sum of $2898.77.

Twelfth. That plaintiffs paid as costs and expenses incurred in taking, keeping, and selling said goods the sum of $434.

Thirteenth. That plaintiffs paid as attorney's fees for foreclosing said mortgage the sum of $175.

Fourteenth. That the defendant, James Mathews, as constable, levied upon, in the possession of mortgagees, and took and held possession of said property, under and by virtue of valid writs of attachment issued out of a justice court for said Polk county, on the seventh day of January, 1879, in favor of each of the defendants, Samuel Burns and Max Meyer & Co.

Fifteenth. That on the eighth day of January, 1879, at 11 o'clock A.M., the sheriff of said Polk county received valid writs of attachment in each of the following suits: W. V. Morse & Co. against Beaty & Woods; Tootle & Maule against Beaty & Woods; John O. Farwell & Co. against Beaty & Woods; A. M. Shasta & Co. against Beaty & Woods; and on the same day at the hour of 3 o'clock P.M., said sheriff, in the presence of two credible persons, did declare that he did levy said attachments upon the goods in question, the same being in the custody and control of said James Mathews as constable, by virtue of the writs of attachment in the suits of Samuel Burns and Max Meyer & Co., but said sheriff did not take possession of said goods, or appraise the same or obtain the custody and control thereof.

Sixteenth. That on the sixteenth day of January, 1879, one of the attorneys for Tootle and Maule in the suit against Beatty & Woods filed an affidavit in said action in due form of law, alleging "that he has good reason to believe and does believe that Clarence H. Buell has property, moneys, and credits in his possession belonging to said defendants, J. M. Beaty and Joseph Woods, and he further makes oath and says, that as he is informed and believes that the said Clarence H. Buell, as agent for the firm of Smith & Crittenden, of Council Bluffs, Iowa, has property, money, and credits in his possession, as such agent, belonging to said defendants, J. N. Beaty and Joseph Woods, and

further makes oath and says that he is informed and believes Smith & Crittenden, a firm doing business at the city of Council Bluffs, Iowa, have property, moneys, and credits in their possession at the town of Osceola, Neb., belonging to said defendants, Beaty and Woods." And on said sixteenth day of January, 1879, due notices of garnishment were issued in said action, one directed to Clarence H. Buell, agent for Smith & Crittenden, requiring him to appear and answer, etc.; and on the seventeenth day of January, 1879, at the hour of 10 o'clock A.M. said notices were, by the sheriff of said Polk county, duly and legally served upon said Clarence H. Buell and Clarence H. Buell, agent for Smith & Crittenden, but no notice of garnishment was issued or directed to said Smith & Crittenden.

Seventeenth. That on the sixteenth day of January, 1879, one of the attorneys for W. V. Morse in said suit against Beaty and Woods filed an affidavit in said cause alleging the same facts as stated in the sixteenth finding. Notices were issued the same as stated in the sixteenth finding, and were served at the same time and in the same manner as stated in the sixteenth finding.

Eighteenth. That on the thirteenth day of March, 1879, the attorney for A. N. Shasta & Co., in the case against Beaty & Woods, filed an affidavit in said cause in due form of law, alleging "that he has good reason to, and does believe, that one Hart, whose first or christian name is unkown, and C. H. Buell have goods, rights, chattels, moneys, etc., in their hands or under their control belonging to said defendants, and liable to be applied to the payment of plaintiff's claim; that on said thirteenth day of March, 1879, notices of garnishment in due form of law were issued, notifying said Hart and C. H. Buell to appear and answer, etc., and were, on the thirteenth day of March, 1879, at 3 o'clock P.M., duly and legally served by the sheriff of said county upon said Hart and C. H. Buell.

Nineteenth. That no notice of garnishment was issued or served in either of said actions directed to plaintiffs Smith and Crittenden.

Twentieth. That on the fourth day of February, 1879, W. F. Kellogg and Alvin W. Barrett, partners under the name of Kellogg and Barrett, secured a judgment against said Beaty & Woods in the county court of Polk county, Nebraska, for the sum of $398.73 debt, and $5.75 costs; that on the thirteenth day of March, 1879, at 8 o'clock A.M., a transcript of said judgment was filed in the office of clerk of district court of said Polk county, Nebraska; that on the same day, to-wit, March 13th, 1879, an execution was duly issued on said judgment out of said district court and placed in the hands of the sheriff of said county, who on the same returned the same unsatisfied for want of property of said defendants whereon to levy.

Twenty-first. That on the thirteenth day of March, 1879, one of the attorneys for Kellogg & Barrett filed an affidavit in said cause in the clerk's office of said district court in due form of law, alleging "That execution in said cause has been issued and returned unsatisfied for want of sufficient property whereon to levy and collect the same. Affiant further deposes and saith that he has good reason to and does believe that Hart and Smith & Crittenden have property of and are indebted to the said Beaty and Woods, partners as Beaty & Woods, the judgment debtors in said cause."

Twenty-second. That on the thirteenth day of March, 1879, a notice of garnishment in due form of law was duly issued, notifying Frank B. Hart and Smith & Crittenden to appear and answer, etc., service of said notices of garnishment was on the same day accepted in writing by said F. B. Hart and Smith & Crittenden, by F. B. Hart, their attorney.

Twenty-third. That said Clarence H. Buell, at the time said garnishment proceedings were commenced and served

upon him, was the agent of Smith & Crittenden, mortgagees, and as such had possession of the goods mortgaged remaining unsold, and had the proceeds of the goods at that time sold.

Twenty-fourth. That said F. B. Hart was, at the time said garnishment proceedings were commenced and served upon him, the attorney for Smith & Crittenden, and as such had the possession of the proceeds of the goods sold at public sale, to-wit, $2000 on the day of sale.

Twenty-fifth. That at the time of the commencement of this action plaintiffs were owners as mortgagees of the property in question, and entitled to the immediate possession of the sales.

Twenty-sixth. That Samuel Burns secured a judgment in his said action against Beaty & Woods on the seventeenth day of January, 1879, for $77.29 debt, and $20 costs, and that there is due thereon at this date $114.03.

Twenty-seventh. That Max Meyer & Co. recovered a judgment against Beaty & Woods on the nineteenth day of January, 1879, for $43.50 debt, and $28 costs, and that there is due thereon at this date the sum of $80.95.

Twenty-eighth. That W. V. Morse & Co. recovered a judgment in their said action against Beaty & Woods on the fourth day of June, 1879, for $373.36 debt, and $37 attorney's fees and $... costs, and there is due thereon at this date the sum of $...

Twenty-ninth. That Tootle & Maule secured a judgment in their said action against Beaty & Woods on the fourth day of June, 1879, for $885.42 debt, and $73 attorney's fees, and $... costs, and there is due thereon at this date the sum of $.....

Thirtieth. That A. M. Shasta & Co. recovered a judgment in their said action against Beaty & Woods on the ..... day of ....., 1879, for $1547.21 debt, $100 attorney's fees, and $8.80 costs, and there is due thereon at this date the sum of .....

Thirty-first. That John V. Farwell & Co. secured a judgment in their said action against Beaty & Woods on the ..... day of ....., 1879, for $130.70 debt, and $6.75 costs, and there is due thereon at this date the sum of $.....

Thirty-second. That there is due Kellogg & Barrett upon their said judgment at this date the sum of $484.20.

As conclusions of law the referee found:

First. That the chattel mortgage in question from Beaty & Woods to Smith & Crittenden, the plaintiffs, is valid.

Second. That Samuel Burns and Max Meyer & Co. did not obtain a lien to said property, or the proceeds thereof, by virtue of the levy of their attachment.

Third. That W. V. Morse & Co., Tootle & Maule, John V. Farwell & Co., and A. M. Shasta & Co. did not obtain a lien upon said property by virtue of the attachment issued in their action.

Fourth. That at the time of the issue of the attachments in the actions of W. V. Morse & Co., Tootle & Maule, John V. Farwell & Co., and A. M. Shasta & Co., and the service of said attachments by the sheriff, the property was in the custody of the law, and the sheriff could make no valid levy of said attachments.

Fifth. That the garnishee proceedings in the cases of Tootle & Maule, W. V. Morse & Co., A. M. Shasta & Co. were ineffectual to give them any interest in or to the property in question or the proceeds thereof.

Sixth. That the garnishee proceedings in the case of Kellogg & Barrett were sufficient to entitle them to the proceeds of said property, after the payment of prior liens.

Seventh. That the plaintiffs are not entitled to deduct from the proceeds of the sale of said property the sum of $75 paid as attorney's fees, as the same are not a part of the costs provided for in said mortgage.

Eighth. That plaintiffs are not entitled to deduct from

the proceeds of said property the sum of $76 due them from said Beaty & Woods, and omitted from the amount of said note and mortgage by mistake, as against valid attachment liens.

Ninth. That plaintiffs are entitled to deduct from the proceeds of said property the sum of $76 due them from Beaty & Woods, and omitted from the amount of said note and mortgage by mistake, as against the garnishee proceedings.

Tenth. That plaintiffs are entitled to a judgment, that they are the owners of the property in question, and were at the time of the commencement of this action entitled to the immediate possession of the same, and that the same was wrongfully held by defendant Mathews.

Eleventh. That plaintiffs are entitled to deduct from the proceeds of the sale of said property the debt secured by said mortgage, to-wit: $1776.29 and the cost of taking, keeping, advertising, and selling of said property, to-wit, $434.

Twelfth. That the balance of the proceeds of the sale of said goods should be applied in this action as follows:

1. In paying of the sum of $76 due plaintiffs from Beaty & Woods, and not included in the amount of said note and mortgage.

2. In payment of the amount due Kellogg & Barrett upon their judgment against Beaty & Woods, to-wit, $484.20.

3. That the defendants, W. V. Morse & Co., Tootle & Maule, John V. Farwell & Co., A. M. Shasta & Co., Samuel Burns, and Max Meyer & Co., are not entitled to relief in this action.

Exceptions were filed which were overruled, and judgment entered on the report. The cause is brought into this court by petition in error. The principal question to be determined is the validity of the proceedings in garnishment.

Sec. 207 of the code provides that: "When the plaintiff, his agent or attorney, shall make oath, in writing, that he has good reason to and does believe that any person or corporation, to be named and within the county where the action is brought, has property of the defendant (describing the same) in his possession, if the officer can not come at such property, he shall leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court at the return of the order of attachment, and answer as provided in sec. 221."

Sec. 208 provides that: "The copy of the order and the notice shall be served upon the garnishee as follows: If he be a person, they shall be served upon him personally, or left at his usual place of residence; if a corporation, they shall be left with the president or other officer of the same, or a managing agent thereof."

Bouvier defines the word "garnishment" to be "A warning to any one for his appearance in a cause in which he is not a party, for the information of the court and explaining a cause." 1 Bouv. Law Dict., 627. In other words, it is notice to the party in actual possession of the goods or choses in action of a debtor that an attachment has been issued against the debtor, and that the debtor's property in the hands of the party receiving the notice is to be held subject to the attachment.

The word "garnishment" appears to be used in all the states except those of New England, where the party warned is called a trustee, and the process under which he is notified a trustee process.

The Revised Statutes of Massachusetts of 1836, part 3, tit. 4, chap. 109, contains a provision that: "Every person having goods, effects, or credits of the defendant intrusted to or deposited in his possession, may be summoned as a trustee, and the property in his hands attached and held to respond to the final judgment," etc.

In Vermont the trustee process is given to creditors against

persons having in their possession money, goods, chattels, rights, or credits of concealed or absconding debtors, or debtors residing out of the state, or removed out of the state, leaving effects within it. Under this statute it was held that a non-resident of the state coming within it for a temporary purpose, is not liable to be summoned as a trustee. *Baxter v. Vincent*, 6 Vt., 614. The same decision seems to have been made in Massachusetts. See *Ray v. Underwood*, 3 Pickering, 302. And this was the custom of London. See cases cited in note 3, sec. 473 of Drake on Attachment. Under our statute proceedings in garnishment are not an action that may proceed to judgment and execution be issued thereon. They are in the nature of notice to the party in actual possession of the property of the attachment, and from the time he receives such notice he becomes in respect to the goods or property of the debtor a trustee.

In *Corey v. Powers*, 18 Vt., 588, it is said: "It is not necessary to constitute the relation of debtor and trustee that a right of action should actually exist and be perfected in the debtor at the commencement of the trustee process. It is sufficient if property is deposited with the trustee, or that he is indebted to the principal debtor, though something further may be required to constitute a right of action thereof."

In *Quigg v. Kittredge*, 18 N. H., 137, it is said: "So bailees are not answerable in many cases until there has been a demand. So administrators of insolvent estates cannot be charged until demand after a dividend has been declared, nor administrators generally for the share of an heir. But they may be charged as trustees although there has been no demand. The reason is that the process of foreign garnishment is not regarded as an adverse suit as against the trustee. Instead of being subjected to costs he recovers costs and these are regarded as an indemnity." And the same rules are applicable under our statute.

From the time of garnishment the effects in the garnishee's possession are considered *in custodia legis*. *Brashear v. West*, 7 Peters, 608, *Mattingly v. Boyd*, 20 Howard, 128, *Biggs v. Kouns*, 7 Dana, 405. The goods are thereafter subject to the lien of the creditor who effected the garnishment. *Burlingame v. Bell*, 16 Mass., 318. *Swett v. Brown*, 5 Pick., 178. And if the goods are taken even by a wrong-doer after the service of notice the liability of the garnishee continues. *Parker v. Kinsman*, 8 Mass., 486, *Despatch Line v. Bellamy Man. Co.*, 12 N. H., 206. Drake on Attachment, sec. 453.

If the goods can be levied upon the officer takes possession of the same, but if he "cannot come at such property," then he is to leave with the garnishee a copy of the order of attachment with a written notice to appear in court and answer under oath all questions touching the property of every description and credits of the defendant in his possession or under his control. Now who is a person to be garnisheed? The statute provides for the service of notice on only two classes, viz., persons and corporations. If a person, the notice is to be served upon him personally or left at his usual place of residence, and if a corporation then with the president or other officer, or managing agent of the same. There is no provision whatever for obtaining service upon a firm not doing business in the county, much less a non-resident of the state. The design of the law is to reach the property, and if from any cause the officer cannot levy upon that, the person in actual possession of the same may be required to appear and show the facts in relation to the ownership. If he fails to obey, an attachment may be issued against him as for contempt. The court by its process may compel the party served with notice to disclose all the facts within his knowledge. But what power would it have over a firm residing out of the state? Suppose the notice in this case had been directed to Smith & Crittenden, and had been served upon Buell & Hart, and no

one had appeared in response to the same, against whom would an attachment issue? It could not issue against Smith & Crittenden unless they were personally served and were within the jurisdiction of the court, nor could it issue against any of their employees, because they were not required to appear. Consequently the court would be powerless to protect the rights of parties asking its aid. Besides Smith & Crittenden, being a non-resident firm and having no place of business in the state, but merely selling certain goods which they held a lien upon, were liable at any moment to have their claim satisfied and leave the state. They could therefore at any moment defeat the proceedings in garnishment if the notice must be served upon them. But this not being an action, notice to the agent is notice to the principal. The property or chose in action becomes a trust fund for the satisfaction of any judgment that may be recovered, and the agent is charged with notice of the trust.

Story says: "Notice of facts to an agent is constructive notice thereof to the principal himself, where it arises the from or is at the time connected with the subject matter of agency." Story on Agency, sec. 140.

And it has been held that in a commercial transaction, if the purchaser's agent on behalf of the principal buy goods from a factor, and such agent has notice, no matter by what means, that the goods are not the goods of the factor, the knowledge of the agent will be held to be the knowledge of the principal. *Dresser v. Norwood*, 17 C. B., N. S., 466.

And in the case of *Hart v. The F. & M. Bank*, 33 Vt., 252, the same rule was extended to the knowledge of a trust acquired by the agent before his employment to levy upon the goods as the property of the trustee. Story on Agency, sec. 140 *a*. But we find it unnecessary to go to this extent. Here was a trust created in favor of other creditors, of which this agent not only had notice, but was

required to make a full and complete disclosure as to his claim and the character in which he holds the property. We have no doubt the service of notice of garnishment upon Buell was sufficient, and that the plaintiff's attachments date from that time. The property or the proceeds thereof are before the court, and it is its duty to make a distribution of the same to the several creditors in the order of the priority of their liens. Smith & Crittenden had no authority to sell more than sufficient goods to pay their claim. The case is precisely similar to that of *Charter v. Stevens*, 3 Denio, 33. In that case the mortgagee, after the day of payment, sold part of the mortgaged property by virtue of a power of sale in the mortgage for sufficient to pay the mortgage debt and costs, and it was held that the mortgagee's title to the chattels remaining unsold was extinguished. The reason is the mortgage is a mere security for the debt. The mortgagee, although the holder of the legal title, is not the absolute owner of the property, and should be held to strict account for any surplus remaining in his hands. See also *Stromberg v. Lindberg*, 25 Minn., 513.

The testimony as to the value of the property sold at private sale is very unsatisfactory, and the same may be said of the expenses of the sale. As we find the proceedings in garnishment referred to in the 16th, 17th and 18th findings of fact sufficient to bind the property, we deem it better to avoid expressing an opinion upon the validity of the attachments referred to in the 15th, as neither the briefs nor argument of counsel have aided the court in solving the question. It would seem like a play upon words to hold the notice of garnishmeut served upon Buell an agent was not good, but that notice to Hart, an attorney of Smith & Crittenden, although a non-resident, was good. How far an attorney can enter an appearance for a garnishee is a proper question for discussion in the distribution of the fuuds, but does not arise in the case, as the lien of Kellogg & Barrett will be postponed until all prior liens are satisfied.

The claim of Smith & Crittenden for $76.00, omitted from the mortgage by mistake, will be postponed until all liens are paid. The judgment of the district court is reversed, and the cause remanded to the district court with directions to modify the findings of the referee in conformity with this opinion, and for further proceedings.

REVERSED AND REMANDED.

EX PARTE GEORGE W. COTTRELL.

1. **Bastardy.** A proceeding under the bastardy act while in the nature of a civil action is properly a police regulation requiring the putative father to furnish support for his child, and to indemnify the public against liability for its support.

2. ———: CONSTITUTIONAL LAW. The sum which the putative father is required to pay for such support is not a debt in the sense in which that word is used in the constitution, and in case of his failure to comply with the judgment of the court he may be committed to prison.

APPLICATION for writ of habeas corpus.

Isham Reavis, for the application.

MAXWELL, J.

This is an application for a writ of habeas corpus. The petitioner alleges that at the March, 1879, term of the district court of Richardson county he was adjudged to be the reputed father of a bastard child theretofore born of one Nancy Perkins, an unmarried woman; and he was adjudged to pay the sum of $10.85 per month for the maintenance of such child until it should be ten years of age, and also the costs of prosecution, and was required to execute a bond to said county in the sum of $1000.00, with

approved security for the performance of said judgment; and in case of default he was to be committed to the jail of said county. It appears that the petitioner has failed to comply with the judgment of the court and has been committed to prison, from which he now seeks to be discharged on habeas corpus. The principal ground upon which a discharge is sought is that the act providing for imprisonment in such cases is in conflict with the constitution.

Sec. 20 of Art 1 of the constitution provides that: "No person shall be imprisoned for debt in any civil action, on mesne or final process unless in cases of fraud." Is a proceeding in bastardy a civil action?

In *Cottrell v. The State*, 9 Neb., 125, it is said the proceeding is in the nature of a civil action to enforce the performance of a civil and moral obligation.

In *Musser v. Stewart*, 21 Ohio State, 356, it is said: "This is not a suit to recover a sum of money owing from the defendant to the complaining party. The liability sought to be enforced is not founded on contract express or implied, but originates in the wrongful act of the defendant, against the consequences of which the statute is designed to protect the public."

In *Hootman v. Shriner*, 15 Id., 43, it was held that the provisions of the code for the discharge of persons imprisoned for debt had no application to the case of a defendant imprisoned by order of the court under the bastardy act.

In *Holmes v. The State*, 2 G. Green., 501, it was held that that portion of the act which authorized imprisonment was unconstitutional and void. That case evidently was decided under a misapprehension of the law, and we have been unable to find any case where it is cited with approval. The proceeding, which is in the nature of a civil action, is properly a police regulation requiring the putative father to furnish maintenance for the support of his child,

and to indemnify the public against liability for its support. The sum charged against the petitioner is not a debt in the sense in which that word is used in the constitution. The statute is not in conflict with the constitution, and where as in this case there appears to be no doubt of the truth of the charge against the petitioner, the law should be enforced to the full extent. The writ is denied.

WRIT DENIED.

EX-PARTE JAMES C. McNAIR.

Camp-meeting subject to city or village ordinances. When a camp-meeting is located within the limits of a city or village it is subject to the ordinances of such city or village, and a person duly licensed by such village to sell articles of food or drink within the limits of the corporation is not required to take out a permit from the managers of such meeting to sell such articles.

APPLICATION for writ of habeas corpus.

W. J. Lamb, for the application.

H. H. Wilson and *A. C. Ricketts, contra.*

BY THE COURT.

The petitioner was convicted before a justice of the peace of selling two glasses of lemonade in the village of Bennett and was fined $20 and costs and committed to jail until the same was paid. He now presents his petition to this court for a writ of habeas corpus. It appears from the record that a camp meeting was being held in a grove within the corporate limits of the village of Bennett, and that the petitioner received a license from the village

authorities of said village to establish a booth at the entrance gate of the camp ground to sell lemonade, and that in pursuance of such license he did erect a booth and sell the lemonade, for which he was arrested and convicted. The prosecution is brought under the provisions of an act "for the prevention of certain immoral practices," approved Feb. 17, 1877. (Laws 1877, 6; Comp. Stat., 338.)

Sec. 1 provides that no person shall sell or expose for sale, give, barter, or otherwise dispose of in any way or at any place, any spirituous or other liquors, or any article of traffic whatever, at or within the distance of three miles from the place where any religious society or assemblage of people are collected or collecting together for religious worship in any field or woodland. *Provided,* That nothing contained in this act shall affect tavern-keepers exercising their calling, or distillers, manufacturers, or others, in prosecuting their regular trades at their places of business, or any persons disposing of any articles of provisions, excepting spirituous liquors, at their residences, nor any persons having a written permit from the trustees or managers of such religious society or assemblage to sell provisions for the supply of persons attending such religious worship, their horses or cattle, such persons acting in conformity to the regulations of said religious assembly and the laws of the state."

The second section provides the penalty for a violation of the law.

The design of this statute was not to supersede or interfere with the police regulations of a city or village, but to bestow upon the trustees of an encampment power to supply such police regulations to the extent stated where they do not otherwise exist. Thus, if a camp meeting is located in a field or woodland and entirely without the limits of a city or village, any person selling articles of food or drink at any other place than their residence or place of business must have a written permit from the trustees or managers

of such camp-meeting to sell said articles. Otherwise they will be liable under the act. The object of the statute is not to grant a monopoly of the business of selling food and drink, but to prevent disturbance of the meeting. If the meeting is located within the limits of a village it will be subject to the ordinances of such village, and the permits of the managers of the meeting will be effective only when they are not in conflict with such ordinances. In the case at bar, the village authorities had authority to grant the license in question, and this was sufficient authority to the petitioner to pursue his business at the place designated. The petitioner must therefore be discharged.

JUDGMENT ACCORDINGLY.

STATE, EX REL. RICHARDSON, v. F. W. FRITZ.

Practice in Supreme Court. Ordinarily a defendant will not be required to appear in an action in the supreme court until the time to which the cause under the rule is assigned.

APPLICATION for hearing of motion to quash.

E. Wakeley and *Brome & Durland*, for the application.

Robertson & Campbell and *James T. Brown*, for respondent.

BY THE COURT.

This is an original action of quo warranto to oust the defendant from the office of county treasurer of Madison county. The defendant filed a motion to quash the information upon certain alleged grounds, and this motion is still pending. The relator served a notice upon the de-

fendant that he would appear on the first day of the term, or as soon thereafter as counsel could be heard, and ask the court to dispose of the motion, and in pursuance of such notice he now asks that a hearing be had on the motion and a decision made thereon. The only question involved is the propriety of taking up business out of its regular order against the objections of the adverse party.

The rules of this court provide that all causes from the same judicial district shall be placed together on the docket in the numerical order of the several districts, commencing with the first, and they will be taken up and heard in this order, allowing at least one week for the hearing of causes from each district. It is also provided that in mandamus cases, except in case of urgency, the time for hearing shall be during the week to which the causes from the district in which the respondent resides are assigned. The object of these rules is to simplify procedure and save expense to litigants. A court, while providing for as speedy a trial as is consistent with the proper administration of justice, should guard the rights of all parties to the action by preventing needless trouble and expenses. Consequently, no one should be required to appear except during the time to which the causes from the judicial district in which he resides or an appeal is taken are assigned. This will not cause any delay in the proceedings, for if the motion is overruled the defendant will be required to answer at once, and unless for cause a continuance is granted, a trial will at once be had. The hearing on the motion will be postponed until the first day of the term for the sixth district.

ORDERED ACCORDINGLY.

JOHN FITZGERALD, PLAINTIFF IN ERROR, v. SAMUEL W. HOLLINGSWORTH, DEFENDANT IN ERROR.

Bill of Exceptions. An adverse party upon receiving a bill of exceptions must propose amendments thereto and return the same with his proposed amendments to the party preparing the bill within the time limited by law. If no amendments are proposed the judge, if satisfied of the correctness of the bill, may sign the same.

MOTION to quash bill of exceptions.

Field & Holmes, for the motion.

Marquett, Deweese & Hall, contra.

BY THE COURT.

This cause was tried in the district court of Lancaster county in March, 1881, and an order made allowing the plaintiff forty days in which to reduce his exceptions to writing. Within the time fixed by the order of the court the plaintiff prepared a bill of exceptions and submitted the same to the attorneys for the defendant for correction. This bill contained all the evidence offered or given in the trial except a certain contract, which had been mislaid. The attorneys for the defendant retained the bill in their office about one hundred days, when the plaintiff's attorneys procured the same, inserted the missing contract, and procured the allowance of the bill by the judge. The defendant now moves to quash the bill of exceptions because not signed within the time required by law.

The case is similar to that of *Deck v. Smith,* 12 Neb., 205. In that case it was held that it was the duty of the adverse party to propose amendments thereto and return the bill with his proposed amendments within the time limited by the statute to the party proposing the bill—

that is, in a case like this, within fifty days from the adjournment *sine die* of the court. The object of requiring the party preparing the bill to submit it to the adverse party for correction or amendment is to obtain an accurate bill. If there is any defect or omission in the proposed bill it must be pointed out and an amendment proposed in that regard. It devolves on the party objecting to the correctness of the bill to propose amendments to the same, and if he fails to do so within the time fixed by the law the judge, if satisfied of the correctness of the proposed bill, may sign the same. As the delay in signing the bill was caused by the neglect of the defendant's attorneys, the motion must be overruled.

MOTION OVERRULED.

SPRINGER GALLEY, PLAINTIFF IN ERROR, V. ALVIN GALLEY, DEFENDANT IN ERROR.

Practice in Supreme Court. Only such matter should be included in a transcript brought to this court as is necessary to a correct understanding of the case.

MOTION suggesting diminution of record.

W. A. Bergstresser, for the motion.

D. W. Barker, contra.

BY THE COURT.

This case was tried at the May, 1881, term of the district court of Nuckolls county, a jury being waived, the cause submitted to the court, and judgment rendered in favor of the defendant. The cause is brought into this

court by petition in error. The plaintiff in error has filed a motion, properly verified, suggesting diminution of the record, the alleged defects being the failure of the clerk to incorporate in the record the verdict of the jury in a former trial of the case, which took place in the year 1880, and also a motion for a new trial filed at that time. The verdict rendered at that time seems to have been set aside, and no question in relation to that trial is now before the court. All matters in relation to that trial were therefore properly omitted from the record. Only such matter should be included in the record as is necessary to a correct understanding of the case, and if more than this is added the costs occasioned thereby will be taxed to the party at fault.

The motion suggesting diminution is overruled.

MOTION OVERRULED.

ANDREW E. SPENCER, PLAINTIFF IN ERROR, v. WILLIAM T. THISTLE, DEFENDANT IN ERROR.

Practice in Supreme Court. A petition in error may be amended by leave of court where the amendment will be in furtherance of justice upon such terms as to costs as may be proper.

APPLICATION for leave to amend petition in error.

Emil Schultz, for the application.

BY THE COURT.

The attorney for the plaintiff in error asks leave to amend his petition in error by an additional assignment of error. A petition in error is within the provisions of the code as to amendments, and an amendment will be per-

mitted in any case where it will be in furtherance of justice. The court, as a condition of making the amendment, may, in cases where new questions are raised, impose the payment of costs caused by the amendment, but will not do so unless the additional costs are the direct result of making the same. The plaintiff in error has leave to amend his petition in error by adding the additional assignment of error prayed for in his motion.

ORDERED ACCORDINGLY.

GEORGE J. TILLOTSON, PLAINTIFF IN ERROR, V. JAMES W. SMALL, DEFENDANT IN ERROR.

Taxes: SALE FOR DELINQUENT TAXES. Taxes were delinquent upon certain real estate for the years 1872, 1873, 1874, and 1875, and the land was sold for the delinquent taxes of 1875, and a tax deed made to the purchaser. In an action by the purchaser to have tax certificates for sales subsequently made for the taxes of 1872-3-4 canceled, *Held*, That the treasurer had no authority to sell, except for *all* the delinquent taxes, penalty, interest, and costs.

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

D. W. Barker, for plaintiff in error.

The purchaser, by his deed, acquires all the right, title, interest, and claim of the former owner, and of the state and county, in and to the land, and the lien of the taxes previously assessed thereon, being included within these terms, is divested. It merges in the title conveyed to the purchaser. And the sale of said lands to the county of Nuckolls for unpaid delinquent taxes, prior to that for which the said lands were sold and tax deed issued there-

for to plaintiff's grantors, was null and void. Such previous taxes, after said lands were sold and tax deed issued in the manner above stated, were no longer liens on said lands, and cannot be enforced against the land thus sold for delinquent taxes. *Preston v. VanGorder*, 31 Iowa, 250. *Bowman v. Thompson*, 36 Iowa, 506. 2 Hilliard on Real Prop., 618. Comp. Stat., sec. 51, p. 393.

Batty & Ragan, for defendant in error, cited *State ex rel. v. Helmer*, 10 Neb., 25. *Dennison v. Keokuk*, 45 Iowa, 266. Gen. Stat., sec. 67, p. 923. *Shoemaker v. Lacy*, 38 Iowa, 277. *Cowell v. Washburn*, 22 Cal., 519. *Reeve v. Kennedy*, 43 Cal., 653. *Hayden v. Foster*, 13 Pick., 492. *Morris v. Smith*, 11 Humph., 133. *Osterberg v. Union Trust Co.*, 93 U. S., 424.

BY THE COURT.

This is an action to quiet title. A demurrer to the petition was sustained in the court below, and the action dismissed. The plaintiff brings the cause to this court by petition in error.

It appears from the petition that on the twentieth of September, 1876, certain real estate in Nuckolls county, described in the petition, was sold to the plaintiff at private sale for the taxes due thereon for 1875, there being at that time taxes due and delinquent on said lands for the years 1872, 1873, and 1874. At the expiration of two years from the date of sale the plaintiff applied for and obtained a tax deed for the lands in controversy. In 1881 the county commissioners of Nuckolls county purchased the lands in dispute for the delinquent taxes due thereon for 1872–3–4, and afterwards sold and assigned the certificates of purchase to the defendant. The plaintiff therefore brought this action to cancel these certificates. The question to be determined is, the authority of the treasurer to sell lands for a *portion* of the delinquent taxes due thereon.

This question was before the court in the case of *State v. Helmer*, 10 Neb., 25, and it was held that the sale could only be made where the purchaser paid all the taxes, penalty, interest, and costs due on each parcel of land. The reason is, the object of a sale is to collect the amount of taxes due upon the land—not a portion of such amount. And the law, which from the necessity of the case requires a sale to be made, yet is intended, as far as possible, to protect the rights of landowners.

A tax deed based upon a sale for a portion only of the taxes due upon land being unauthorized, is ineffectual to convey the title, although the holder may be entitled to a lien for the taxes paid, with twelve per cent interest. As the object of this action is to have the plaintiff's deed declared valid, the petition fails to state a cause of action, and the judgment is affirmed.

JUDGMENT AFFIRMED.

CRANS & HAZLETT, PLAINTIFFS IN ERROR, V. MAURICE F. CUNNINGHAM, DEFENDANT IN ERROR.

1. **Replevin:** AFFIDAVIT MAY BE AMENDED. An affidavit in replevin may be amended by leave of court at any time before the trial, or on the trial, where such amendment will be in furtherance of justice, but the court may impose the payment of reasonable costs as a condition of making the amendment.
2. **Exemption.** Property exempt from attachment execution may be claimed at any time before the sale.

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

Batty & Ragan, for plaintiffs in error, cited: Thompson on Homestead, secs. 820, 821. *Wallace v. Lawyer*, 54 Ind.,

509. *Bowman v. Smiley*, 31 Penn. State, 225. *McCluskey v. McNeely*, 8 Ill., 578. *Lindley v. Miller*, 67 Ill., 244. *Butt v. Green*, 29 Ohio State, 667. *Borland v. O'Neal*, 22 Cal., 504. *Bonnell v. Bowman*, 53 Ill., 460.

B. F. Smith and *John D. Hayes*, for defendant in error.

No brief on file.

MAXWELL, J.

The plaintiffs in error commenced an action by attachment against the defendant in error in the county court of Clay county, and a span of mules belonging to the defendant was taken under the order. The defendant thereupon brought an action of replevin in the district court of that county to recover possession of the property upon the ground that it was exempt from attachment or execution. On the trial of the cause a verdict was rendered in his favor, upon which judgment was rendered.

The plaintiffs assign as errors in this court: First, that the court erred in allowing the defendant to amend his affidavit for the replevin of the property; Second, that the court erred in permitting the defendant on the trial to file a second amended affidavit. The third, fourth, and fifth assignments, that the court erred in giving and refusing certain instructions, may be considered together.

Under the provisions of the code an affidavit in replevin may be amended by leave of court at any time before trial, or on the trial, where such amendment will be in furtherance of justice. The court may impose reasonable conditions as to costs, but should grant an amendment in all cases where the ends of justice will thereby be subserved. The first and second assignments therefore are not well taken.

The only material question presented by the instructions given and refused is, at what time must the exemption be

claimed. There are a number of cases which hold that a party claiming property to be exempt must do so at the time the levy is made. These cases seem to place a very narrow construction upon the law. If the property levied upon is actually exempt and of such a character as the law declares shall not be subject to the payment of debts, does the mere failure of the debtor at the time of the levy to claim it as exempt divest it of that character and become a waiver of his rights? If so, upon what principle? The policy of the law is to protect the citizen, in order that the state may be preserved. If the citizen is to be protected so that he may be enabled to discharge his duties to society and the state, he must have some means of livelihood left to him of which no creditor has a right to deprive him. If the mere silence of a debtor at the time a levy is made will deprive him and his family of the benefit of the exemption law, an officer with an attachment or execution, if he can obtain peaceable admission to the dwelling of the debtor, may levy upon every article belonging to the debtor and his family therein, and turn them into the street, and if the property was thereafter claimed as exempt by the debtor, the officer might answer, "You have waived your right, and the property is liable." Surely such a construction cannot be upheld. In many of the states it is held that an express waiver of exemption in a contract is nugatory as being against public policy. *Curtis v. O'Brien*, 20 Iowa, 376. *Troutman v. Gowing*, 16 Id., 415. *Woodward v. Murry*, 18 *Johns.*, 400. *Kneettle v. Newcomb*, 22 N. Y., 249. *Gilman v. Williams*, 7 Wis., 329. *Maxwell v. Reed*, Id., 582. Under our statute exempt property may be claimed at any time before the sale. *Chesney v. Francisco*, 12 Neb., 626.

The judgment is clearly right, and is affirmed.

JUDGMENT AFFIRMED.

HENRY C. STOLL AND MATTHIAS J. MATHEWS, PLAINTIFFS IN ERROR, V. S. L. SHELDON, DEFENDANT IN ERROR.

1. **Note Payable to Agent: JOINDER OF PARTIES.** Where a promissory note is made to an agent in his own name as promisee, he may maintain an action thereon without joining the person beneficially interested in the note.

2. **Release of Surety by Attorney.** An attorney at law, by virtue of his employment to make collections, has no authority to release a surety on a promissory note without payment; such authority must be proved.

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

A. Hardy, for plaintiffs in error, against right of defendant in error to sue, cited: Code, sec. 32. *Camden Bank v. Rodgers*, 4 How. Pr., 63. *Clark v. Phillips*, 21 Id., 87. *Billings v. Jane*, 11 Barb., 620. On question of settlement, cited: *Douglass v. White*, 3 Barb. Ch., 621. *Palmerton v Huxford*, 4 Denio, 166. *Bull v. Bull*, 43 Conn., 455. *United States v. Child*, 12 Wall., 232. *Fisher v. May*, 2 Bibb, 449. *Reed v. Bartlett*, 19 Pick., 273.

Pemberton & Forbes, for defendant in error.

Plaintiff can maintain the suit. *Robinson v. Wilkinson*, 38 Mich., 299. Bliss on Code Pleading, sec. 59. Maxwell's Plead. and Prac., 22. Failure to take possession of machine did not release surety. See cases cited by us 11 Neb., 273, and *Fuller v. Tomlinson* (Iowa), 12 N. W. R., 127. As to authority to make settlement, see *Graydon v. Patterson*, 13 Iowa, 256. Wharton on Evidence, sec. 702. *McDonough v. Heyman*, 38 Mich., 334. *Graham v. Taggart*, 44 Mich., 383.

BY THE COURT.

This case was before this court in 1881, and is reported in 11 Neb., 272, the facts being stated, and a copy of the note upon which the suit is brought being given in that case. Stoll signed the note in controversy as surety, and now relies upon two defenses:

First. That the action is not brought in the name of the real party in interest.

Second. Settlement with one Hutchison, an attorney of the plaintiff.

The note was made payable to "S. L. Sheldon or order." The testimony shows that Sheldon, at the time the note was given, was and now is the agent of Meadow King Mower, for Gregg & Company, who are the real owners of the note.

The code requires an action to be brought in the name of the real party in interest, but excepts trustees of express trusts, executors and administrators, and persons in whose names contracts are made for the benefit of others. Judge Bliss has referred to the cases bearing upon this question. See sec. 57, Code Pleading. And Pomeroy more fully in Remedies and Remedial Rights, secs. 171–182. The law seems to be definitely settled by the decisions referred to, that when a contract is entered into with an agent in his own name, the promise being made directly to him, he may maintain an action on such contract in his own name without joining the person beneficially interested; but the defendant would not thereby be deprived of any defense he might have to the action. The first objection of the plaintiff is therefore not well taken.

As to the alleged settlement, it appears that Mr. Stoll had been the agent of the Meadow King Mower at Joliet, Ill., and in his testimony he states how a settlement was made, as follows:

Q. Were all the notes there at this time?

A. Yes; I told him (the attorney) I would take one mower to send to Nebraska, and I have got the note with me now. I would take up the note and run it on a year's time, and I would pay cash for another note, and I had a man who would take a mower on sixty days' time, I would give a note for that. That made three, and he would have to take back one mower. I would settle it with this understanding, if he would give me up as security on this Williams note; otherwise I would not settle with him, I would have nothing to do with it. He says: "Stoll, I can settle just as I am mind to." I says: "If you settle that way I will give you a Poland-China pig." He says: "What kind of a pig is it?" I told him it was a pig that will sell for fifteen or twenty dollars. He says: "All right, I will settle." I says: "My boy will fetch the pig to you," and he fetched the pig down and we settled it, and he took back one mower; I paid cash for the other. One mower we made out a new note for, which I have got with me, and we settled it that way.

Mr. Stoll's testimony shows an accord without satisfaction. The amount of the debt was undisputed. This being so, the manner in which he satisfied certain portions of it does not seem to be material. He was liable for the whole debt unless released in some manner by the creditor or his duly authorized agent.

Where claims are placed in the hands of an attorney for collection there is no presumption that he is authorized to receive anything but money in payment, or that he has power to release a surety on an obligation, and such authority must be proved.

In the case of *Graul v. Strutzel*, 53 Iowa, 712, it was held by the supreme court of Iowa that an agent's authority cannot be shown by his own testimony. That is, where an agent is acting under a special authority the principal will only be bound to the extent of the authority. An

attorney in releasing a surety is acting under a special power which must be proved. As there is an entire failure of proof upon that point, the court did not err in directing a verdict for the defendant in error. The judgment is affirmed.

JUDGMENT AFFIRMED.

THE SYCAMORE MARSH HARVESTER MANUFACTURING COMPANY, PLAINTIFF IN ERROR, v. JOHN T. STURM, DEFENDANT IN ERROR.

1. **Contract**: BREACH: DAMAGES. Where two parties have made a contract which one of them has broken the damages which the other ought to receive should be either such as may fairly and reasonably be considered rising naturally, that is, according to the usual course of things, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

2. ——: ——: ——: WARRANTY. Upon the sale of a machine the seller gave the purchaser a warranty in writing in these words: "Hastings, Neb., Sept. 5, 1877. We warrant Wheeler No. 6 combined reaper and mower to be a good grain-cutting machine and a good mowing machine. Should the machine fail to do as warranted, then in that case we are to be notified and given time to make the machine work. Should we fail to make the machine work, then we agree to take it back." Upon suit being brought on one of the notes given for the purchase money the defendant plead the warranty and breach, and made a counter claim for loss of time for himself, two hands, and team, loss of grain out of crop caused by delay in harvesting, in being compelled to hire extra help and another machine to harvest said grain, and for money paid on said machine. Verdict and judgment for defendant. On error, *Held*, That by the last clause of the warranty the vendee's damages were limited to the recovery back of the money paid on the contract.

3. ——: WARRANTY: RATIFICATION. The contract of warranty above set out was signed by dealers who in point of fact

were the agents of the plaintiff, but they used their firm name and not the name of the plaintiff, nor did they describe themselves as agents. The notes for the machine were drawn payable directly to the plaintiff, and suit thereon brought in its name. *Held*, That the giving of the warranty and taking of the notes being parts of the same transaction, the claiming of property in and bringing suit on the note was a ratification of the warranty by the plaintiff.

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

Batty & Ragan for plaintiff in error.

Contract of Stabler & Deisher was not binding on plaintiff. 1 Parsons on Contracts, 54. *Long v. Colburn*, 11 Mass., 97. *Magill v. Hinsdale*, 6 Conn., 464. *Hancock v. Fairfield*, 30 Me., 299. *Merchant's Bank v. Hayes*, 7 Hun., 530. *Hayes v. Crutcher*, 54 Ind., 260. On question of warranty cited: *Nichols v. Hail*, 4 Neb., 210. *Edgerly v. Gardner*, 9 Neb., 130. On damages, cited: Field, 266, 275. *Crosby v. Watkins*, 12 Cal., 85. *Hamilton v. McPherson*, 28 New York, 72. *McClary v. S. C. & P. R. R.*, 3 Neb., 54. *Berry v. Dwinel*, 44 Me., 255.

Thompson Brothers, for defendant in error.

On question of agency, cited: 2 Smith's Leading Cases, 432. Story on Agency, 259. *Lawrence v. Taylor*, 5 Hill, 107. Story on Sales, sec. 77. *Hovey v. Blanchard*, 13 New Hamp., 145. *Woodbury v. Larned*, 5 Minn., 339. On damages: *Kelley v. Peterson*, 9 Neb., 81. *Baldwin v. Blanchard*, 15 Minn., 489. Field, 238, *et seq.* *Hadley v. Baxendale*, 9 Exch., 341.

COBB, J.

This action was brought on a promissory note executed by the defendant in error to the plaintiff in error, for the

sum of fifty dollars and interest. In the court below the defendant answered that the note sued on was made and executed to the said plaintiff on a contract made and executed between Stabler & Deisher as agents of the plaintiff and the defendant. That by virtue of said contract, said plaintiff conditionally sold and delivered to said defendant a certain combined reaper and mower; that at the time of making said contract, said plaintiff agreed to set said machine up in running order, by the time said defendant's grain of 1878 was ready to be harvested, which it utterly refused and neglected to do after said defendant had given them due notice that said grain was ripe; that at the time of entering into contract above mentioned, the plaintiff by its agents, Stabler & Deisher, gave a warranty to said defendant as follows, to-wit:

"HASTINGS, NEB. SEPT. 5, 1877.

"We warrant Wheeler No. 6, combined reaper and mower, bought of us, to be a good grain cutting machine and a good mowing machine. Should the machine fail to do as warranted, then and in that case we are to be notified and given time to make the machine work. Should we fail to make the machine work, then we agree to take it back.

"STABLER & DEISHER."

That said machine was not a good grain cutting machine; that plaintiff was notified by said defendant and given time to make said machine work; that said plaintiff refused and neglected and entirely failed to make said machine work; that said plaintiff having failed and neglected to make said machine work as it agreed, said defendant gave said plaintiff due notice to take it back; that said machine has ever since been at plaintiff's disposal and subject to its order, etc. The said answer also contains a counter claim on the part of said defendant, wherein, after repeating the terms of agreement of the said plaintiff to set up said machine in good running order in due time to cut and harvest defendant's grain of 1878, the giving of due notice by the

defendant to the plaintiff that the said grain would be ready to harvest in a few days thereafter, and that said plaintiff would be expected to fulfill its aforesaid agreement, which the said plainitiff entirely neglected and failed to do; alleges that said defendant, by reason of the above mentioned neglect and failure on the part of the plaintiff to perform its part of the contract, after using all due diligence sustained the following damages, to-wit:

1. In loss of time for himself, two hands, and one team in the sum of $50.00.

2. In loss of grain out of crops of 1878, three bushels to each acre on 60 acres, worth $108.00.

3. In being compelled to hire extra help and another machine to harvest said grain of 1878, in the sum of $35.00.

4. That said plaintiff now owes this defendant for money had and received on or about the 1st day of January 1878, the sum of $30.50, with interest at the rate of 10 per cent per annum, etc.

The cause was tried to a jury, who returned a verdict for the defendant for $100.00, for which sum judgment was rendered in his favor. The plaintiff, in its motion for a new trial, as well as in its petition in error, assigns twenty-six errors. Most of these arise upon the admission of testimony objected to on the part of the plaintiff, and will not require an examination in detail in order to arrive at a disposition of the case.

The plaintiff objected to the introduction in evidence on the part of the defendant of the warranty signed by Stabler & Deisher, above set out, on the ground that it was the individual obligation of said Stabler & Deisher, and not the obligation of the plaintiff. This objection we do not think was well taken. Stabler & Deisher were the agents of the plaintiff for the sale of its harvester. They had traded one of plaintiff's harvesters for this Wheeler combined machine, presumably within its authority as agents. The notes

of the defendant for the price of the machine were taken in the name of the plaintiff, who sued upon the one described in its petition. The warranty was a part of the consideration of the notes, and by claiming the benefit of the transaction, as evidenced by the suit on one of the notes, the plaintiff is held to have ratified it in its entirety including the warranty. The authorities cited by counsel for defendant, as well as reason and justice, fully sustain this position. There was then no error in the refusal of the court below to charge the jury that the said warranty was the warranty of Stabler & Deisher, and not of the plaintiff.

The written warranty having been received in evidence, and being held to be the contract of the plaintiff, its terms, fairly construed, become the law of the case. Aside from the general principle, as stated by Mr. Justice Parker in the leading case of *Stackpole v. Arnold*, 11 Mass., 27, "that when parties have deliberately put their engagements in writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it shall be presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing; so that oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed, or afterwards, would tend in many instances to substitute a new and different contract for the one which was really agreed upon," etc., it is equally repugnant to law and reason that a party, after having proven and availed himself of the advantage of a contract, entire in its terms and covering the whole ground, should be allowed to prove another and different one to sustain the same cause of action. Accordingly, although the testimony of the defendant of the verbal agreement of plaintiff's agents to set the machine up in good working order in time for the defendant's harvest of 1878 was not objected to or made a point in the petition in error, such agreement can

not be taken as the true contract between the parties upon which to base a recovery of damages.

The plaintiff, as shown by the written warranty, had warranted the machine in question "to be a good grain cutting machine and a good mowing machine. Should the machine fail to do as warranted, then in that case we are to be notified and given time to make the machine work. Should we fail to make the machine work, then we agree to take it back." By their verdict the jury must have found that the machine failed to do as warranted; that the plaintiff was notified and failed to make the machine work. What then was the rule of damages? There are many adjudicated cases nearly in point, but in the limited time at my disposal I have failed to find a single one entirely so. There are many cases of express and many of implied warranties, some in writing and some verbal, but I find no case where, like the present one, the warranty contains a clause of limitation upon the consequences of a failure to make the warranty good. This clause is of importance in two points of view: First, as fixing a limitation upon the warranty, and secondly, in view of the rule laid down in some of the leading cases on this subject, in showing the scope of the plaintiff's liability as contemplated by the parties when they entered into the contract.

The leading case bearing upon this subject is that of *Hadley v. Baxendale*, 26 Eng. L. & Eq. R., 398. In that case the court states the rule as follows: "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under

which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might have especially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be unjust to deprive them." In the case at bar the machine was purchased and the contract of warranty entered into on the fifth day of September, 1877. The machine was a combined reaper and mower. Doubtless the immediate object of the purchase on the part of the defendant was to use it as a mower in the cutting of grass that fall. It is true the machine was warranted to be a good grain-cutting machine, and the cutting of the defendant's harvest of 1878 was contemplated and spoken of, but the amount or kind of grain that would constitute defendant's harvest of that year was neither known to himself or the plaintiff's agents at the time of entering into the contract.

In the case of *Hadley v. Baxendale, supra,* the plaintffs were the owners of a steam grist mill and contracted with the defendant, a carrier of goods by railway, to carry for hire two pieces of iron, constituting the broken shaft of a mill, and deliver the same to an artificer who lived at a considerable distance, in order to serve as a model for a new shaft to be made for them by him. The defendant having violated

his agreement by not delivering these pieces of iron within a reasonable time, a delay necessarily arose in supplying the new shaft, and a shaft being indispensable to the working of the mill, and the plaintiffs not having any other, the mill remained idle until the delivery of the new one; but although there was evidence that the defendant knew the mill was standing still, he was not aware that this was for want of the shaft for which the iron delivered to him was to serve as a model. Baron Alderson, in the opinion of the court, says: "We find that the only circumstances communicated by the plaintiff to the defendant at the time the contract was made were that the article to be carried was the broken shaft of a mill and that the plaintiff was the miller of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiff had another shaft in his possession put up, or putting up at the time, and that he only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the immediate profits of the mill. Or, again, suppose that at the time of the delivery to the carrier the machinery of the mill had been in other respects defective, then also the same result would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that in the great multitude of cases of millers sending of broken shafts to third persons by a carrier under ordinary circumstances such consequences would not in all probability have occurred, and

these special circumstances were here never communicated by the plaintiff to the defendant. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract; for such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances," etc.

In the case at bar had the plaintiff not limited its liability by the terms of the warranty, would such liability, upon the authority above quoted, have extended to the damages embraced in the first, second, and third paragraphs of the defendant's counter-claim? I think not. It cannot be that in a populous county of this state like Hall county, that usually and ordinarily when a farmer is disappointed in his reaper, and is obliged to obtain the use of another with which to cut his harvest, such consequences follow as those set out in the said paragraphs. Certainly, as in the case above cited, "such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which perhaps would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the" plaintiff. So I think the district court erred in refusing to instruct the jury substantially as prayed by the plaintiff in respect to the said paragraphs. This, even upon the theory that plaintiff's liability was not limited by the terms of the written warranty and the evidence of a verbal agreement on the part of the plaintiff to set up the machine in time for the harvest of 1878, etc., was properly admitted. But as we have before stated, the terms of the written warranty limited the liability of the plaintiff to taking back the machine, and of course restoring any part of the purchase price which had been paid.

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

REVERSED AND REMANDED.

EDMISON CROSSLEY, PLAINTIFF IN ERROR, V. J. N. STEELE, DEFENDANT IN ERROR.

1. **Bill of Particulars.** A bill of particulars in justice's courts in the form of an account claiming damages to grain in the field, *Held*, Sufficient after trial and judgment.

2. **Judgment:** FINDING. Sec. 297 of the code applies to justices of the peace, and where a jury is waived in a justice's court, and the cause tried before the justice, there must be a finding of facts. A judgment without a finding is not void, but voidable.

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

Bush & Rickards, for plaintiff in error.

Bill of particulars insufficient. *Gage v. Roberts*, 12 Neb., 276. *K. P. R. R. v. Taylor*, 17 Kan., 569. *Bowen v. School District*, 10 Neb., 265. *B. & M. R. R. v. York Co.*, 7 Neb., 487. There should be a finding. *Smith v. Silvis*, 8 Neb., 164. *Sprick v. Washington County*, 3 Neb., 255.

Pemberton & Forbes, for defendant in error, cited: *Bell v. Sherer*, 12 Neb., 409. Bliss on Code Pl., sec. 439. *Wilcox v. Toledo*, 43 Mich., 588, 589. Finding. Swan's Treatise, 209. *Lucas v. San Francisco*, 28 Cal., 591.

BY THE COURT.

This action was brought before a justice of the peace of Gage county upon the following bill of particulars:

"I, J. N. Steele, do charge Edmison Crossley, of Holt precinct, with damage to crops on the south-west quarter of section 3, town five, range six.

"Oats in the field, 250 bushels, 15.....$37.50
Corn in field, 250 bushels, 20..... 50.00
Millet in field, 24 bushels, 50..... 12.00

$99.50

"J. N. STEELE."

Crossley appeared in the action and a trial was had before the justice, and judgment was rendered in favor of Steele for the sum of $82 and costs. Crossley took the case on error to the district court, where the judgment was affirmed. He now brings the cause into this court by petition in error.

The errors assigned are:

First. That the bill of particulars is not sufficient to sustain the judgment.

Second. That there is no finding of facts.

The bill of particulars, while informal, is sufficient to sustain a judgment. It is in effect an account, wherein Edmison Crossley is charged as debtor. If he desired a more definite statement, he should have filed a motion to that effect; but having failed to do so, the defect is waived. All matters relating to the form of the proceedings in justice courts will be construed with great liberality.

Sec. 297 of the code provides that upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which

case it shall state in writing the conclusions of fact found separately from the conclusions of law.

Sec. 1085 provides that the provisions of the code, which are in their nature applicable, and in respect to which no special provision is made by statute, shall apply to proceedings before justices of the peace.

In *Sprick v. Washington County*, 3 Neb., 255, this court say: "Sec. 297 of the civil code clearly provides that in all actions tried by the court there must be a general finding, and when requested by one of the parties, a special finding. General Statutes, 575. And if this finding be vague, uncertain, or indefinite, it will not maintain a judgment." *Demming v. Weston*, 15 Wis., 236. The necessity of a finding seems to be as great in cases tried before justices of the peace as in cases tried in courts of record. The finding takes the place of the verdict of a jury, and shows upon what facts the justice bases his judgment. There must therefore be a finding of facts in all cases tried before a justice of the peace where a jury is waived. A judgment without a finding is not void, but voidable. As there is no finding, the judgment of the district court, and also of the justice of the peace, is reversed, and the cause is remanded to the district court for trial.

REVERSED AND REMANDED.

DAVID B. HOWARD, PLAINTIFF IN ERROR, V. JOSEPH E. LAMASTER, DEFENDANT IN ERROR.

1. **Bill of Exceptions.** A bill of exceptions must be submitted to the adverse party for examination and amendment before being signed by the judge, and if not thus submitted, may be quashed.

2. ———: If there is no receipt or other evidence in the record, an affidavit stating the delivery of the bill to the adverse party must show when and to whom the bill was delivered.

MOTION to quash bill of exceptions.

A. C. Ricketts, for the motion.

Harwood & Ames, contra.

BY THE COURT.

This is a motion to quash a bill of exceptions upon the ground that the bill was not submitted to the adverse party for examination and amendment before it was signed by the judge. There is no receipt or other evidence in the record tending to show that the bill was ever submitted to the defendant in error, or his attorneys, and Mr. Ricketts has filed an affidavit denying specifically that such bill was ever submitted to him or the defendant. To offset this, one of the plaintiff's attorneys has filed an affidavit, wherein he denies the truth of that of the attorney for the defendant, but fails to state any facts showing *where* or to whom he delivered the bill for examination. An affidavit, like a pleading, must state facts, and not mere conclusions of law—that is, the affiant must state the time and manner of performance. Unless the bill was submitted to the adverse party for examination and amendment, the judge had no authority to sign the same. *Uhling v. Schellenberg*, 12 Neb., 609. The object of the statute in requiring it to be thus submitted to the adverse party is to obtain an accurate bill.

The motion to quash must be sustained.

MOTION SUSTAINED.

THE STATE OF NEBRASKA, EX REL. JASON G. MILLER, APPELLEE, V. LANCASTER COUNTY, APPELLANT.

1. **Mandamus.** A mandamus under our practice is an action at law, and is reviewable only on error, and not by appeal.
2. **Dismissal of Appeal.** Where an appeal is dismissed, and it is necessary to file an amended transcript in order to show the judgment sought to be reviewed, leave will not be granted to file a petition in error.

MOTION to dismiss appeal.

Ricketts & Wilson, for the motion.

Harwood & Ames, contra.

BY THE COURT.

In May, 1882, the relator commenced proceedings by mandamus in the district court of Lancaster county to compel the defendant to act upon a certain claim filed by him against the county. The defendant filed a return in the form of an answer to the writ, to which the relator filed a demurrer. The defendant appeal to this court. The relator moves to dismiss the appeal as being unauthorized.

Appeals are authorized by statute in actions in equity, but a proceeding by mandamus is strictly a legal action. In *Commonwealth v. Dennison*, 24 How., 97, TANEY, CH. J., says: "A mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ." An action at law can be reviewed only on error. The motion to dismiss the appeal must therefore be sustained.

The attorney for the defendant asks to have the transcript retained in this court, and for leave to file a petition in error. This has been permitted in some cases, where in

furtherance of justice the application was made within the time limited by the statute for filing a petition in error, upon such terms as to costs as seemed proper—*Stewart v. Carter*, 4 Neb., 564; but in no case where it was necessary to file an amended transcript in order to show the judgment sought to be reviewed.

The motion must be sustained.

MOTION SUSTAINED.

HENRY E. FLETCHER, PLAINTIFF IN ERROR, v. MATTHEW A. DAUGHERTY, DEFENDANT IN ERROR.

1. **Note and Mortgage:** SPECIAL AGREEMENT IN NOTE. A provision in a note secured by mortgage that, "Upon a failure to pay any of said interest within thirty days after due, the holder may *elect* to consider the whole note due, and it may be collected at once," *Held*, To control a general provision in the mortgage, and to restrict the right, in case of default of payment of interest, to declare the debt due to the holder of the note.
2. **Tender.** An action was commenced before a justice of the peace to recover $30 on an interest coupon. The defendant then in open court tendered $535, the amount due on a note and mortgage. *Held*, That the justice was not the agent of the plaintiff, and had no authority to receive payment in excess of the amount involved in the suit, and that the tender was unavailing. A tender must be made to a party entitled to receive payment.

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

Dawes & Foss, for plaintiff in error.

Note and mortgage should be construed together. 1 Jones on Mortgages, sec. 76. *Muzzy v. Knight*, 8 Kan., 456. *Kennion v. Kelsey*, 10 Iowa, 443. Mortgage subject

to conditions of note. 1 Hilliard on Mortgages, 286. 2 Jones on Mortgages, 902. Tender unavailing. *Saunders v. Frost*, 5 Pick., 267. *Graham v. Linden*, 50 N. Y., 547.

Hastings & McGintie and *M. B. C. True*, for defendant in error.

The construction of note and mortgage must be such as to give effect to the terms of each. 2 Parsons Cont., 501. *National Bank v. Peck*, 8 Kan., 662. *Schoonmacker v. Taylor*, 14 Wis., 313. Stipulation may be taken advantage of by mortgagor as well as mortgagee. *National Bank v. Peck*, 8 Kan., 662. *Pope v. Hooper*, 6 Neb., 180. *Stanclift v. Norton*, 11 Kan., 218. *Robinson v. Loomis*, 51 Penn. State, 78.

BY THE COURT.

In April, 1881, the plaintiff commenced an action before a justice of the peace of Saline county, upon the following instrument:

"$30. April 1, 1881, I promise to pay H. E. Fletcher or order thirty dollars, being interest to that date on my note for five hundred dollars. This interest note draws twelve per cent per annum from maturity.

"MATT. A. DAUGHERTY."

On the return day of the summons the defendant appeared in open court and tendered the sum of $535, being the amount due upon the note and mortgage for which the interest note was given, and costs to that date. The plaintiff refused to accept the tender in that form, and judgment was rendered by the justice in his favor for the sum of $30.25 and costs. The defendant appealed to the district court, where the judgment of the justice was reversed, and the action dismissed. The case is brought into this court by petition in error.

I. It appears from the record that on the first day of

April, 1879, the defendant executed a note to the plaintiff for the sum of $500, due in five years, with interest at twelve per cent, payable semi-annually, and also executed coupon notes for the interest as it should become due, and to secure the payment of the principal and interest executed a mortgage upon certain real estate. The mortgage contains this provision: "*Provided also*, That on default in payment of any part of said principal, or interest, or taxes as the same should become due, the whole of the moneys hereby secured shall become payable immediately upon such default."

The note contains the following provision: "And upon a failure to pay any of said interest within thirty days after due the holder may *elect* to consider the whole note due, and it may be collected at once.

The note and mortgage were made at the same time, in relation to the same subject matter, and must therefore be construed together. By construing them together as parts of one contract it is very evident that the provisions of the note control those of the mortgage. The holder of the note, in case of default, may *elect* to consider the note due. Unless he do so and in some manner signify the same, the statute of limitation will not commence to run against the note until the expiration of five years from its date. Whether in a proper case a mortgagor may plead his own default as a defense in the action it is unnecessary to determine.

In the case of *The Bank v. Peck*, 8 Kas., 660, it was held that a stipulation in a mortgage "that if any part of the money secured by it (the mortgage) should not be paid when it became due then all should immediately become due and payable" was available to the mortgagor equally with the mortgagee. And that in case of the failure of the mortgagor to make payments as provided the whole debt became due and the statute of limitations commenced to run from the time of the default. Whether that decis-

ion can be maintained upon either principle or authority may perhaps be questioned, but it has no application to the case at bar, because in this case there is a provision as to the party entitled to elect which seems to exclude the mortgagor.

II. The tender was insufficient, even if the mortgagor had authority to declare the debt due and tender payment of the same. Sec. 1100 of the code limits the jurisdiction of a justice of the peace in an action on a promissory note to the sum of $100. The justice was not the agent of the plaintiff and had no authority to receive any money for him in excess of the sum involved in the suit. A tender of that amount would have been valid and would have defeated the action. A tender must be made to the person authorized to receive payment. If the defendant desired to make a valid tender he should have tendered the entire sum due to the plaintiff, and a tender made to a person not authorized to receive payment is unavailing. The judgment of the district court is reversed and the judgment of the justice reinstated.

JUDGMENT ACCORDINGLY.

ANDREW E. SPENCER, PLAINTIFF IN ERROR, v. WILLIAM T. THISTLE, DEFENDANT IN ERROR.

1. **New Trial.** A new trial can only be granted after judgment for specific causes, which must be assigned in the motion therefor.

2. ———: LEAVE TO ANSWER: PRACTICE. When a defendant files a motion to set a judgment, rendered by default, aside, and for leave to answer, he must accompany his motion with his proposed answer duly verified.

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

Emil Schultz, for plaintiff in error.

Burr & Marshall, for defendant in error.

MAXWELL, J.

On the sixteenth day of March, 1882, the district court of Lancaster county confirmed the report of a referee and rendered judgment in favor of the plaintiff and against the defendant for the sum of $135.00. Two days thereafter the attorneys for the defendant filed a motion in said court, of which the following is a copy, omitting the formal portion:

"Now comes the defendant, by his attorneys, and upon the affidavits of J. A. Marshall and L. C. Burr, and upon all the pleadings, proceedings, and records herein, moves the court for an order vacating judgment herein and to set aside report of referee and vacate said reference and allow defendant to answer, and that said action stand for trial before a jury, and for such other further and different relief as to the court may seem just."

This motion was sustained and a new trial granted. The plaintiff brings the cause into this court by petition in error. It will be seen that no specific ground is assigned for setting aside the report and judgment.

Sec. 314 of the code provides that a new trial may be granted for any of the following causes affecting the substantial rights of such party:

First. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court, or referee, or abuse of discretion by which the party was prevented from having a fair trial.

Second. Misconduct of the jury or prevailing party.

Third. Accident or surprise which ordinary prudence could not have guarded against.

Fourth. Excessive damages, appearing to have been given under the influence of passion or prejudice.

Fifth. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon contract or for the injury or detention of property

Sixth. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law.

Seventh. Newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial.

Eighth. Error of law occurring at the trial and excepted to by the party making the application.

Sec. 602 provides in what cases a judgment may be vacated after the term at which it is rendered.

Sec. 606 provides that a judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action, etc.

A trial is a judicial examination of the issues in an action, and a judgment the final determination of the rights of the parties. When a trial has been had and the court has rendered judgment in the action such judgment is conclusive so far as the matters were in issue, unless afterwards it be set aside or modified. And the party applying for the new trial must set forth in his motion therefor the specific ground or grounds upon which he relies, so that if necessary issue may be taken upon the same. And the court has no authority without cause to set aside the report of a referee and judgment thereon.

The defendant appears to have been in default of an answer, and the court, without setting aside the default or without a copy of the proposed answer, set the judgment aside and granted a new trial with leave to the defendant

to answer. In a number of cases this court has held that where a defendant has a defense to the action and this fact is made to appear to the court at any time before judgment, the court must permit the defense to be made upon such terms as to costs as may be just. But where a party seeks to have a judgment against him set aside and for leave to answer, he must accompany his motion to set the judgment aside with his proposed answer duly verified, so that the court may see whether he has a defense to the action, and he must also state satisfactory reasons in excuse of his default. If the answer fails to state a defense, the motion should be overruled. There is nothing in this record tending to show that the defendant has any defense to the action. The judgment of the district court granting a new trial is reversed at the costs of the defendant, and the judgment confirming the report of the referee and rendering judgment thereon is affirmed.

JUDGMENT ACCORDINGLY.

GEORGE H. BAKER, PLAINTIFF IN ERROR, V. THOMAS B. SLOSS ET AL., DEFENDANTS IN ERROR.

Practice in the Supreme Court. An *alias* summons in proceedings in error, issued more than one year from the date of the final order sought to be reviewed, is of no effect, being issued after the bar of the statute is complete.

MOTION to dismiss petition in error.

E. E. Brown, for the motion.

J. L. Caldwell, contra.

BY THE COURT.

This is a motion by the defendants to dismiss the action upon the ground that the summons in error was issued and served after the expiration of a year from the date of the final order. It appears from the record that the final order sought to be reviewed was made on the ninth day of May, 1881. A transcript of the proceedings was filed in this court on the eleventh day of April, 1882, and a summons in error issued, but at what time does not appear. This summons was taken by one of the attorneys for the plaintiff in error, and was lost without having been served. An *alias* summons was issued on the twelfth of July, 1882, and served on the defendants on the next day. Is this service sufficient to give the court jurisdiction?

Sec. 19 of the code provides that: "An action shall be deemed commenced within the meaning of this title, as to the defendant at the date of the summons which is served on him." A summons issued within the time limited by statute for the commencement of an action may be served after such period has elapsed, but there is no authority to issue a summons after that time, and this prohibition applies to an *alias* summons. In all cases the summons served, whether the original or not, must be issued before the bar of the statute of limitation is complete. *Rogers v. Redick*, 10 Neb., 332.

It follows that the motion to dismiss must be sustained.

MOTION SUSTAINED.

J. H. McMURTRY, IMPLEADED WITH UNIVERSITY BOARDING HALL ASSOCIATION, PLAINTIFF IN ERROR, V. TUTTLE & DOOLITTLE, DEFENDANTS IN ERROR.

1. **Summons:** SERVICE ON CORPORATION. Where the president or chief officer of a corporation is absent from the county, service may be made upon the treasurer.

2 **Confirmation of Sale in Vacation.** A judge of the district court has authority, under section 498 of the code, in vacation to confirm a sale of real estate made upon execution.

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

J. A. Marshall, for plaintiff in error.

S. J. Tuttle, for defendants in error.

MAXWELL, J.

On the twenty-ninth day of July, 1882, the sheriff of Lancaster county sold, upon execution, lot 12 in S. W. Little's addition to Lincoln, to J. H. McMurtry, for the sum of $850. The plaintiffs in execution thereupon filed a motion to confirm the sale, and caused a notice of the same to be served upon the University Boarding Hall Association by "leaving a true and correct copy of the same with Austin Humphrey, treasurer of the defendant corporation, the president and secretary of the same both being absent from said county and state." The purchaser resisted the confirmation upon two grounds, viz., that the service of process was defective, and that the court had no authority in vacation to confirm a sale upon execution. The court overruled the objections, and confirmed the sale. The purchaser brings the cause into this court by petition in error.

Sec. 73 of the code provides that a summons against a corporation may be served upon the president, manager, chairman of the board of directors or trustees, or other chief officer; or if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or if none of the aforesaid officers can be found, by a copy left at the office, or last usual place of business of such corporation.

The notice in this case was properly served on the treasurer of the corporation, the president and secretary being absent, and the statement of such absence in the return is sufficient. The first assignment of error was therefore properly overruled.

Sec. 498 of the code provides that if the court, upon the return of any writ of execution or order of sale, for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provisions of this title, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such lands and tenements; and the officer on making such sale may retain the purchase money in his hands until the court shall have examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto, agreeable to the order of the court. *Provided*, That the judge of any district court may confirm any such sale at any time after such officer has made his return, on motion and ten days notice to the adverse party or his attorney of record, if made in vacation. When any sale is confirmed in vacation, the judge confirming the same shall cause his order to be entered on the journal by the clerk.

Sec. 23, art. VI of the constitution provides that: "The several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law." The

legislature therefore had authority to confer jurisdiction upon the judges of the district courts to confirm in vacation sales of real estate made upon execution. The order, though made in vacation, must be entered on the journals of the court and become a part of its records, and has the same effect as though made in open court. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

13 N.W. 206

WILLARD W. EARL ET AL., APPELLANTS, V. CENEK DURAS, TREASURER OF SALINE COUNTY, APPELLEE.

Taxes: ENJOINING COLLECTION. Where taxes are levied upon real estate without authority of law, a court of equity may enjoin the collection of the same.

APPEAL from Saline county. Heard below before WEAVER, J.

M. B. C. True, for appellant.

W. G. Hastings, for appellee.

BY THE COURT.

This is an action brought by the plaintiffs, who are taxpayers of school district No. 17, of Saline Co., to enjoin the collection of a tax of five mills on the dollar valuation levied upon the taxable property of said district for the use and benefit of district No. 102. A demurrer to the petition was sustained in the court below and the action dismissed. The plaintiffs appeal to this court.

It is alleged in the petition that in June, 1876, the county superintendent of public instruction of Saline county di-

vided school district No. 17, and created district No. 102, which was formed from the territory set off from 17, and that said superintendent duly ascertained and determined the amount justly due from district No. 17 for the corporate property retained by it, which amount said district has paid to district No. 102; that on the 22nd day of June, 1881, the county commissioners of Saline county, on their own motion made a levy of five mills on the dollar valuation upon all the taxable property in district No. 17 for the purpose of paying the same to district No. 102 for the coporate property retained by district No. 17; that at the time of the levy of said tax there was not nor is there now anything due from district No. 17 to district No. 102, and said tax is wholly unauthorized. There are other allegations to which we need not refer.

The attorney for the defendant contends that sec. 144 of the revenue law of 1879 (Comp. Stat., 427) prohibits an injunction to restrain the collection of a tax unless it was levied for an unauthorized purpose. Such is undoubtedly the law, but a tax which is levied without authority of law is a tax for an unauthorized purpose; that is, the tax is unauthorized. When an illegal tax is levied upon real estate an action at law does not afford an adequate remedy; nor can a court of law grant adequate relief. The tax would remain as an apparent incumbrance upon the property and would cast a cloud upon the title to the same. This a court of equity may prevent or remove and quiet the plaintiff's title. The petition states facts sufficient to constitute a cause of action, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HENRY R. WALBRIDGE, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law.** CIRCUMSTANTIAL EVIDENCE. To warrant a conviction upon circumstantial evidence, the circumstances when taken together must be of so conclusive a nature as to show beyond a reasonable doubt that the accused and no other person committed the offence.

2. **Setting aside verdict.** When there is a failure to prove a material fact, the verdict will be set aside.

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

J. Wesley Tucker, for plaintiff in error.

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

MAXWELL, J.

The plaintiff in error was convicted of robbery in the district court of Burt county and sentenced to imprisonment in the penitentiary for three years. He now prosecutes a writ of error to this court. The only error relied upon is that there is not sufficient evidence to sustain the verdict.

It appears from the testimony that on the 3d day of November, 1879, one John Teeters, a resident of Monroe county, Iowa, came to Tekamah to pay taxes upon certain property owned by him in Burt county. At that time he had about $100.00 in paper money. On the same day he went from Tekamah to Herman, and from there to Blair, returning to Tekamah on the 6th of that month. On his return to Tekamah he went to a saloon and became intoxicated. While at the saloon he met Walbridge and seems to have invited him to drink with him. Teeters was proposing to start a meat market in Tekamah, and Walbridge informed him that he had the necessary implements and

a building which he would sell, and invited Teeters to go home with him and stay all night, and in the morning he would fix up the business. Teeters thereupon went home with Walbridge, being at the time according to his own statement very drunk. About half-past nine o'clock Teeters retired for the night, sleeping with his pants on, the money as he testified being in a pocketbook in the left hand pocket. Walbridge's family were absent on a visit at the time. So far as appears, Walbridge owned the property he was proposing to sell to Teeters, and there is nothing in the testimony tending to impugn his motives in inviting Teeters to his house. There appear to have been three rooms in Walbridge's house, two of which were occupied as sleeping rooms. Teeters occupied one of the sleeping rooms and Walbridge the other. About midnight three acquaintances of Walbridge, named Monroe, Sawtelle, and Menier came to the house and demanded admittance and forced open the door, and insisted that Walbridge should get up, make a fire in the stove, and cook some chickens that they had brought with them for their supper. These men were very much under the influence of liquor. The testimony tends to show that Walbridge made a fire, dressed the chickens, and endeavored to cook the same. There is no testimony tending to show that Monroe, Sawtelle, and Menier, or any of them, had any knowledge that Teeters was stopping with Walbridge before they entered the house; but soon after gaining admission to the house they entered the room in which Teeters was sleeping and woke him up. He complained at once that his pocketbook was missing, but it was found on the bed and he proceeded at once to count the money. After some altercation with Monroe in regard to the money, he went to the door of his room, and after some conversation with the others, requested Walbridge to assist him in counting his money. Walbridge and he then commenced to count the money on the bed, and while thus engaged, Monroe came in, broke the lamp

chimney, extinguished the light, and seized and carried away the pocketbook and money. Walbridge testifies that he went at once into another room and procured a light and returned to the room in which he had left Teeters. In the mean time Teeters had escaped from the house closely surrounded by the three men named, and he seems to have had a struggle with Monroe in the yard near the door. Teeters then cried "murder" twice, and was permitted to go away. There is no testimony tending to show that Walbridge took any part in, or aided or abetted in the robbery, and aside from the fact that it was committed in his house by persons with whom he seems to have been on intimate terms, and the further fact that a few days afterwards he paid a merchant $25 in $5 bills, there is absolutely no testimony tending to connect him with it in any manner. There is no testimony tending to identify any of the bills as having belonged to Teeters; and Walbridge proved by his own testimony that he had received from various persons whom he named, various sums, the aggregate of which greatly exceeds the sum paid to the merchant, and there is no attempt on the part of the state to dispute this testimony. Two witnesses were called, who stated that they had refused him credit for small sums on the day preceding the robbing; but there is no attempt to deny the facts as to the possession of the money. This question may therefore be considered as eliminated from the case. Is the remaining testimony sufficient to sustain a verdict of guilty? Monroe has already been convicted and sentenced to the penitentiary as the principal in the transaction, and Walbridge, if guilty, is so merely as accessory.

The law presumes everyone to be innocent. And this presumption is to be considered by the jury as evidence to the benefit of which the party accused of crime is entitled. And when a criminal charge is to be proved by circumstantial evidence the proof ought not only to be consistent

with the guilt of the accused but inconsistent with any other rational conclusion. 1 Greenleaf Ev., SEC. 34.

In sec. 29, vol. 3, the same author thus states the rule as to the degree of proof: "It is therefore a rule of criminal law that the guilt of the accused must be fully proved. Neither a mere preponderance of evidence nor any weight of preponderant evidence is sufficient for the purpose unless it generate full belief of the fact to the exclusion of all reasonable doubt." To warrant a conviction of crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. And the circumstances, when taken together, must be of so conclusive a nature as to show beyond a reasonable doubt that the accused and no other person committed the offense. *Sumner v. The State*, 5 Blackf., 579. *Com. v. Webster* 5, Cushing, 296. A jury can convict only on facts proved, and not on mere suspicion of guilt, however strong it may be. The law fixes the standard by which guilt is to be determined—that the proof shall exclude reasonable doubt of the prisoner's guilt. The credibility of the witnesses must necessarily be left to the jury, and they must determine from the testimony, under the instructions of the court, whether or not the accused is guilty. But if there is a failure to prove a material fact the jury cannot substitute their own judgment, or belief, or suspicion, for such fact and find a verdict of guilty. If they do so the court has a plain duty to perform—to set the verdict aside. In nothing is the state more interested than in the protection of the innocent, and as courts deal only with tangible evidence every person is innocent whom the proof fails to show is guilty. Where there is a failure of proof upon a material point the humblest citizen may confidently appeal to the courts to set aside a verdict that should not have been rendered. If this was not so, constitutional rights and guarantees would amount to but little, while erroneous

verdicts, rendered under misapprehension, mistake, or from suspicion, would go unreversed. But such is not the law. As there is a failure of proof upon material points the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

LAKE, CH. J.

I am of the opinion that the evidence submitted to the jury was sufficient to sustain the verdict of guilty, and therefore dissent from the conclusion reached by the majority of the court.

ALEXANDER WILSON, PLAINTIFF IN ERROR, V. WILSON T. MOORE ET AL., DEFENDANTS IN ERROR.

Assignment for Creditors: CONTRACT TO BUY UP CLAIMS. A and B being insolvent made an assignment of all their property for the benefit of their creditors. C, a banker, then stated to them that if they would furnish him the name, address, and amount owing to each creditor and aid him in buying up the claims, he would purchase the same and accept the assigned estate in full satisfaction thereof. *Held*, In an action to recover the difference between the amount paid by the estate and the face value of the claims: 1. That the contract was valid. 2. That the contract, though verbal, being completed, was not void, by the statute of frauds, and the services, being valuable, were sufficient to sustain the contract.

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

Burr & Kelly, for plaintiff in error.

The agreement is void. *Taylor v. Boardman*, 24 Mich.,

287. *Richardson v. Johnson*, 41 Wis., 100. *Marcy v. Marcy*, 9 Allen, 8. *Eiseley v. Malchow*, 9 Neb., 180. *Baldwin v. Palmer*, 10 N. Y., 232. *Scott v. Thomas*, 1 Scam., 58. *Erben v. Lorillard*, 19 N. Y., 299. Browne on the Statute of Frauds, 118, 131, 134.

Lamb, Billingsley & Lambertson, for defendant in error, cited: *Doyle v. Knapp*, 3 Scam., 337. *Tompkins v. Phillips*, 12 Georgia, 52. *Warren v. Whitney*, 24 Maine, 561. *Hubbard v. Coolidge*, 1 Metcalf, 84. *Perry v. Buckman*, 33 Vermont, 7. *Sanford v. Huxford*, 32 Mich., 313. *Randle v. Harris*, 6 Yerger, 508. *Berry v. Graddy*, 1 Met. (Ky.), 553. *Burr v. Wilcox*, 13 Allen, 269.

MAXWELL, J.

This is an action brought in the district court of Lancaster county by the plaintiff against Wilson T. Moore and George Sexton, upon certain evidences of debt, to recover the sum of $16,541.21, with interest from September, 1876. Judgment was rendered in the court below in favor of the defendants. The plaintiff brings the cause to this court by petition in error.

The errors assigned are in substance that the verdict is against the weight of evidence, and certain erroneous instructions of the court.

It appears from the evidence that in May, 1875, the defendants were doing business at Lafayette, Indiana, and being unable to pay their debts in full made an assignment for the benefit of their creditors. The property assigned was appraised at the sum of $17,714.61, from which a deduction of $600 was made for exempt property. The character of the property assigned is shown by the report of the assignee, who states therein that it consisted "almost exclusively of a stock of leather, findings, shoemakers' and harnessmakers' supplies, and of a parcel of untanned leather and tanners' stock at the tannery on the lands of

said Moore, in said Tippecanoe county." The plaintiff was engaged in banking, and the defendants were indebted to the bank in the sum of $6000, secured by mortgage; $3000 of this sum had been loaned to the defendants within four months preceding the assignment, and the remainder of the sum, secured by mortgage, was an antecedent debt.

The plaintiff purchased claims against the estate of the defendants amounting in the aggregate to more than $20,000, for twenty-five per cent of the face value, and received from the estate payment in full of the mortgage heretofore referred to, and more than twenty-eight per cent on the claims purchased against the defendants, together with many other advantages not possessed by other creditors.

This action is brought to recover the balance due upon the claims at their face value. The defendant Moore, as a defense to the action, alleges in substance that soon after the assignment the plaintiff came to him and stated that he could buy up the claims for the special benefit of the defendants; that he could afford to pay forty cents on the dollar, but that he would not pay more than twenty-five cents on the dollar, and that if the defendants would stay there and assist him in buying the claims—"meeting the creditors there and tell them he would buy the claims," and furnish the names and residences of the creditors to the plaintiff, he would take the property assigned in full payment of said claims. The defendant Moore testifies fully that he performed his part of said agreement and aided the plaintiff all that he could in purchasing said claims. This is denied by the plaintiff, but the clear preponderance of the testimony sustains the defendant's answer. The testimony tends to show that friendly and intimate business relations had existed between the plaintiff and defendants for some time previous to the assignment; that the plaintiff went to the defendant as a friend having money which he was anxious to invest, and make something in the

transaction, and at the same time perform a friendly act by accepting the bankrupt estate in full satisfaction of the claims, and free the defendants from the embarrassments of debt, which would paralyze their efforts and prevent their engaging in business on their own account. The stock was of such a character as to be readily convertible into money, and its value was known within a few dollars. If, therefore, the plaintiff could be informed of the entire amount of the debts, the name, and residence of, and amount due each creditor, he could purchase the claims with the absolute certainty of making a good investment. That this information was furnished by the defendants there is not, in our minds, a shadow of doubt.

But it is said that the contract is void because not in writing. If the contract rested in a mere promise it could not be enforced, as, if the plaintiff had agreed to purchase the claims, but had failed to do so, no action would lie to compel the performance of the contract. Suppose the defendants, by a verbal agreement before the assignment, had sold the plaintiff all the property afterwards assigned, such contract could not be enforced unless the plaintiff had paid a portion of the purchase money, or received a part of the property. Up to that point the statute of frauds would be a complete defense; but the instant that he accepted the property or a portion of it under the contract, or paid a portion of the purchase price, that instant the contract would become as valid and effectual as if in writing. So in the case at bar, the proposition of the plaintiff was accepted by the defendants, and the services performed in pursuance thereof. The contract is therefore as valid as if in writing.

It is urged that there was no consideration for the contract. Without discussing that branch of the law relating to injuries sustained by a party as being a consideration, it will not be denied that anything of value received by a party is as to him a valuable consideration. And this con-

sideration may be in money, property, or services. In this case the consideration was certain services to be performed by the defendants. The services have been performed according to the agreement. The services were of value, the parties were capable of contracting, and the court will not measure the value of such services to see if it is possible to avoid the contract. It is sufficient that the contract is completed as agreed upon, and the plaintiff, having obtained all that was promised to him from the defendants, cannot retain the benefits thus derived and insist on the invalidity of the contract. The defendants seem to have surrendered all their property for the benefit of their creditors, and this seems to be conceded by the plaintiff. It was found necessary, even at common law, which authorized imprisonment for debt, to provide relief for debtors in case of inevitable misfortune. Hence insolvent and bankrupt laws, which were intended to secure the application of the debtor's effects to the payment of his debts, and thus discharge him from them. 2 Kent's Com., 389. Can it be possible that the defendants, after surrendering all their estate and having it applied to the payment of their debts, were still to remain indebted to their professed friend in a sum sufficient to prevent their ever again engaging in business? The United States bankrupt law was then in full force, and it is pretty clear that, had proceedings in bankruptcy been instituted in the United States court, a question would have arisen as to the validity of the plaintiff's mortgage for $3000, and it is probable that the plaintiff was aware of this fact. No error has been pointed out in the instructions, and it is unnecessary to examine them.

It is very clear that justice has been done in the premises, and there is no error in the record. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

PAUL NINDLE ET AL., PLAINTIFFS IN ERROR, V. THE STATE BANK OF NEBRASKA, DEFENDANT IN ERROR.

Landlord and Tenant: LEASE. K. and N. leased certain premises for six months from the sixth day of December, 1881, for $750, to be paid in installments of $125, on the first of each month. It was stated in the lease that it would terminate May 6th, 1882. *Held*, There was no ambiguity in the lease; that it ran for six months from December 6th, 1881, and the date May 6th, 1882, as the time of the termination, was an error in computation.

ERROR to the district court for Douglas county, where the cause had been brought from the county court, and its judgment affirmed by SAVAGE, J.

C. A. Baldwin and *Walter Bennett*, for plaintiff in error.

Parol evidence should have been admitted to explain the intention of the parties, and the court erred in excluding that offered. *Leggit v. Buckhalter*, 30 Miss., 421. 2 Leading Cases in Equity, Hare & Wallace Notes, 670. *Boggs v. Taylor*, 26 Ohio State, 604. *Painter v. Painter*, 18 Ohio, 265. *Alger v. Kennedy*, 49 Vermont, 109. *Goddard v. Bulon*, 9 American Decisions, 663.

George E. Pritchett, for defendant in error.

MAXWELL, J.

The defendant brought an action of forcible detainer against the plaintiffs in error in the county court of Douglas county, where judgment was rendered in its favor, which was affirmed in the district court. This is a proceeding in error to reverse that judgment.

To maintain the action in the county court the defendant introduced in evidence a lease, of which the following is a copy of all that is material in this case:

"This lease made and entered into this sixth day of December, 1881, by and between the State Bank of Nebraska, a corporation doing business at Omaha, Nebraska, of the first part, and William Krelle, and Paul Nindle, of the second part, witnesseth, that the said party of the first part, in consideration of the rents, covenants, and agreements hereinafter contained, to be paid, kept, and performed by the said parties of the second part, hath devised, leased, and let, and by these presents doth devise, lease, and let unto the said parties of the second part the brick building on the northeast corner of 13th and Farnham streets, in the city of Omaha, Douglas county, Nebraska, and known as No. 1224 Farnham street, for the *term* of six months from the 6th day of December, 1881, which *term* will end on the 6th day of May, 1882. To have and to hold the same unto the said lessee for the *term* aforesaid. And the said Wm. Krelle and Paul Nindle, in consideration of the leasing aforesaid, doth hereby agree to pay as rent for said premises the sum of $750, and to pay the same in monthly installments of $125 each on the first day of each and every month during said term," etc.

There are other provisions in the lease in regard to the lessees holding over the term or failing to comply with the provisions of the lease, to which it is unnecessary to refer.

The attorneys for the plaintiff in error contend that the terms of the lease are ambiguous and uncertain, and therefore parol evidence was necessary to explain and determine its true meaning.

Ambiguity is defined as follows: Duplicity, indistinctness, or uncertainty of meaning of an expression used in a written instrument. 1 Bouv. Law Dict., 117.

In *Goodrich v. McClary*, 3 Neb., 123, it was held that parol evidence was admissible to supply an omission in a written contract which otherwise would be ambiguous and

wholly inexplicable. And in a proper case parol evidence is admissible to explain the terms of a written instrument to render them definite and certain. But is there any uncertainty as to the terms of this lease? The lease is for six months from the sixth day of December, 1881. The whole amount of the rent is stated to be $750, to be paid in monthly installments of $125 each. The term is mentioned three times. This evidently refers to the lease for six months. It was unnecessary to fix the date of the termination of the lease, but when the date thus fixed is clearly inconsistent with the granting clause in the lease it must yield to it. 2 Parsons on Contr. (5th Ed.), 513, and cases cited in note o. In the case at bar it is very clear that the date, May 6, fixed as the time for the termination of the lease, is an error of computation, and that the lease did not terminate until the sixth day of June, 1882. There is no ambiguity in the lease, and parol evidence was not admissible to change its terms. The plaintiffs therefore, by holding the premises under the lease from May 6, 1882, to the sixth of June, did not enter upon a new lease as tenants from month to month or from year to year. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

MAGENAU & CO., PLAINTIFFS IN ERROR, V. N. H. BELL AND CHARLES C. TURNEY, EXECUTORS, DEFENDANTS IN ERROR.

1. A person who is precluded by statute from testifying against an executor cannot, by transferring his interest, be rendered competent to testify.

2. A transfer by a plaintiff of his interest in the action to a co-plaintiff will not justify a court in dismissing the action.

2. ———: TRANSFER OF INTEREST. A transfer by a plaintiff of his interest in the action to a co-plaintiff during the pendency of the suit will not justify a court in dismissing the action.

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

George L. Loomis, for plaintiffs in error, cited Greenleaf on Evidence, sec. 426. *Myers v. Walker's Admr.*, 9 Ohio State, 558. *White v. Tucker*, 9 Iowa, 100. *Burrows v. McLain*, 37 Iowa, 189.

N. H. Bell, for defendant in error.

BY THE COURT.

1. The defendants are executors of the last will and testament of John Riddle, deceased. The firm of Magemau & Co. in April, 1880, consisted of Eugene Magemau, Otto Magemau, and Oswald Miller, who filed a claim against the estate of Riddle for the sum of $94.50, which claim was disallowed by the county court. The plaintiffs then appealed to the district court. In July, 1881, Eugene Magemau sold his interest in the firm to Otto Magemau, and up to the present time he has no interest therein. On the trial of the cause in the district court Eugene Magemau was offered as a witness to prove the claim, to which objection was made upon the ground that the adverse party was the executor of Riddle. The objection was sustained and the witness excluded. This is now assigned for error.

Sec. 329 of the code provides that: "No person having a direct legal interest in the result of any civil cause or proceeding shall be a competent witness therein, when the adverse party is an executor, administrator, or legal representative of a deceased person, unless the testimony of such deceased person shall have been taken during his lifetime and is to be read in evidence in such cause or proceeding."

In the case of *Davis v. Davis*, 26 Cal., 37, the court say: "We are of the opinion that the word 'representative' in the amendment of 1863 was intended by the legislature to designate the executor or administrator of a deceased person, and also the person or party who had succeeded to the right of the deceased, whether by purchase or descent or operation of law. Any other construction would leave the purchaser of an estate from a grantor who subsequently died in a worse condition than the grantor's executor would be had no conveyance of the estate been made."

In the case of *Kimball v. Kimball*, 16 Mich., 211, it was held that the statute precludes a party from putting in evidence his account of a transaction known to both when the death of the opposite party prevents his being heard. See also *Grand Gulf R. R. v. Bryan*, 8 S. & M., 275. *Kelton v. Hill*, 59 Me., 259. *Hollister v. Young*, 41 Vt., 160. *Wamsley v. Crook*, 3 Neb., 350.

But it is said that a party may, by divesting himself of his interest, in the event of a suit render himself competent as a witness, that the disability arises alone from his interest in the result of the suit; that is, suppose A has a claim against an estate which he is not competent to establish by his own testimony, but he may sell the claim and thereby divest himself of his interest, and he will then be permitted to testify in regard to the matter. If such was the law it would afford an easy mode of evading the statute.

The word "representative" is used in the statute to designate the person who succeeds to the rights of the deceased, whether by purchase, descent, or operation of law. There was no error in excluding the witness Magemau.

2. The court dismissed the action because it appeared that Eugene Magemau had sold his interest in the claim to O. Magemau. In this there is error.

Sec. 45 of the code provides that: "In case of the death or other disability of a party the court may allow

the action to continue by or against his representative or successor in interest. In case of any other transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." This section authorizes the court to substitute the party to whom the interest is transferred to be made a party, or permits the action to proceed in the name of the original party, and such transfer of interest is not cause to justify the court in dismissing the action. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. JOHN DISTIN, PLAINTIFF IN ERROR, V. GRAN. ENSIGN, DEFENDANT IN ERROR.

1. **Habeas Corpus:** PLEADING. A petition for a writ of habeas corpus must state the facts which constitute the illegal restraint. It is not sufficient to allege that the petitioner is illegally restrained of his liberty. Where no copy of the petition is set forth in the record, error cannot be predicated on the refusal of the court below to admit certain evidence offered.

2. ———: EVIDENCE. Where a petition for habeas corpus is presented for alleged want of probable cause, it should set forth all the testimony taken before the examining magistrate.

ERROR to the district court for Lancaster county, where the cause had been brought on error from the county court, and its judgment affirmed by POUND, J.

Ricketts & Wilson, for plaintiff in error.

F. M. Hall, for defendant in error.

MAXWELL, J.

On the twenty-seventh day of May, 1882, the relator filed a petition in the county court of Lancaster county alleging that he was illegally restrained of his liberty by the defendant. The court thereupon issued a writ of habeas corpus, to which the defendant made return that he held the relator by virtue of a mittimus issued by the county judge of Webster county, in which mittimus it was stated that "said John Distin had been examined by said judge on a charge of horse-stealing in said Webster county, and that said judge found that there was probable cause for holding said John Distin to answer to said charge at the next term of the district court," etc. The court held that it had no authority to review the case, and remanded the prisoner. The case was taken on error to the district court, where the judgment of the county court was affirmed. The cause is brought into this court by petition in error.

There is no copy of the petition for a writ of habeas corpus which was presented to the county judge. Whether this omission is intentional or not does not appear. Nor was any copy of the petition taken into the district court. There is therefore nothing before the court upon which it can act. The petition must set forth the facts constituting the illegal detention. It is not sufficient to state that the petitioner is illegally restrained of his liberty, as that is a conclusion, but it must be made to appear in what the illegal restraint consists. *Ex parte Nye*, 8 Kan., 99. And where a petition is presented for alleged want of probable cause, it should set forth all the testimony taken before the examining magistrate. *In re Snyder*, 17 Kas., 553. *In re Balcom*, 12 Neb., 316. The question whether or not evidence should have been received by the county judge cannot be determined without a statement of the facts as to

the cause of illegal detention. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

EBEN IVES, PLAINTIFF IN ERROR, V. ABEL T. NORRIS, DEFENDANT IN ERROR.

1. **Constitutional Law:** TITLE TO ACT. The title to the act approved February 26th, 1879, in these words, "An act regulating the herding and driving of stock," is not comprehensive enough to authorize the provision in section four of said act giving damages for the castration of animals in certain cases.
2. **Instructions to Jury.** A county judge or justice of the peace has no authority to charge a jury upon the law of a case.

ERROR to the district court for Dodge county, where the cause had been brought from the county court, and its judgment affirmed by POST, J.

N. H. Bell, for plaintiff in error, against title to the act, cited Cooley Const. Lim., 148. *State, ex rel. Jones, v. Lancaster County*, 6 Neb., 474. 3 West Va., 588. 20 Ind., 490.

E. F. Gray, for defendant in error, in favor of constitutionality of the law, cited Cooley Const. Lim. (2d Ed.), 143, 144. *Bonorden v. Kriz, ante* p. 121.

BY THE COURT.

1. This action was commenced in the county court of Dodge county by the defendant in error against the plaintiff to recover the value of a grade Durham bull belonging to the defendant, which bull it is alleged was castrated by

the plaintiff. The case was tried to a jury in the county court, and verdict and judgment were given for the defendant in error. The case was taken on error to the district court, where the judgment of the county court was affirmed.

The action is brought under the provisions of an act entitled "An act regulating the herding and driving of stock," approved February 26th, 1879. Comp. Stat., ch. 4.

Sec. 1 of the act provides what persons shall be deemed stock growers.

Sec. 2 provides a penalty for driving away the stock of another.

Sec. 3 provides that the brand shall be *prima facie* evidence of ownership.

Sec. 4 provides "that no stallion over the age of eighteen months, nor any Mexican, Texan, or Cherokee bull over the age of ten months, nor any Mexican ram over the age of eight months, shall be permitted to run at large in the state of Nebraska. The owner or person in charge of such animals as are prohibited from running at large by this section, who shall permit such animal or animals to run at large, may be fined for each offense not less than fifty dollars nor more than two hundred dollars, and it shall be lawful for any person to castrate or cause to be castrated any such animal running at large. *Provided,* That if any person shall castrate any stallion, bull, or ram, and it shall, on proper evidence before any competent court, be proven to the satisfaction of said court that such animal was not of the class of stock prohibited from running at large by this act, said person shall be liable for damages to the amount of the value of said animal so castrated, and the costs of suit. *Provided also,* That for the purpose of this act any bull possessing one-half Texan, Mexican, or Cherokee blood shall not be deemed a Texan, Mexican, or Cherokee bull, as the case may be; and any ram possessing one-half Mexican blood shall not be deemed a Mexican ram."

It is claimed on behalf of the defendant that the statute provides as a penalty for the castration of a bull not within the prohibited classes, that the person causing the act to be performed shall pay the value of the animal.

Does the title of the act in question authorize the imposition of such penalty? We think not.

The title of an act must express the subject of the bill.

In *White v. City of Lincoln*, 5 Neb., 516, it is said: 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 bill have but one general object which is fairly expressed in the title. See also *Tecumseh v. Phillips*, Id., 311. *Lincoln, etc., Association v. Graham*, 7 Id., 179. *Dawson County v. McNamar*, 10 Id., 279. *Miller v. Hurford*, 11 Id., 381.

The constitution makes the title the index of the legislative intention as to the subject matter of the bill, and this cannot be enlarged by the courts. Judge Cooley has cited a few of the cases upon that point. Const. Lim. (4 Ed.), 181–2.

In *Stuart v. Kinsella*, 14 Minn., 524, the title of the act being: "An act to incorporate the village of High Forest, in the county of Olmsted, Minnesota," it was held that a provision for the division of the village and the organization of a new village, was not within the title and was void. See also *Weaver v. Lapsley*, 43 Ala., 229. *Tuskaloosa Bridge Co. v. Olmstead*, 41 Id., 9. In the case at bar, the provision for a penalty is clearly not included in the title of the act, and is therefore null and void. But even if the act was not void, it is doubtful if a party could recover more than his actual damage not to exceed the value of the animal. The language being, "said person shall be liable for damages to the amount of the value of said animal." That is, not to exceed in amount such value.

2. Has a county judge or justice of the peace authority to instruct a jury? Sec. 980 of the code provides that "after the jury shall have been sworn, they shall sit together and hear the proofs and allegations of parties; and after hearing the same, shall be kept together in some convenient place, under charge of a constable or sheriff until they have agreed upon their verdict, or shall be discharged by the justice." There is no provision in our statutes that we are aware of authorizing a county judge or justice of the peace to instruct a jury; and the section above quoted evidently contemplates that no such instructions shall be given. Besides, if either of the officers named possessed authority to give instructions, he would also have power to set a verdict aside in case the jury disregarded his instructions. But no such authority is given. A verdict can only be set aside by a justice or county judge in case of fraud, partiality, or undue means. This question was before the supreme court of Iowa, in the case of *St. Joseph Manfg. Co. v. Harington*, 5 N. W. R., 654, and it was held that justices of the peace had no power in such cases. That case meets with our entire approval. The judgment of the district court is reversed, and the cause remanded to the district court for a new trial.

REVERSED AND REMANDED.

JOHN O'DONOHUE, PLAINTIFF IN ERROR, V. JACOB R. HENDRIX, DEFENDANT IN ERROR.

1. **A bill of exceptions** is necessary only to bring into the record that which without one would not be a part thereof.

2. **A motion for a new trial** is necessary only in those cases where a trial has been had. If the court has merely construed the pleadings or some of them, as in sustaining or overruling a

demurrer to a petition, answer or reply, no motion for a new trial is necessary.

3. **Pleading**: PRACTICE. Where the facts stated in a petition do not constitute a cause of action, merely filing an answer is not a waiver of that defect.

MOTION to strike petition in error from files.

Clarkson & Hunt, for the motion.

Redick & Redick, contra.

BY THE COURT.

This is a motion to strike a petition in error from the files.

First. Because there is no bill of exceptions.

Second. Because there was no motion for a new trial in the court below.

Third. Because the plaintiff in error (defendant below) did not elect to stand upon his demurrer to the petition.

Are any or all the causes sufficient to authorize the court in striking the petition in error from the files?

A bill of exceptions is necessary only in those cases where it is desired to bring into the record evidence or other matters which by law are not required to be entered of record. If, therefore, there is error apparent in the record proper, no bill of exceptions is necessary.

A motion for a new trial is necessary only in cases where a trial has been had. If the court has merely construed the pleadings or some of them, as in sustaining or overruling a demurrer to a petition, answer or reply, no motion for a new trial is necessary, because there has been no trial in the sense in which that word is used in the statute. But where evidence has been offered or introduced in order that the rulings of the court thereon may be reviewed on error, there must be a motion for a new trial, in which the

specific grounds of error are set forth. *Swanson v. Swanson*, 12 Neb., 224.

If a good cause of action is definitely stated in the petition and a demurrer thereto is overruled, the party demurring, in order to avail himself of the ruling thereon, must rest on his demurrer. And if he reply, he thereby waives his exception. This applies only to defects in the form of pleading; but if the facts stated in the petition do not constitute a cause of action, filing an answer by the defendant is not a waiver of such defect. *Farrer v. Triplet*, 7 Neb., 240.

The grounds assigned in the motion are not sufficient to justify the court in striking the petition from the files, and the motion is overruled.

MOTION OVERRULED.

SAME V. SAME.

Taxes: SALE OF LAND. Under our revenue law a sale of land can be lawfully made only by including all the taxes, interest, and costs due thereon at the time. A sale for a portion only is not binding upon the owner.

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

Redick & Redick, for plaintiff in error.

Clarkson & Hunt, contra.

BY THE COURT.

This action was brought by the defendant in error against the plaintiff to have a certain tax deed, in which he was named as the grantee, declared valid, but if the court

should find it to be invalid, then that the lien for the taxes paid be foreclosed and the premises sold. A decree was rendered in the court below declaring the tax deed invalid, but finding the *tax sales* to have been legally made, and awarding the holder of the deed a lien upon the real estate described in the petition for the amount of the purchase money and forty per cent interest thereon, and directing a sale of the premises. The plaintiff brings the cause into this court by petition in error. There is no bill of exceptions, and the only question that can be considered is, whether or not the petition will sustain the decree.

It is alleged in the petition that in January, 1875, the county treasurer of Sarpy county sold to Milton Hendrix, at private tax sale, the lands in controversy, for the taxes levied thereon for the year 1873. That thereafter said Hendrix paid the taxes levied on said real estate for the years 1865 to 1872 inclusive, and 1874, and that on the fourth day of September, 1876, he purchased said premises for the taxes due thereon for 1875. The tax certificates were afterwards assigned to the defendant, who, on the fourteenth day of February, 1880, procured a treasurer's deed for the land. The sale being invalid, is the defendant entitled to forty per cent interest? We think not.

In the case of *Tillotson v. Small*, *ante* page 202, and in *State v. Helmer*, 10 Neb., 25, we held that a county treasurer had no authority to sell real estate for a *portion* of the taxes due thereon. The statute authorizes him to sell for all the taxes, penalty, interest, and costs due upon a tract of land.

In *State v. Helmer*, *supra*, it is said: "It is doubtless the true intent and meaning of the law that lands or town lots can only be sold for taxes to those who offer to pay and do pay the amount of *all* taxes due on any parcel of land or town lot, or the smallest portion of the same." We adhere to our decision in that case. The sale to the defendant was therefore unauthorized and the defendant is entitled to only 12 per cent interest.

The judgment of the district court is reversed, and the cause is remanded to the district court, with directions to enter a decree in conformity to this opinion.

REVERSED AND REMANDED.

JOSEPH H. MILLARD, TRUSTEE AND MORTGAGEE OF THE OMAHA HORSE RAILWAY COMPANY, PLAINTIFF IN ERROR, V. ALFRED BURLEY, DEFENDANT IN ERROR.

Mortgage. In a contract between the trustee of a mortgage and certain creditors of a railroad company, *Held*, The property levied upon was not included in the mortgage. LAKE, CH. J., dissenting.

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

George E. Pritchett, for plaintiff in error.

The act incorporating the company authorized it to mortgage its franchise. In such case the road becomes an indivisible entire thing, and a mortgage of its property covers everything used in operating the road. *Pierce v. Emery*, 32 N. H., 484. *Phillips v. Winslow*, 18 B. Mon., 431. *Willinck v. Morris Canal Co.*, 3 Green (N. J. Eq.), 377. *Phila., &c., R. Co. v. Wollper*, 64 Pa. St., 366. *Galveston v. Cowdrey*, 11 Wall., 459. *Ludlow v. Heard*, 1 Disney (Ohio), 552. While some of the articles replevied in this action are not described, *eo nomine*, in the description in the mortgage, we claim they are covered by the phrases, "other appurtenances belonging to or connected therewith," and "the franchise of said company, with all the rights, privileges, and property pertaining thereto." The articles all pertained to the franchise or were appurtenant to the road. See Webster's definition of "appurte-

nance." *Blake v. Clark*, 6 Greenleaf, 436. *Parsons v. Camp*, 11 Conn., 525. *Veazie v. Somerby*, 5 Allen, 285.

John I. Redick and *W. J. Connell*, for defendant in error.

MAXWELL, J.

In 1872 the Omaha Horse Railway Company executed a mortgage to the plaintiff in trust to secure its bonds in the sum of $20,000. The mortgage was duly recorded. The property mortgaged was as follows: "Lots one and two in block 206½ in the city of Omaha, together with the stable and all other structures and improvements thereon. Also the road-bed of said company, now or hereafter to be constructed, including all the ties, iron, side tracks, turn-tables, and other appurtenances belonging to or connected therewith; also all one-horse cars of the said company, either now owned or hereafter to be acquired by said company; also the franchise of said company, with all the rights, privileges, and property pertaining thereto." The mortgage contained a provision that in case of default the trustee should have the right to immediate possession of the property.

In October, 1877, a judgment for $4950 was recovered against the railway company, and about the first day of February, 1878, an execution was issued on the judgment, and levied by the defendant upon the following described property of the company, viz., 1 stovepipe and zinc board, 2 revolving chairs, 4 office chairs, 2 bedsteads and bedding, 5 window curtains and fixtures, 2 coal scuttles, 1 city map, 1 state map, 1 tin safe, 4 one-horse railroad cars and accoutrements, 8 car-poles and doubletrees, 2 pairs car wheels and axles, hay in mow estimated at three tons, 1 lot of straw estimated at 1000 pounds, about 120 bushels of corn, 400 bushels of oats, 1 cutting-box, 1 feed mill, 1 corn sheller, 1 lot bran estimated at 2000 pounds, 6 lanterns, 1 part barrel of lubricating oil, 1 saddle, 1 rake, 4

forks, 1 scoop shovel, 1 clock, 1 ash bucket, 1 table, 1 wood-box, 2 jack-screws, 12 old car wheels, 1 set of wagon harness, 1 lot of old lumber, 1 temporary turn-table, 1 lot old and new horse shoes, 1 lot old iron, 3 sets doubletrees, and 1 lot of old chairs. Default being made in the payment of the amount due on the mortgage, the trustee demanded possession of the property levied upon by the defendant, which, being refused, he brought this action to recover the same. Upon the trial of the cause the court instructed the jury that the plaintiff was "entitled to 4 one-horse railroad cars and accoutrements, the 8 car poles and doubletrees, the turn-tables," and that all the remaining property levied upon was not covered by the plaintiff's mortgage. The jury returned a verdict in accordance with the instructions of the court, upon which judgment was rendered. The plaintiff brings the cause into this court by petition in error. The sole question before the court is, is the property levied upon described in the plaintiff's mortgage? In our opinion the instruction of the court is correct, and none of the property levied upon, except that released, was embraced in the plaintiff's mortgage. This is a contest between creditors, and the mortgagee is entitled to nothing which is not embraced within the terms of his mortgage. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

LAKE, CH. J., dissents.

WILLIAM W. MARSH, PLAINTIFF IN ERROR, v. ALFRED BURLEY, DEFENDANT IN ERROR.

1. **Chattel Mortgage.** Under the provisions of sec. 11, chap. 32, Comp. Stat., a chattel mortgage, although filed for record, is *prima facie* fraudulent as to creditors and *bona fide* purchasers, if

the mortgagor retains possession of the mortgaged property. And the person claiming under such mortgage must make it appear that the same was made in good faith in order to recover. *Pyle v. Warren*, 2 Neb., 252, adhered to.

2. ———. Certain property levied upon, *Held*, Not to be included in a sale under a decree of foreclosure. LAKE, CH. J., dissenting.

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

George E. Pritchett, for plaintiff in error.

John I. Redick and *W. J. Connell*, for defendant in error.

MAXWELL, J.

This is an action of replevin brought by the plaintiff against the defendant to recover the possession of certain property which it is claimed belongs to the Omaha Horse Railway. The plaintiff, who is the owner of the railway, bases his right to recover upon two distinct grounds:

First. By virtue of a chattel mortgage executed by himself as an officer of the railway company, to himself as a creditor.

Second. As purchaser under a decree of foreclosure of a mortgage made by the railway company to Joseph H. Millard as trustee.

The defendant claims the right to the possession of the property in question by virtue of a levy made by him as sheriff under an execution issued on a judgment against the railway company.

On the trial of the cause in the district court a verdict was returned in favor of the defendant, upon which judgment was rendered.

The chattel mortgage was executed upon the following property, viz., "Fifty horses, fifty horse collars, eighteen sets of harness, one wagon, two desks, one stove, six office

chairs, one chamber set, two carpets, one safe, one complete set of blacksmith's stools, one letter press, three twelve-foot cars, numbered 5, 6, and 7, one sixteen-foot car."

This mortgage is dated on the seventeenth day of November, 1877, and was recorded on the same day. There was no change in the possession of the property, and no new consideration was paid by Marsh. In the most favorable view possible, it was executed by the plaintiff to himself to secure an antecedent debt.

About the time the chattel mortgage in question was executed, one Mary J. Doolittle recovered a judgment in the district court of Douglas county against the Horse Railway Co. for the sum of $4950. The question presented to the jury therefore was whether the mortgage was executed for the purpose of hindering and delaying creditors.

Sec. 11, chap. 32, Comp. Stat., provides that: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or the creditors of the person making such assignment or subsequent purchasers in good faith; and shall be conclusive evidence of fraud unless it be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith and without any intent to defraud such creditors or purchasers."

Sec. 14 provides that: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor

and as against subsequent purchasers and mortgagees in good faith unless the mortgage or a true copy thereof shall be filed in the office of the county clerk," etc.

In *Becker v. Anderson*, 11 Neb., 496, it was inadvertently stated by the writer that the filing and recording of the mortgage were made equivalent to a change of possession of the property. Such is the law in a number of the states, but section 11 above quoted makes the retention of the possession by the mortgagor of the goods mortgaged *prima facie* evidence of fraud. The court, in construing this statute in *Pyle v. Warren*, 2 Neb., 252, say: "If, however, the mortgage be duly recorded and the mortgagor retain possession of the property, the presumption of fraud is merely *prima facie*, and may be overcome by competent testimony; but if no evidence of good faith is produced this presumption becomes conclusive as to creditors and *bona fide* purchasers." We adhere to the decision in that case as a correct construction of the statute. The plaintiff failed to overcome this *prima facie* presumption of fraud, and therefore can claim nothing under the mortgage. See *Horton v. Williams*, 21 Minn., 187. *Wood v. Lowry*, 17 Wend., 492. *Smith v. Acker*, 23 Id., 653.

A number of objections are made to the instructions which it is unncessary to notice in detail, as in our opinion there was no error in giving the same.

In September, 1878, a decree of foreclosure was rendered on the mortgage to Millard above referred to upon the following property, to-wit: Lots one and two, in block two hundred and six and a half, in the city of Omaha, together with the stable and all other structures and improvements thereon. Also the road bed of said company, now or hereafter to be constructed, including all the ties, iron, side-tracks, turn-tables, and other appurtenances belonging to or connected therewith; also all one-horse cars either then owned or thereafter to be acquired by said company. Also the franchise of said company, with all the rights, privileges, and property pertain-

ing thereto." At a sale under the decree the plaintiff purchased the property above described and now claims to own the same by virtue of such purchase. The plaintiff also claims to have purchased the property described in the chattel mortgage at the sale under said decree. The question presented therefore is, does the description in the latter mortgage include the property included in the chattel mortgage?

It is very clear that the plaintiff himself did not at the time of the execution of the chattel mortgage in question suppose that the property covered by the chattel mortgage was included in the mortgage to Millard. It will not be contended that the property levied upon by the defendant is specifically described in the mortgage under which the plaintiff purchased, and if he acquired any right to such property thereby he acquired the same because the property was appurtenant to the franchise. The decree is somewhat broader than the petition, but it refers to the property described in the petition as being that which is directed to be sold, so that the description above given controls. The mortgage under which the plaintiff claims was intended to be a mortgage upon all the realty of the company, and evidently was not intended to include personal property. The description includes the railroad, its franchise, real estate, etc., and the mortgage was and necessarily must have been foreclosed in the same manner as a mortgage upon real estate. And in our opinion it did not include the property levied upon by the defendant. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

LAKE, CH. J., dissents as to the conclusion reached by the court as to what property was embraced by the mortgage.

DAVID SWANEY ET AL., PLAINTIFF IN ERROR, V. EUGENE HUTCHINS, DEFENDANT IN ERROR.

Attachment: NON-RESIDENTS. One S. in May, 1881, came from Illinois to this state, with the intention of abandoning his former residence and residing here; but his wife remained in Illinois until October of that year. In January, 1881, an action by attachment was commenced against S. and wife upon the ground that they were non-residents. *Held*, That the attachment could not be sustained.

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

Burr & Kelly, for plaintiffs in error, cited *People v. McClay*, 2 Neb., 7. *Chesney v. Francisco*, 12 Neb., 626. Thompson on Exemptions, secs. 91 and 259. *Lacey v. Clements*, 36 Tex., 66 or 661. *Succession of Christie*, 20 La. An., 383. *Wilder v. The State*, 29 Ark., 280. *Williams v. Sweetland*, 10 Iowa, 51. Bishop on Mar. and Div., sec. 118.

M. Montgomery, for defendant in error, cited 2 Bouvier Law Dic., 470. Comp. Stat., 261, sec. 32. *Keith v. Stetter*, 25 Kan., 100. *Campbell v. White*, 22 Mich., 178.

BY THE COURT.

The plaintiffs in error are husband and wife, and prior to May, 1881, were residents of the state of Illinois. Mary Swaney is the owner of certain real estate in Lancaster county, and during the month of May, 1881, David Swaney came to this state bringing with him his team and harness, wagon, clothing, etc., intending to become a permanent resident of the state. He at once, with the consent of his wife, commenced the erection of a dwelling upon the real estate owned by her, intending as soon as the building was completed, to bring his wife and family to

reside therein. The building was not completed until October of that year. About the 1st of August, 1881, David Swaney, in consequence of the sickness of his wife, returned to Illinois, having previously made arrangement for the completion of a dwelling upon his wife's land; and about the first of October of that year, he with his wife and family came to this state, and as soon as the dwelling-house upon his wife's land was completed, moved therein, and have since occupied the same as the family homestead. On the 14th day of June, 1881, the defendant in error commenced an action by attachment against the plaintiffs in error, the sole ground of the attachment being that they were non-residents of the state. A copy of the summons and order of attachment were served upon David Swaney, in Lancaster county, while engaged in digging a cellar for his dwelling, and by personal service upon Mary Swaney in the state of Illinois. The plaintiffs filed a motion to dissolve the attachment upon the ground that at the time the attachment was levied they were not non-residents of the state; and supported the motion by affidavits showing the facts above stated. The court overruled the motion and sustained the attachment. The sole question for determination is, were the plaintiffs non-residents at the time the attachment was levied?

In the case of *The People v. McClay*, 2 Neb., 7, it was held that a person who came to this state with the intention of becoming a resident, and who has no intention of removing therefrom, was entitled to the benefit of the exemption law. And the fact that his family did not accompany him was held to be of no consequence so long as he came with the settled purpose of abandoning his foreign residence, and of bringing his family here. And in *Chesney v. Francisco*, 12 Neb., 626, the same rule was applied to a person who had removed to this state with his family with the intention of residing here. If a person go to a place with the intention of residing there, he acquires

a domicile whether his residence be long or short, provided it appears that he took up his abode with the intention of remaining. Thus in the case of *Wells v. The People*, 44 Ill., 40, one Wells, formerly a resident of New York, came to Illinois and purchased a farm therein, which he cultivated and lived upon from 1861 to August, 1864, but his wife continued to reside in New York. In May, 1864, his property was attached upon the ground that he was a non-resident of Illinois. The court held that the facts and circumstances showed that he was a resident, and that the attachment would not lie.

In *Brown v. Ashbough*, 40 How. Pr., 260, one Ashbough left Hamilton, Canada, where he had resided and done business for several years, on the twenty-fourth of September, 1870, and went to the state of New York with the intention of taking up his residence there, but his wife still remained in Canada. On the third day of October of that year an attachment was issued against him in New York upon the ground that he was a non-resident. It was held that the defendant was a resident of the state. *Heidenbach v. Schland*, 10 How. Pr., 477, is to the same effect. See also *Barnet's Case*, 1 Dallas, 152. *Thurneyssen v. Vouthier*, 1 Miles, 422. *Kennedy v. Baillie*, 3 Yeates, 55. *Lyle v. Foreman*, 1 Dallas, 480. *Smith v. Story*, 1 Humph., 420. *Stratton v. Brigham*, 2 Sneed, 420. *Shipman v. Woodbury*, 2 Miles, 67. *Wheeler v. Degnan*, 2 Nott and McCord, 323. *Matter of Wrigley*, 4 Wend., 602.

The test of residence, when a party removes from one state to another, seems to be, did he remove from his former residence with the intention of abandoning the same? If a party, in pursuance of that intention actually went beyond the borders of the state, he will become a non-resident of that state, and upon going into another state with the intention of residing there, he will become a resident thereof. The wife's domicile is that of the hus-

band. This maxim, as was said by SHAW, Ch. J., in *Harteau v. Harteau*, 14 Pick., 185, is founded upon the theoretic identity of person and of interest between husband and wife, as established by law, and the presumption that, from the nature of that relation, the home of the one is that of the other. *Lacy v. Clements*, 36 Texas, 661. *Johnston v. Turner*, 29 Ark., 280. *Succession of Daniel Chastie* 20 La. Ann., 383.

The plaintiffs were not non-residents of the state at the time the attachment was issued, and there was no authority to issue the same upon that ground. The plaintiffs claim the land in dispute as a homestead, and seem to be entitled to the same on that ground; but we find it unnecessary to pass upon that question. The judgment of the district court sustaining the attachment is reversed, the attachment dissolved, and the proceedings therein dismissed

JUDGMENT ACCORDINGLY.

GEORGE P. BEMIS, APPELLANT, V. GEORGE T. M. DAVIS, APPELLEE.

Creditor's Bill. In 1864, certain real estate in the city of Omaha was purchased by the wife of T., the consideration therefor paid with her own money, and the title thereto taken in her name. She afterwards conveyed to D., in trust for her children. In 1876, one B. commenced an action by attachment against T., and caused the real estate in question to be levied upon as belonging to him. Afterwards judgment was rendered against T., the property sold as his, and a sheriff's deed therefor made to B., who thereupon commenced an action against D. to quiet the title and for a decree that the property, when the attachment was levied, in fact belonged to T. *Held*, That T. had no interest in the property liable for his debts and the action was properly dismissed.

APPEAL from Douglas county. Heard below before SAVAGE, J.

Redick & Redick, for appellant.

George W. Ambrose, for appellee.

BY THE COURT.

This is an action in the nature of a creditor's bill to have certain real estate in the city of Omaha, held in trust by the defendant, declared the property of George Francis Train and liable for his debts. A decree was rendered in the court below dismissing the action. The plaintiff appeals to this court.

It appears from the record that in the year 1864 the real estate in question was conveyed by one Patrick to the wife of Train, and that afterwards she conveyed it to the defendant, who is her father, in trust for her children. In 1876, the plaintiff commenced an action by attachment in the district court of Douglas county against George Francis Train to recover the sum of $47,660.68, for services as private secretary for a series of years, and caused the land in question to be levied upon under the attachment. In October, 1876, a judgment was rendered by default for the sum claimed and costs, and the land in question ordered sold. A sale was thereafter had, and the property purchased by the plaintiff. The sale was confirmed and a deed made to him. The only question necessary to be considered is, by whom was the consideration for the land paid. Upon this point Henry C. Crane testified as follows: "I have known the defendant and his daughter, Mrs. W. D. Train, for the last fifteen years. In 1864, in the month of October, I find on examination of Mrs. Train's account that I paid Mr. Patrick for her account one thousand dollars for some land bought in Omaha, Nebraska. The fund from which I paid this thousand dollars was her in-

dividual money, and to my personal knowledge was made by her in stock operations, the accounts of which were kept by me, and the proceeds of which speculation I held subject to her individual control, and paid it out upon her order or by her direction." This testimony is not denied and it is conclusive upon the question of her good faith in making the purchase, and that she paid for the land in question with her own money. Even if it appeared that the funds belonged to the husband, the purchase would not be void, except as to creditors then existing, and but a small portion of the plaintiff's claim existed at that time; but from the fact that it appears beyond question that the consideration was paid by the wife out of her own funds, it is unnecessary to consider the second question. It is very clear that justice has been done, and the decree is affirmed.

DECREE AFFIRMED.

HENRY ATKINS, APPELLANT, V. REBECCA ATKINS, APPELLEE.

1. **Practice in supreme court.** After a cause is submitted to the court on the merits, it is too late to raise the objection that the bill of exceptions was not presented to the adverse party for correction and amendment before being signed by the judge.
2. **Divorce and alimony.** Decree for alimony modified by reducing the same from $5,500 to $3,000, and an allowance for attorney fees and expenses from $2,000 to $1000.

Appeal from the district court for Lancaster county. Tried below before POUND, J.

T. M. Marquett, and *Courtnay & Caldwell*, for plaintiff (appellant).

J. R. Webster and *J. H. Foxworthy*, for defendant, (appellee).

BY THE COURT.

This action was commenced in 1873 in the district court of Lancaster county, by the plaintiff against the defendant, to obtain a decree of divorce. The defendant was a non-resident of this state, and service was had upon her by publication. In consequence of a failure to state essential facts in the affidavit for publication the decree was held for naught, and the defendant permitted to answer. *Atkins v. Atkins*, 9 Neb., 191. The defendant thereupon filed an answer and cross petition and a large amount of testimony was taken, and a decree of divorce rendered on the cross petition, and for alimony as follows: Two thousand dollars for expenses and attorney fees, in addition to three hundred and fifty dollars previously allowed. Twenty-five dollars per month to be paid by the plaintiff to the defendant from the 21st day of July, 1879. Five thousand five hundred dollars, in lieu of dower, to be paid in installments.

1. Since the case was submitted an informal objection has been made to the bill of exceptions, that it was not presented to the adverse party for correction and amendment before being submitted to the judge for his allowance. This is an objection that must be made at the earliest opportunity, and before the case is submitted on the merits. The rule was adopted to insure the obtaining of a correct bill of exceptions. But if the bill has been properly signed and the case is submitted to the court without objection upon that ground, the presumption is that the bill is correct, and the fact that it was not submitted to the adverse party for correction is error without prejudice. In any event, under our present statute the objection must be made before the submission of the case.

2. The testimony upon which the divorce was granted

is conflicting, and in our opinion sustains the decree. The amount allowed for alimony, however, seems excessive, and the same is true of the sum granted for attorney fees. The testimony is quite indefinite as to the value of the plaintiff's estate, but it fails to show it to be worth sufficient to justify the court in awarding the very large sums allowed in the decree. In addition to this, the defendant has lived apart from the plaintiff for years, to some extent of her own volition, and has contributed but little to the accumulation of the property. The case, therefore, falls within the rule laid down in *Shafer v. Shafer*, 10 Neb., 468. The decree of five thousand five hundred dollars is reduced to three thousand dollars, to be paid as follows: One thousand dollars in thirty days, one thousand dollars in one year from this date, with interest, and one thousand dollars in two years, with interest.

3. The amount allowed for attorney fees and expenses is reduced to one thousand dollars in addition to the three hundred and fifty dollars previously allowed, and with these modifications the decree is affirmed, except that, it is not to be a lien upon the plaintiff's real estate, and the cause is remanded to the district court for Lancaster county, with directions to enter a decree in conformity with this opinion.

REVERSED AND REMANDED.

THE STATE, EX REL. WILLIAM SEXAUER, V. TRUMAN BUCK.

City of First Class: ELECTION. In April, 1881, one M. was elected treasurer of the city of Omaha for the term of two years. In December of the same year M. died, whereupon the mayor of said city appointed B. to fill the vacancy. The ap-

pointment was confirmed by the council, B. qualified, and took possession of the office. At the city election in April, 1882, certain voters of said city, without any resolution of the city council or proclamation of the mayor, cast their ballots for S. and D. S. having a majority of all the votes cast. In a proceeding by quo warranto to oust B. from the office of treasurer and install S. therein, *Held*, That as the city election in April, 1882, was not a general election in said city, votes cast to fill a vacancy in the office of treasurer, without a resolution of the city council or proclamation of the mayor, were nugatory.

ORIGINAL information in nature of *quo warranto*.

James Neville and *E. F. Smythe* for relator.

Charles H. Brown and *C. F. Manderson* for respondent.

BY THE COURT.

This is a proceeding in *quo warranto* to oust the defendant from the office of treasurer of the city of Omaha, and instate the relator therein. The information states the following facts: That on the 5th day of April, 1881, Samuel G. Mallette was elected treasurer of said city for the term of two years, from April 11th, 1881, at which date he qualified and entered upon the duties of his office; that on the thirty-first of December of that year, Mallette died, and on the third of January, 1882, the mayor of Omaha appointed the defendant to fill the vacancy caused by the death of Mallette. The appointment was confirmed by the city council, and the defendant thereupon gave a bond, which was duly approved, took the oath required by law, and entered upon the duties of his office. No election for city officers has been called or held in the city of Omaha since said appointment, except that an election was held on the fourth of April, 1882, for the election of one councilman from each ward of the city. At this election, without any action of the city council or proclamation of the mayor, calling an

election for city treasurer, certain voters of that city cast their ballots for the relator for treasurer, and certain other voters for George W. Doane. The whole number of votes cast for the relator was 1,628 and for Doane 545. The city council canvassed the votes cast for councilmen, but refused to canvass those cast for treasurer upon the ground that there was no vacancy in said office. The relator afterwards tendered a sufficient bond to the council for approval, but it refused to receive the same. Defendant demurs to the information. Do the facts stated in the information entitle the relator to the office in question?

Sec. 11 of the act relating to cities of the first class (Comp. St. 84) provides: "That the general city election in all cities governed by this act shall be held on the first Tuesday in April, 1881, and every two years thereafter, for the election of the following named officers, to-wit: Mayor, police judge, and treasurer. Each of said officers shall be elected by a plurality of votes, for the term of two years, commencing on the first Tuesday succeeding their election, and they shall hold their respective offices until their successors are elected and qualified," etc.

Sec. 13 provides that at the annual election to be held in 1882, one councilman shall be elected from each ward, who shall hold his office for two years. Six councilmen were elected by the city at large in 1881, whose term of office is two years.

It will be seen that the general election in cities of the first class is to be held in the odd numbered years, all the elective officers of the city, except one councilman from each ward, being elected at that time.

Sec. 37 of the act grants the power "to provide for filling such vacancies as may occur in the office of councilman, or other elective offices of the city, by calling special elections for that purpose."

Sec. 12 of chap. 18, of the Comp. Ordinances of Omaha, reads as follows: "Special elections to fill a vacancy in

the office of councilman shall be held within twenty days after such vacancy occurs. Special elections to fill a vacancy in any other elective city office shall be held at such time as the council shall by resolution determine, and the mayor and council may by appointment fill such offices temporarily."

Sec. 103 of the general election law provides that vacancies in city and village offices shall be filled by the mayor and council, or board of trustees.

The authority to fill the vacancy by the appointment of the defendant was thus conferred on the mayor and council of the city of Omaha by the ordinances of the city and by the general law, and this appointment would continue in force until the next general election for city purposes in said city, which will take place in April, 1883, unless the voters of the city, without a resolution of the city council, or proclamation of the mayor, had authority to fill the vacancy at the election held in April, 1882.

The question here presented was before this court in the case of *The People v. Hamilton County*, 3 Neb. 244, and it was held, where the election is one that the authorities may hold or not at their option, and they decide against holding the same, individual citizens must acquiesce, and votes cast on the assumption of the right to cast the same were nugatory. In that case certain votes were cast for the removal of the county seat of Hamilton county, without the proper orders calling the election, or notice of the same. The election in the city of Omaha in April, 1882, not being a general election, there was no authority for the voters of that city to fill the vacancy in question unless the city council by resolution had submitted that matter to the voters. In other words, the city election in April, 1882, was for the sole purpose of electing one councilman from each ward, and this being the only matter required by law, there was no authority for the voters of said city to fill a vacancy in the office of city treasurer without a resolution

of the council or proclamation of the mayor for that purpose. The relator therefore acquired no right to the office of treasurer by virtue of the votes cast for him at said election. The demurrer must therefore be sustained, and the proceedings dismissed.

JUDGMENT ACCORDINGLY.

HENRY GIBSON, PLAINTIFF IN ERROR, v. THE CLEVELAND PAPER COMPANY.

Error: VERDICT AGAINST EVIDENCE. Where the only error assigned is that the verdict is not sustained by the evidence, it will not be set aside unless it is clearly wrong.

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

Kennedy & Gilbert, for plaintiff in error.

Clarkson & Hunt, for defendant in error.

MAXWELL, J.

In 1879, the plaintiff in error accepted a draft for $300, drawn by the defendant. The plaintiff in error in his answer admits the acceptance, but alleges that it was made for the sole purpose of enabling him to draw against the same, which he has failed to do, and that therefore it is without consideration. A verdict was rendered against him in the court below, upon which judgment was rendered. The only question to be considered is, does the testimony sustain the verdict? It appears from the record, that in December, 1879, Gibson was indebted to the defendant in error in about the sum of $700; that at that time he

asked an extension of the time of payment of $300, which was granted, and the acceptance in question made; that afterwards a new note for the remainder of the debt was given, which has been paid. There is no dispute as to these facts, so that the only question before the jury was, whether or not the plaintiff in error had paid the $300, for which the acceptance was made. All the testimony, including that of the plaintiff himself, tends to show that he has not paid the same or any part thereof. In no case will a verdict be set aside unless it is clearly wrong. But this is fully sustained by the evidence, and it is evident that justice has been done. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. W. W. W. JONES, v. JOHN WALLICHS.

Mandamus. An application for mandamus must show that the relator is entitled to the writ, otherwise it will be refused.

ORIGINAL application for mandamus.

J. R. Webster, for the application.

The Attorney General, contra.

BY THE COURT.

This is an application by the relator as secretary of the board of education of the state normal school, to compel the defendant to draw a warrant on the state treasury in favor of Robert Curry for the sum of $75.00. By what authority the relator institutes this action does not appear,

and we are unable to find that such power is conferred upon him. A judgment in the case would bind neither Curry nor the state. The application must therefore be denied.

APPLICATION DENIED.

THE HASTINGS AND GRAND ISLAND RAILROAD COMPANY, PLAINTIFF IN ERROR, V. CHARLES C. INGALLS, DEFENDANT IN ERROR.

Practice in supreme court. A transcript and petition in error were filed in the supreme court within one year from the rendition of the judgment. But after the expiration of the year, the plaintiff asked for and obtained leave to amend his petition in error by making new assignments. On a motion to strike the petition in error from the files, *Held*, That the court had authority to permit an amendment as to any matter contained in the transcript, proper to be considered on error.

MOTION to strike petition in error from the files.

Brown & Ryan Brothers, for the motion.

Batty & Ragan, and *John Doniphan*, contra.

BY THE COURT.

The transcript and petition in error in this case were properly filed in this court within one year from the rendition of the judgment in the court below. After the expiration of one year from the time the judgment was rendered the plaintiff in error asked for and obtained leave to amend his petition in error by making new assignments. The defendant now moves to strike the petition in error from the files, upon the ground that as the amendment was made after

the expiration of a year from the date of the judgment the court did not acquire jurisdiction of the amendment. A petition in error is within the provisions of the code as to amendments. *Spencer v. Thistle, ante* p. 201. And may be amended in any case when the amendment will be in furtherance of justice. The amendment may be made as to any matter embraced in the record, which may be assigned for error, the transcript for that purpose being the case, and the power of amendment as to all matters in the transcript proper to be considered is entirely within the discretion of the court. The motion must be overruled.

MOTION OVERRULED.

THE REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR, V. GEORGE SAYER, DEFENDANT IN ERROR.

1. **Practice in Supreme Court:** SERVICE OF SUMMONS. Where a summons in error is directed to the sheriff of a particular county, it cannot be served by a private person unless appointed for that purpose by such sheriff.

2. ———: ———. A court or judge may, for cause shown, appoint a person to serve a particular process, but a justice of the peace has no authority to appoint a person to serve a summons issued out of the supreme court.

3. ———: JURISDICTION. Where an alias summons was issued and served after the expiration of a year from the rendition of the judgment, *Held*, It gave the court no jurisdiction.

MOTION to quash summons.

A. E. Harvey and *Charles O. Whedon*, for the motion.

Marquett, Deweese & Hall and *James Laird*, contra.

BY THE COURT.

Final judgment was rendered in the district court of Furnas county on the seventh day of October, 1880. On the twenty-fifth of September, 1881, a transcript and petition in error were filed by the plaintiff in this court and a summons in error issued directed to the sheriff of Furnas county. This summons was sent to H. A. Gray, the station agent at Arapahoe, Furnas county, with directions to place the same in hands of the sheriff at once for service. Mr. Gray made inquiry for the sheriff of that county, but found that he was temporarily absent therefrom, and being unable to find a deputy sheriff, went to a justice of the peace and had W. D. Pruit appointed to serve the summons. Pruit served the summons upon the defendant, and made a return of such service under oath. This summons was then returned to the attorneys for the plaintiff, who returned the same to some one in Furnas county for delivery to the sheriff for service. From some cause that does not clearly appear, the summons did not reach the hands of the sheriff, and no service was made by him or any of his deputies, but it was returned without being served to the plaintiff's attorneys about the twenty-seventh of October, 1881. It was lost before being returned to the clerk's office. An alias summons was issued and served after the expiration of the year. The defendant now moves to quash the summons.

Two questions are presented by the motion: *First*, Was the service by Pruit of any validity? *Second*, Was the service under the alias summons sufficient to give the court jurisdiction?

Sec. 68 of the code provides that: "The summons shall be served by the officer to whom it is directed, who shall indorse on the original writ the time and manner of service. It may also be served by any person not a party to

the action, appointed by the officer to whom it is directed. The authority of such person shall be indorsed on the writ," etc.

Sec. 882 provides that: "The court or judge, for good cause, may appoint a person to serve a particular process or order, who shall have the same power to execute it which the sheriff has," etc.

Sec. 585 provides that: "The summons mentioned in the last section shall, upon the written precipe of the plaintiff in error or his attorney, be issued by the clerk of the court in which the petition is filed to the sheriff of any county in which the defendant in error or his attorney of record may be; and if the writ issue to a foreign county the sheriff may return the same by mail to the clerk," etc.

A summons must be served by the party to whom it is directed, except that under the statute a sheriff may appoint a deputy to serve the same. *Hickey v. Forristal*, 49 Ill., 255. *Schwabaker v. Reilley*, 2 Dillon, 127. *Branner v. Chapman*, 11 Kas., 118. *Dietrichs v. Schaw*, 43 Ind., 175. Pruit therefore, if lawfully appointed, would have had no authority to serve the summons unless he was the sheriff or deputy sheriff of Furnas county, which he was not. And his appointment by the justice to serve the summons was an absolute nullity.

Second, The *alias* summons being issued after the expiration of a year from the rendition of the judgment gave the court no jurisdiction. *Baker v. Sloss*, *ante* page 230.

The motion must therefore be sustained, and the cause

DISMISSED.

LUCIUS A. WARREN, ADMINISTRATOR, PLAINTIFF IN ERROR, V. FERDINAND ENGLEHART, DEFENDANT IN ERROR.

1. **Descent and Distribution of Estates:** CONSTRUCTION OF STATUTE. The phrase "next of kin" includes such persons as are entitled to inherit the personal estate of a deceased person. Under our statute of descent and distribution a husband does not inherit his wife's personal estate, and is not the next of kin.
2. **Right of Husband to sue for death of Wife.** A husband, as executor, cannot maintain an action under the statute approved Feb. 25, 1873, for the death of his wife, unless it appear that there are next of kin entitled to the amount to be recovered.
3. ——: PLEADING. If the petition in such case fails to state facts showing the existence of next of kin, it will not state a cause of action.

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

Sibbet & Fuller and *Phelps & Thomas*, for plaintiff in error, cited *Steel v. Kurz*, 28 Ohio State, 191.

Myers & Evans and *Whitmoyer, Gerrard & Post*, for defendant in error, cited: *Wilson v. Bumstead*, 12 Neb., 1. Code, sec. 454. *Woodward v. C. & N. W. R. R.*, 23 Wis., 400. *Railway Co. v. Keely*, 23 Ind., 133. *Stafford v. Drew*, 3 Duer, 627. *Commonwealth v. R. R.*, 11 Cush., 517. Comp. Stat., 215, 232. 2 Kent's Com., 136. 2 Bouvier Law Dic., title "Next of kin."

MAXWELL, J.

This is an action by the plaintiff as administrator of the estate of Esther Warren, deceased, to recover damages for her death, which it is alleged was caused by the defendant. An answer and reply were filed which need not be considered. On the trial of the cause in the court below

the defendant objected to the introduction of any testimony on the part of the plaintiff for the reason that the petition did not state facts sufficient to entitle him to any relief. The objection was sustained and the action dismissed.

The questions presented to this court are: *First.* Can a husband under the civil damage act, Feb. 25, 1873, recover for the death of his wife? *Second.* Under our statute of descent and distribution does the husband in any case inherit the wife's personal estate?

Sec. 2 of the civil damage law is as follows: "That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by husbands dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars." Comp. Stat., chap. 21.

As the damages are given to the widow and next of kin, the word "widow" being used twice, and "wife" once, it is very clear that no right of action is given to the husband unless he is within the designation "next of kin." The question perhaps is not entirely free from difficulty, particularly in view of the decision from Ohio, which will hereafter be noticed.

Bouvier says, this term (next of kin) is used to signify the relations of a party who has died intestate. 2 Law Dict., 226. The term "next of kin" embraces only that class of persons to whom at common law administration of the estate of the deceased would be committed in case of intestacy. 1 Wm.'s Exrs., 281. Willard's Exrs., 154.

The phrase comprehends all those persons who are entitled to inherit personalty under the statutes of descent and distribution. The question is therefore presented, does the husband, in case of the wife's death without issue, inherit her personal estate?

Sec. 30 of our statute in relation to decedents provides that "when any person shall die seized of any lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in the manner following:

"*First.* In equal shares to his children, and to the lawful issue of any deceased child by right of representation; and if there be no child of the intestate living at his death, his estate shall descend to all his other lineal descendants; and if all the said descendants are in the same degree of kindred to the intestate, they shall have the estate equally; otherwise they shall take according to the right of representation.

"*Second.* If he shall leave no issue, his estate shall descend to his widow during her natural lifetime, and after her decease to his father; and if he shall leave no issue, nor widow, his estate shall descend to his father.

"*Third.* If he shall leave no issue, nor widow, nor father, his estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by right of representation. *Provided,* That if he shall leave a mother also, she shall take an equal share with his brothers and sisters.

"*Fourth.* If the intestate shall leave no issue, nor widow, nor father, and no brother nor sister living at his death, his estate shall descend to his mother, to the exclusion of the issue, if any, of the deceased brother and sister.

"*Fifth.* If the intestate shall leave no issue, nor widow, and no father, mother, brother, nor sister, his estate shall descend to his next of kin in equal degree, excepting that

when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor, shall be preferred to those claiming through an ancestor more remote. *Provided, however,*

"*Sixth.* If any person shall die, leaving several children, or leaving one child, and the issue of one or more other children, and any such surviving child shall die under age, and not having been married, all the estate that came to the deceased child, by inheritance from such deceased parent, shall descend in equal shares to the other children of the same parent, and to the issue of any such other children who shall have died, by right of representation.

"*Seventh.* If, at the death of any such child who shall die under age, and not having been married, all the other children of his said parent shall also be dead, and any of them shall have left issue, the estate that came to said child by inheritance from his said parent shall descend to all the issue of other children of the same parent, and if all the said issue are in the same degree of kindred to said child, they shall share the said estate equally, otherwise they shall take according to the right of representation.

"*Eighth.* If the intestate shall leave a widow, and no kindred, his estate shall descend to such widow.

"*Ninth.* If the intestate shall have no widow nor kindred, his estate shall escheat to the people of the state." Comp. Stat., 215—16.

Sec. 176 provides that personal estate shall be distributed in the same proportion to the same persons, and for the same purposes as prescribed for the descent and disposition of real estate, except that the widow, if any, shall be entitled to receive the same share as a child of the intestate would be entitled to.

It will be seen that there is no provision that the husband shall inherit from the wife, and this is one distinction

between the case of *Steel v. Kurz*, 28 Ohio State, 197, and the case at bar. The statute of Ohio provides that, "if there be no children or their legal representatives, the estate shall pass to and be vested in the husband, wife, or relict of such intestate." But as there is no such provision in our statute, the husband does not inherit from the wife, and therefore is not within the meaning of the phrase "next of kin."

2. There can be no recovery unless it appears from the petition that there is some one in existence entitled under the statute to the amount recovered. In other words, it must appear that there is a widow, or some person next of kin, to entitle the administrator to recover. *Woodward v. C. & N. W. R. R. Co.*, 23 Wis., 400. *Commonwealth v. Boston R. R. Co.*, 11 Cush., 517. *Stafford v. Drew*, 3 Duer, 627. *Railway Co. v. Keely's administrator*, 23 Ind., 133. There are no allegations in the petition from which it appears that there are in existence any of the next of kin of Esther Warren. This being so the court did not err in excluding evidence, as the petition fails to state a cause of action. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

MARGARET A. THOMPSON, PLAINTIFF IN ERROR, V. GEORGE M. CHURCH, DEFENDANT IN ERROR.

Justice of Peace: ENTERING JUDGMENT ON SUNDAY. In an action tried to a jury in a justice court the jury retired at 10:30 P.M. on Saturday, and returned their verdict into court at 7:30 A.M. on Sunday. *Held*, That it was the duty of the justice to render judgment immediately upon the receipt of the verdict.

ERROR to the district court for Jefferson county. Heard below before WEAVER, J.

Slocumb & Hambel, for plaintiff in error.

Entry of judgment on Sunday was void. Sec. 1002, Code, must be construed with sec. 38, Comp. Stat., 202. *Houghtaling v. Osborn,* 15 Johns., 119. *Reid v. State,* 53 Ala., 402. *Blood v. Bates,* 31 Vt., 147. *Allen v. Godfrey,* 44 N. Y., 433. *Story v. Elliott,* 8 Cow., 27. *McCorkle v. The State,* 14 Ind., 39. *Arthur v. Mosby,* 2 Bibb., 589. *Baxter v. The People,* 3 Gilm., 368. *Chapman v. The State,* 5 Blkf., 111. *Van Vechten v. Paddock,* 12 Johns., 178.

O. H. Scott and *A. R. Scott,* for defendant in error, cited: *Perkins v. Jones,* 28 Wis., 244. *Wearne v. Smith,* 33 Wis., 412. *Sibley v. Howard,* 3 Denio, 72.

MAXWELL, J.

This case was tried to a jury in a justice's court, the trial commencing on the twentieth day of August, 1881. The cause was submitted to the jury at 10:30 P.M., August 20, and at 7:30 A.M. on the twenty-first of that month, the jury returned their verdict into court. The justice thereupon immediately rendered judgment thereon. This is assigned for error. The question to be determined is the authority of the justice to render judgment on Sunday.

Sec. 38 of an act to amend chapter 13 of the Revised Statutes of 1866, entitled "Courts" (Comp. Stat., 202), provides that, "no court can be opened, nor can any judicial business be transacted on Sunday, or on any legal holiday, except, 1. To give instructions to a jury then deliberating on their verdict; 2. To receive a verdict or discharge a jury; 3. To exercise the powers of a single magistrate in a criminal proceeding.

Sec. 1002 of the code provides that, "upon a verdict, the justice must immediately render judgment accordingly."

These provisions of the statute must be construed to-

gether, and effect given to both as far as possible. Construed in this way but little difficulty will be found. Whenever a verdict is received, it is the duty of the justice to render judgment thereon. He is required *immediately* to perform this duty. There is no restriction upon the power nor any exceptions stated as to the operation of the rule. The verdict must be delivered publicly to the justice. It must be in writing and signed by the foreman, and the justice should enquire of the jury if it is their verdict, and either party may require the jury to be polled. These are formalities that attend the receipt of all verdicts, those received on Sunday not being excepted. These inquiries are necessary in order to determine that what purports to be a verdict has received the assent of all the jurors, and is actually what it purports to be, yet if the statute is to be construed literally, the right to make such inquiries might be questioned. The authority of a justice of the peace is derived wholly from the statute. That is the chart and compass by which he is to be guided. In certain cases where there is nothing in the nature of the power to be exercised by the officer which justifies the inference that time was mentioned in the statute as a limitation, the time within which an act is to be performed is sometimes considered merely as directory.

Judge GANTT seems to have stated the rule correctly in *Hurford v. City of Omaha*, 4 Neb., 349, 350–1. But where the language of the statute is imperative, and it is apparent that the legislature intended to limit the time within which the power must be exercised, the officer has no discretion in the premises, but must perform the duty within the time limited. *Perkins v. Jones*, 28 Wis., 243. *Weaver v. Smith*, 32 Id., 412. We have no doubt that where a verdict is received on Sunday, it is the duty of the justice immediately to render judgment thereon. There is no error in the record, and the judgment is affirmed.

21 JUDGMENT AFFIRMED.

WILLARD E. STEWART, PLAINTIFF IN ERROR, V. JAMES DAGGY, DEFENDANT IN ERROR.

Guardian and Ward. A judge of the district court has authority at chambers in a proper case to grant license to a guardian to sell the real estate of his ward.

ERROR to the district court for Lancaster county.

Harwood & Ames, for plaintiff in error.

J. R. Webster, for defendant in error.

MAXWELL, J.

The plaintiff purchased certain real estate at guardian's sale, and upon a motion being made to confirm the same, he filed exceptions thereto, which were overruled and the sale confirmed. He now brings the case into this court by petition in error. The question to be determined is the authority of the judge in vacation to grant license to sell.

Under the territorial laws, this power was conferred on the probate court of the proper county, but the gross abuse of the power in some of the counties led to the insertion of a provision in the constitution of 1867 depriving the probate courts of the authority to grant license, and conferred the same on the district courts. And the authority was continued in the constitution of 1875. The law in relation to decedents has, since the admission of the state into the Union, been amended by substituting the word "district" for "probate" before the word "court," in cases where authority is conferred to sell real estate. The change being made in this way, let us enquire the object of the provision, in order to ascertain the intent of the legislature in amending the law. It is pretty clear that the object was not to change the *procedure* or to require the proceedings to be conducted before a jury in open court. The sole object of

the change, so far as we can determine, was to place the matter in the hands of judges who would be free from local influences, and also, from their greater knowledge of the law, would be presumed to exercise greater care and circumspection in authorizing a sale. In granting a license, the duties of a judge of the district court are precisely the same as those of a judge of the probate court were under the territorial laws. The petition for license, showing the necessary facts, is to be filed in the district court, and all the proceedings therein, up to the confirmation of the sale, are to be had therein—that is, entered of record therein. But as under the territorial laws, as at the present time, the probate court consisted of but a single judge, who was his own clerk, and the court was always open for the consideration of matters relating to estates, the terms fixed by law being merely for the convenience of parties, but not essential to the jurisdiction of the court, so under the present statute the power is conferred on the judge, and may be exercised in open court or at chambers, as may be most convenient. In either case the hearing is before the judge, and he is to determine the necessity for a sale. If either party is dissatisfied with his decision, undoubtedly the judge has authority to sign a bill of exceptions setting forth the testimony in the case, and it may then be reviewed on error. The construction contended for by the plaintiff would amount to a practical denial of justice in most cases, from the length of time required to perfect a sale.

An additional reason is found in the fact that licenses to sell real estate have been issued in this way ever since the admission of the state. When the writer came upon the bench ten years ago he found such had been the practice by the judges of the supreme court, who at that time were also judges of the district courts. And the practice has been continued by all the judges of the district courts until the present time. The construction given to the statutes by the early judges by granting licenses, directing

and confirming sales made thereunder, has been accepted as a proper construction of the same. Had objection been made and the judges refused to issue licenses in this way, the legislature without doubt would have amended the the statutes so as to confer the power upon judges in vacation. Such a power was necessary to enable creditors to collect their claims against estates. And no valid reason can be given why they should be required to wait six months or a year before a petition could be presented to a court for its approval, with a further delay of one or two years perhaps, before the confirmation of the sale. This being a rule of property, which has been acted upon for many years, and valuable estates acquired under it, no change should now be made that would have the effect to deprive purchasers of their property. The license in the court below was properly issued and exceptions thereto were properly overruled. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THOMAS GIBSON, PLAINTIFF IN ERROR, V. PARLIN & ORINDORFF, DEFENDANTS IN ERROR.

1. **Promissory Note:** INDORSER. The holder of a promissory note is not required to resort to his remedy against the maker before he may proceed to collect it from the indorser.

2. ———. And when the indorser has waived a demand, protest, and notice of non-payment, a right of recovery accrues against him as soon as the note is due.

3. ———. The indorser cannot, like a surety, call upon the holder of the note to proceed and collect it of the maker.

4. **Pleading:** CONSTRUCTION OF. In construing a pleading the rule is that it must be taken most strongly against the pleader.

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

O'Brien & Bartlett, for plaintiff in error.

Warren Switzler, for defendant in error.

LAKE, CH. J.

This is a petition in error to reverse a judgment of the district court for Douglas county. The action was upon a promissory note on which the plaintiff in error was accommodation indorser, and had waived in writing demand, protest, and notice of non-payment.

The only questions presented for our consideration are two, and they were raised by the ruling of the court below upon a demurrer to the alleged grounds of defense, which were in substance: *First*, that when the note matured the makers were solvent and its payment could have been enforced from them; that the defendants in error were requested to proceed against the makers and make collection of the amount due on the note from them, which they neglected to do; that the makers have since become and are now insolvent. *Second*, that said "note has long since been sued in the county court of Butler county, Nebraska, and by the consideration of said court, on the 6th day of March, 1877, judgment was rendered on said note * * * * whereby said note became merged in said judgment." To these defenses a general demurrer was interposed and sustained, and a judgment entered in accordance with the prayer of the petition. In this ruling, we perceive no error. The holder of a promissory note is not required to resort to his remedy against the maker before he may proceed to collect it from the indorser. And when, as in this case, the indorser has waived his right to a demand of payment upon the maker, protest, and notice of

non-payment, a right of recovery accrues against him as soon as the note becomes due. 1 Edward's Bills, etc., sec. 385, 3d Ed. And the endorser cannot, like a surety, call upon the holder of the note to proceed and collect it of the maker. Id., sec. 415. *Trimble v. Thorne*, 16 John., 152. *Beardsley v. Warner*, 6 Wend., 610. Of the former judgment pleaded in bar, all that need be said is that it is clearly bad for not showing that the indorser was a party to it. In construing a pleading, the rule is that it must be taken most strongly against the pleader. *Green et al. v. Covillard et al.*, 10 Cal. 307. *Harrington v. Santa Clara Co.*, 44 Id., 508. *Covington v. Powell*, 2 Bush. (Ky.), 226. Here all that we have upon this point is indicated by the quotation from the answer given above, the substance of which is merely that a judgment had been "rendered on said note" in the county court of Butler county. As to who the judgment was against the answer is silent. It may have been against the makers of the note alone, or even one of them, and still the answer be true. The want of an averment that the indorser was a party to the judgment compels the inference that he was not. *B. & M. R. R. Co. v. York Co.*, 7 Neb., 487. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

BOARD OF COMMISSIONERS OF DIXON COUNTY, PLAINTIFF IN ERROR, V. JOHN B. BARNES, DEFENDANT IN ERROR.

County Board: JURISDICTION. The board of county commissioners have exclusive original jurisdiction in the examination and allowance of claims against a county, and the only mode of prosecuting an action on such claims is by appeal from their decision.

ERROR to the district court for Dixon county. Tried there before Isaac Powers, Jr., referee.

J. J. McAllister, for plaintiff in error.

Gantt & Norris, for defendant in error.

BY THE COURT.

In July, 1880, the defendant in error commenced an action against the plaintiff before a justice of the peace of Dixon county to recover the sum of $50, with interest from January, 1879, "for services as attorney for said commissioners in the case of Gaugurve." A summons was issued and served and judgment rendered against the county for the sum of $50.70. The case was taken on error to the district court, where the judgment was affirmed.

The only question for the determination of this court is, had the justice jurisdiction? In other words, can a party having a claim against a county refuse to file the same with the county commissioners for allowance, but bring an action directly thereon? The question depends upon the construction to be given sec. 37 of an act concerning counties and county officers approved Feb., 1879, which reads as follows; "Before any claim against a county is audited and allowed, the claimant or his agent shall verify the same by his affidavit, stating that the several items therein mentioned are just and true, and the services charged therein, or articles furnished as the case may be, were rendered or furnished as therein charged, and that the amount allowed is due and unpaid after allowing all past credits. *All claims* against the county must be filed with the county clerk, and when the claim of any person against a county is disallowed in whole or in part by the county board, such person may appeal from the action of said board to the district court of same county, etc." There is also a provision that a taxpayer may appeal.

It is very clear from an examination of the statute that the legislature intended *all* claims against the county to be submitted to the county commissioners for examination and allowance. The object doubtless was to prevent counties being subjected to costs and to guard the right of taxpayers against judgments rendered upon questionable claims through the neglect or collusion of those having the charge of county affairs. The statute has therefore provided a plain adequate remedy for creditors, by requiring them to verify their claims by stating that the several items thereof are just and true, and that the amount claimed is due after allowing all past credits. These claims are submitted to the county board, and they are held responsible to the people at large for their action in the premises. If a claim is allowed that in the opinion of any taxpayer is unjust he may appeal to the district court, and the warrant is required to be withheld for twenty days after the allowance of a claim to enable any taxpayer to take such appeal. In this way the rights of the claimant and the taxpayers may be protected. We adhere to our decisions in *Brown v. Otoe Co.*, 6 Neb., 111, and *Clark v. Buffalo Co.*, Id, 454, and those decisions hold, that the board has exclusive original jurisdiction in the examination and allowance of claims against a county. The judgment of the district court is reversed, and the cause dismissed.

JUDGMENT ACCORDINGLY.

DOOLITTLE, GORDON & CO., APPELLEES, V. FRANCES GOODRICH, ET AL., APPELLANTS.

Mechanic's lien. In November, 1880, one M. contracted with G. to erect a house and furnish the material. M. thereupon purchased lumber for the erection of said dwelling in his own name,

the credit being given to him, and after the erection of the building, left the state without paying for the lumber. A mechanic's lien was thereupon filed against the lot on which the building was erected and appurtenances, for the amount of the claim, and judgment was thereafter rendered against G. for the amount and the premises were sold. *Held*, That as the testimony failed to show that M. was the agent of G., the judgment and lien could not be sustained under the lien act in force at that time.

APPEAL from the district court for Lancaster county. Heard below before POUND, J.

J. H. Foxworthy, for appellants.

Samuel J. Tuttle, for appellees.

BY THE COURT.

Frances Goodrich is the owner of lot 5, in block 240 in the city of Lincoln. In November, 1880, she contracted with one James McLelland, to erect a small house thereon which he afterwards did. The lumber for the house was purchased from the plaintiff by McLelland on his own account, and was charged to him on their books. McLelland was paid by Mrs. Goodrich the full contract price for the erection of said building. Sometime thereafter, McLelland left the state, leaving the lumber bill unpaid. An itemized account against Frances Goodrich and Elizabeth McLelland, the mother of Mrs. Goodrich, duly verified, was then filed in the county clerk's office of Lancaster county, to obtain a mechanic's lien upon the premises above described. A judgment for the sum of $173.00 was rendered in the court below against Frances Goodrich, and directing a sale of the real estate in question.

The only question necessary to be considered in this case is, was McLelland the agent of the defendant Goodrich in purchasing the lumber with which the house was erected? In our opinion the testimony not only fails to establish

that fact, but clearly shows that the lumber was sold to McLelland upon his individual account, and that he was not her agent. This being so she was not liable under the mechanic's lien law then in force for the payment of the claim We adhere to our decision in the case of *McCormick v. Lawton*, 3 Neb., 449, but it has no application to the facts of this case. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

C. C. HOUSEL, PLAINTIFF IN ERROR, V. H. W. CREMER, DEFENDANT IN ERROR.

1. **Witness:** COMPETENCY. In an action between the assignee and a mortgagee of a deceased assignor, the mortgagee is not a competent witness.
2. **Voluntary Assignment:** ASSIGNEE—WHO HE REPRESENTS. Under a voluntary assignment the assignee represents simply the assignor, and not his creditors, respecting the assigned property.
3. ——. The assignee under a voluntary assignment will not be permitted to urge that a sale of the property previous to the assignment was fraudulent as to the creditors of the assignor in order to defeat it.

ERROR to the district court for Douglas county. The action was replevin by Housel who claimed title as mortgagee under chattel mortgage. The defendant, Cremer, claimed title by virtue of a voluntary assignment made by Agnes M. McKelligon, mortgagor of the property. The assignment was made subsequent to the mortgage. Before the trial Agnes died, and at the trial Housel was not permitted to testify as a witness. Testimony was introduced on the part of the defendant, tending to show that these mortgages were fraudulent as to the creditors of Agnes. The court also

gave instructions to the jury based on the hypothesis that it was a proper defense to show that the mortgages were fraudulent as against these creditors. Verdict and judgment for Cremer.

Webster & Gaylord, for plaintiffs in error. The creditors were not parties to the suit. If this had been an action on the part of the creditors to set aside the mortgage, or if the creditors had commenced suit against McKelligon and attached this property and Housel had replevied from the officer, such testimony might have been admissible. An assignee, however, under a voluntary assignment, cannot defend against a prior conveyance of his assignor on the ground that the conveyance was fraudulent as to creditors. The assignee in this respect is clothed with no greater powers than the assignor, and the assignor could not have made defense that she had executed this mortgage to defraud her creditors. Such is the common law, and there is no provision of the Nebraska statutes to change it. *Wakeman v. Barrows*, 41 Mich., 363. *Van Heusen et al. v. Radcliff*, 17 New York, 580. *Estabrook v. Messersmith*, 18 Wis., 546. *Brownell v. Curtis*, 10 Paige, 210. *Leach v. Kelsey*, 7 Barb., 466. *Pillsbury v. Kingon*, 31 N. J. Eq., 619. *Heinrichs v. Woods*, 7 Mo. App., 236. *Flower v. Cornish*, 25 Minn., 473.

John D. Howe and *Groff & Montgomery*, for defendant in error, on question of Housel's competency as a witness, cited *Wamsley v. Crook*, 3 Neb., 344. On question of attacking mortgage for fraud, said that intent of statute is to invest the assignee with the character of a trustee for creditors. Comp. Stat., 60. See also, *Hoagland v. Trask*, 48 New York, 686. *Lininger v. Raymond*, 9 Neb., 40. S. C., 12 Id., 167. *Hallowell v. Bayliss*, 10 Ohio State, 540. *Thomas v. Talmadge*, 16 Id., 434.

LAKE, CH. J.

We will consider the points relied on for a reversal of the judgment, in the order of their presentation by counsel in their brief. The first of these is that Housel, who offered himself as a witness in his own behalf, was not permitted to testify, the court holding him to be disqualified by section 329 of the code of civil procedure, which provides that: "No person having a direct legal interest in the result of any civil cause or proceeding, shall be a competent witness therein, when the adverse party is an executor, administrator, or legal representative of a deceased person," etc. This ruling was correct. It is true that Cremer was neither an executor nor administrator, but he was the assignee of Agnes M. McKelligon, and within the contemplation of the statute, her "legal representative." He had, by the deed of assignment, been entrusted with the property in controversy for the purpose of selling it and paying off her debts. This done, if there should happen to be a surplus it would belong to her estate. In view, therefore, of the language of this section, "executors, administrators and legal representatives," the construction given to it in *Wamsley v. Crook*, 3 Neb., 344, is clearly correct. The principle applied to the defendants in that case is applicable here, and makes Housel incompetent to testify. *Magenau v. Bell, ante* p. 247.

Several of the rulings complained of were based upon the assumption that Cremer, the assignee, could make the same defense to the mortgage that the creditors of Mrs. McKelligon might do, viz., that as to them it was fraudulent. This was an erroneous view of the law, and may have been induced to some extent by the remark in the last clause of the opinion in *Lininger v. Raymond*, 12 Neb., 167, that "the assignee is a trustee for the creditors." That the very reverse of this is the correct rule in the case of a voluntary assignment, is shown by an almost unbro-

ken line of decisions in the courts of this country as well as of England. And even in Pennsylvania, where decisions have been made which support the rulings of the court below, Chief Justice Gibson, in one case, said: "The assignee is the debtor's instrument for distribution, and stands in relation to the property as stood the debtor himself." * * * "As he stands in no privity to the creditors he cannot arrogate to himself any of their attributes and rights." *Vandyke v. Christ*, 7 Watts & Serg., 374.

And in *Pillsbury v. Kingon*, 31 N. J. Eq., 619, it is said: "The important question is: Whom does the assignee under a voluntary assignment represent? Simply the assignor? Or, does he also stand in the right of his creditors, and represent both? If he represent only the assignor, it is clear that he cannot be heard to impeach his assignor's acts, for no man can invest another man with a power he does not himself possess (the creature can never be greater than his creator), and no man can be permitted to found a claim on his own iniquity; *nemo ex proprio dolo consequitur actionem.* A fraudulent conveyance is good against the parties and their representatives." And in *Brownell v. Curtis*, 10 Paige's Ch., 210, the rule was stated to be, that no one by his mere voluntary assignment can transfer to his voluntary assignee a right of action which he does not himself possess. And where an insolvent makes a fraudulent transfer of property to defraud his creditors, so as to deprive himself of the right to reclaim it, he cannot by a merely voluntary assignment give the assignee that right. A great number of cases might be cited to the same effect, but in addition to the foregoing, we will refer only to *Jones v. Yates*, 9 Barn. & Cress., 532. *Estabrook et al. v. Messersmith*, 18 Wis., 546. *Leach v. Kelsey*, 7 Barb., 466. *Wakeman v. Barrows*, 41 Mich., 363. *Van Heusen et al. v. Radcliff*, 17 N. Y., 580. *Heinrichs v. Wood*, 7 Mo. App., 236. *Flower v. Cornish*, 25 Minn., 473.

The rule contended for by counsel for the defendant in error is doubtless the proper one in cases where the assignee derives his title to the property, not through the merely voluntary act of the debtor, but by operation of law, as is the case with assignees in bankruptcy. In such cases he is not the creature of the debtor, but of the law for the protection of his creditors, and he may therefore very properly exercise their powers and attributes. *Pillsbury v. Kingon, supra.* Briefly stated then, the correct rule seems to be that the rights of a voluntary assignee, which Cremer was, respecting the assigned property, are simply those of the assignor at the time of making the assignment, and inasmuch as the assignor could not have interposed his own fraud in making a prior sale of his property to defeat it, his assignee cannot do so. Such being the law applicable to this case, Housel was not obliged to vindicate his mortgage against any presumption of bad faith in the making of it. The presumption of fraud which the statute raises, and which the judge referred to in his charge to the jury, is permitted only in favor of "creditors of the vendor, and subsequent purchasers in good faith," to neither of which classes Cremer belonged.

Such being our views of the law applicable to this case, the judgment must be reversed and a new trial awarded.

REVERSED AND REMANDED.

FABIAN S. POTVIN, PLAINTIFF IN ERROR, V. CURRAN & CHASE, DEFENDANTS IN ERROR.

1. **Verdict:** NEW TRIAL. A new trial will not be granted by the supreme court on the ground of a want of sufficient evidence to support the verdict, unless the want is so great as to show that the verdict is manifestly wrong. Rule applied.

2. **Real Estate Broker:** COMMISSION. Where the price of property and the terms of payment are fixed by the seller, and the broker engages to procure a purchaser at that price and upon those terms, if, upon the procurement of the broker, a purchaser is produced, with whom the seller himself negotiates and effects a sale, although the terms may be changed, and even the sale itself finally abandoned, he is entitled to his commission.

3. ———: ———. And he is also in such case entitled to his commission, even although the seller see fit to let the contract rest in parol, whereby he may be unable to enforce it.

4. **Statute of Frauds.** Whether payment of a considerable part of the purchase money on a parol contract for the sale of real estate will take it out of the statute of frauds, *quære.*

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

J. R. Webster, for plaintiff in error, cited: *Coleman v. Meade,* 13 Bush., 358. *Wylie v. Marine Bk.,* 61 N. Y., 415. *Schwartze v. Yearly,* 31 Md., 270. *McGavock v. Woodlief,* 20 How., 221. *Middleton v. Findlar,* 25 Cal., 76.

S. P. Vanatta, for defendants in error, cited: *Love v. Miller,* 53 Ind., 294. *Kock v. Emmerling,* 22 Howard, 69. *Pearson v. Mason,* 120 Mass., 53. *Lest v. Norton,* 43 Com., 219. *Simonson v. Kissick,* 4 Daly, N. Y., 143.

LAKE, CH. J.

One of the alleged errors is, that the verdict is not supported by sufficient evidence. We are of the opinion, however, that it is. The action was brought to recover the sum of fifty dollars as the stipulated consideration or commission for furnishing to the plaintiff in error a purchaser of a leasehold interest in certain real estate, which he was desirous of selling, at the fixed price of two thousand dollars.

There is some conflict in the evidence, to be sure, but,

under the rule of this court, that a verdict not manifestly wrong will be sustained, it is ample to justify the ruling of the learned judge of the district court in refusing a new trial.

The defense to the action seems to rest upon the claim that no completed sale of the property was made, wherefore there could have been no purchaser, and consequently no commission earned. If, however, the testimony of Curran be accepted as embodying the true state of facts (and we see no reason for holding that the jury were not warranted in so taking it), then it is clear that a purchaser was furnished, to the satisfaction of Potvin, and a sale actually made to him.

In his testimony, Curran says: "I was employed by Fabian S. Potvin, as one of the firm of Curran & Chase, to sell his interest in a certain building on O street between Eleventh and Twelfth streets, in Lincoln, Nebraska. * * * Potvin told me that he wanted to sell his interest in the property * * * and that, if I could furnish him a customer, he would give me fifty dollars commission. I told him I would try and do the best I could in looking up a purchaser. I found a man by the name of Lockwood looking for property. I took him over, * * introduced him, and said to Mr. Potvin that Mr. Lockwood would like to look the property over which he wished to dispose of. Mr. Potvin showed it to him, and Mr. Lockwood said to Mr. Potvin: 'If you will give me two or three days to look the matter over, I will call;' and Mr. Potvin said, 'No;' that he would only give him until noon of the same day. Some time before noon of that day, Mr. Lockwood came to me and said that he had concluded to take the property. I went with him down to Mr. Potvin, and Mr. Lockwood said to Mr. Potvin: 'I have concluded to take your property if this offer will do; I will pay you two hundred dollars down now, and the balance the next Monday or Tuesday.' Possibly it might have

been Wednesday. Mr. Potvin told him that would do. So Mr. Lockwood paid him (Mr. Potvin) two hundred dollars, and took Potvin's receipt for the same. And I said: 'That is all right then, is it?' He said, 'Yes.' I told him I was in a hurry, and left." Curran testified still further on his cross and re-direct examination, but to the same effect. Among other things, he said: "Mr. Potvin agreed to accept the two hundred dollars as part payment, and to extend the time until next week for the balance; and, as I understood it, gave his receipt in that way for the said sum of two hundred dollars. After I produced the purchaser, Lockwood, to defendant, I did not have anything to say. Potvin and Lockwood did the talking, and really made the bargain."

On the other hand, Potvin swore that no sale was really made; that the two hundred dollars was simply "forfeit money," which he was to have in case Lockwood did not take the property. And in this he is corroborated by Lockwood himself, who testified to the effect that by the arrangement he was under no binding obligation to take the property.

It is an important circumstance, however, and one strongly supporting the view of the case taken by the jury, that Curran's description of the writing or receipt given by Potvin for the two hundred dollars was not controverted. If its character were not in fact such as he claimed it to have been, it seems strange that it was not produced, or, if lost or destroyed, its contents made known by verbal testimony.

Certain of the instructions given to the jury are also complained of. Of these, the first, second, and third were clearly right. Taken together, they were to the effect that when the price of property and terms of payment are fixed by the seller, and the broker's engagement is to procure a purchaser at that price and upon those terms, if, upon the procurement of the broker, a purchaser is produced with

whom the seller himself negotiates and effects a sale, although the terms may be changed, and even the sale itself finally abandoned, he is entitled to his commission. This, we think, was a correct statement of the law applicable to the facts of the case.

Whether the other instruction to which exception was taken was right, we have some doubt; probably it was not. It was to the effect that payment of a considerable part of the purchase money on a parol contract for the sale of land will take it out of the statute of frauds. It is generally held, we believe, that it will not. But, however this may be, from the view we take of the case, the instruction was unimportant. There is not a particle of doubt that Curran performed his obligation to the complete satisfaction of Potvin. He undertook to produce a purchaser, and he did it. Neither is there any doubt of the fact that Potvin made a sale of the property to that purchaser for the stipulated price, and even if he did see fit to let the contract rest in parol, Curran was not to blame for it, nor should he be compelled to suffer on account of it. We have no doubt that justice has been done, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

C. H. AND L. J. MCCORMICK, PLAINTIFFS IN ERROR, V. S. O. RAYMOND, DEFENDANT IN ERROR.

1. **Pleading:** BANKRUPTCY. It is only the final discharge of a debtor, under the bankrupt law of the United States, that constitutes a good plea in bar of an action. The fact that he has simply been adjudged a bankrupt is not a defense.

2. ———. The only effect of bankruptcy proceedings upon a pending action prior to the discharge, is to enable the bankrupt to have the action stayed to await the decision of the bankrupt court on the question of his discharge.

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

Byron Millett, for plaintiffs in error, cited Bump on Bankruptcy, 9th Ed., 754. *Ray v. Wight*, 119 Mass., 426. Maxwell's Pl. and Pr., 352. *McCormick v. Pickering*, 4 New York, 276. *Jaffray v. Crane*, 50 Wis., 352.

Whitmoyer, Gerrard & Post, for defendant in error.

LAKE, CH. J.

The principal question in this case is, whether the fact of the defendant having been adjudged a bankrupt under the law of the United States after the cause of action sued on had accrued, without showing also a final discharge from the debt, was a good defense to the action. The county court held that it was not, and accordingly sustained a demurrer to the answer, which ruling was reversed by the district court, and a judgment entered for the defendant.

Upon this question the judgment of the county court was right, and that of the district court wrong. It is only the final discharge under the bankrupt law that constitutes a good plea in bar to an action. This will very clearly appear by a reference to the law itself. It will thus be seen that the only effect which the bankruptcy proceedings, as shown by the answer, had upon the action was to enable the defendant, if he so chose, to have it "stayed to await the determination of the court in bankruptcy on the question of his discharge." U. S. Rev. Stat. 1867, sec. 21. *Bradford v. Rice*, 3 Am. Repts., 483. The judgment of the county court ought to have been affirmed.

The judgment of the district court must therefore be reversed and the cause remanded with instruction to enter a judgment in conformity to this opinion.

REVERSED AND REMANDED.

GUS. GETTINGER AND CHRIS. DAHL, PLAINTIFFS IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Larceny**: INDICTMENT: EVIDENCE: VARIANCE. On the trial of an indictment charging the larceny of "a cast-iron balance-wheel," the evidence was that, in order to facilitate its removal and disposition to their use, the prisoners broke the wheel in pieces, thereby depriving the material composing it of its former character, converting it into "old iron," and as such disposed of it. *Held*, No variance. That the destruction of the wheel was simply a part of the act of taking, and resorted to for the more successful accomplishment of the theft.
2. ——: ——: ——. In such case the article as it was at the inception of the taking, must govern in determining the degree of criminality attaching to the act.
3. **Feloniously Take and Carry Away.** To take an article feloniously is accomplished by simply laying hold of, grasping or seizing it *animo furandi*, with the hands or otherwise. And the very least removal of it from the place where found, by the thief, is an asportation or carrying away.
4. **Mistake as to Ownership of Property Stolen no Defense.** The supposition of the thief that the article stolen belonged to one indebted to him is no defense, not even if the supposition were true.
5. **Finding of Value**: ERROR IN. A finding of the value of property stolen to be much less than the evidence showed it to be, but still enough to make the offense grand larceny, although erroneous, is without prejudice to the accused, and not a ground for a new trial.
6. **Failure to Charge Jury.** Before error can be predicated upon the failure of the judge to charge the jury upon a given point, he must be requested to do so.

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

Frank T. Ransom and *T. B. Stevenson*, for plaintiffs in error.

1. If there was not a variance, the evidence ought to show that the prisoners stole a cast-iron balance-wheel and that it was stolen at some particular time. But the evidence shows a trespass perhaps on one day, and a removal of part of the wheel after it had been destroyed on the same day, and at least one day intervened between the carrying away of the first part and the carrying away of the last. If a larceny was committed, when was it? Was it the first day or the second day? Was there a larceny of the wheel committed on the first day? If so, where was the wheel? On the foundry premises, or on the premises where the pieces of the spokes and hub had been carried? Was there an asportation of a wheel? We think not. 1 Whart. Crim. Law, 928, note 3, (8th ed.) 3 Greenleaf Evidence, 152. *Com. v. Beaman*, 8 Gray, 497. 9 N. W. Reporter, July 2, 1881, page 389. Whart. Crim. Ev., 146, and 121. 2 Bishop Crim. Prac., 710 and note (2d ed.) 2 Bishop Crim. Law, 765 (6th ex.) *State v. Horan*, Phil., N. C., 571. *Com. v. Gavin*, 121 Mass., 54.

2. On question of admissibility of Dahl's conviction, see *Com. v. Ingraham*, 7 Gray, 46.

C. J. Dilworth, attorney general, for the State.

LAKE, CH. J.

As shown by the brief of counsel for the prisoners, four points seem to be relied on for obtaining a new trial in this case. The important one, however, and the one most relied on is the first, viz., that there was a fatal variance between the allegation of the indictment and the evidence as to what was stolen.

The indictment charged the larceny of "a cast-iron balance-wheel of the value of one hundred and fifty dollars." The point of alleged variance lies in the fact that, in order to facilitate its removal from the place where found, and disposition of it to their use, the prisoners broke the wheel

in pieces, thereby depriving the material composing it of its former character, converting it into "old iron," and as such disposed of it. We are of the opinion that this was no variance. The destruction of the wheel was simply a part of the act of taking—a means to an end—and was resorted to for the more successful and safe accomplishment of the theft.

The evidence shows the wheel to have been of very great weight, probably considerably over two thousand pounds; its removal, therefore, to the place where the prisoners sold it, was a somewhat difficult task, but was effected the more easily, and with less chances of detection by destroying its character and identity. They therefore, resorted to the scheme of breaking it in pieces. Now there is no rule of criminal law that we are aware of by which such destruction of an article stolen can advantage the thief if, fortunately, he chance to be discovered. It ought really to be held to aggravate the crime, for, although the owner may discover and regain the material of which the article was composed, its chief value to him is forever gone.

Counsel would have us say that, although it is true that when the prisoners set upon this property with the felonious design of converting it to their own use, it was a shapely mass of iron—in form a wheel—and as such worth a hundred and fifty dollars, yet inasmuch as in order to enable them the more successfully to carry out that design they changed entirely its form, and in doing this reduced its value to that of old iron merely, and less than thirty-five dollars, they must either go entirely acquit, or suffer only the comparatively mild penalty provided for petit larceny. Than such a ruling as this would be, a more striking travesty upon the criminal jurisprudence of a state could not well be imagined.

Let us see, for a moment, how such a rule would operate as to another kind of property. For instance, a thief

enters a jewelry store, and seeing an opportunity to steal a valuable watch, worth say a hundred dollars, resolves to do so, but reflecting that, because of its value, the crime might be grand larceny, he hesitates. Soliloquizing, he says: "Now, although I am resolved to deprive the jeweler of that watch, and am quite willing to take the risk of a conviction for petit larceny in doing so, still I am a little uneasy in the reflection that perhaps its value may be such as to give me a term at hard labor in the penitentiary if I am found out." But a happy thought comes to his relief and he says: "Now the chief value of this watch is not so much in the materials of which it is composed as in its complex and beautiful mechanism, the curious and perfect adjustment of its various parts, its form; therefore, if I but first deprive it of these qualities there will be no danger of the greater penalty, for its reduced value will surely bring my offense below the grade of grand larceny." Thereupon he seizes the delicate article, crushes it into a shapeless mass, deprives it of its form and value as a watch, makes off with it, and by a sale for what it will bring as old metal, converts it to his own use. Under such circumstances would not a conviction of the thief of the crime of grand larceny for stealing the watch be proper? As the law really is we think it would, but not if the law were as we are requested to declare it to be.

Nor is the case of the prisoners here different in character from that of the supposed thief. The destruction of the wheel, like that of the watch, was a part of the act of taking, and was a mode of converting it to their own use. The felonious intent, which is the gist of the offense, was present, prompting the act, and whether the property were taken carefully so as to preserve its form and value intact, or violently so as to destroy or greatly injure it in respect to these qualities, can make no sort of difference as to the character of the offense. The article as it was at the inception of the taking must govern in determining the degree of criminality that attaches to the act.

The indictment charges that the prisoners did "take and carry away the wheel. To take an article signifies merely to lay hold of, grasp or seize it with the hands or otherwise.—*Webster*. With this understanding of the meaning of the term, can it be reasonably said that the act of the prisoners in laying hold of, and with a sledge breaking the wheel in pieces, *animo furandi*, was not a taking of it within the contemplation of the criminal law? We think not.

As to the asportation or carrying away of the wheel, which is another necessary ingredient of the alleged offense, the rule is, that the least removal of it by the prisoners from the place where they found it was sufficient. 2 Broom & Had. Com. (Am. Ed.), 514. 3 Greenleaf on Ev., Sec. 154. Even if the removal were but a hair's breadth, it will do. *Harrison v. The People*, 10 Am. Repts., 517. And we think such removal might be properly inferred from the seizure of the wheel, the mode of breaking it, and the subsequent disposition made of its parts.

Another point that seems to be relied on by counsel for the prisoners is, that one of them supposed the wheel belonged to a person who owed him for labor. Such a supposition, even if it were true, was neither a justification nor an excuse. The law does not permit a creditor to make collection of what is due him by a larceny of his debtor's goods. For these reasons the seventh instruction to the jury, the only one now complained of, was not erroneous.

The prisoner Dahl was a witness, and testified in his own behalf. As tending to impeach his credit with the jury, the record of his conviction for obtaining money under false pretences was introduced on behalf of the state. It is now urged as error, that the jury were not instructed that this record "should not be considered by them as against the defendant Gettinger," who was also a witness. While such an instruction would have been proper enough,

inasmuch as it was not asked there was no error in not giving it. Besides, we are entirely satisfied that Gettinger could not have been prejudiced by the omission complained of for the reason that, upon the record being offered, it was ruled upon objection, to be admissible only as affecting the credibility of Dahl as a witness. The jury could not possibly have misunderstood its import, nor the effect they might properly give it. Before error can be predicated upon the failure of the judge to charge the jury upon a given point, he must be requested to do so.

Finally, it is urged that the finding of the jury upon the question of the value of the wheel was unwarranted by the evidence. This is true. The evidence showed its value to be not less than one hundred and fifty dollars, while the jury fixed it at forty only. This, however, was without prejudice to the prisoners, and is not a ground for reversing the judgment, which must be affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., dissenting.

I am unable to concur in the judgment of affirmance in this case for the following reasons: *First,* The plaintiffs in error were indicted for the larceny of a balance-wheel owned by one Alonzo W. Shepherd. The testimony tends to show that one, or perhaps two, of the arms of this wheel were broken at the time Shepherd left the same at the foundry in 1874. Is it not somewhat remarkable that Shepherd should bring the wheel from Cass county, a distance of many miles, and take it to a *foundry?* And it is pretty clear that it was taken there because it was necessary to have it recast before it was safe as a balance-wheel. After the foundry was removed, the wheel lay partly buried in the earth for a number of years before it was carried away by the plaintiffs in error, and had ceased to be of any value except as old iron. And this in substance is the tes-

timony of William Brown, whose testimony is not directly denied.

The testimony of Shepherd, that the reason he took the wheel to the foundry was because it was near his residence, and it was inconvenient to leave it at such residence, is not very satisfactory, and fails to furnish a sufficient reason why he should leave an imperfect balance-wheel at a place where he seems to have had no right, and where it was proposed to permit it to remain for an indefinite period.

Second, The jury found the value of the property to be forty dollars. The testimony as to the value of this property as a *wheel* fixed it at $150. The jury, therefore, must have found that it was valuable only as old iron. The value of old iron per hundred is proved to be from fifty to seventy cents per hundred pounds, and this testimony is not denied. The exact weight was not proved, the testimony showing the weight to be from 1700 to 2850 pounds. If we take the highest estimate, at the highest price proved, the value was less than twenty dollars, and the jury could not have found the accused guilty of grand larceny. The judgment of the district court should be reversed and the case remanded for a new trial.

DEODE SMITH, PLAINTIFF IN ERROR, v. J. W. EVANS AND OTHERS, DEFENDANTS IN ERROR.

1. **Verdict Without Evidence.** Evidence examined and found insufficient to support the verdict, a new trial is ordered.
2. **Instructions.** Where an instruction, though correct as an abstract proposition of law, submits to the jury a question not in issue, and has a tendency to mislead, it is good ground for the reversal of the judgment. Rule applied.

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

Hastings & McGintie and *M. B. C. True*, for plaintiff in error.

E. S. Abbott, for defendants in error.

LAKE, CH. J.

There are several errors shown by the record in this case which call for a reversal of the judgment. There is error in the charge of the court to the jury, and the verdict is clearly against the evidence and the law of the case.

The defense made by the answer is, that in the sale of the machine for which the note sued on was given, the seller gave an express warranty that it was "as good as any harvesting machine in the market, and especially to be as good as, and do as good work as, the Marsh harvester." This averment was put in issue, and on its truthfulness depended the defense to a recovery on the note. The testimony of the defendants themselves, if taken as true, was perhaps sufficient to establish the fact that the contract of sale embodied a warranty substantially as charged, with this proviso, that if, on trial, they found it would not work, they "were to let him know, and he would come and make it work." The seller "was to keep up repairs for a year," and whenever it failed to answer the requirements of the warranty, "he was to have notice." They also testified that on one occasion, soon after the purchase, some part of the machine did not work well, whereupon the plaintiff on being notified, had it put in order. As to the fact of this repair the parties are in accord, which shows that up to that time they understood the contract alike, and that by its terms the seller was to be notified if at any time within the life of the warranty the machine failed to perform satisfactorily.

But, notwithstanding such was undoubtedly the agreement respecting the giving of notice, the defendants admit

that none was afterwards given, although they say that within a few days after said repair was made, the machine performed so badly that they hauled it off their premises, and abandoned it to the elements as worthless "*as a machine.*" After treating the machine in this manner, without giving the plaintiff an opportunity to put it in order, the defendants are in no situation to insist upon the warranty as a defense to the note. The law will not permit them to take advantage of a contract so shamefully disregarded on their own part. We are therefore of the opinion that the verdict is clearly against the uncontroverted facts of the case.

Again, the court charged the jury that in the sale of the machine the law implied a warranty that it would "perform the work for which it was intended and sold reasonably well." This was error, for the reason that the defendants neither plead nor claimed to defend on the ground of an implied warranty. Both parties claimed that the warranty was express, whatever may have been its terms. According to the defendants' claim, the standard of excellence was "the Marsh harvester," and none other, and it was upon the establishment of this claim that their defense depended. This instruction tended to mislead.

The court also gave an instruction in these words, viz., That if "the machine for which the note was given was of any value, and that defendants did not return, nor offer to return, the machine to plaintiff, they will find for the plaintiff." This was, doubtless, a correct proposition of law; but, unfortunately, there was nothing in the case calling for its application. True, the defendants had alleged by way of defense, that the machine was actually worthless; but this averment was denied, and we look in vain for any evidence to sustain it. The nearest approach made to proving it was by the testimony given by the defendants, in which they said that it was "worthless as a machine." They were not willing, however, to swear that it

was absolutely worthless for all purposes, and manifestly it was not. There was no evidence tending to show either of the propositions to be true, which the court by this instruction gave to the jury to pass upon. Such an error is good ground for a new trial. *Dunbier v. Day*, 12 Neb., 596, and cases there cited.

For these reasons the judgment is reversed and a new trial awarded.

REVERSED AND REMANDED.

THE SIOUX CITY, ETC., RAILROAD COMPANY, PLAINTIFF IN ERROR, V. CHARLES H. BROWN, DEFENDANT IN ERROR.

1. **Practice:** INSTRUCTIONS TO JURY. Where the only complaint made against instructions given to a jury is that they are "vague and general," and it does not appear that a more explicit charge was requested, it will not be entertained.
2. **Railroad:** DAMAGES FOR RIGHT OF WAY: INTEREST. If on appeal from an award of damage for land condemned and occupied for railroad purposes the damage be found to exceed that returned by the commissioners, the owner may have interest thereon from the time he was entitled to compensation.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J., upon appeal from an award of damages made in the county court in favor of Brown for property in Omaha, condemned and appropriated by the railroad.

John D. Howe, for plaintiff in error.

C. A. Baldwin and *Charles H. Brown*, for defendant in error.

LAKE, CH. J.

We will dispose of the alleged errors in the order followed by the attorney of the plaintiff in error in his brief.

It is complained that the instructions to the jury were erroneous. As to the one given by the judge on his own motion, it is urged that it is "vague and general." It is true that it states a general rule for the jury to observe in determining the amount of damages to be awarded, but it is not open to the charge of vagueness. By it the jury were explicitly told that the owner of the lots taken by the company was entitled to "just compensation" therefor; and that just compensation meant the "fair market value of the property taken, at the time it was taken." Further, that the jury should determine this value "from the testimony of the witnesses," and that "in weighing the testimony of these witnesses," the jury "should consider their ability to judge, their experience in the matters upon which they testify, their freedom from interest in the event of the suit, and their apparent truthfulness," etc. There is nothing in this charge to complain of. If the company desired a more explicit instruction upon any branch of the case, the judge should have been requested to give it. No such request having been made, the presumption is that it was not wished, and it is too late now to complain. Complaint in such case will not be entertained.

Another instruction complained of, and the one which presents the principal question in the case, is that given by request of the defendant in error, by which the jury were told that, in case the value of the lots was found by them to exceed the award appealed from, they should allow interest on that value from the time of condemnation. While there is some little diversity in the ruling of different courts upon the question of the right of an appellant to interest in such cases, it now seems to be firmly settled that, under a statute like ours, where, notwithstanding the appeal, the

company may occupy the land, while the owner may not take the money deposited under the award, interest should be added to the value of the land from the time the owner became entitled to compensation. See Pierce on Railroads, 220, and the cases there cited. The cases cited by counsel for the plaintiff in error upon this point, particularly *Concord Railroad v. Greely*, 23 N. H., 237, and *Shattuck v. Wilton Railroad*, Id., 269, do not support him in his position. By the statute under which these two cases were decided, in case of appeal from an award of damages for right of way, the railroad company had the option, either to deposit the money awarded for the use of the land owner, or to give security for the costs and damages that might be adjudged on the appeal. And, if a deposit were made, the land owner had the privilege of taking it without prejudice to his appeal. Under these provisions it was held that, if a deposit of the amount of the award were made, interest was allowable only on what was finally recovered on the appeal in excess of the deposit; if, however, there were no deposit, but the company elected to give security for the payment of the costs and damages finally adjudged, so that the land owner could not have the use of the money, then interest on the whole amount should be given. In principle those decisions seem rather to uphold the view taken by the court below, inasmuch as by our statute it is provided that the deposit, in case of appeal, "shall remain in the hands of the probate judge until a final decision be had," so that it is legally impossible for the owner, although deprived of his land, and all benefit of a possible rise in its value during the delay, to have the use of the money until the proceedings under the appeal are terminated. [Comp. Stat., 150.]

By our constitution (Sec. 21 of the Bill of Rights), it is declared that, "The property of no person shall be taken or damaged for public use without just compensation therefor." Where, as in this case, an entire tract or lot of land

is taken, "just compensation" doubtless means, that the owner shall have its fair market value at the time of the taking or condemnation. Pierce on Railroads, 210. But can it with reason be said that he has this when, during the delay incident to an appeal, he is deprived both of the use of his property, and of its value? We think not. The statute, sec. 97, ch. 16, Comp. Statutes, provides that the damages awarded by the commissioners shall be paid to the probate judge, for the use of the land owner, at any time before entering thereon for the purpose of constructing the road, so that, by leaving to the owner the use of the premises during the pendency of the appeal, the payment of the condemnation money may be deferred until the amount is finally fixed by the judgment of the court, and the railroad company thus saved the use of it.

It is true, as claimed by counsel for the plaintiff in error, that there is a hardship in requiring the payment of interest on the whole amount of the condemnation money when, during the time for which it is computed, a large portion thereof has been lying idle in the custody of the law. But it would be a hardship also to deprive the owner of the property of its use during the same time without compensation therefor; and besides, it would be a flagrant violation of his constitutional right to a "just compensation." In such case we think a nearer approximation to exact justice is reached by visiting the loss upon the party at whose instance, and for whose benefit it was incurred, than by putting it upon the one whose property is forcibly taken from him for the benefit of others. There is no error in the matters complained of, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE STATE, EX REL. FRANK KAHOON, v. M. KRUMPUS.

1. **Property Exempt from Execution.** A debtor who is the owner of a house which he occupies as a homestead, although incumbered by a mortgage for all it is worth, is not entitled to the exemption provided for by sec. 521 of the code of civil procedure.

2. ———: ORDERED SOLD UNDER ATTACHMENT. The property of a debtor seized in attachment and ordered to be sold by the judgment of a court having jurisdiction of it, cannot be released as being exempt from execution as provided by secs. 522 and 523 of the code. [MAXWELL, J., dissenting.]

LAKE, CH. J.

A peremptory writ of mandamus having been awarded on an *ex parte* hearing and without the care that ought to have been observed, on application of the defendant a rehearing was ordered.

The application for the writ was based upon the refusal of the defendant, as constable, to proceed, at the relator's request, to have his property appraised, and that which was exempt from execution ascertained and set off to him, as provided by secs. 521, 522, and 523 of the code of civil procedure.

The first of these sections provides that: "All heads of families who have neither lands, town lots, or houses, subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property." In his affidavit for the writ the relator admits that he owns a small house or "shanty" in Omaha, in which he resides, but which is mortgaged for its full value. The fact of it being incumbered, however, does not take from it the character of a house or homestead, nor render it subject to attachment or sale on execution against his will. Clearly, therefore, he does not, by his showing, bring himself within

the class of persons for whom the five hundred dollars exemption was intended.

But there is another equally good reason why the writ ought not to go out. The property which it is sought to have released is not held by the defendant under execution, but by virtue of an order of sale duly issued in an attachment proceeding from a court of competent jurisdiction. It is in the custody of the law, and under the solemn judgment of a court, and so long as that judgment stands unreversed it is entitled to our respect in all collateral proceedings. When the property was seized in attachment, if the relator claimed and desired to hold it as exempt, he should have brought the matter to the attention of the court in whose custody it was, and thus have obtained its release; or, if he preferred to do so, he could at any time before final judgment against him have replevied it from the officer in whose possession it was. In principle, this case is not different from that of *The State, ex rel., v. Sanford*, 12 Neb., 425.

For these reasons our former order allowing the writ must be vacated, and the application dismissed at the costs of the relator.

WRIT DENIED.

MAXWELL, J., dissented from the last point.

JACOB E. MARKEL AND THOMAS SWOBE, PLAINTIFFS IN ERROR, v. JOSEPH MOUDY, ET AL., DEFENDANTS IN ERROR.

1. **Deceit:** DAMAGES FOR: EVIDENCE. In an action for deceit in the sale of a railroad eating-house, fixtures, furniture, and the business of keeping it, as a whole, and for a single unapportionable consideration, the value of the house, etc., estimated separately from the business, and without reference to it, is not a proper basis for computing the damages. The value of the business also should be included.

2. **Railroad Eating-House:** RECEIPTS OF. In estimating the probable receipts of a railroad eating-house, the amount of travel over the road is material, if accompanied by evidence as to the facilities afforded to passengers, by the stoppage of trains, to patronize the house.

3. **Witness:** CROSS EXAMINATION OF. A witness called to estimate the value of property, fixed it at $3,000. On his cross-examination it was offered to prove by him that, as an insurance agent, he had offered and written a policy of insurance upon the same property at a valuation of $4,000, but the offer was rejected. *Held*, error.

4. ———: ———. Statements or admissions made by a witness out of court in conflict with his testimony on the trial, may be shown on cross examination. Rule applied.

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

W. H. Munger, for plaintiffs in error.

N. H. Bell for defendants in error.

LAKE, CH. J.

This is a proceeding in error to reverse a judgment of the district court for Dodge county.

The defendants in error were plaintiffs below, and their cause of action as made by the petition was deceit in the sale to them by the plaintiffs in error of an eating-house, fixtures and furniture, together with the business of keeping the same, in Fremont, on the line of the Union Pacific railroad.

The questions presented for our present consideration arose on the trial before a jury, and are in many respects similar to some of those decided in *Markel v. Moudy*, 11 Neb., 213.

Perhaps we were not quite so explicit in deciding that case as we ought to have been in the matter of the proper mode of valuing the property as a basis for estimating dam-

ages, if any there were, which the Moudys were entitled to recover. We there simply stated, in general terms, the rule to be "the difference, if any, between the price paid for the property and its actual value at the time of the purchase," which "must be ascertained from the testimony of witnesses competent to judge of it." By this, however, we by no means intended to be understood as holding, or even intimating, that the value of the house could be taken without reference to the business for which it was specially intended, and which it is settled by the pleadings was included within the purchase as an entire property.

The house was intended, bought, and used, solely for the purpose of conducting in it the business of keeping a railrood eating-house at the place where it stood. For this particular purpose, it is reasonable to presume that it had a peculiar value, while for any other, or disconnected entirely from that business, and considered as an "old building," as it was by the witnesses, it probably had comparatively little. Therefore, upon the question of the value of the property purchased, the defendant in error should have been required to produce witnesses having some knowledge of such business, and of the adaptiveness of the house and fixtures to that business, and thus have had its value fairly estimated as a whole. This, however, was not done. The witnesses called, not only did not profess to have a knowledge of this business, but, judging from their avocations, they being carpenters merely, evidently had none which could aid the jury in reaching a just conclusion. And these witnesses were permitted, against objection, to give their opinions as to the value of the house alone, as "an old building" and without the least reference whatever to the business carried on in it. As showing the necessary connection of the business of keeping the eating-house with the house itself, it is only necessary to refer to the last charging paragraph of the petition, which is in these words: "And that said personal property (referring to the house,

fixtures and furniture,) *and business aforesaid,* at the time of said sale and purchase, and ever since, have been without benefit or value to said plaintiffs, and utterly worthless, whereby the plaintiffs have sustained damage, as they aver, to the amount of eight thousand dollars." This was denied in the answer.

The matter in issue being, then, the alleged worthlessness of the "personal property and business," which was purchased as a whole, for a single and unapportionable consideration, the absolute necessity of including that business in estimating the value of the purchase is apparent. Yet, notwithstanding this, not a single witness was called on the part of the defendant in error as to what the tangible property and business, taken together as a unit, was really worth. This want of evidence as to the value of the business included in the sale renders the verdict erroneous for want of evidence to support it.

It is assigned for error that testimony was admitted against objection as to the comparative amount of travel over the Union Pacific road during the years 1876, 1877, and 1878. This testimony would have been material and entirely competent if it had been followed by a showing that opportunity was given, by the stoppage of trains, during the time the Moudys were there, for the passengers upon them to patronize the house. We find, however, that as to the stoppage of passenger trains during the time in question there is a total want of evidence, so that the amount of travel over the road was wholly immaterial.

And while upon this matter, we may as well dispose of another question intimately connected with the stoppage of trains, and raised by a part of the fifth instruction given to the jury.

The alleged deceit in making the sale consisted of certain false statements respecting the sellers' receipts from the business during the time they had conducted it. There was no complaint as to the house, fixtures, or furniture.

No misrepresentations are charged to have been made as to them. As tending to prove that the alleged representations, if made, were false, the defendants in error sought to show, and this was proper, that under equally favorable circumstances to those of the year preceding their purchase the receipts from the business were very much less than Markel had represented them to have been while he and his partner conducted it.

Upon this point, the fifth instruction was given, in which this language was used: "If you find from the evidence that the house was as well kept by plaintiffs as it had been by the defendants before plaintiffs took it; and if you find that the circumstances, such as *the running and stoppage of trains*, the amount of travel, etc., were as favorable for the plaintiffs as they had been for the defendants while they were conducting the business; * * * that under such circumstances the plaintiffs could only receive an average of $46.10 per day * * * such facts would be competent to consider as tending to prove that Markel & Co. did not, while they were in charge of the house, receive the sum of $60 or $65 per day."

This instruction was upon a very material branch of the case, and it erroneously, as we think, gave the jury to understand that there was evidence before them from which they could properly find that, in the matter of the stoppage of trains, the Moudys were as favorably circumstanced as Markel & Co. had been, when in fact there was none whatever. There was evidence to the effect that travel over the road was as extensive after the sale to the Moudys as it had been before, and it is quite likely that, from this fact alone, in view of the court's instruction, the jury may have inferred that the trains were run as favorably for them as they had been for Markel & Co. But they had no right to do so. The plan upon which trains were run, their rules of stoppage, and the opportunity afforded to passengers for taking meals at this particular station were

all susceptible of clear proof, and it ought to have been made. The error of this instruction is sufficient ground for a new trial. *Meredith v. Kennard*, 1 Neb., 312. *Meyer v. Midland Pacific R. Co.*, 2 Id., 319. *Newton Wagon Co. v. Diers*, 10 Id., 285. *City of Crete v. Childs*, 11 Id., 252. *Sheldon v. Williams*, Id., 272.

Several errors are complained of in the rulings of the judge upon the admissibility of evidence. Some of these which seem to be of importance we will notice.

Check Toncray, a witness called by the defendants in error to testify as to the value of the building and fixtures, had fixed it at $3,000. On his cross-examination it was proposed to show, and a question to that end was put to him, that, as an insurance agent, he had offered to place, and had actually written a policy of insurance upon it at a valuation of $4,000, but it was rejected. We think this ruling was clearly erroneous. The proposed testimony was material and competent as tending to discredit the valuation put upon the property in his testimony in chief. It was admissible upon the same principle that permits statements made by the witness out of court different from what he had testified at the trial to be shown. 1 Greenleaf on Ev., sec. 462. The value of the proposed testimony as tending to discredit the witness rests upon the very reasonable presumption that he would not, in the very important matter of taking an insurance risk, value the property higher than what he really believed it to be worth.

Again, on the cross examination of Joseph Moudy, one of the parties to the suit, who had testified in chief in support of the alleged unprofitableness of the business, he was shown the following notice, which he admitted was given by himself: "*For Sale.*—Railroad eating-house, with furniture and good will, on line of Union Pacific R. R. in Nebraska; regular eating-house for all trains; large trains and large profits; terms, part cash and part on time. For particulars, address J. Moudy, Fremont, Neb." Thereupon

it was offered in evidence, but the court excluded it on an objection made by the defendants in error that it was "irrelevant, incompetent, and not proper cross examination." This was error. The notice was certainly admissible over this objection. It was a concession by the witness, made out of court, and in conflict with the testimony he had given to the jury. It was the right of the plaintiffs in error to have the notice itself go hand in hand with the admission of the witness that he had given it. The judgment must be reversed and a new trial granted.

REVERSED AND REMANDED.

CHARLES H. FOLDEN, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Lease.** A lease is "properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years, or at will. Rent, properly speaking, is not essential to a valid lease of land.
2. **Forgery:** UTTERING AND PUBLISHING. To utter and publish an instrument alleged to have been forged, "is to declare or assert, directly or indirectly, by words or actions, that it is good." Rule applied.
3. **Immaterial Error.** An immaterial error, or one which could not have prejudiced the prisoner, is not a ground for a new trial.
4. **Presence of Prisoner at Trial.** The presence of a prisoner at his trial being once shown by the record will be presumed to have continued to the end unless the contrary be made to appear.

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

John P. Maule, for plaintiff in error.

1. The fabricated writing was invalid as a lease within the meaning of the statute. Comp. Stat., sec. 1, chap. 73. Definition of lease. 1 Hilliard on Real Property, 261, sec. 2. Definition of rent. 2 Bouvier Dic., 437. There is no rent stipulated for here. The agreement is to quit claim an interest in the premises in consideration of a certain amount of wheat and corn. If the pretended lease is not valid in law as a lease, it is not the subject of forgery. *Clarke v. The State of Ohio*, 8 Ohio State, 630. Wharton on Criminal Law, vol. 2, sec. 1444. *John v. The State*, 23 Wis., 505. *Roode v. The State*, 5 Neb., 174.

2. The verdict is not sustained by the evidence. The lease is dated March 1, 1881, at which time Folden was the owner of and in possession of the premises. Story purchased Folden's interest March 22, and there is no proof of an uttering of the lease after that date.

3. The record should show affirmatively that the defendant was in court when the verdict was brought in by the jury. *Burley v. The State*, 1 Neb., 391.

C. J. Dilworth, Attorney General, and *W. H. Morris, District Attorney*, for the State, cited *Dodge v. The People*, 4 Neb., 227.

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The prisoner was indicted, tried, convicted and sentenced for the crime of forging a lease from one Joseph Story to himself. A demurrer was interposed to the indictment, on the ground that the instrument alleged to have been forged was not a lease. The demurrer was overruled, and the overruling of it is the first error complained of.

The instrument was clearly a lease, which is "properly a conveyance of any lands or tenements (usually in consideration of rent, or other annual recompense), made for life, for years, or at will." * * * * "Though no formal words are requisite to a lease at common law, the usual

words of operation in it are 'demise, grant, and to farm let, *dimisi, concessi, et ad firmam tradidi.*'" 1 Brown & Hadley's Com., Am. ed., 744.

Referring to the instrument in question, we find that it comes fully up to this requirement. By its express terms the nominal lessor, Joseph Story, "in consideration of the covenants of the said party of the second part," (the prisoner) does lease to him the premises described, "from the first day of March, 1881, to the first day of December, 1881." While it is true that the consideration mentioned does not fall within what is commonly understood by the term rent, that is not at all important. Rent, properly speaking, is not essential to a valid lease of land. 1 Washburn on Real Property, *292. As expressed in the instrument itself, the "consideration of the leasing of the premises as above set forth" was, that the prisoner should "quit claim his interest to said premises;" but as to what that interest was understood to be, we are unadvised. However, let the consideration from the lessee be what it may, the obligation imposed upon Story by the plain terms of the instrument, was that of lessor and nothing else.

But it is claimed further, that the evidence as to the uttering and publishing of the instrument was insufficient. "To utter and publish an instrument, is to declare or assert, directly or indirectly, by words or actions, that it is good." Whar. Am. Crim. Law, 339. All this the prisoner did of this instrument, as a brief reference to the evidence will show.

W. A. Folden, a witness called by the prisoner, testified that he drew up the lease at his request. The prisoner then took it and went away. It is shown, too, by the testimony of several witnesses, including the prisoner himself, that he had the lease in his possession after it purported to be signed by Story, and claimed rights under it. He even testified that he saw Story sign it. And David S. Robinson, called by the state, swore that the prisoner came to

him with the lease and wanted to commence a suit against William Lipincott for trespass on the land described in it. Upon Robinson expressing the opinion, as justice of the peace, we suppose, that the lease was not "complete" for want of a witness and acknowledgment, the prisoner asserted its sufficiency by saying "he had a counsel on that, and it was all right." And this witness, in answer to the question: "State as near as you can the exact language he (the prisoner) used," said: "I think he said that Story had been over there and denied the lease; and he claimed he had a lease, and wanted to sue Lipincott for trespass on the land."

It is also claimed that the court erred in refusing to sustain objections made on behalf of the prisoner to several questions put to him on his cross-examination. These questions were in effect, whether he had, on certain occasions, said that he did not sign Story's "name to the lease, and Story would have trouble in proving who did it?" His answers were, that he had not.

These questions ought certainly to have been rejected. They were neither proper cross-examination, nor competent for any other purpose that we are aware of. They neither sought to contradict anything called out by the direct examination, nor to lay a foundation for impeachment. The assertion of the prisoner upon the witness stand was, that Story signed the lease himself, and he saw him do it. To have had him admit, or to have proved that he had said he did not sign Story's name to it, would have been in entire harmony with that assertion. It would have benefitted rather than injured him. Therefore, although these questions were erroneously admitted, inasmuch as neither they nor the answers to them could possibly have prejudiced the prisoner, the error is not a sufficient ground for a new trial.

Still another error alleged is, that the court permitted the jury to use a magnifying glass, produced by counsel

for the state, but not offered in evidence, in examining the signature alleged to have been forged. To this, it is a sufficient answer to say, that there is nothing in the bill of exceptions to show that a magnifying glass was either used or produced in court, so that no foundation exists for the objection.

And, lastly, it is urged that the record fails to show affirmatively that the prisoner was present in court when the jury brought in their verdict. This point was not made in the motion for a new trial, and therefore, even if it could otherwise be regarded as fatal to the judgment, it is too late to raise it now. *Dodge v. The People*, 4 Neb., 220. The record, however, does show that the prisoner was duly arraigned, and plead to the indictment; that he was present at the impaneling of the jury who tried him, and gave his own testimony as a witness before them. With these facts, it would be altogether unreasonable to presume from the mere silence of the record on that point, that he was absent when the verdict was received by the court. Where the record once shows the presence of the prisoner at his trial, it will be presumed to have continued to the end unless the contrary is affirmatively shown. The presumption is, rather, that the trial court did its duty, than that it did not. We see no error in the record that calls for a new trial, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

JOHN DUNBAR, PLAINTIFF IN ERROR, V. B. B. BRIGGS, DEFENDANT IN ERROR.

1. **Evidence:** SUFFICIENCY OF. When, on proceedings in error, the evidence is found to be clearly insufficient to support the verdict, a new trial will be ordered. Evidence in this case examined and found to fall within this rule.

2. **Opinion of Witness.** A witness who had answered that he knew *only a portion* of a lot of horses, was asked to give his opinion of the value of the entire lot. *Held*, That he was not qualified to answer the question.

3. **Circumstantial Evidence.** Circumstances having a tendency to establish a fact in dispute, *Held*, Admissible in evidence.

4. **Instruction to Jury.** The want of precision of expression in charging a jury is not a sufficient ground for setting aside the verdict where there is no reason to believe they were misled by it.

ERROR to the district court for Gage county. It was a suit upon a promissory note, for $900.00, given by Dunbar, for thirty-nine head of Texas ponies, dated July 28th, 1879, and due ninety days after date. The Texas ponies for which the note was given were bought of Briggs, and the note made payable to the order of Briggs. The answer admits the making and delivery of the note to Briggs, and sets up as a defense, that the note was given for the purchase price of thirty-nine head of Texas horses, and that Briggs knew at the time of said sale the Texas horses so bought were to be turned in with a large number of other horses, owned at that time by Dunbar, which horses were sound and free from disease. That Briggs warranted the Texas horses bought of him, and for which the note was given, sound and free from disease, and that Dunbar gave his note for Texas horses, and purchased the same on the faith of said warranty and guarantee that said horses were sound. That said horses were in fact unsound and diseased at the time of said purchase, and were in fact diseased with the mange or Texas itch. That Dunbar, relying upon the warranty that said horses were sound, turned said Texas ponies or horses in with his herd, and they communicated the disease to his herd of American horses, and he was damaged thereby in the sum of $10,000.00. These Texas horses, bought of Briggs, all died of the mange or

Texas itch, and one hundred head of other horses in the herd took the disease and died. To this answer there was a reply. The case was tried in the Gage county district court, before WEAVER, J., and a jury. The verdict of the jury was in favor of the plaintiff below, Briggs, for the amount of the note and interest, and judgment accordingly. The court instructed the jury as follows:

"The plaintiff brings this suit to recover on a promissory note for nine hundred dollars, together with interest on the same since maturity. The execution of the note is admitted by the defendant, Dunbar, so that, unless by reason of the defendant establishing his counter claim, the plaintiff would be entitled to recover the full amount of the nine hundred dollars, together with interest on the same at seven per cent per annum from the time of its maturity."

O. P. Mason, for plaintiff in error.

Bush & Rickards and *Hurley & Crane*, for defendant in error.

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We do not care to refer at length to the voluminous evidence contained in the bill of exceptions, nor would it be of any profit to do so. We have read it with care, and are forced to the conclusion that it does not sustain the finding of the jury upon it. The verdict being clearly against the weight of the evidence, as we have frequently held, is a sufficient reason for giving a new trial.

Dunbar's defense to the note on which he was sued rested upon the establishment of three facts only. These were set out in his answer to the petition, and were, *first*, a warranty by Briggs of the soundness of the horses for which it was given; *second*, that the horses were unsound; and *third*, that by reason of their unsoundness he was damaged.

As to the fact of a warranty having been given, and that

it was an inducement to the purchase, there is not room for doubt, if any reliance can be placed on human testimony. It is positively affirmed by the uncontradicted testimony of four witnesses who seem to be wholly uninterested, and entirely credible. It is true that Briggs swore that he had no recollection of having given a warranty, and does not think he did. But this sort of denial, coming, too, as it does from a party so greatly interested, cannot be received as sufficient to counterbalance the testimony there is against it.

Then as to the fact of the horses, or at least some of them, being unsound and afflicted with what was conceded on all hands to have been a very troublesome and dangerous disease, and known as the "mange or Texas itch," the evidence was, as it seems to us, equally conclusive. It is true that Briggs himself, and also several witnesses who had in various ways been connected with the herd for him, testified that so far as they knew, or had observed, the horses were not diseased. But, opposed to this, which at best is not a very satisfactory sort of evidence on the question, there is the testimony of four or five witnesses who swear positively that the signs of this disease were manifest on the very next day, or very soon after the purchase was completed.

One of these witnesses, Ira Waldo, testified that, "These Briggs ponies were taken directly from Emory's yard to the herd. Ed. Blackman had charge of them. I first observed the disease the next day after the herd was taken there from Emory's yard. The horse was of a darkish color, sorrel I called her—some would call her a chestnut sorrel. She came from the Briggs herd, one of those took out the day before. I noticed she looked rough and bad." * * * * * "We caught her right away and examined her, and found there was little bunches on her—little scabs on her neck and back of her fore legs: and she was inclined to bite herself; she seemed to itch, and scratched herself. There was a place where the hair

was a little off; the hair was starting. We noticed it the next day after she was taken there to the herd. Blackman was with me when this was observed. I did not know what it was; I had never seen anything of the disease before. It kept spreading on that horse until she was pretty near hairless, and these little bunches kept coming out until it got all over her, and got on a scale almost like the itch." * * * "It finally killed her in the end." This witness further says, that on the return of Dunbar from New York, about four weeks after the purchase, "I told him there was something wrong, and we went out to the herd and caught two or three, I think, and examined them. They had the Texas itch, or mange. I did not know at the time what to call it. I call it Texas itch now." This testimony is supplemented by that of at least four other witnesses to the same effect substantially, thus making it very clear that the horses must have been infected with the disease of which they all or nearly all died, at the time Briggs sold them; although he may have been, and probably was, wholly unaware of it.

As to the third fact upon which Dunbar rested his defense, viz., that he sustained damage, that follows as a necessary sequence, from the establishment of the other two. That the damage was not merely nominal, but considerable in amount, was abundantly shown by the testimony on that point, to which, however, we need not refer.

It is also claimed that the court erred in certain rulings on the admissibility of testimony. We have examined those points which seem to be most plausible with the following result:

The witness, Waldo, was asked to give his opinion of the value of the entire "lot" of horses that had died. The question was objected to for this, among other reasons, viz., that the witness was "not qualified" to give an opinion on the subject. This was true, for he had just sworn that he knew only "a portion of the horses."

John Dunbar, the plaintiff in error, was asked if he ever knew or heard "of this disease in this county until this herd of horses came here?" This was ruled out. We think the inquiry was certainly proper. Dunbar, as was shown, was a dealer in horses, and must have had considerable acquaintance with their prevailing diseases in that locality. And if it were a fact that this particular ailment, which was shown to be infectious, had not been observed by him or others until the arrival of the Briggs herd, in which it was first discovered, the conclusion that that herd brought it there would not, it seems to us, be unreasonable. This sort of evidence, it is true, is not direct to the point that these horses were diseased when Briggs sold them; but it was admissible, nevertheless, as a circumstance tending in some degree to the establishment of that fact.

The admission of considerable testimony as to the condition and health of the horses, from witnesses having knowledge of them to some extent from the time Briggs purchased them in Texas to the time he sold them, was objected to. We see nothing, however, in the several rulings of the court in this particular that calls for correction.

The first of the instructions given to the jury upon the judge's own motion, is assigned for error. The use of the term counter-claim seems to be the objectionable feature which it possesses. This term was here used for the purpose, evidently, of designating the entire defense made by the answer, rather than as indicating a part of it. And so we think the jury must have understood it. Even if the utmost precision of expression be not observed in an instruction, so long as there is no reason for believing that it misled the jury, the verdict should not be disturbed on that account. And this remark is also applicable to the other instructions complained of, given at the request of the defendant in error. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

GUSTAVE SPITZNAGLE, PLAINTIFF IN ERROR, V. CHRISTINA VANHESSCH AND OTHERS, DEFENDANTS IN ERROR.

1. **Deed**: ACKNOWLEDGMENT: CERTIFICATE OF. A certificate of acknowledgment to a deed, which showed simply that the grantors appeared before the officer taking it "and acknowledged that they executed the same," *Held*, invalid.

2. ———: ———: ———. The certificate must show that the execution of the deed is "voluntary" on the part of the grantor.

3. ———: ———: ———. A certificate of acknowledgment, in which it was shown that the grantors appeared and acknowledged the instrument to be "their voluntary act," omitting the words "and deed," *Held*, To be a substantial compliance with the statute.

4. **Action to Recover Real Property**: PROOF OF TITLE. In a real action brought by the heirs at law of a deceased person against one holding simply under an invalid tax deed, the seizin of the deceased ancestor is sufficiently proved to warrant a recovery, by showing his actual possession of the premises at the time of his death.

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

A. R. Scott and *A. Schoenheit*, for plaintiff in error.

1. Deeds were inadmissible. Comp. Stat., 387, sec. 2. *Dickerson v. Davis*, 12 Iowa, 353. *Becker v. Anderson*, 11 Neb., 497.

2. The deeds were not conveyances so as to pass title. At best they were, as a matter of equity, only contracts to convey. *Barr v. Hatch*, Ohio, 3, 527, 528. *Carr v. Williams et al.*, 10 Ohio, 305.

3. The plaintiff in error was not liable for the enhanced rent of the premises caused by improvements put thereon by his own labor. *Adkins v. Hudson*, 19 Ind., 392. *Nixon v. Porter*, 38 Miss., 401. *Neale v. Hagthrop*, 3 Bland (Md.), 551.

E. W. Thomas and *Amos E. Gantt*, for defendants in error, on admissibility of deeds cited: 2 Wait's Actions and Defences, 499. *Ready v. Kearsley*, 14 Mich., 215. *Meriam v. Harsen*, 2 Barb. Ch., 232. *Dennis v. Tarpenny*, 20 Barb., 371. *Dovar v. Cardwell*, 27 Ind., 478. Title of defendants in error was good. Possession was evidence of title. *Ward v. McIntosh*, 12 O. St., 231. *O'Brien v. Wetherell*, 14 Kan., 622. *Keane v. Cannovan*, 21 Cal., 292, 305. *Sherin v. Larson*, 28 Minn., 523. *Burt v. Panjaud*, 99 U. S., 180.

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Christina Vanhessch, formerly Christina Eckstein, as the widow, and her co-defendants in error, as the children and heirs at law of Henry Eckstein, deceased, were plaintiffs in the court below, and brought their action to recover from the plaintiff in error the land in controversy, [together with damages for its occupation and use], of which the said Henry died possessed, and claiming to be the owner in fee, about the year 1866. The plaintiff in error claimed the title to the land by virtue of tax proceedings culminating in a tax deed executed by the treasurer of Richardson county on the 13th day of September, 1878.

A large number of errors are formally assigned, but in this opinion we shall notice only those discussed by counsel for the plaintiffs in error, in their brief.

It having been stipulated by the parties on the trial that the land in question had been duly patented by the United States to Juliette Barrada, through whom Henry Eckstein claimed title, two deeds were offered in evidence for the purpose of tracing the title from the said Juliette to him. These deeds were objected to on the ground that the certificates of acknowledgment did not show a compliance with the statute, which requires that the grantor in a deed of real estate "must acknowledge the instrument to be his

voluntary act and deed." Sec. 2, chap. 73., Comp. Statutes.

To the first of these deeds the certificate is that, the grantors personally appeared, etc., "and acknowledged that they executed the same;" and to the other, that they appeared, "and acknowledged that it was their voluntary act," omitting the words "and deed." The first of these acknowledgments is clearly defective. It is wanting in that which is evidently of the very essence of the statutory requirement, viz., that the execution of the instrument was *voluntary* on the part of the grantors. It is true that the exact words of the statute are not indispensable to a good certificate of acknowledgment; provided, however, that the full meaning intended to be conveyed by them is otherwise clearly expressed. But, either the language of the statute, or other of like import, must be used. *Wickersham v. Reeves*, 1 Ia., 413. *Owen v. Norris*, 5 Blackf., 479. *Becker v. Anderson*, 11 Neb., 497. This deed was inadmissible.

As to the other certificate, however, we must hold that it was not vitiated by the omission of the words "and deed," and was therefore properly admitted in evidence; but, being unsupported by valid proof of a conveyance to the grantor therein, it was valueless. The reason for our holding the omission of these words to be unimportant is, that the evident object of the statute is fully attained without them. The design of the provision clearly is to guard the action of a grantor in the execution of a conveyance of his property, and to have the assurance of his own admission, in a preservable form, that it was not induced by compulsion, or other improper influence, but was the result of his own free choice. Besides, inasmuch as the completed deed is but the result of the grantor's action—an act accomplished—if that action be voluntary, the deed, or act itself, must necessarily be so too. But we might have disposed of all questions respecting these instruments summarily. The deeds were not necessary evidence in the case. The

title of the defendants in error was fully established without them, by the fact that Henry Eckstein, their ancestor, was in the actual occupation of the land, claiming to be the owner, and improving it, at the time of his death. The presumption arising from such possession alone is that he was the owner in fee, to overcome which it devolved upon the plaintiff in error, either to show for himself an anterior possession, or to trace his own title to a paramount source, neither of which he did. *Burt v Panjaud*, 99 U. S., 180. *Keane v. Cannovan*, 21 Cal., 291. *Ward v. McIntosh*, 12 Ohio St., 231. The seizin of the deceased ancestor was proved by showing his actual possession of the premises, and this in the absence of a showing to the contrary was sufficient. 3 Phillips on Ev., Cowin & Hill's and Edwards' notes, 595. The title of the defendants in error having been thus established, all that the plaintiff in error offered against it was the tax deed through which he claimed. This, however, was held to be invalid, and the ruling of the court in this particular is not complained of.

It is also complained that the court erred in holding the plaintiff in error liable for the rental value of the land as enhanced by a fence which he put upon it. We find in the record, however, nothing to warrant the assumption that this was done. The court found the rental value to be fifty dollars a year during the time Spitznagle occupied it. There was testimony tending to show that it was worth considerably more than this, and even as much as one hundred dollars for one year, and seventy-five dollars for each of the other two. It is unnecessary therefore to determine whether the mode which it is claimed the court adopted in estimating the mesne profits was the correct one or not. The finding is clearly supported by the evidence, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

JAMES LEFFEL & CO., PLAINTIFFS IN ERROR, v. MARTIN L. SCHERMERHORN AND OTHERS, DEFENDANTS IN ERROR.

1. **Fraudulent Conveyance of Property as to Creditors.** Evidence examined and the ruling of the court below that the conveyance was not fraudulent sustained.

2. ———: INSOLVENCY AS EVIDENCE OF. The insolvency of the grantor in a deed of conveyance, although a circumstance which may be taken together with other material facts to show a fraudulent design in disposing of property, is not of itself sufficient to establish it.

3. **Pleading:** PROOF. A fact necessarily inferable from the pleadings need not be proved.

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

H. W. Short, for plaintiffs in error.

Deed was without consideration and void: 1 Bouvier Institutes, secs. 576, 578. In this case there was no acceptance of either deed or property, or of the offer to sell. Under decision in 3 Neb., 140, there must have been an absolute sale or nothing. Parties have sworn it was not a mortgage, and court cannot make it such by its finding and decree. If it is a deed, is it upon sufficient consideration? *Tootle & Maule v. Dunn*, 6 Neb., 99. *Savage v. Hazard*, 11 Id., 323. Grantors are shown to be insolvent. It cannot be presumed that grantee was an innocent purchaser. *Wake v. Griffin*, 9 Neb., 47. *Knowlton v. Hawes*, 10 Id., 534.

D. W. Barker, for defendants in error.

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The action below was brought by the plaintiffs in error, who are judgment creditors of said Schermerhorn and John

W. Kern, partners, to set aside a conveyance by them to George Kern, the father of John W., of a certain mill property, as being in fraud of creditors. The fact of the plaintiffs being judgment creditors is conceded, and the defense consisted simply of a denial of the alleged fraudulent character of the conveyance.

The errors formally assigned are four, but they may be properly regarded and considered as one, viz., that the court was not warranted by the testimony in finding that George Kern was a purchaser or mortgagee in good faith, and that there was consequently no equity in the plaintiffs' case.

The conveyance complained of was in form an absolute deed, and plaintiffs' counsel urge in argument that whatever the rights of George Kern may have been the court was not justified in holding it to have been in effect a mortgage simply; that he either had the right of an absolute purchaser, or none at all. To this it may be answered that George Kern does not complain. He seems to be satisfied with the judgment in this particular. Besides, it is of no consequence to the plaintiffs whether George Kern were held to have taken by his deed an absolute interest, or only a conditional one, so long as they failed to show that he was a fraudulent grantee.

In regard to the finding of the court below upon the question of fraud, which was the vital one in the case, we have to say that after a careful examination of the evidence we see nothing whatever to correct. Indeed, there is not a particle of evidence, save the fact that Schermerhorn and John W. Kern were insolvent at the time of executing the deed, tending to the establishment of fraud on the part of either grantors or grantee. But the insolvency of the grantor, although a circumstance which may be taken, together with other material facts, to show a fraudulent design in disposing of property, has never, that we are aware of, been held sufficient of itself to establish it.

The point is also made in argument that no delivery of the deed was shown by the evidence. We think otherwise. But, even if counsel were admitted to be correct in this, our answer would be that no evidence of a delivery was needed under the pleadings, inasmuch as it is charged in the petition and admitted by the answers that the deed was so executed as to convey the title to the property from the grantors to the grantee named therein, which necessarily included a delivery of the instrument. A fact, although essential, necessarily inferable from the pleadings, need not be proved upon the trial.

We see no error in the judgment and it will be affirmed.

JUDGMENT AFFIRMED.

DAVID Y. SEARLES, PLAINTIFF IN ERROR, v. JAMES H. ODEN, DEFENDANT IN ERROR.

1. **Conversion of Property.** O. sued S. for the wrongful conversion of a lot of hay standing in stacks on the land of L. The alleged ownership of the hay by O. was denied upon the ground that he was a trespasser in going upon the land and making it. O. obtained a verdict and judgment in his favor, one of the errors complained of being the want of evidence to support the verdict. Evidence examined and held to be sufficient.

2. **Evidence:** REJECTION OF. Where a question put to a witness calls for an answer which is incompetent, or which can have no legitimate bearing upon any issue in the case, it is not error to reject it.

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

H. G. Candee, for plaintiff in error, cited: *Murphy v. S. C. & P. R. R. Co.*, 55 Iowa, 473. Conversation was not sufficient evidence of lease or authority to enter on land.

Gen. Stat., 392, sec. 5. And see *Hungerford v. Redford*, 29 Wis., 345. *Turley v. Tucker*, 6 Mo., 583.

Bush & Rickards, for defendant in error, cited: *Chicago Dock Co. v. Kinzie*, 49 Ill., 289. *Robison v. Uhl*, 6 Neb., 328. *Rickards v. Cunningham*, 10 Id., 417, and authorities cited.

LAKE, CH. J.

The action in the court below was brought by Oden to recover the value of a lot of hay alleged to have been wrongfully taken from him and converted by Searles to his own use. This hay had been cut by Oden on land belonging to one Larimore, who was, it seems, a non-resident of this state. Oden recovered a judgment which it is now sought to reverse upon two grounds: *first*, for error occurring on the trial in the rejection of certain testimony; and, *second*, for that the evidence was not sufficient to support the verdict.

The principal question on the trial, and the one upon which Searles mainly relied to prevent a recovery, was as to Oden's right to enter upon Larimore's land and make the hay. The evidence upon this point, it must be conceded, was exceedingly meager, but ample we think to show such right with sufficient clearness for the purposes of this controversy. This evidence consisted simply of the testimony given by Oden himself to the effect that, three years before, Larimore had given him permission to "cut hay there." That such permission was given was not controverted by any evidence whatever, so that it must be taken as an established fact; and, although the privilege thus granted seems to have been quite general, and altogether indefinite as to the time of its continuance, so long as Larimore made no objection, but assented to its exercise, even tacitly, it would, as to strangers at least, give Oden a good title to hay made by him on the land. We think the evidence

upon the question of the right of Oden to the hay was sufficient to support the verdict, and that there is no error in this particular.

The alleged error in the rejection of testimony was in sustaining an objection to a question put to the witness C. L. Schell, called on behalf of the plaintiff in error. The question was this: "State whether or not, during the last three years, the plaintiff Oden has had any lease of the premises, or any right of entry to the premises?" This witness had testified that he was the agent of Mr. Larimore, and had been such agent for about three years, and in answer to a previous question, had stated that there had been no lease of the land through him, or that he knew of, during that time. The question was properly held to be immaterial. Oden did not claim to be a lessee of the land, nor did his right to recover depend upon his having a lease. In his petition he had alleged his ownership of the hay which he claimed Searles had converted. To this it was answered that Oden was a trespasser upon the land where he had "without leave or license" * * * "cut the grass, and put up the prairie hay mentioned in the plaintiff's petition." And in support of his claim of ownership Oden had testified, as already stated, that Larimore in person had given him the right to make the hay. The question, therefore, at this stage of the case was not whether Oden had a lease from the owner of the land, but simply whether the privilege which he claimed had been given. If what Oden swore to in this particular were true—and it was not disputed—then he was not a trespasser, and his ownership of the hay, and his right to recover for its conversion, were fully established. The fact that he had no lease from Larimore would not defeat him. As to that branch of the question which asked of the witness whether Oden had "any right of entry to the premises," it may be answered that it called for the opinion of the witness upon a question of law which could be prop-

erly drawn only from facts proven, and was therefore rightly held to be inadmissible. An answer to this question could have had no legitimate bearing upon any issue in the case, and it was therefore rightly rejected. There is no error in the matters complained of, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

JOHN S. BRITTAIN, APPELLANT, v. DAVID C. WORK AND OTHERS, APPELLEES.

1. **Mortgage Deed:** DELIVERY OF. No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. And a delivery may be presumed from the grantee's possession of the instrument, in the absence of proof to the contrary.

2. ———: WHEN AN ESCROW. It is only where the deed is delivered to a third person, to be held until some condition be performed on behalf of the grantee, that it can properly be said to be an escrow. If it be delivered to the grantee, although with the understanding that the wife of the grantor shall afterwards execute it also, this being solely for the benefit of the grantee, he may waive it, and the delivery is complete.

3. ———: ———. Evidence examined, and *held* sufficient to show a delivery.

ACTION to foreclose a mortgage on real estate in Jefferson county, given by David C. Work and Mary J. Work as mortgagors. The instrument was acknowledged by David C. on the eighth day of November, 1880, and by Mary J. on the tenth day of December following. It was filed for record Nov. 12, at 10 o'clock A.M. W. P. Freeman intervened, and set up title to same property by virtue of a deed of assignment executed by David C. Work, Nov. 12, 1880, and filed for record at 12 o'clock M. of that day.

On a trial before WEAVER, J., finding and decree were in favor of the assignee, and plaintiffs appealed.

Boyle & Lindley, for appellants, as to the delivery of the deed, cited, *inter alia: Miller v. Fletcher*, 21 American Reports, 356, and cases cited. *Arnold v. Patrick*, 6 Paige Ch., 310. *Lawton v. Sager*, 11 Barb., 349. *Worrall v. Munn*, 1 Selden, 229. 2 Bouvier Institutes, 293.

Slocumb & Hambel, for appellees.

LAKE, CH. J.

The result of this case depends upon the answer to be given to a single question, which is: Was there an absolute delivery of the mortgage in controversy on the eighth day of November, 1880, the time of its execution by David C. Work?

In view of the fact that, in holding the deed of assignment executed by Work on the twelfth of the same month, and recorded subsequently to it, to be "senior and superior to the mortgage," as a lien upon the property, the learned judge before whom the case was tried in the district court must have answered this question in the negative, we have bestowed much care in our examination of the evidence before finally deciding, as we are constrained to do, that his judgment must be reversed. A careful reading of the testimony embodied in the bill of exceptions leaves our minds in no doubt whatever that as between David C. Work and the mortgagee there was a complete delivery of the instrument on the day it was executed, and, being first recorded, it is entitled to priority over the deed of assignment.

That there was at least a manual delivery at that time is not only fully shown by testimony given on behalf of the appellant, but is in effect clearly conceded by Work himself, as we will show by a brief extract from his testimony.

Having stated in his examination in chief that one Richardson, who was an agent of the mortgagee, and the person with whom the arrangement for the giving of the mortgage was made, had "picked it up off the table," leaving it to be inferred that he had done so without permission, he was cross-examined on that point in part as follows:

Q. You did not object to Richardson taking the papers (referring to the mortgage and the notes it was intended to secure) from the table; it was what you expected him to do?

A. Yes, sir.

Q. They were put there for him?

A. They were signed and left on the table.

Q. For him? For his use? They were put there for him?

A. They were signed on the table and left there. I signed them and left them lying on the table.

Q. You had nothing more to do with them after signing?

A. No.

Q. You expected him to take them?

A. Yes.

Work, it is true, claims in another part of his testimony to have understood that John Exton, the notary who took the acknowledgment, and who was also an agent of the mortgagee, was to hold the mortgage until his wife, who was then absent, came home and executed it, which he had agreed with Richardson she should do. He does not pretend, however, nor is there a particle of evidence to show that, in any event, the mortgage was to be returned to him, so that, even if his were a correct understanding of the matter, such holding of the instrument would have been in the interest of the mortgagee alone, which he was at full liberty to waive. If the mortgagee saw fit to dispense with the signature of Mrs. Work to the instrument, we know of no reason why he could not do so.

Looking to the whole of the testimony, it clearly appears —in fact it is not denied—that Richardson, who was himself a member of the firm in whose interest the mortgage was taken, was exceedingly importunate in the matter of getting his claim against Work secured. So exacting and particular was he, that he would not even take Work's word that he would procure a release the next morning of a prior incumbrance on the property, but exacted from him a mortgage on his homestead as a guarantee that it would be done. Both mortgages were then left by Richardson with Exton, who was directed to surrender the homestead mortgage if Work's agreement to remove the prior incumbrance was complied with. The incumbrance was removed, the homestead mortgage surrendered, and the mortgage in controversy put upon record.

Mrs. Work being delayed in consequence of the sickness of a child, did not return so soon as expected; but when she came home, Exton went to her with the mortgage, which she promptly executed in the presence of her husband, and with the full knowledge on his part of its having been recorded, and to which he then made no sort of objection. This acquiescence on his part is to our minds very strong proof of Work then supposing that, when Richardson took the mortgage, he had parted with all control over it, and that the act of Exton in having it recorded was justifiable. The testimony of both Richardson and Exton, the only witnesses besides Work to the transaction, whose testimony, however, it is not worth while to review, fully supports this view of the case.

If this mortgage were not actually delivered to Richardson, then Exton must have held it simply as an escrow. That it was not held by Exton as an escrow is clearly shown by the fact that nothing whatever remained for the mortgagee to do as a condition to its taking effect as a contract between the parties to it. No particular act or form of words is necessary to constitute a delivery of a deed.

Anything done by the grantor, from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. And a delivery may even be presumed from the grantee's possession of the instrument in the absence of evidence to the contrary. 2 Wait's Actions and Defenses, 494. And a delivery may be either absolute—that is, to the party or grantee himself, or to a third person, to hold until some condition be performed on the part of the grantee, in which last case it is not delivered as a deed, but as an escrow. 1 Broom & Had. Com. (Wait's Notes), 735. Here we not only have the instrument in the possession of the mortgagee, by his agent, under circumstances pointing only to an absolute delivery, but also the admitted fact that nothing whatever remained for the mortgagee to do as a condition to it taking effect. It is not contended that the execution of the instrument by Work was conditioned upon his wife subsequently joining him in it, and his act in this respect seems to have been entirely independent of hers. It was doubtless understood between Work and Richardson that Mrs. Work would execute it, but that was intended to benefit the mortgagee, and which, as before stated, he was at liberty to waive.

The judgment must be reversed, and the cause remanded to the court below with instructions to enter one conforming to the prayer of the petition. If any surplus remain after satisfying the mortgage debt it can go to the assignee.

REVERSED AND REMANDED.

JULIA M. GREGORY AND OTHERS, PLAINTIFFS IN ERROR, v. THE CITY OF LINCOLN, DEFENDANT IN ERROR.

1. **Dedication of Streets in City.** One L., the owner of a tract of land adjoining the city of Lincoln, in 1869 and 1870 laid out the same into additions to said city and filed plats upon which "K" street was marked as if laid out, and lots were sold fronting thereon, but the description merely extended to the outer line of the street. There was also proof of dedication. In 1876 the strip of land composing the street was sold on execution as the property of L. *Held*, That the purchaser acquired no title.
2. **Ejectment:** TWO TRIALS. A party is entitled as a matter of right to two trials in an action of ejectment.
3. **Trial by Jury:** WAIVER. In an action at law the parties are entitled to a trial by jury; but this is a privilege that may be waived, and if done in open court such waiver may be made orally.

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

John S. Gregory, for plaintiffs in error.

1. The laying out of an "addition" to a city of the second class does not vest in the city any control of streets therein, unless they have been accepted by special ordinance for that purpose. Comp. Stat., 121, sec. 77; p. 124, sec. 95.

2. Conveyance to a municipal corporation of land beyond its boundaries for the purpose of a street, is void. Dillon on Mun. Corp., 533, sec. 435.

3. Non-user by the public, of a street or highway, for the period of five years will operate as an abandonment and reversion. Comp. Stat., p. 439, sec. 3. *Evens v. City of Cincinnati*, 2 Handy, 236. *Pres. Church v. Cincinnati*, 8 Ohio, 298. Angel on Highway, 407.

4. An action for recovery of real property can only be brought within ten years from the time the cause of action

accrued. Comp. Stat., p. 531. *Gregory v. Langdon*, 11 Neb., 168.

5. If a highway be clearly excluded by a description of the property conveyed by metes and distances which bring it only to the edge of the highway, the fee of the soil of such highway remains in the former owner. *Jackson v. Hathaway*, 15 John., 447. *Cale v. Haynes*, 22 Vt., 588. *Sutherland v. Jackson*, 32 Maine, 83.

6. Where a grant is only for *the use* of the public, it is easement, and not fee title. Dillon on Mun. Corp., 600, sec. 496.

A. C. Ricketts, for defendant in error.

1. The platting of Lavender's first addition was in strict compliance with the statute then in force and vested in the city of Lincoln the title in fee to the street. Revised Statutes, p. 387, secs. 42–3. 2 Dillon on Mun. Corp., 3rd ed., sec. 628, and authorities cited. 33 N. J. L., 13.

2. If defect in the dedication existed, which is not pointed out, so as to invalidate the same as a statutory dedication, yet the sale of property bounded by the street, the value of which depends on the existence of the street, and the constant use by the public of other portions of the same street obtained by the same dedication, with such use of the street in question as the public demand required, and a continued recognition by the dedicator of the right of the public in the land in question, would create a common law dedication and constitute an *estoppel in pais*, as to plaintiffs. 2 Dillon Mun. Corp., 3d ed., secs. 628 and 638. 21 Mich., 319.

3. No formal acceptance of the dedication was required by the law in force under which it was made and the use and occupation thereof by the city, so far as its needs required, was sufficient evidence of its acceptance.

4. The statute relating to vacation by reason of non-user

is applicable to public roads only, and not to streets; besides the evidence shows a continuous use of the property. Comp. Stat., 439, sec. 3.

5. To constitute a possession adverse, so as to set in motion the statute, it must be actual, continued, notorious, and exclusive under a claim of right as against all persons for the full extent of the statutory period.

6. The pretended possession in dispute was not inconsistent with the right of the city until about a year prior to the bringing of this action, when plaintiffs enclosed the land, prior to which time a roadway was left and the right of the public to pass over the same was recognized. The statute will not run as against the city. *Horbach v. Miller*, 4 Neb., 31. 2 Dillon Mun. Corp., 667 to 675. 1 Whart. (Pa.), 469. 58 Pa. St., 253. 12 Ill., 60.

MAXWELL, J.

This is an action of ejectment brought by the city of Lincoln against Julia M. Gregory, E. Mary Gregory, and John S. Gregory, to recover possession of a strip of land "commencing at the northwest corner of block two, in Lavender's first addition to the city of Lincoln, thence running east on the north line of said ——— and across Nineteenth street in said city four hundred feet, thence north one hundred feet, thence west four hundred feet, thence south one hundred feet to the place of beginning;" being that part of K street between the east line of Eighteenth street and the east line of Nineteenth street in said city. The defendants admit the possession, but they deny the other facts stated in the petition. As a second defense they plead that in the year 1876 they purchased said land at sheriff's sale in an action wherein one Hulda Sayles was plaintiff and Luke Lavender defendant, and that said sale was confirmed and a deed made to them. They also plead adverse possession for more than ten years. The case was

referred to a referee who found for the defendant in error and the report was confirmed and judgment entered thereon.

It appears from the evidence that about the years 1869 and 1870, Luke Lavender being the owner of a considerable tract of land adjoining the city of Lincoln, had the same platted and the plats duly acknowledged and filed as "Lavender's first and second addition" to said city. It also appears that Lavender then owned the strip of land in dispute and platted the land so as to include that portion of the street in dispute, but in describing the boundaries of the tract platted, bounded the tracts on the side of the street, so that the tract in question, although marked on the plat as a street, and lots sold in reference thereto, yet was not included in the description. Whether this was done by oversight or design it is not necessary to enquire.

Sec. 42 of chapter 53 of the Revised Statutes of 1866, which was then in force, provided that: "Such plat and acknowledgment being so recorded, shall be equivalent to a deed in fee-simple from the proprietor, of all streets, alleys, avenues, squares, parks and commons, and such portion of the land as is therein set apart for public, county, village, town or city use, or is dedicated to charitable, religious, or educational purposes."

Sec. 49 provides that: "Every town plat when presented for record shall have appended to it a regular survey thereof made by some competent surveyor, beginning at some permanent, visible, natural or artificial monument, with at least one bearing post, stone, tree or object, and the surveyor shall certify that he has accurately surveyed such town, and that the streets, alleys, lanes, avenues, squares, parks, commons, and such places or lots set apart for public, village, town, city or county use, or dedicated to charitable, religious, or educational purposes, are well and accurately staked off and marked. And if any proprietor or proprietors of such town or addition shall sell

or offer to sell any lots or subdivisions of such town or parts thereof, without complying with the requirements of this chapter, he or they shall forfeit one hundred dollars for each lot, subdivision, or part thereof, so sold or offered for sale, to be recovered by any person who will sue for the same."

The act of filing the plat in connection with Lavender selling lots upon this street certainly was a dedication to the public of the street. No one but the owner of the fee can dedicate land to the use of the public; but where he has done an act with the intention of influencing the conduct of another as the filing of a plat of a street and selling lots fronting thereon, and such other person has thereby been induced to purchase such lots or some of them, the original owner will be estopped to deny the dedication.

In *Livermore v. The City of Maquoketa*, 35 Iowa, 358, one L. being the owner of a tract of land laid the same off as a town plat, designating a block not divided as "Livermore Square." There was evidence tending to show that after the filing of the plat, L had treated the square as belonging to the public. It was held that the dedication was sufficiently established.

And in *Giles v. Ortman*, 11 Kan., 59, where it appeared that the owners of land in preparing the plat of a town for acknowledgment and record intended to lay out a strip of ground as an alley and thus dedicate the same to the use of the public, and took certain steps to carry the intention into effect, it was held that but slight evidence would sustain a finding that such dedication was in fact made.

So in this case, the street was marked on the plat as though it was open, and lots were sold upon such street which probably could not have been done but for the fact that it was regarded as a public thoroughfare. We think the proof fully sustains the finding of a dedication.

The plea of the statute of limitations is not sustained,

because the possession of Lavender from the time of the dedication until the sale of his interest in 1876 was not adverse. *Livermore v. The City of Maquoketa*, 35 Iowa, 358. *Burhans v. VanZandt*, 7 Barb., 91. *Currier v. Earl*, 1 Shep., 216. *Johnson v. Farlow*, 13 Ired. Law, 84. And the plaintiffs were not in possession ten years.

The plaintiffs claim that they are entitled to two trials. This is conceded, and this is the second trial. A jury was waived by the plaintiff on the first trial, orally in open court, and the cause submitted to the court. It is claimed that this was error, that the waiver should have been in writing. A party has a right to a trial by jury in an action at law, and may insist upon his rights. But trial by jury is a privilege which may be waived, and such waiver, if made in open court, may be oral. The court has jurisdiction, and if a jury is waived, and the case tried to the court, it is its duty to hear the evidence and render judgment. The plaintiffs by purchasing the interest of Lavender at sheriff's sale, took merely the title possessed by him at that time, and as in our opinion he had previously dedicated the land for a street, they acquired nothing by the purchase. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

GEORGE P. UHL, APPELLEE, v. F. H. RAU AND OTHERS, APPELLANTS.

Real property: SALE: ADVERSE POSSESSION. In March, 1873, one U. sold to R, lots 3 and 4 in block 65, in Falls City, and a house standing on lots 1 and 2 in the same block. R. entered into possession, but paid no part of the purchase price; but in February, 1879, executed a mortgage upon lots 1 and 2 to H to secure a debt, and afterwards in July of that year sold and conveyed said lots to one D., who perfected his chain of title by

deeds running back to the mayor. U. had no record title, nor was there anything in the record to charge H. and P. with notice of his rights, and there was testimony tending to show that they had no notice that U had any interest in the premises. *Held*, In a contest between them and U, that they had the prior right to the house.

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

Isham Reavis and *E. W. Thomas*, for appellant Dorrington; *C. Gillespie* for appellant Harkendorf; and *Marquett, Deweese & Hall*, for appellant Rau.

George P. Uhl, pro se.

MAXWELL, J.

This is an action to quiet title. A decree was rendered in the court below in favor of the plaintiff, from which the defendants appeal to this court.

It appears from the record, that in March, 1873, the plaintiff sold to F. H. Rau, lots 3 and 4 in block 65, in Falls City, and the house standing on lots 1 and 2 in same block. The consideration for said property was the sum of $168, to be paid in seven payments of $24 each, with interest, the last payment being due in 1876. The plaintiff at the time of the sale gave Rau a title bond containing the terms of the agreement, and providing that upon the payments being made, the plaintiff should make a deed to Rau. This bond was not recorded, but Rau took possession of the premises and continued in possession until 1879, but wholly failed to pay any portion of the purchase money. In February, 1879, Rau and wife executed a mortgage upon lots 1 and 2 to John F. Harkendorf to secure the sum of $162.25. In July, 1879, Rau and wife sold and conveyed all their interest in lots 1 and 2 to F. M. Dorrington. It also appears that in February,

1859, the mayor of Falls City conveyed lots 1 and 2 to one David Whittaker. In April, 1879, Whittaker conveyed to one Lowe, and Lowe, in May of that year, sold and conveyed to Isham Reavis, who on the 8th day of August of that year, conveyed to Dorrington, who took possession of the premises in September thereafter. On the 2nd day of August, 1879, the plaintiff commenced this action to cancel the bond for the deed; to have the mortgage to Harkendorf and the deed to Dorrington declared invalid, and to quiet the title in the plaintiff. In the petition filed August 2nd, the plaintiff did not allege that he was the owner of lots 1 and 2, but claimed the house standing thereon. Afterwards in May, 1880, he filed an amended petition, in which he alleged that he was the owner of these lots. Harkendorf filed an answer, in which he alleges that the mortgage was made in good faith to secure a *bona fide* debt. Dorrington filed a cross petition, in which he alleges that he purchased the lots in controversy for a valuable consideration, and without notice of any rights of the plaintiff.

The plaintiff does not claim to have any record title for these lots, but claims by adverse possession. It is unnecessary to discuss the question of adverse possession, as, however it might be between Rau and the plaintiff, it does not enter into this case. As the plaintiff had no record title to this property, and as Rau was in possession as the owner, the only question presented is, did Harkendorf and Dorrington have notice of the plaintiff's rights before taking the mortgage and deed in question? For the purpose of notice the possession of Rau was not the possession of the plaintiff. Rau was in possession of the property, claiming to be the owner. As such owner he executed a mortgage on the property to Harkendorf to secure a debt that is clearly shown to be *bona fide*. Afterwards he conveyed all his interest in the property to Dorrington, and the testimony tends to show that he pur-

chased without notice and for a valuable consideration. The proof, too, is pretty clear that the plaintiff was not the owner of lots 1 and 2, but merely sold Rau the house standing thereon. This house the testimony shows Rau had enlarged and considerably improved, and to some extent, at least, enhanced its value, so that to that extent he was selling his own property, while there was nothing to charge a purchaser with notice of the plaintiff's claim.

In *Willoughby v. Willoughby*, 1 T. R., 763, 767, Lord Hardwicke, in speaking of a *bona fide* purchaser, said: "In the first place, he must be a purchaser for a price paid, or for a valuable consideration. He must be a purchaser *bona fide* not affected with any fraud or collusion. He must be a purchaser without notice of the prior conveyance, or of the prior charge or encumbrance, for notice makes him come in fraudulently. And here, when I speak of a purchaser for a valuable consideration, I include a mortgagee, for he is a purchaser *pro tanto*."

In this case plaintiff sold lots 3 and 4 and the house on lots 1 and 2. The house therefore was personal property, and no deed was necessary to pass title thereto, as the title passed by delivery of the property. This property Rau retained possession of for more than six years, and improved without any objection or assertion of title on the part of the plaintiff. Rau was holding as owner and not as tenant; and while holding as such owner executed the instruments in question. The question presented is, not what the plaintiff's rights would be in a contest with Rau, but what are his rights as against a *bona fide* purchaser and lien holder. As against Rau he is entitled to a cancellation of the contract, but as to Harkendorf and Dorrington, they have the superior right. The case does not differ materially from that of a vendor seeking to enforce his lien against a purchaser from his vendee without notice. In such case the innocent purchaser is protected, and the same rule must be applied in this case. The judgment of

the district court as to Harkendorf and Dorrington is reversed, and the cause is remanded to the district court with directions to enter a decree in conformity to the opinion.

REVERSED AND REMANDED.

DORA DEITRICHS, APPELLANT, V. THE LINCOLN & NORTHWESTERN R. COMPANY, APPELLEE.

1. **Witness:** OPINION. A witness not shown to have any knowledge in the matter of the construction or operation of railroads, is not competent to give an opinion as to the needs of a railroad company in respect to its depot, or other grounds.

2. **Evidence:** ERROR IN THE REJECTION OF, CURED. When the evidence of a witness is erroneously excluded, if it be subsequently admitted, the error is not a ground for reversing the judgment.

3. **Railroad:** GENERAL MANAGER: EMINENT DOMAIN. The decision of the general manager of a railroad company is *prima facie*, and in the absence of all evidence to the contrary, a just measure of what is essential to the convenient and proper conduct of its business, and sufficient to warrant the exercise of the power of eminent domain in its behalf.

4. ———: ———. In the exercise of the right of eminent domain by a railroad company for right of way, depot and other grounds, under the statute of this state, one appropriation does not exhaust its power, but new appropriations may be made from time to time as the necessities of the road may require.

5. ———: ———. Where one of the grounds upon which it was sought to enjoin the condemnation of land was that the company, in whose name the proceedings were conducted, had leased its road for a term of years not yet expired, *Held*, That the proceedings were properly taken in the name of such company.

APPEAL from the district court for Platte county, POST, J., presiding.

McAllister Brothers, for appellant.

Right to condemn exhausted by one user. Mills on Eminent Domain, sec. 58. *Brooklyn Central R. R. v. Brooklyn City R. R.*, 32 Barb., 358. *Hudson & Delaware Canal Co. v. N. Y. & Erie R. R.*, 9 Paige Ch., 322. *Moorhead v. Little Miama R. R.*, 17 Ohio, 340. *Atkinson v. Marietta & Cincinnati R. R.*, 15 Ohio State, 21. Evidence of William Dietrichs should have been admitted. 1 Greenleaf on Evidence, sec. 99. 1 Wharton Evidence, secs. 172, 173. Before a corporation can condemn private property they are required to prove their existence and right to exist. Abbot's Trial Evidence, p. 19, sec. 3. This company had not complied with the law.

A. M. Post, for appellee.

LAKE, CH. J.

This action was commenced in the district court for Platte county to enjoin the condemnation of a lot in the city of Columbus, belonging to the plaintiff, by the defendant for railroad purposes.

In the court below the case was sent to a referee for trial, who reported his findings of fact and conclusions of law together with the evidence submitted to him. In accordance with these findings, the action was dismissed for want of equity. The several questions presented for our determination were raised on a motion for a new trial, and we will consider them in the order in which they were there stated.

It is claimed, *first*, that the referee erred in excluding certain testimony offered by the plaintiff to show that the lot in question was not needed for the purposes of the defendant company. The witness whose opinion was asked as to the needs of the company in this respect was the husband of the plaintiff. The proposed testimony was rightly excluded for the reason that the witness was not shown to be qualified to give an intelligent opinion upon that sub-

ject. There is nothing in the bill of exceptions to indicate what his pursuits had been or then were, and it certainly could not be presumed that he was a proficient in the matter of the construction or the necessities of railroads.

It is also claimed that the referee erred in not permitting the same witness to answer a question put to him as to the time when the road, side tracks, depot buildings, etc., at Columbus, were finished. The testimony thus sought was pertinent to, and was probably offered in support of the averment in the petition that the lot in controversy was "not needed for any purpose whatever by said defendant corporation." As an admission by the company that at the time of establishing and laying out its grounds at this place the acquisition of this lot was not included in its then anticipated wants, we think this was proper testimony. But, although it may have been, and probably was admissible, still, in view of the fact that under a more favorable ruling of the referee the fact thus sought for was fully brought out from this witness in his further examination, the error was without prejudice, and is not a good ground for reversing the judgment. On this point the record shows that, in answer to the second succeeding question, this witness said that "it was about three months" after the completion of the tracks, depot, and other buildings before proceedings for the condemnation of this lot were commenced. And besides, it was conceded on the part of the company that in the first location of its grounds the plaintiff's lot was not included.

Complaint is also made that the referee would not permit the plaintiff to show by this witness that there had been no change made in the location of the tracks or buildings of the company within the city since they were first placed. Conceding this fact to have been material to the plaintiff's case, still the ruling complained of was entirely harmless, for the reason that it was clearly established by the cross examination of A. M. Post, one of the defendant's

witnesses, that no change in any of these particulars had been made.

It is also urged that certain testimony given by the witness Post as to what was done and said by A. E. Touzalin, the general manager of the company, in directing the location of the tracks and depot grounds, and as to the necessity for taking this lot, ought to have been excluded. Much of this testimony was admitted without objection; but even that which was not was clearly admissible under the pleadings, especially in view of the charge made in the petition that the proceedings in condemnation were not directed by any competent authority, but by persons whose only relation to the company was merely that of attorneys at law. It may be said further of this testimony that it tended strongly to show good faith on the part of the company in desiring to acquire this lot, which, together with a total want of evidence of bad faith, fully justified the conclusion of the referee upon this point. We are of opinion that in the location of depot and other grounds of a railroad company, and in fixing their extent, the decision of the general manager of the company, who, as this official designation fairly implies and the evidence clearly shows, "had charge of all of its business," including the construction of the road and buildings, is *prima facie*, and in the absence of all evidence to the contrary a just measure of what is essential to the convenient and proper conduct of its business, and sufficient to warrant the exercise of the power of eminent domain in its behalf.

It is further objected that the referee erred in his finding that the Burlington & Missouri River Railroad Company had been consolidated with the Chicago, Burlington & Quincy Railroad Company. There is, however, no error in this respect, for the fact of such consolidation is substantially set forth in the petition, although claimed to have been somewhat irregularly done, and is formally admitted in the answer.

Exception is also taken to the conclusions of law drawn by the referee from the pleadings and evidence. These conclusions were in substance, *first*, that by the original condemnation of property to its use in the city of Columbus the company had not exhausted its right under the statute to take land for "right of way and depot grounds" therein; *second*, that the proceedings to condemn the lot in question were properly taken by the defendant company; *third*, that there was no equity in the plaintiff's case.

We discover no error in either of these conclusions. As to the first, we find that the referee is well supported by many decisions under statutes not materially different from our own.

In *Prauther v. Jeffersonville M. & I. R. Co.*, 52 Ind., 16, it is said that: "It is firmly settled that making one appropriation does not exhaust the power, but new appropriations may be made from time to time as the necessities of the road may require." To the same effect is the decision in the case of *The Toledo & Wabash R. Co. v. Daniels et al.*, 16 Ohio St., 390, under a statute of which ours is a substantial copy. See also *Chicago, Burlington & Quincy R. Co. v. Wilson*, 17 Ill., 123. We are aware that there are cases in which a contrary rule is held, but they arose under statutes wherein the intent of the legislature to limit the power of the company to that, taken for the original construction of the road, was apparent. We find nothing in our statute indicative of such intent, but, on the contrary, an intent the very reverse of this seems manifest. By sec. 81, ch. 16 Comp. Statutes, it is provided that: "Such corporation is authorized to enter upon any land for the purpose of examining and surveying its railroad line, and may take, hold, and appropriate so much real estate as may be necessary for the location, construction, and convenient use of its road, including all necessary grounds for stations, buildings, workshops, depots, machine-shops, switches, side tracks, turn-

tables and water stations;" * * * * * "*Provided* that the lands held, taken and appropriated, otherwise than by consent of the owner, shall not exceed two hundred feet in width, except for wood and water stations, and depot grounds, unless where greater width is necessary for excavations, embankments, or depositing waste earth, etc. It seems to us that it would be an exceeding narrow construction of this language to hold that it does not authorize an additional condemnation of land by a company, when it is ascertained that the quantity first appropriated is inadequate to the convenient use of its road."

It appears that the defendant company, prior to the commencement of the proceedings to condemn this lot, had by lease for a term of years transferred to another company "all of the property and franchises," which it then owned, or might thereafter acquire. This lease, it is urged, had the effect to deprive the defendant of the right, even if it would otherwise have had it, to exercise the power of eminent domain, and that therefore the finding of the referee in this respect was erroneous. We think this objection is untenable. The lease expressly provides that the defendant shall "do and perform any and every corporate act which may be necessary, useful or appropriate to" secure to its lessee "the full enjoyment of * * * every franchise, right, easement, power, and privilege" which it then possessed or might thereafter acquire, and that it would also to this end "maintain its corporate organization." The condemnation of this lot for the purposes of the company is certainly a corporate act, and if essential to the convenient and proper use of its road by the lessee, is one which by the terms of the lease the defendant was bound to perform upon request; and besides there is no authority for proceeding in any other name than that of the defendant company. Of the finding of no equity in the plaintiff's case, all that need be said is that this is a necessary conclusion from the findings of fact, which, as already

stated, we approve. There is no material error in the record, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE BURLINGTON & MISSOURI RIVER RAILROAD IN NEBRASKA, APPELLANT, V. CLAY COUNTY AND ANOTHER, APPELLEES.

1. **Taxes for court house and jail.** The county commissioners have no authority to submit to the electors of the county, the question of voting taxes in excess of the limit fixed by law, for the purpose of erecting a court house and jail; and a tax levied under such a proposition is illegal and may be enjoined.
2. ——: SINKING FUND. A sinking fund tax, levied to pay other than the bonded indebtedness of a county, may be enjoined. And the fact that the county commissioners, after the levy of the tax, formally rescinded the same, will not defeat the action, where the tax is an apparent lien upon real property.

Appeal from Clay county. Tried below before WEAVER, J.

Marquett, Deweese & Hall, for appellant.

Brown & Ryan, for appellees.

BY THE COURT.

In January, 1879, the county commissioners of Clay county submitted to the electors of that county the following proposition: "Shall the county commissioners of Clay county, Nebraska, have authority to levy a tax of three mills on each dollar of the assessed valuation of said county of Clay, each year, to-wit: The year 1879 and 1880, for the purpose of creating a court house and jail fund, to be expended in building a court house and jail

for said county?" The proposition was adopted by 1339 votes in favor of the same to 573 against, and was declared carried. In pursuance of the adoption of such proposition, the county commissioners of that county, in the year 1879, levied three mills on the dollar on the assessed valuation, and also a levy of five-eighths of a mill for a sinking fund. The plaintiff is a large tax-payer in Clay county, and filed a petition in the district court of that county to enjoin the collection of the above taxes upon the ground that they were illegal. The court found for the defendant, and dismissed the action. The plaintiff appeals to this court.

The principal question presented is, did the adoption of the above proposition by the voters of Clay county authorize the county commissioners to levy the three mill tax in dispute?

Sec. 14 of an act concerning counties and county officers, approved Feb. 27, 1873, which was in force when the proposition was adopted, provided that "the board of county commissioners at any meeting shall have power:

"I. 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.

"II. To examine and settle all accounts of the receipts and expenditures of the county, and allow all accounts chargeable against the county; and *when so settled*, county warrants may be issued therefor as provided by law.

"III. To purchase sites for and to build and keep in repair county buildings and cause the same to be insured in the name of the county treasurer for the benefit of the county; and in case there are no county buildings, to provide suitable rooms for county purposes.

"IV. Apportion and order the levying of taxes as provided by law, and to borrow upon the credit of the county a sum sufficient for the erection of county buildings, or to meet the current expenses of the county in case of a deficit in the county revenue." Gen. Stat., 234.

Sec. 15 provides that the county commissioners shall not have power to borrow money without submitting that question to the electors of the county; and section 16 authorizes them to submit such question at any regular or special election.

Sec. 18 provides that "the whole question including the sum desired to be raised, or the amount of the tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation * * is to be published for four weeks preceding the election, in some newspaper published in the county."

Sec. 19 provides that: "When the question submitted involves the borrowing and expenditure of money, the proposition of the question must be accompanied by a provision, to levy a tax for the payment thereof and no vote adopting the question proposed shall be valid, unless it likewise adopt the amount of tax to be levied to meet the liability incurred."

It will be seen that the authority conferred upon the county commissioners when funds are needed to aid in the construction of county buildings, is to borrow money for a specific purpose upon the credit of the county. This purpose must be submitted to the electors of the county, and be adopted by them. The whole question—that is the amount of the debt, the character of the obligations to be issued, the time and place of payment, and the rate of interest, together with the adoption of a provision for taxation for the payment of the same—must be submitted. While such a proposition is pending, every tax-payer may oppose or uphold it. And even if it is declared carried, such tax-payers may prevent the issue of such obligations by invoking the aid of the courts if the proposition was not legally carried, or any equitable grounds exist against issuing such securities. In this way the necessities of the county for funds can be supplied, and the rights of the tax-payers protected, as funds not required

for a specific purpose cannot be borrowed. It is not the policy of the law to authorize the levy and collection of taxes not necessary to meet the indebtedness of the county, which is already incurred or to be incurred during the year for which the taxes were levied; that is, it is not the intention that more revenue should be raised than is necessary to pay the actual indebtedness of the county. To guard the tax-payers, the legislature has imposed limitations upon the amount to be levied. If the sum that can thus be raised is not sufficient to pay past indebtedness, to meet the current expenses of the county, or for an extraordinary occasion, the only remedy is to borrow money. There is no authority for the county commissioners to submit to the voters the question whether they shall levy taxes in excess of the limit fixed by statute, and such a system is open to gross abuse, as there could be no certain limit to the amount to be raised, as it must depend upon uncertain aggregate valuations for each year; besides they have no authority to draw warrants, except upon duly verified vouchers that have been allowed. Warrants are not commercial paper, and are open to the same defense in the hands of an indorsee that they would be as against the payee. *School District v. Stough*, 6 Neb., 357.

There being no authority to levy the tax in question, the judgment of the court below is reversed, the case reinstated, aud the injunction made perpetual.

As to the sinking fund tax, the case clearly falls within that of the *U. P. R. R. v. Buffalo Co.*, 9 Neb., 448, and the *U. P. R. R. v. Dawson Co.*, 12 Id., 254; and the tax is clearly illegal and the same should be enjoined. The county commissioners attempted after the levy of the tax to rescind the same, but their authority to make such rescission is doubtful; and a party has a right to have an apparent cloud on his title removed. Judgment will be entered in conformity with this opinion.

JUDGMENT ACCORDINGLY.

REUBEN R. TINGLEY, PLAINTIFF IN ERROR, V. MARY DOLBY, DEFENDANT IN ERROR.

1. **Practice:** SETTING ASIDE REPORT OF REFEREE. A case was referred to a referee, who heard all the testimony and made his report, which was afterwards set aside by the district court, to which exception was taken. A trial was then had before a jury, a verdict, and judgment. *Held*, That the court had no authority to set aside the report of the referee, except for cause and none appearing, the order was reversed.

2. **Garnishment:** LIABILITY OF GARNISHEE. A garnishee who answered "I have under my control notes, judgments, and other evidences of indebtedness" of the debtor, is not liable as garnishee in an action for money, unless he has money belonging to the debtor in his hands, or has converted some of the securities to his own use.

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

Brown & Ryan Brothers, for plaintiff in error.

The possession of personal property does not subject the garnishee to liability to answer in cash for such personal property in his hands. *Dolby v. Tingley*, 9 Neb., 417. Comp. Stat., 559, sec. 224. *Miner v. Parker*, 1 Alabama, 421. *Estill v. Goodlor*, 6 La. Ann., 122. *Peet v. Whitmore*, 16 La. Ann., 48. *Coleman v. Fennimore*, 16 La. Ann., 253. *Frost v. Patrick*, 11 Miss. (3 Smed. & M.), 783. *Wetherell v. Flanigan*, 2 Miles (Pa.), 243. *People v. Johnson*, 14 Ill., 342.

A. C. Ricketts and *Walter J. Lamb*, for defendant in error.

MAXWELL, J.

This case was before this court in 1879, and is reported in 9 Neb., 412. The case having been remanded for a new

trial, was referred to Hon. S. B. Galey as referee, who heard the testimony and made a report in favor of the plaintiff in error. This report was set aside by the district court, to which the plaintiff excepted, and now assigns the same for error. The referee also signed a bill of exceptions containing all the testimony taken in the case. Upon the report of the referee being set aside the cause was tried to a jury, which rendered a verdict in favor of the defendant for the sum of $625.41, upon which judgment was rendered.

The conceded facts are as follows: In July, 1875, one Thomas J. H. Dolby commenced an action against R. F. Parshall in the county court of Lancaster county, to recover the sum of $500. Tingley was served with process of garnishment, and in obedience to such process, on the second day of August of that year appeared in said court, when the following question was asked him: "Mr. Tingley, you may state whether you have any goods, chattels, or rights in action belonging to R. F. Parshall in your possession or under your control? State in full." To which he answered: "I have under my control notes, judgments, and other evidences of indebtedness belonging to Parshall, in the amount of about two thousand dollars, more or less." Thereupon the court made the following order: "On this second day of August, 1875, it is considered by me that said garnishee keep in his hands the sum of $450, and $25 to cover costs, until the further order of this court."

The county court rendered judgment in favor of Parshall, but on appeal to the district court judgment was rendered against him and in favor of Dolby for the sum of $549.20 and costs.

Afterwards the following proceedings were had in the district court: "Plaintiff, by his attorney, on this second day of March, 1878, being the eighteenth day of this term of the court, to require R. R. Tingley, garnishee herein, to pay money into court as per his answer as garnishee, which

motion was argued and submitted to the court, and now on this thirteenth day of March, 1878, it is considered by the court that the motion be sustained."

The money not being paid this action was brought. Tingley sets up a number of defenses; those which are deemed material will be noticed.

First, He alleges in substance that on the fifteenth day of March, 1878, he tendered to the clerk of the district court the note of Thomas J. H. Dolby to Parshall on which there was due about the sum of $492, said note being a part of the assets in his hands as garnishee, and he is still ready to deliver said note to the court.

Second, That prior to the notice of garnishment Parshall was indebted to him in the sum of $921, and by agreement with him the proceeds of the assets in the hands of the garnishee were to be applied in payment of this sum. And that he has been unable to collect a sufficient sum to pay said indebtedness, and that Parshall is still indebted to him in the sum of $525.

There is also a statement of the assets at the time of garnishment and a denial of all the facts not admitted.

The reply consists of special denials of the new matter in the answer.

This is not an action to recover from the garnishee upon the ground that his answer is unsatisfactory—in other words has failed to disclose all the property under his control, but an action to recover in money for "notes, judgments and evidences of indebtedness" in his hands. Such being the case, Mrs. Dolby, as a condition precedent to the right to recover, must prove that Tingley had such money, derived from the securities in question, or has converted such securities to his use.

And this brings us to the first assignment of error, that the court erred in setting aside the report of the referee, and granting a new trial. Motions for a new trial are addressed to the sound discretion of the court, and this rule

prevails whether the ground of the motion is that the verdict is against the weight of evidence, or for accident or surprise, newly discovered evidence, or like cause. But this discretion is a legal discretion.

In *Rex v. Wilkes*, 4 Burr, 2539, Lord Mansfield says: "Discretion when applied to a court of justice means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular."

Blackstone says: "A new trial will not be granted where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right, or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcilable to conscience. Nor is it granted where the scales of evidence hang nearly equal; that which leans against the former verdict ought always very strongly to preponderate." 3 Black. Com., 392.

In many cases it is absolutely necessary to do justice that there should be a new trial, and whenever it is apparent from the record that a new trial will be in furtherance of justice it should be granted. But on the other hand a new trial can only be granted for cause, and this must be a legal cause. That is, there must be a sufficient reason why a new trial is granted. This is in keeping with all the proceedings in court. A trial is a judicial examination of the issues in a case. These issues are specific and distinct, and the evidence is confined to them. The trial is public, and the instructions are required to be publicly given and be directly applicable to the testimony in the case, while the verdict must respond to the issues. These are safeguards that are thrown around every litigant, and every step in the procedure up to the rendition of final judgment is subject to review.

Can it be that if the court refuse a new trial its action is

subject to review, but if it grants one it is not? It may be said that a new trial, being in furtherance of justice, is not reviewable. But suppose it is not? Suppose there is no sufficient cause? Then the granting of the same is clearly error, and such has been the uniform holding of the court. *Axtell v. Warden*, 7 Neb., 186. *Iler v. Darnall*, 5 Id., 192. *Kruger v. Harvester Co.*, 9 Id., 533. The right of review in such cases is unquestioned.

But it is said the plaintiff in error should have stood on his exception to setting aside the report of the referee, and that by joining in the trial before the jury he waived the objection. Undoubtedly there are cases in relation to entering an appearance, filing papers and the like, where such a rule would prevail, upon the ground that the objection is technical merely. But where substantial rights are affected a party is not required to desist from defending his rights in order to avail himself of material errors affecting the same. Suppose the court should overrule a demurrer to a petition upon the ground that it failed to state a cause of action, to which exception was taken? The objection would still be open for review notwithstanding the defendant had answered and defended the case on its merits. In our opinion Tingley did not waive this defect by appearing and making his defense before the jury. The question therefore arises, was there sufficient cause for setting aside the report? The referee found in substance that Parshall was indebted to Tingley in 1873 in the sum of $921.06, which sum had not been paid in full, and that it was then agreed between the parties that Tingley was to be paid out of the assets in his hands. He also finds that in August, 1873, Tingley advanced to Parshall the sum of $500. The grounds of the motion to set aside the report are in substance, that the finding is against the weight of evidence; that the referee erred in excluding certain evidence as to money forwarded by Tingley to Parshall. As to the first objection, it is sufficient to say that the clear preponderance

of the evidence sustains the finding of the referee as to the indebtedness of $921 from Parshall to Tingley, and that this sum was to be paid out of the assets in Tingley's hands, but has not yet been paid in full. In other words, the referee finds that Tingley had no funds in his hands belonging to Parshall, and therefore is not liable. The evidence as to the payments of money was also properly excluded as it related to a period antecedent to the notice of garnishment. The court therefore had no sufficient grounds for setting aside the report. The record of the trial before the jury shows a large number of material errors, which it is unnecessary to notice. The judgment of the district court upon the verdict is reversed and set aside, and also its judgment setting aside the report of the referee, and the case is remanded to that court, with directions to confirm the report of the referee and render judgment in conformity therewith.

JUDGMENT ACCORDINGLY.

REZINE WASSON, PLAINTIFF IN ERROR, v. A. L. PALMER, DEFENDANT IN ERROR.

1. **Trial:** OBJECTIONS TO IMPANELING JURY. An objection that a case was called and a jury impaneled in the absence of the attorneys for one of the parties must be made in the trial court, and cannot be made for the first time in the supreme court.
2. **Instructions to Jury.** If one of the paragraphs in the charge of the court to the jury misstate the law upon a material point, such error will not be cured by another paragraph which states the law correctly, because the jury would be left in doubt as to which paragraph was correct.

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

Dwight G. Hull and *R. D. Stearns* for plaintiff in error.

Lamb, Billingsley & Lambertson for defendant in error.

MAXWELL, J.

This is an action by Palmer against Wasson to recover damages for an alleged breach of contract for the sale of real estate. It is alleged in the petition that on the 3d day of May, 1877, Wasson purchased from Palmer the building in which he resided and ten acres of land for the sum of $7,000, to be paid as follows: $100 cash in hand, $3,000 in thirty days, and $3,900 in sixty days from that date. That said Wasson has wholly failed to comply with said contract, and has paid no part of said sum except the $100. The damages alleged to have been sustained are set forth in the following language: "Plaintiff further avers that by reason of the non-performance of the said covenants and agreements in said contract contained, by defendant to be performed, he, plaintiff, hath suffered damage in the sum of one thousand dollars over and above the one hundred dollars paid as aforesaid, by reason of the decline of said lands in value from the price it was sold at to defendant to a price $1,100 less, which plaintiff was subsequently compelled to sell said land by reason of the actual decline in value thereof in said sum last named."

Wasson in his answer admits the making of the contract and the payment of $100, but denies the other allegations in the petition and alleges that Palmer has suffered no loss on account of the alleged breach of contract. On the trial a verdict for $1,000 was rendered in favor of Palmer, upon which judgment was rendered.

The first error assigned is that the jury was impaneled in the absence of the plaintiff in error or his attorneys. This assignment is sustained by an affidavit of Mr. Stearns, but there is no record of any objection to the jury or any particular juror.

The jury seems to have been acceptable to Wasson's attorneys before the trial was entered upon, nor is any objection of this kind made in the motion for a new trial. The right of every suitor to a fair and impartial jury has been steadily maintained by this court ever since its organization; but the objections must be made before the trial, otherwise they are waived.

It is the business of attorneys to be present in court and be ready to proceed with their cases when reached in their regular order on the docket; but if from the sudden termination of a trial a case is reached at a much earlier date than might reasonably have been expected, and in consequence the attorneys of one of the parties are absent from the court room, it would seem but reasonable that the court should direct that notice be given them to attend at once.

In the case at bar there is nothing in the record to show that the matter was brought to the attention of the trial court, and it cannot therefore be considered here.

Objection is made to the third paragraph of the instructions, which is as follows: "If you find for the plaintiff, you should assess such damages as the plaintiff sustained by the breach of the contract by the defendant, if you find that he broke or terminated the same, and that at the time he did so the plaintiff was ready, able, and willing to perform the same on his part according to its terms." This instruction was well calculated to mislead. The proper measure of damages was the difference between the contract price and the actual value of the property at the time the contract was broken, yet the jury are told that they may assess such damages as the plaintiff sustained by the alleged breach, not limiting them in any manner. Such an instruction could not fail to mislead the jury, and is not cured by a subsequent instruction stating the measure of damages correctly. While instructions will be considered as a whole, yet the several

paragraphs must be consistent with each other. It would be a very unsafe rule to adopt, to sustain instructions some of the paragraphs of which misstated the law.

It is said that this defect is cured by the giving of a correct instruction. It is a sufficient answer to say that the jury would not know whether to rely upon the correct or the incorrect paragraph. The object of instructions is to enable the jury, who are the judges of the facts, to apply the law to the facts proved. The law thus given must be applicable to those facts and none others. The question at issue in this case was whether Palmer had sustained damages by the alleged breach of the contract, and if so, the jury should have been told in plain, unequivocal language the proper mode of estimating the same.

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

REVERSED AND REMANDED.

R. E. MOORE AND JOHN MICHAELS, PLAINTIFFS, AND CHARLES MICHAELS, APPELLEE, V. J. A. FEDEWA, IMPLEADED WITH OTHERS, APPELLANT.

1. **Attachment.** In a contest between attaching creditors the attachment first levied is entitled to priority.
2. **Process:** CAPTION. A writ commencing "The State of Nebraska, Lancaster County," is sufficient without repeating the words "The State of Nebraska" before the name of the officer addressed.

APPEAL from Lancaster county. Tried below before POUND, J.

James E. Philpott, for appellant.

L. C. Burr and *J. R. Webster*, for appellee.

MAXWELL, J.

The principal question involved in this case is the priority of attachment liens. It appears from the record that in the year 1876 the defendant Weichbrodt executed a note for the sum of $100 to one Thompson, and to secure the payment of the same made a trust deed to Moore upon certain real estate in Lancaster county. The note was afterwards assigned to John Michaels. In May, 1879, an action was brought in the district court of Lancaster county to foreclose the trust deed, and J. A. Fedewa was made defendant. He filed an answer setting up an interest in the real estate in question by virtue of an attachment levied thereon in an action in which he was plaintiff and Weichbrodt was defendant. The attachment was levied on the 9th day of July, 1878, and judgment was rendered in his favor on the 26th day of October of that year. Charles Michaels, by leave of court, filed an answer, in which he states substantially that on the 29th day of June, 1878, he caused an attachment to be levied upon the real estate in controversy, in an action pending in the district court of Lancaster county, wherein he was plaintiff and Weichbrodt was defendant, and that on the 28th day of October, 1878, judgment was rendered in said action against Weichbrodt and in his favor for the sum of $279.89 debt, and $107 costs, and the attached premises were ordered to be sold. That in November of that year the premises were sold under the attachment to Charles Michaels for the sum of $427. The sale was thereafter confirmed, and a deed made to the purchaser. He then intervened in the action of foreclosure. The court below found that Charles Michaels was the owner of the equity of redemption, and that Fedewa had no lien or interest in the premises. Fedewa brings the cause into this court by appeal.

The only question for consideration is the priority of liens of the attachment.

Sec. 212 of the code provides that "an order of attachment binds the property attached from the time of service." This being so, there is no doubt that Michaels' attachment was prior in point of time to that of Fedewa, and is therefore the prior lien, and is to be satisfied before that of Fedewa. The costs in the case of *Michaels v. Weichbrodt* seem to be excessive, and we cannot perceive any necessity for incurring so large an amount; and the right of Michaels to charge the same upon the land attached might be doubtful, if the question was raised; but it is not. It appears also, that Fedewa caused an execution issued on his judgment to be levied upon the surplus remaining after the satisfaction of Michaels' judgment, and he received $62.52 thereon.

The attorney for Fedewa contends that the order of sale under which Michaels obtained title "is void on its face, for its style is 'The People of the State of Nebraska.'"

The order is in the following form:

"The State of Nebraska, }
Lancaster county. }

"The people of the State of Nebraska to Joseph Hoagland, sheriff, etc."

A writ is defined to be "a mandatory precept isssued by the authority and in the name of the sovereign or the state, for the purpose of compelling the defendant to do something therein mentioned. It is issued by a court or other competent jurisdiction, and is returnable to the same. It is to be under the seal and attested by the proper officer, and is directed to the sheriff or other officer lawfully authorized to execute the same." 2 Bouv. Law Dict., 680.

A writ may be defined to be a mandatory direction to the officer to whom it is addressed, requiring him to perform a particular act, as to summon the defendant, to sell property under the decree of the court, etc. In every case

the writ itself contains directions as to what is required to be done.

At common law all writs ran in the name of the sovereign. Sec. 24, Art. VI, of the constitution provides that "All process shall run in the name of the State of Nebraska." Sec. 880 of the code provides that "The style of all process shall be the 'State of Nebraska..... county.'" The statute merely adds to the constitutional provision a requirement showing the county from which the writ is issued. If the writ is issued by the proper authority, and substantially complies with the law, it is not void. At the most it is voidable. Thus, in *Livingston v. Coe*, 4 Neb., 379, the order of attachment did not run in the name of "The People of the State of Nebraska," as required by the constitution then in force, yet the court properly held that the writ was not void and was curable by amendment. See *State v. Bryant*, 5 Ind., 192. And that it made no difference that the omission was of a form required by the constitution. *Illsly v. Harris*, 10 Wis., 95. But there was no defect in the writ in this case. It ran in the name of the state, followed beneath by the name of the county, and this was sufficient. Would it add anything to the authority of such officer to repeat the words "The State of Nebraska" before his name? We think not, as the authority sufficiently appears. *McPherson v. Bank*, 12 Neb., 202. This being so, the words "The People of the State of Nebraska" before the name of the officer are immaterial. A writ in this form is not to be commended as a model, but it is sufficient after the confirmation of the sale. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

ARCHIBALD B. CADMAN, SPECIAL ADMINISTRATOR OF THE ESTATE OF JOHN PRICE, PLAINTIFF IN ERROR, V. P. COURSEY RICHARDS, DEFENDANT IN ERROR.

1. **Administration of Estates:** SPECIAL ADMINISTRATOR. A special administrator has authority in a proper case to appear and defend an action against the estate. Such power is to be inferred from the authority to bring and maintain suits; but his powers cease upon the appointment and qualification of a general administrator.

2. ———: ———. A special administrator should be appointed by the court having authority to grant letters testamentary or of administration.

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

J. R. Webster, for plaintiff in error.

S. P. Vanatta, for defendant in error.

MAXWELL, J.

On the 9th day of April, 1881, one John Price, an unmarried man, died at a hotel in the city of Lincoln, having at the time of his death personal property in Lancaster county of at least the value of $150. On the 12th day of April of that year the defendant in error filed in the probate court of Lancaster county an instrument purporting to be the last will and testament of said Price, of which notice by publication was duly given. On the 15th day of April, 1881, James Price, a brother of the deceased, filed objections to the will in said probate court. These objections were presented in a petition for the appointment of a special administrator. On the hearing the plaintiff herein was appointed special administrator. The hearing on the instrument purporting to be a will was postponed by agree-

ment, from time to time, until the 17th day of May, when the proceeding was dismissed for want of proof. On the next day the defendant filed his account, duly verified, claiming from the estate $109.45, with a credit of $10.96. The hearing on this account was continued, by agreement, until the 9th of June, 1881, when the defendant was allowed a balance of $98.45. From the order allowing the account the special administrator appealed to the district court, and afterwards filed a petition in error there. The district court dismissed the proceedings in error, upon the ground that the special administrator had no authority to appear in the action. It also appears that on the 28th of May, 1881, the probate court of Lancaster county was notified by the probate judge of Nemaha county that letters of administration were granted to W. E. Majors in that county, and requesting the court to forward the instrument purporting to be the will of John Price.

The question to be determined in this court is the authority of the special administrator to appear in the action.

Sec. 180 of the chapter of Decedents (Comp. Stat., 233–4) provides that: "When there shall be a delay in the granting letters testamentary, or of administration, occasioned by an appeal from the allowance or disallowance of the will, or from any other cause, the judge of probate may appoint an administrator to act in collecting and taking charge of the estate of the deceased, until the question on the allowance of the will, or such other question as shall occasion the delay, shall be terminated, and an executor or administrator be thereupon appointed, and no appeal shall be allowed from the appointment of such special administrator."

Sec. 181 provides that: "An administrator appointed according to the provisions of the preceding section, shall collect the goods, chattels, and debts of the deceased, and preserve the same for the executor or administrator who may

afterwards be appointed, and for that purpose may commence and maintain suits as an administrator, and may sell such perishable and other personal estate as the probate court may order to be sold."

Sec. 182 provides that: "Such special administrator shall not be liable to an action by any creditor, to be called upon in any other way to pay the debts against the deceased."

Sec. 184 provides that: "Upon granting letters testamentary, or of administration, on the estate of the deceased, the power of such special administrator shall cease, and he shall forthwith deliver to the executor or administrator all the goods, chattels, money, and effects of the deceased in his hands; and the executor or administrator may be admitted to prosecute to final judgment any suit commenced by such special administrator."

While there is no direct authority for the special administrator to appear and defend an action, yet such power is clearly conferred in the authority to commence and maintain suits, as in cases where affirmative relief is sought by the defendant, both parties will be actors. The special administrator therefore had authority to appear and contest the claim. But upon the appointment of the general administrator his power ceased, and it was then the duty of the general administrator to appear in the case. The authority of the plaintiff in error therefore ceased on the twenty-eighth of May, 1881, and before the allowance of the claim, and he had no authority to have the order allowing the claim reviewed. Whether administration was properly granted in Nemaha county or not, we have no evidence except the notification above referred to from the county judge of Nemaha county to the judge of Lancaster county.

Sec. 177 of the chapter relating to decedents, provides as follows: "When any person shall die intestate, being an inhabitant of this state, letters of administration of his

estate shall be granted by the probate court of the county of which he was an inhabitant or resident at the time of his death. If such deceased person, at the time of death, resided in any other territory, state, or county, leaving estate to be administered in this state, administration thereof shall be granted by any probate court of any county in which there shall be estate to be administered; and the administration first legally granted shall extend to all the estate of the deceased in this state, and shall exclude the jurisdiction of the probate court of every other county."

Application for the appointment of a special administrator should be made in the county having authority to grant letters testamentary or of administration. If the deceased was a resident of the state, the probate court of the county in which he resided has exclusive jurisdiction; but in this case it does not appear where the deceased had resided and as the next of kin made application to the county court of Lancaster county for the appointment of a special administrator and as the administrator was appointed and acted, and was accountable to that court and not to the county court of Nemaha county, this would seem to give the court jurisdiction, and there is no proof in the record to show that the county court of Nemaha county had exclusive jurisdiction. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

D. L. THOMPSON AND JOHN P. MANNING, PLAINTIFFS IN ERROR, V. MARY S. LOENIG, DEFENDANT IN ERROR.

Husband and Wife. Where property is transferred by a husband to his wife after a debt is contracted, as against that debt, she must show by a preponderance of proof that she is a *bona fide* purchaser.

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

J. D. Gilman and *A. R. Scott*, for plaintiffs in error.

C. Gillespie, for defendant in error.

MAXWELL, J.

This is an action of replevin brought by the wife of F. A. Loenig to recover certain property levied upon for a debt of her husband. Judgment was rendered in the court below in favor of the defendant in error. It appears from the testimony that the debt against Loenig was incurred in 1873, and that at that time he was the owner of 160 acres of land in Richardson county, upon which he resided, and that he also possessed three horses, two cows, and farming implements. In May, 1875, judgment for the sum of $218.85 and costs was rendered against him on the claim above mentioned, in the county court of Richardson county, and on the seventh day of November, 1879, an execution was issued on the judgment and levied upon a quantity of corn in the crib and fifty fat hogs. This property was claimed by the wife of Loenig and reclaimed by replevin. Her title to this property was derived in the following manner, viz.: In 1873, she cooked for a neighbor while he was threshing his grain, and received $10 for her services. With $6 of this sum she purchased six small shoats, that have multiplied to the number of about 100. In December, 1874, Loenig and wife conveyed the land upon which they resided, and still reside, to one James A. Pickett, for an expressed consideration of $500, and on the fourteenth day of December, 1874, Pickett and wife conveyed the land in question to Mary S. Loenig for an expressed consideration of $600. The testimony fails to show that Pickett paid a single dollar of consideration for the land, or that Mrs. Loenig paid him any sum whatever of

her own money. She swears that she paid $600, which she borrowed from friends in small sums, but wholly fails to name a single person from whom she received assistance. There has been no change in the possession. The farm is still cultivated by the husband, so far as appears, with his team and implements, and the corn in the crib and that fed to the hogs levied upon, so far as this record discloses, was raised by the husband on this farm. The debt being contracted before the farm was transferred to the wife, and the grain being raised by the husband, the wife must establish by a preponderance of evidence that she is a purchaser in good faith. *Seitz v. Mitchell*, 4 Otto, 583. *First Nat. Bank v. Bartlett*, 8 Neb., 329. *Koch v. Rhodes*, 10 Id., 445. The testimony upon this point is not sufficient to sustain the verdict. The case differs from that of *Deck v. Smith*, 12 Neb., 389. In that case the debt was contracted in 1876, and the wife, in 1853, had received from her father's estate between $250 and $300, which, with the assent of her husband, she had continued to manage as her individual property. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

BYRON STREETER, PLAINTIFF IN ERROR, V. JOHN T. ROLPH, DEFENDANT IN ERROR.

Public Lands of United States: FORCIBLE ENTRY AND DETENTION. One S, in 1871 entered a tract of land as a homestead under the United States statute. In 1876 he made final proof and has resided on the land since 1871 claiming the same. After S. made final proof the commissioner of the general land office, without notice, on his own motion, cancelled the entry of S., upon the ground that a filing had been made thereon in 1863 which was uncancelled. In 1881, R. entered the land as a timber culture claim and sought to evict S. by an action of forcible entry. *Held*, That the action would not lie.

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

Matt Miller and *Phelps & Thomas*, for plaintiff in error, cited *Johnson v. Towsley*, 2 Neb., 484. 13 Wall., 72.

Russell & Chambers and *J. C. Roberts*, for defendant in error, cited *Randall v. Falkner*, 41 Cal., 242. *Wilson v. Shackleford*, Id., 630. *Kinney v. Degman*, 12 Neb., 237.

MAXWELL, J.

This is an action of forcible entry and detention by Rolph against Streeter, to recover the possession of the west half of the northwest quarter of section one in town 16, range 3 east, in Butler county. Judgment was rendered in the county court in favor of Rolph, which was affirmed in the district court. It appears from the record that in 1871 Streeter settled upon the land in question and entered the same as a homestead; that in 1876 he made final proof, which entitled him to a patent from the United States, and that he has been continuously in possession of this land for ten years. It also appears that near the close of the year 1876 the commissioner of the general land office attempted to cancel the entry of the plaintiff in error, upon the ground that one Green, in 1863, entered the land as a homestead. This so-called homestead, under which nothing had been claimed for twelve or thirteen years, when the statute requires final proof to be made in seven, is treated by the commissioner as valid, and an entry and settlement, otherwise fair, are sought to be set aside and held for naught. And this, too, without any contest or claim of right under the so-called entry. Whether that officer possessed this right or not, is not before the court, but the lands were public lands and open to settlement under the homestead laws, and the plaintiff in error was permitted to enter the same as a

homestead and was required to live the full statutory period of five years and make improvements thereon. It hardly seems possible that a filing made thirteen years before, under which no rights were claimed, could defeat this settlement, nor should he be permitted to sustain injury from the default of the General Land Office.

In any event, the plaintiff in error has rights in the land itself which can only be determined in a proper action in a court of general jurisdiction. The defendant in error entered the land as a timber claim in 1881, and claims the land under his certificate of entry. Both parties thus claiming the land itself, forcible entry will not lie. The case differs from that of *Kinney v. Degman*, 12 Neb., 237. In that case it was held that a party having entered a tract of land as a homestead, and having planted and raised a crop thereon, was, as against a party claiming the land as a pre-emptor, entitled to the crop. In other words, he that planted should reap. But that case has no application to the one at bar. The judgment of the district court and also of the county court is reversed and the case dismissed.

REVERSED AND DISMISSED.

GEORGE GORACKE, PLAINTIFF IN ERROR, V. JOSEPHINE HINTZ, DEFENDANT IN ERROR.

1. **Action for Assault and Battery:** DAMAGES. In an action for assault and battery, the plaintiff, a married woman, having, while testifying in her own behalf, stated that at the time of the battery she was *enciente*, and that the battery caused her to miscarry, upon her cross-examination she was asked by defendant's counsel whether her husband was not in the habit of beating her? To which question the plaintiff by her counsel objected; which objection was sustained by the court. *Held*, No error.

2. ———: ———. A verdict of two hundred and fifty dollars for assaulting and beating an *enciente* woman so as to produce a miscarriage, *Held*, Not excessive.

3. **New Trial.** On the trial an important witness for the defendant who had been subpœnaed, upon being called did not answer, and was reported to be sick, whereupon the defendant proceeded with his defense without applying to the court for either a continuance or a delay of the trial. *Held*, No ground for a new trial.

4. ———. A new trial will not be granted on the ground of newly discovered evidence, when such evidence, if produced, could have no greater effect than to discredit a party as a witness in his own behalf.

5. ———: AFFIDAVIT. It is not sufficient to allege in an affidavit for a new trial on the ground of newly discovered evidence, that the party could not, with reasonable diligence, procure such testimony before the trial. The affidavit must state what particular effort the party has made to procure such testimony. *Heady v. Fishburn*, 3 Neb., 263; *Axtell v. Warden*, 7 Id., 186; and *Tomer v. Densmore*, 8 Id., 384, adhered to.

Error to the district court for Johnson county. Tried below before WEAVER, J.

Osgood & Harris and *C. Gillespie*, for plaintiff in error.

Damages excessive. *Yates v. Joyce*, 11 Johns., 136. *Rockwood v. Allen*, 7 Mass., 256. *Bussy v. Donaldson*, 4 Dall., 206. *Allison v. McCune*, 15 Ohio, 726. *Froy v. Parker*, 53 N. H., 342. Punitive damages not recoverable. *Boyer v. Barr*, 8 Neb., 68. *Roose v. Perkins*, 9 Id., 304. *Riewe v. McCormick*, 11 Id., 264. Petition for new trial on ground of additional evidence should have been granted. Reasonable diligence is all that is required. *Jones v. Singleton*, 45 Cal., 94. *Brown v. Lahers*, 79 Ill., 575.

Selby & Irwin, for defendant in error, on newly discovered evidence, cited cases mentioned in opinion, and *Bowen v. Rutherford*, 60 Ill., 41. *Loeffner v. The State*,

10 Ohio State, 598. On absence of witness. *Cowen v. Smith*, 35 Ill., 416. Excessive damages. *C. & N. W. R. R. v. Williams*, 55 Ill., 185. *Alcorn v. Mitchell*, 63 Ill., 553. *Blanchard v. Morris*, 15 Ill., 35.

COBB, J.

The petition in error in this cause assigns ten grounds of error, which will be stated and disposed of in their order.

1. The court erred in sustaining the objection to the question asked of the defendant in error, if her husband was not in the habit of beating her; the fact of the beating the plaintiff in error stood ready to prove. The plaintiff below in her petition had alleged as a ground of aggravated damages, that at the time of the assault and beating, for which the action was brought, she was pregnant, and that by reason of such beating, etc., she had suffered a miscarriage. It was probably the design of the testimony sought to be elicited by the question, to show by the witness that the miscarriage was caused in whole or in part by the beating of the plaintiff by her husband, but certainly no answer which could have been made to the question could have had that effect. Whatever may have been the habit of her husband, unless he did in fact beat her, at or shortly before the time of the misfortune, it could not have contributed to that end. Plaintiff in error in his petition says "the fact of the beating he stood ready to prove." From this it would seem that counsel thought that before they would be allowed to prove such beating of the plaintiff by her husband, she must deny it. In this view they were in error. If such fact existed they could prove it as a ground of defense to the aggravation of injury; not by showing the habit of the husband in this regard, but the fact of such beating at or about the time of the miscarriage.

2. The court erred in excluding from the jury material evidence offered by the plaintiff in error, to be proven by one Wiley Sandusky, of careless, imprudent, and dangerous acts, and habits of the defendant in error, while in a state of pregnancy. By reference to the testimony, it appears that the witness, Wiley Sandusky, was sworn on the part of the defense. After having stated that he was acquainted with the plaintiff, he was asked the following questions:

Q. State to the jury if you saw her (the plaintiff) in the fall of 1881?

A. Yes, I saw her in the fall of 1881.

Q. You may state if there was any occurrence happened there?

Plaintiff objects as too remote and immaterial. Objection sustained.

The court was clearly right in sustaining this objection. Whatever act of carelessness or imprudence the plaintiff may have committed in the fall of 1881, could have had no effect on the plaintiff's health in March of that year.

3. The court erred in giving the 2d and 3d paragraphs of instructions given by the court of its own motion. The instructions referred to are in the following words:

"2. If you shall find from the evidence that the defendant assaulted and beat the plaintiff, and that she was injured thereby, she will be entitled to a verdict at your hands for such damages as may have been shown by the testimony that she has sustained, not exceeding the $500 claimed in the petition. However, this instruction is given you subject to the proposition of law, that the defendant in the protection of his person or property, would be justified in using so much force only as was necessary to protect his person from injury, or his property from being carried away. That is, such force as a man of ordinary prudence would have used under similar circumstances.

"3. If you shall find from the evidence that the de-

fendant, after pushing or knocking the plaintiff on the ground, if you so find, jumped upon her with his knees, and beat her, and thereby injured her and damaged her, you will find for the plaintiff. You are the judges as to what weight you will give to the testimony of each and every witness."

We do not see in what respect these instructions are erroneous, or fail to state the law of the case. Plaintiff in error, in his brief, fails to point out any error in these instructions, unless it be that it is to these that he refers in the 7th point in his brief as "giving prominence to the evidence of the plaintiff to the entire disparagement of the plaintiff in error." We do not consider this charge as giving undue prominence or any prominence to any part of the evidence. The court states the material facts of the plaintiff's case as alleged in her petition, and testified to by her and her sons, a part of which is denied by the defendant and his son, and tells the jury that if they find such facts to be true, that they shall find for the plaintiff. We see no error in this.

4. * * *

"5. That the damages are excessive, appearing to have been given under the influence of passion or prejudice."

The verdict was for two hundred and fifty dollars, for the assaulting and beating of a pregnant woman by a man, to such a degree as not only to produce an abortion, but to permanently disable and destroy the health of the woman. There is nothing in the pleadings or evidence, nor have we been pointed to fact, theory, or hypothesis by which said amount would seem to be excessive compensation for the injury. According to the testimony it is quite too small.

"6. The verdict is not sustained by sufficient evidence."

There certainly is a sharp conflict of testimony. The facts and circumstances of the assault and beating are testified to by the plaintiff and two witnesses, her sons. A different state of facts, less damaging to him, is testified to

by the defendant, and he is corroborated by one witness, his son. The jury, under a proper instruction, find the testimony of the plaintiff and her witnesses to be true. As to the other points, the extent of the injury as subsequently developed and the amount of damages, there is some testimony as to every material point.

7. * * *

"8. For accident in this particular that an important witness for the plaintiff in error * * * having been duly subpœnaed, being called by the plaintiff in error during the progress of the trial, was reported sick, which sickness was unknown and unexpected to this plaintiff in error."

The above presents no sufficient ground for a new trial. It is the duty of a party before entering upon a trial to know that his witnesses are present, and should a witness who is present at the commencement of a trial be taken sick so as to be unable to attend, the trial court will always find means to protect the rights of the party by a continuance or otherwise, upon timely application being made. But here it does not appear that the attention of the court was called to this sick and absent witness until after the party had taken the chance of a verdict. Then it was too late.

"9. The verdict is contrary to the 2d, 3d, and 4th instructions given to the jury at the request of the defendant, plaintiff in error."

The instructions here referred to are in the following words:

"2. That if they find from the evidence that the plaintiff made the assault, and the defendant used such force only as was necessary to protect himself and his property, they will find for the defendant.

"3. The court instructs the jury that unless they find from the evidence the allegations set forth in the plaintiff's petition to be true, they will find for the defendant.

"4. The court instructs the jury that on the assessment of damages in the case, if they find that the plaintiff is entitled to damages, they are confined to such damages as the plaintiff has actually sustained."

In view of the testimony, the verdict is not contrary to these instructions. According to the testimony of the plaintiff and her two sons, which the jury certainly believed, the plaintiff did not make the assault, nor did the defendant use such force only, as was necessary to protect himself or his property. It is equally certain that the jury did find from the evidence the allegations of the plaintiff's petition to be true, and as before stated, it is not apparent that the jury went outside of the actual damages proven in fixing the amount of their verdict.

"10. That there is newly discovered evidence material to this plaintiff in error, as was shown by affidavits of Amanda Rutter and Mary M. Sandusky, and by the affidavits of George Goracke, plaintiff in error, and D. F. Osgood, one of the counsel for the plaintiff in error."

The motion for a new trial was accompanied by the affidavits of the plaintiff in error, of one of his counsel, and of the said Amanda Rutter and Mary M. Sandusky. Mary M. Sandusky states in her affidavit that some time in the winter of 1881 she had a conversation with the plaintiff, in which the plaintiff told her that she had a miscarriage on the road between her home and Tecumseh, and that the said miscarriage took place after the 1st day of February and before the 10th day of March, 1881. Mrs. Amanda Rutter states in her affidavit that the plaintiff told her she had a miscarriage in the spring of 1881, caused by the fright in the trouble with the Gorackes, and the said miscarriage took place at her own house.

Had the testimony of these witnesses been produced at the trial, it could have had no other effect favorable to the plaintiff in error than to impeach the credibility of the plaintiff below. The damage to the plaintiff was neither

more nor less whether the miscarriage occurred at the house of the plaintiff or on the road to Tecumseh, and it is a well settled rule that a new trial will not be granted on account of newly discovered evidence, the only effect of which would be to discredit or impeach a witness on the other side.

Neither the affidavits of the plaintiff in error nor of his counsel purport to state what degree of diligence had been used on the part of the plaintiff in error to procure or learn of this evidence. Plaintiff in error says that he could not with reasonable diligence have ascertained the same in time to present it at the trial. Mr. Osgood, his counsel, states in his affidavit that "the newly discovered evidence * * * was unknown to the attorneys for the defendant, and they used a reasonable amount of diligence previous to the trial of said cause."

In the case of *Heady v. Fishburn*, 3 Neb., 263, this court by the C. J. say: "But in order to entitle a party to a new trial for this reason (newly discovered evidence), he must set forth in his affidavit what particular efforts he made as tending to establish due diligence on his part. It is not enough for him to say that he was unable to procure the testimony, for his ability or inability to obtain it is a question of fact for the court to determine from the proofs submitted in support of the motion." This case has been adhered to in *Axtell v. Warden*, 7 Neb., 186, and *Tomer v. Densmore*, 8 Id., 384, and cannot be departed from now. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

JEFFERSON H. FOXWORTHY AND OTHERS, PLAINTIFFS IN ERROR, V. THE LINCOLN & FREMONT RAILWAY CO., DEFENDANT IN ERROR.

Election contest: JURISDICTION OF COUNTY COURT. A county court has no jurisdiction of a contest of an election held within a city of the county on the question of voting aid to a work of internal improvement.

ERROR to the district court for Lancaster county, where the cause had been brought by appeal from the county court. The action was brought there to contest an election held in the city of Lincoln, on a proposition to vote bonds to the defendant company.

J. R. Webster and *J. A. Marshall*, for plaintiffs in error.

Mason & Whedon, for defendant in error.

COBB, J.

Section 9 of article VI of the constitution provides that "The district court shall have both chancery and common law jurisdiction" etc. Under this provision, if the legislature confers a right upon any citizen, or class, or subdivision of citizens, and provides no special tribunal for the enforcement of such right, the jurisdiction to enforce the same devolves upon the district court. The right to contest an election of the character of that mentioned in the petition in this action, is clearly given to the tax-payers of the city by the first clause of section 64 of chapter 26 C. S., p. 266, and if no special tribunal is provided for the enforcement of such right, then by force of the constitutional provision it devolves upon the district court. But little of construction is required to make sec. 70 of the act under consideration cover such cases. The language of the section is "The district courts of the re-

spective counties shall hear and determine contests of the election of county judges, and in regard to the removal of county seats, and in regard to any other subject which may by law be submitted to the vote of the people of the county," etc. It is objected that in the case at bar the question of voting aid to the Lincoln & Fremont Railway Company was not submitted to the vote of the people of Lancaster county, but only to part of them, to-wit, the people of the city of Lincoln. The people of a municipal corporation within the territorial limits of the county cannot be called the people of the county in the sense of a political body or organization, and yet I think that the legislature used the words "the vote of the people of the county," as the equivalent of the words "a popular election in the county."

On the other hand, I fail to find anything in the language of the 71st section to indicate an intention on the part of the legislature, to class contests of this character with those of "county, township, and precinct officers and officers of cities and corporated villages within the county" other than county judges. Certainly this class is confined to officers, to the exclusion of questions submitted to a vote of the whole or any portion of the people of the county.

County courts are courts of limited jurisdiction. Says the constitution, "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of, guardians and the settlement of their accounts, in all matters relating to apprentices; and such other jurisdiction as may be given by general law." The jurisdiction claimed for such courts in this case, then, not being a matter of probate, nor relating to the settlement of estates of deceased persons, appointment of guardians or the settlement of their accounts, nor a matter relating to apprentices, to be sustained, must be found expressed in a general statute.

Being cited to no such statute, and believing that there is none in force, we see no error in the judgment of the district court, and the same is affirmed.

JUDGMENT AFFIRMED.

JOHN W. BOGGS, PLAINTIFF IN ERROR, V. JULIUS F. STANKY, DEFENDANT IN ERROR.

Replevin: CHATTEL MORTGAGE ON STOCK: INCREASE. In an action of replevin, commenced January 24, 1880, by J. F. S., against J. W. B., sheriff, the property replevied was described as "about seven hundred bushels of corn in the crib; one sorrel last spring's colt; twenty-six head of black and white spotted shoats, about ten months old; all being kept on a farm occupied by F. G. S., one mile south of Fort Calhoun, Washington county, Nebraska." Plaintiff claimed this property by virtue of a chattel mortgage executed by F. G. S. to him April 28, 1879, in which the property was described as "one bay mare eleven years old, named Tony; one gray horse, about nine years old, named Pet; one sorrel mare, four years old, named Bet; fifty head of hogs, from six weeks to two years old; all of said property being owned and kept by me on my farm, near Fort Calhoun, in Washington county, Nebraska; also all grain growing or in the bin or crib on my said farm." Evidence was introduced that one of said mares was in foal at the date of the mortgage, and dropped the colt replevied sometime afterwards; also that some of the shoats replevied were pigged in the month of May, some in June, and some later. Verdict and judgment for the plaintiff as to all the property replevied. On error, *Held*, That as to the colt and shoats, the verdict was not sustained by the evidence. Reversed and remanded.

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

Jesse T. Davis, for plaintiff in error, cited: Jones on Chattel Mortgages, sec. 150. *Winters v. Lamphere*, 42 Iowa, 470. 7 Northwestern Reporter, 649. *Gardner v.*

Cockrill, 1 Kansas, 259. *Bullock v. Williams*, 16 Pick., 33. *Montgomery v. Wright*, 8 Mich., 143. *Savings Bank v. Sargent*, 20 Kan., 580.

L. W. Osborn, for defendant in error, cited: *Forman v. Proctor*, 9 B. Monroe, 124. *Evans v. Merriken*, 8 Gill & J., 39. *McCarty v. Blevins*, 5 Yerg., 195. *Fonville v. Casey*, 1 Murph., 389. *Hughes v. Grover*, 1 Litt. (Ky.), 317.

COBB, J.

The property replevied is described in the petition as follows: "About seven hundred bushels of corn in the crib, one sorrel last spring's colt, twenty-six head of black and white spotted shoats about ten months old, all of said chattels being kept on the farm occupied by Frederick G. Stankey, one mile south of Fort Calhoun, Washington county, Nebraska."

The chattel mortgage was executed April 28th, 1879, the property being described as follows: "One bay mare eleven years old, named Tony; one grey horse about nine years old, named Pet; one sorrel mare four years old, named Bet; * * fifty head of hogs from six weeks to two years old, * * all of said property being owned and kept by me on my farm near Fort Calhoun, in Washington county, Nebraska."

The action was commenced and property replevied January 24, 1880.

On the trial the chattel mortgage was offered in evidence by the plaintiff below, after the testimony was all in and the argument to the jury commenced.

The parol testimony of the plaintiff's own witnesses, including the mortgagor, clearly establishes the following facts: 1. That at the time of the giving of the chattel mortgage the "sorrel last spring's colt" had not been foaled. 2. That at that date but few, if any, of the

"twenty-six head of black and white spotted pigs" had been pigged. 3. That at said date but a part, if any, of the seven hundred bushels of corn had been planted.

The court charged the jury, among other things, that "The mortgage does not cover corn planted after the 28th day of April, 1879 (the date of the mortgage) nor animals not specifically described in such mortgage."

Applying the instruction to the evidence, then, the jury were in effect instructed to find for the defendant, so far as the shoats and colt were concerned; and this instruction having been disregarded by the jury, their verdict should have been set aside and a new trial awarded.

Whether title to a crop of corn passes by virtue of a mortgage executed before the corn was planted is a question upon which there is great conflict and confusion of authority. For the purpose of this case it will be assumed that the charge of the district court, to which no exception was taken, was correct. And as there was, according to the evidence, a part of the corn planted before the execution of the mortgage, there was no error in allowing the mortgage to go to the jury with the instruction above quoted.

There was no description or attempted description in the mortgage of the colt replevied. The question whether the colt to be dropped by a mare in foal is the subject of a mortgage, is not involved in this case, as the only animals of the horse kind mentioned in the mortgage are the horse about nine years old and the two mares, aged respectively eleven and four years; and there is nothing in the pleadings or testimony as to which one of the said mares is the mother of the colt. Certainly there was no expressed intent on the part of the mortgagor to give a lien on the produce of said mares, or either of them.

The fifty head of hogs were described in the mortgage executed April 28, 1879, as being from six weeks to two years old. This is a rather wide margin, but not wide

enough to embrace the shoats described in the petition of the plaintiff below. They are described on the 24th day of January, 1880, as being "about ten months old." If there were other points of description or identity, this discrepancy would probably not be controlling; but there are none. Again, the mortgagor, when on the stand as a witness for the plaintiff, testified on his cross-examination as follows:

Q. Is it not a fact that those twenty-odd head of pigs and shoats that we levied on at that time were all pigged after the first of May, 1879?

A. Some were in May, some in June, and some later; they were pigged all the way through.

There was no testimony in conflict with this; no other witness knew the ages of the hogs. It will thus be seen that there is an entire failure to identify the shoats replevied with the hogs mentioned in the mortgage.

The verdict not being sustained by the evidence, and being made in disregard of the instructions of the court, should have been set aside and a new trial awarded.

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

REVERSED AND REMANDED.

JOHN W. BOGGS, PLAINTIFF IN ERROR, V. BATEMAN THOMPSON, DEFENDANT IN ERROR.

1. **Witnesses.** The cross-examination of a witness should be restricted to the facts and circumstances drawn out on his direct examination. If it is desired to examine the witness upon other matters, the party desiring such examination must make the witness his own, and call him as such. *Davis v. Neligh*, 7 Neb., 84, adhered to.

2. **Exempt Property.** Property which is exempt by law from liability for the owner's debts is not susceptible of a fraudulent alienation. *Derby v. Weyrich*, 8 Neb., 174, adhered to.

ERROR to the district court for Washington county. The action was in replevin by Thompson against Boggs, who, as sheriff, had levied on the property in question to satisfy executions issued on judgments against O'Hara. Judgment below before SAVAGE, J., for Thompson.

Jesse T. Davis, for plaintiff in error.

L. W. Osborn and *J. Wesley Tucker*, for defendant in error.

COBB, J.

The first error assigned by the plaintiff in error is, that "The court erred in excluding from the jury the cross examination of witness J. T. Kennell, commencing at question and answer 26," etc. The property, consisting of household goods, for the taking of which the suit was brought, was originally owned by one O'Hara, by whom the same was sold to the witness J. T. Kennell, and by him sold to the plaintiff. Kennell having removed to Kansas, his deposition was there taken by the plaintiff, no one appearing at the taking on the part of the defendant. For some cause not apparent, the witness was afterwards recalled for cross examination on the part of the defendant. On his direct examination witness had testified to the purchase by him of the property from O'Hara; that he loaned him some money, or rather that he paid some money for him on his debts, at his request; that he paid $160 for him and paid him $40 at the time of the trade. Witness then enumerated the articles bought of O'Hara, and presented a copy of the bill of sale taken by him from O'Hara and wife at the time of the sale. Witness also stated that the property at the time he purchased it was in the possession of O'Hara and wife. Witness further testified that after keeping the property for ten days he sold and delivered it to the plaintiff, etc. The cross examination of this witness

by the defendant was devoted chiefly to transactions between the witness and one Captain Anthony, at Blair, and between the witness and one Henry Eberline, at Tekamah; none of which matters were proper subjects of cross examination of this witness. So far as the court can see, his testimony in chief might be true whatever might be the facts in reference to any or all of the matters contained in the cross examination. We think the court exercised a fair degree of discrimination in striking out the objectionable and improper questions and the answers thereto.

The next error assigned is, that the verdict is not sustained by the evidence. We think there was evidence before the jury of every necessary fact to establish ownership and possession of the property in the plaintiff, and while this testimony is rather weak as to the good faith of either of the sales, yet this court cannot shut its eyes to the fact that in the hands of the O'Hara family this property was exempt from execution or attachment, and so, under the authorities cited, not the subject of a fraudulent sale.

The only remaining error assigned is, that the damages were excessive. The evidence as to the value of the property came nearly altogether from the side of the plaintiff below, and was uncontradicted except in one small matter, and it was competent for the jury to adopt whichever estimate of value they believed to be correct. According to the plaintiff's testimony as to the value of the several articles, it amounted in the aggregate to one hundred and fifty-six dollars. The jury were properly told by the court that, should they find for the plaintiff, they had a right to add to the value of the property as proved interest at seven per cent from the time of the taking to the first day of the trial term. Under the facts and law, as thus given, the jury might have found a somewhat larger verdict than they did.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

HENRY R. A. PUNDT AND OTHERS, PLAINTIFFS IN ERROR, v. JOHN P. CLARY, DEFENDANT IN ERROR.

Garnishment of License Money. A license to sell intoxicating liquors, granted by the proper authority, not void upon its face, cannot be treated as a nullity and the money paid for the license be garnished as the property of the licensee.

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

M. B. C. True (*Lamb, Billingsley & Lambertson* with him), for plaintiffs in error, cited: *State, ex rel. Noonan, v. City of Lincoln*, 6 Neb., 12. *State, ex rel. Fairchild, v. Andrews*, 11 Neb., 523. Drake, 6th Ed., 482. *Morse v. Holt*, 22 Me., 180.

Hastings & McGintie, for defendant in error, cited: *Powell v. Sammons*, 31 Ala., 552. *Walke v. McGehee*, 11 Id., 273. Freeman on Execution, 160. *Spaun v. Omaha*, 2 Neb., 166.

MAXWELL, J.

The defendant in the year 1881 was treasurer of the city of Crete. In May of that year, one William Gasser published in a newspaper of that city a notice that by the first day of June of that year he would apply to the city council for license to sell intoxicating liquors in that city. The application for license and bond were filed June 1st, and the application was granted, bond approved, $500—the amount of the license—paid to the defendant as treasurer of said city, and the license issued to Gasser on or about the thirtieth of June, 1881, and on or about July 1st, 1881, and after the license was issued, the defendant passed the amount thus received to the credit of the school district of Crete, of which district he was treasurer. In October of that year, an execution against Gasser having been returned

unsatisfied, proceedings in garnishment were instituted before a justice of the peace against the defendant to require him to pay the plaintiff's claim out of the $500 license money in his hands as treasurer, upon the ground that the license was illegal.

The justice discharged the defendant and dismissed the proceedings. The case was taken on error to the district court, where the judgment was affirmed.

The only question to be determined is, can a license to sell intoxicating liquor, issued by the proper authority and not void on its face, be attacked collaterally. We think not. A number of objections are made to the license which in a direct proceeding for that purpose might be sufficient to set it aside. But it is not void, and cannot be attacked in this collateral manner. Gasser had accepted the license, and at the time the defendant was garnished was selling liquor under the authority thus conferred. He could not have maintained an action against the defendant to recover the money paid for the license. Has a creditor any greater right of action in a case of this kind than the party himself?

Clearly not; because it is an invariable rule that under no circumstances shall the garnishee, by operation of the proceedings against him, be placed in a worse condition than he would be in if the defendant's claim against him were enforced by the defendant himself. Drake on Attachment, sec. 462. It is very clear that Gasser was not in a situation to maintain an action against the defendant to recover the amount paid for the license, and the plaintiffs have no greater right than he possessed. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE VICTOR SEWING MACHINE COMPANY, PLAINTIFF IN ERROR, V. HENRY J. DAY, DEFENDANT IN ERROR.

Verdict against Evidence. Where a verdict is against the clear weight of testimony it will be set aside.

ERROR to the district court for Fillmore county. Tried below before GASLIN, J.

Gaylord & Fifield, for plaintiff in error.

John P. Maule, for defendant in error.

MAXWELL, J.

This is an action upon a contract alleged to have been entered into by the defendant with the plaintiff to purchase from it three sewing machines for the sum of $57. The answer is a general denial. On the trial of the cause in the court below a verdict was rendered for the defendant, upon which judgment was rendered.

The questions presented to this court are:

First. Did the defendant sign the contract set out in the petition.

Second. Did the plaintiff perform the agreement on its part.

All the evidence tends to prove both of the propositions, and the verdict is against the clear weight of testimony.

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

REVERSED AND REMANDED.

JOHN KING AND OTHERS, PLAINTIFFS IN ERROR, V. ELLA H. BELL, DEFENDANT IN ERROR.

1. **Pleading:** PARTNERSHIP. Where in the title of a cause the individual names of partners are given, followed by the word "partners," it is unnecessary to repeat the names in the body of the petition.

2. **Action against Saloon Keepers:** ABATEMENT. In an action against such partners as saloon keepers for injury caused by the sale of liquor by them, the action does not abate by reason of the death of one member of the firm.

3. **Practice:** MOTION TO STRIKE OUT MATTER FROM PLEADING. Where a motion is sustained to strike certain matter out of a pleading, it is the right of the adverse party to have such matter erased or an amended pleading filed; but if this is not insisted upon, it will be sufficient to treat the objectionable matter as stricken out.

4. **Instructions,** *Held,* Applicable to the issue and testimony.

5. **Evidence.** Carlisle tables of expectancy of life, *Held,* Properly admitted in evidence in an action for loss of means of support. *Roose v. Perkins,* 9 Neb., 304, adhered to.

6. **Evidence,** *Held,* Sufficient to sustain verdict. LAKE, CH. J., dissenting.

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

A. Schoenheit and *Frank Martin,* for plaintiffs in error.

Recovery must be a pecuniary recompense for a pecuniary loss. Damages not recoverable for wounded feelings and disgrace. *Kearney v. Fitzgerald,* 43 Iowa, 568. Nor for loss of society and companionship. *Dunleavy v. Watson,* 38 Iowa, 400. The pleadings go to the jury. Jury in this case could see by petition that plaintiff claimed damages for the "mental anguish, disgrace, loss of society, etc., etc." They could see further that defendant moved the court to strike that portion out; could see that the court refused to do so. Seeing all these things they must natu-

rally have concluded that these were proper elements of damage, and consequently considered them in making up their verdict. Therefore we claim the court erred in overruling the motion to strike out. Instructions were erroneous. *Hartford Life Insurance Co. v. Gray*, 80 Ill., 31. *Evans v. George*, 80 Ill., 53. *Robertson v. Dodge*, 28 Ill., 163. *Gansley v. Perkins*, 30 Mich., 496. On evidence, cited: *Hall v. Barnes*, 82 Ill., 229. *Wightman v. Devere*, 33 Wis., 579.

Isham Reavis and *E. W. Thomas*, for defendant in error, cited: Cooley on Torts, 150. *Friend v. Dunks*, 37 Mich., 25. *Emory v. Addis*, 71 Ill., 273.

MAXWELL, J.

The defendant in error brought an action in the district court of Richardson county against John King and Fred Weber, W. J. Ralston, J. Wixel, and Daniel Lydick, to recover damages for the loss of means of support caused by the death of her husband, which it is alleged was caused by intoxicating liquors sold to him by the plaintiffs in error. On the trial of the cause a verdict was rendered in favor of the defendant in error, and against W. J. Ralston, Daniel Lydick, and John King, upon which judgment was entered.

The first objection is, that at the time the action was commenced, John King, the plaintiff in error, and one Fred Weber were in partnership in the saloon business, at Falls City, and the action was brought against them in the firm name of King & Weber. And that since the action was commenced, Weber has died, therefore the action should abate. The objection is not sustained by the facts, as these parties are described in the title of the case as, "John King and Fred Weber, doing business as King & Weber." The action is against them as individuals, although they are thereafter described in the petition as King & Weber.

The code makes the title of the case a part of the petition, and it is unnecessary to repeat the names of the parties plaintiff or defendant. It is sufficient thereafter to describe them as "plaintiff" or "defendant," or in any other manner sufficient to designate them. Where, therefore, parties are designated by name as defendants in the title, the addition of the relation they occupy to each other, such as a description of them as "partners," will not restrict the action to one against the *firm* alone, such as "King and Weber, a firm formed for the purpose of doing business in this state." The plea in abatement therefore is entirely unwarranted. We do not decide, however, that even if the action had been brought against the partnership as a firm that the plaintiff would not be liable, as the general rule is that if a partner, in pursuance of the partnership business, commit a wrongful act, the members of the firm are liable.

Second. King and Weber moved to strike out of the petition the following words: "And these plaintiffs aver that they have suffered other and further damages by reason of the aforesaid wrongful acts of the defendant, on account of mental anguish, disgrace, loss of society and the companionship of their said husband and father, whose death was caused in part by the joint acts of all of said defendants in selling and giving him intoxicating liquors in the manner as hereinafter more particularly stated." Which motion was sustained. No new petition was filed, however, nor were the words erased, but the question was not submitted to the jury. In this there was no error. Unless the moving party required the words to be stricken out literally, which they could have insisted upon, it is sufficient that the words were treated as though stricken from the pleading.

It is also objected that the motions of the other parties to strike out these words were overruled. The petition was a joint one against all the defendants, and a general

motion filed by one to strike out any of the general allegations in the petition, when sustained, operated to the benefit of all. At the most, therefore, the failure to sustain the motions was error without prejudice.

Third. The court gave the following instructions to the jury: "The court instructs you that when there is a conflict of testimony, it is for the jury to reconcile the same and determine what weight the testimony of any witness shall have; what credit shall be given to any witness rests with the jury; you can credit or discredit witness according as you may believe or disbelieve the same."

We fully agree with the plaintiffs in error that the jury, although the judges of the credibility of the witnesses, have no right arbitrarily and without cause to discredit the testimony of a witness. In other words, there must be a reason for disbelieving the same. In a case where the evidence is conflicting, and it is impossible that all the witnesses have sworn to the truth, it is the duty of the jury to harmonize the testimony as far as possible, and where that cannot be done, to determine which of the witnesses is more worthy of belief. In such case the conflicting testimony may be said to be to some extent impeaching testimony, directly discrediting that of some of the witnesses, and it is for the jury to determine what witnesses have testified in accordance with the apparent truth of the case, and what not. The instruction in question when applied to the testimony in this case is substantially correct, there being a direct conflict in the testimony. The cases of *Hart. Ins. Co. v. Gray*, 80 Ill., 31, *Evans v. George*, Id., 51, are not applicable.

Objection is made to the second instruction, which is as follows:

"The jury are instructed that if you find from the evidence that the defendants, or any of them, furnished or sold to John Bell, the deceased, intoxicating liquors which contributed to cause his death, then it is immaterial at what

time such liquor was furnished, provided the same contributed to cause his death and was furnished while Bell was under the influence of liquor or in quantities sufficient to produce intoxication."

This must be construed with reference to the issue made by the pleadings and testimony in the case. It is alleged in the petition that: "When the said John W. Bell came to Falls City, in March, 1879, he became addicted to the excessive use of intoxicating liquor to such an extent that he spent nearly all of his daily earnings for liquor in the saloons of the defendants, Jacob Wixel, W. J. Ralston, and King & Weber, who were severally engaged in the business of selling malt, spirituous, and vinous liquors in Falls City, having been duly licensed therefor by the proper authorities of said city, according to law, in consequence of which the said John W. Bell was kept in a partial or complete state of intoxication during all of the time of his residence in said city and until he removed to Kansas as above stated. That during all of which time the said defendants sold liquor to said John W. Bell in quantities sufficient to produce intoxication, and plied him with liquor when in a state of intoxication, knowing him to be so, constantly and continually, whereby he became and was disqualified by intemperance from earning the support of these plaintiffs, which legally devolved upon the said John W. Bell, by means of which these plaintiffs were greatly damaged in the means of support on account of said traffic, and that sale of intoxicants to their husband and father of these plaintiffs by said defendants. That after the return of said John W. Bell to Falls City, in March, 1880, the said defendants continued to sell intoxicating liquors to said Bell in quantities sufficient to produce intoxication, and while he was in a state of intoxication, from that time continuously (the said defendants, Jacob Wixel, King & Weber, and W. J. Ralston, still being in the business of selling liquors as aforesaid at Falls City) and until the afternoon

of the thirtieth day of November, 1880, when, from the excessive and long use of intoxicating liquor furnished and sold to him by all of the defendants, Daniel Lydick as well, the said John W. Bell, at the time aforesaid, instantly fell dead."

The testimony as to loss of means of support is limited to the times stated in the petition, and therefore the instruction could not have misled the jury.

The third instruction is as follows:

"The jury are instructed that if you find from the evidence that the defendants, or any of them, sold or gave liquor to John W. Bell, the deceased, while he was under the influence of liquor, and that the liquor so sold or given contributed to cause his death, it is no defense to this action even if it should appear that John W. Bell had been, or was, of intemperate habits before he began to buy liquor of such defendant or defendants."

The effect of such instruction is this: the mere fact that Bell was of intemperate habits before he began to procure liquor of the defendants, will not prevent a recovery, provided that you find the plaintiff has sustained loss of means of support by such sale. That is, his intemperate habits would not defeat the action. The word defense, as defined by Bouvier, is "The denial of truth of the validity of the complaint, a general assertion that the plaintiff has no ground of action, which is afterwards extended and maintained in the plea." 1 Bouv. Law. Dic., 446. 3 Sharwood Black. Com., 296. Coke Litt., 127.

In this sense it is similar to the *contestatio litis* of the civil law, and does not include justification. Under the code new matter may be set up as a defense, but this admits an apparent right which the new matter seeks to avoid. Bliss on Code Pleading, sec. 340. The court did not say, and did not intend to say, that the previous drinking habits of the husband might not be considered for the purpose of affecting the amount to be recovered.

The question of the introduction of the Carlisle tables of expectancy was before this court in the case of *Roose v. Perkins*, 9 Neb., 304, and we adhere to our decision in that case. There is a clear preponderance of the evidence sustaining the verdict, and it is evident that substantial justice has been done. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

A. D. TRUSSEL, PLAINTIFF IN ERROR, V. GEORGE LEWIS, DEFENDANT IN ERROR.

1. **Boundary Lines.** T. and H., the owners of a fractional half section of land, in 1864 agreed upon an equal division of the tract and established a line upon which a hedge was set out, and fence erected, and both parties cultivated up to and made improvements upon their respective tracts with reference to this line. Both parties sold and conveyed their respective interests in the land, the grantees having knowledge of the agreement. *Held*, That the line thus established would be sustained, particularly in view of the fact that there was testimony tending to show that the action was barred.

2. ———: STATUTE OF LIMITATIONS. Where the true line can be ascertained, and parties by mistake agree upon an erroneous line as their boundary, believing it to be the true line, they will not be concluded by such agreement from claiming to the true line when discovered, unless the statute of limitations has run, or equitable reasons exist for establishing the erroneous line. But if the true line cannot be ascertained with certainty, then an agreement establishing a line of division will be sustained.

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

A. R. Scott and *C. Gillespie*, for plaintiff in error, cited: *Hubbel v. McCulloch*, 47 Barb., 287. *McAfferty v. Conover*, 7 Ohio State., 104. *Smith v. McNamra*, 4 Lans., 169.

Smith v. Hamilton, 20 Mich., 438. *Yates v. Shore*, 24 Ill., 367. *Prescott v. Nevey*, 4 Mason, 326. *Bailey v. Carlton*, 12 New Hamp., 1. *Horbach v. Miller*, 4 Neb., 32. *Hodges v. Eddy*, 38 Vermont, 345.

J. H. Broady, for defendant in error cited: 3 Wash. Real Property, 367, sec. 54. *Revere v. Leonard*, 1 Mass., 91. *Wuesthoff v. Seymour*, 22 N. J. Eq., 66. *Boyd v. Graves*, 4 Wheat., 513. *Laverty v. Moore*, 33 New York, 658. *Wakefield v. Ross*, 5 Mass., 16. *Gove v. White*, 23 Wis., 282. *Smith v. Hamilton*, 20 Mich., 433. *Hagey v. Detwiler*, 35 Penn. State, 409.

MAXWELL, J.

This is an action of ejectment brought by Lewis against Trussel in the district court of Richardson county, to recover possession of thirteen acres of land on the west side of the northeast quarter of sec. 6, town. 3, range 16, in Richardson county. The case was submitted to the court without the intervention of a jury and judgment rendered in favor of Lewis. It appears from the record that in the year 1860 the United States conveyed to Amelia Deroin, a half-breed Indian, the north half of sec. 6, township 3, range 16 east, which contained 295.95 acres. Amelia being a minor, her guardian in 1864 sold and conveyed to one Trowbridge the northeast quarter of section 6, township 3, range 16, and to one Hamsberry the northwest quarter of the section. Trowbridge and Hamsberry entered into possession. Whether the quarter section line running north and south through the section was known at that time or not, does not clearly appear; but Trowbridge and Hamsberry employed the county surveyor and caused a line to be run across said half section at a point equidistant between the east and west lines, and agreed that this should be the division line between them. They also set

a stone into the ground at each corner and stakes every twenty rods as monuments. Trowbridge set out a hedge on this line for a division fence, and a rail fence seems to have been built thereon as a division fence. Both parties cultivated to this fence, while Hamsberry erected a house immediately west of the fence, and set out an orchard the east side of which extended to the fence. In 1867 Trowbridge and wife conveyed the northeast quarter of the section to one Danes, who was informed of the actual boundary before purchasing. In 1876, Danes and wife conveyed to the plaintiff. In 1867, Hamsberry and wife conveyed the northwest quarter to one Arnold, who in 1877 conveyed to the defendant. Between 1872 and 1876 Danes notified Arnold that the line agreed upon by Trowbridge and Hamsberry was not the true line and claimed the land to the quarter section line. There seems to have been an attempt at arbitration, but the award was not carried out by either party. The northeast quarter contains twenty-six acres more than the northwest, and the division line, as agreed upon by Trowbridge and Hamsberry, runs east of the true line about seventeen rods, taking about thirteen acres from the northeast quarter and adding it to the northwest and making an equal division of the fractional half section.

The question to be determined is the validity of the agreement between Trowbridge and Hamsberry. There is testimony in the record tending to show that Trowbridge and Hamsberry purchased the land in question under an agreement with the administrator, that it was to be equally divided. There is also testimony tending to show that the grantees of Hamsberry were in possession more than ten years before being disturbed in the possession, so that a perfect title was acquired by adverse possession.

Whether owners of adjoining lands, having agreed upon a dividing line between them, and built fences upon the line agreed upon, are estopped from changing the line if after-

wards it is found to not conform to the true line, is a question upon which the courts are somewhat at variance. Thus in *Laverty v. Moore*, 32 Barb., 347, where two adjoining owners of land covered with water, which they were about to fill, agreed upon a line between them, and one of them thereupon filled his part to the line agreed upon, it was held that the other was estopped to deny that the line agreed upon was the true one. And in *Burdick v. Heivley*, 23 Iowa, 515, where the parties by mistake had occupied up to a dividing fence on each side for the period of limitation, the bar of the statute was held to be complete.

In the case of *Yetzer v. Thoman*, 17 Ohio State, 130 it was held that where one of two proprietors respectively of adjoining lands holds actual, continuous, notorious, and exclusive possession up to a certain line, though not originally the true one, for the full period of twenty-one years, the statute of limitations applies in his favor and against the adjoining proprietor, although such mistake may have grown out of the mutual mistake of the parties as to the true line between them.

In *McAfferty v. Conover*, 7 Id., 99, it was held that where adjoining proprietors under a mutual mistake occupy up to and acquiesce in a line other than a true one for a period less than the limitation fixed by statute, neither party as a general rule is estopped to assert title to the true line. The rule seems to be that if parties by mistake agree upon a line between them, believing it to be the true one, and afterwards the true line is found, the parties will not be estopped to claim to the true line unless the action is barred by the statute, or some equitable ground of estoppel exists. In other words, if a line, not the true one, is agreed upon under a mistake of fact, the parties will not be precluded from making the proper correction and establishing the true line. Where, however, the line is ambiguous and uncertain, if the parties agree upon a line, and mutually

enter upon the occupancy of their lands in conformity thereto, and make improvements thereon, they will be estopped from disputing the line thus agreed upon. *Joice v. Williams*, 26 Mich., 332. *Smith v. Hamilton*, 20 Id., 438. *Kip v. Norton*, 12 Wend., 127. *Huston v. Sneed*, 15 Tex., 307. *Davis v. Townsend*, 10 Barb., 333. *Knowles v. Toothaker*, 58 Me., 174.

In the case at bar the testimony tends to show that Trowbridge and Hamsberry agreed upon the line established by them for the purpose of dividing the fractional half section into two equal parts, and that the line agreed upon makes an equal division. The division was known to all the subsequent grantees of both parties, and they purchased with reference to the same. This is not a case where a mutual mistake was made as to the true line, but where the paties agreed that the land should be divided evenly without regard to the true line. This, therefore, is not a case calling for correction of a mistake, but rather to sustain an agreement which has been fully executed. We think the testimony fully sustains the agreement, and the line as established by Trowbridge and Hamsberry must be sustained, particularly in view of the fact that there is testimony tending to show that more than ten years elapsed before the validity of the agreement was questioned. The judgment is fully sustained by the evidence, and is affirmed.

JUDGMENT AFFIRMED.

RICKARDS & MERRILL, PLAINTIFFS IN ERROR, v. C. B. COON, DEFENDANT IN ERROR.

Final Judgment. A decree enjoining a sale of real estate is a final judgment, and may be revived on error or appeal.

Motion to dismiss proceedings in error.

Mason & Whedon and *E. S. Knight*, for the motion.

O. H. Scott, J. D. Gilman, and *A. R. Scott, contra.*

MAXWELL, J.

This action was brought in the district court of Thayer county to enjoin the defendant from selling certain real estate. An injunction was granted in the court below, to review which the plaintiffs bring the cause into this court by petition in error. The defendant now moves to dismiss the proceedings, because there is no final judgment.

The judgment is as follows:

"C. B. Coon, plaintiff,
vs.
Rickards & Merrill, defendants. } Journal Entry.

And now on this 12th day of May, 1881, this cause coming on further to be heard upon the proofs adduced, the court finds generally for the plaintiff, and finds that the judgment of the defendants which is referred to in defendant's answer herein, is not a lien on the realty described in plaintiff's petition. And said defendants are perpetually enjoined from selling land to satisfy their said judgment."

This shows a final judgment enjoining the sale, and is sufficient. The motion must be overruled.

MOTION OVERRULED.

SAME V. SAME.

1. **Pleading:** PETITION. A petition which states that the plaintiff is the owner of certain real estate by tax deeds, and that the defendants hold a prior judgment, which was a lien upon the land before the sale and conveyance, and seeking to enjoin the sale under an execution issued on such judgment, does not state a cause of action.

2. ——: ——: INJUNCTION. In such case the defendants have a right to complete the sale and contest the validity of the tax deeds in an action at law, and a court of equity will not enjoin a sale under the execution unless some equitable ground exists for its interference.

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

O. H. Scott, J. D. Gilman, and *A. R. Scott,* for plaintiffs in error.

Mason & Whedon and *E. S. Knight* for defendant in error.

MAXWELL, J.

This is an action to enjoin the sale upon execution of certain real estate. A decree was rendered in the court below in favor of the defendant, to review which the plaintiffs bring the cause into this court by petition in error.

It is alleged in the petition, in substance, that on the thirtieth day of August, 1879, one George McCracken became the owner of the lands in controversy by a tax deed from the treasurer of Thayer county, and that afterwards McCracken conveyed to one Crothers, who conveyed to Coon; also that one Weatherald on the seventh day of May, 1879, obtained a tax deed for the lands in question and afterwards conveyed to Coon. That Rickards and Merrill recovered a judgment against one Wilson in the district court of Richardson county for the sum of $220 and $20.98 costs of suit, and on the tenth day of August, 1876, a transcript of the same was filed in the clerk's office of the district court of Thayer county, and in October, 1879, an execution was issued thereon and levied upon the land in question. The prayer is to enjoin the sale under the execution and for a decree divesting the lien of the judgment.

The answer of Rickards and Merrill denies that plaintiff is the owner of the lands in dispute by virtue of the tax deeds set forth in the petition, but alleges that he purchased said land from Wilson, the judgment debtor, who was the owner of the fee, the deed of conveyance being dated July 17th, 1879. Various facts are also stated showing the invalidity of the tax deeds.

To this answer Coon filed a general demurrer. No action seems to have been had thereon.

A motion was also made to dissolve the injunction.

None of the testimony is preserved, and the question presented is, can the judgment be sustained upon the petition and answer? We think not. The petition itself shows that the judgment was a valid lien upon this land at the time Coon acquired the tax deed. This being so, by what authority will a court enjoin a sale under an execution issued upon the judgment? It is said that the tax deeds divest the title of the land owner and that the purchaser takes the title entirely free from all prior claims. This is true in a case of a valid sale and conveyance for taxes. But this will not prevent a person having a prior claim upon the lands sold from perfecting his title and contesting the validity of the tax deeds in an action at law. And a court of equity will not interfere unless the case is brought under some head of equity jurisprudence and a case is made entitling the plaintiff to the relief sought. The statute, while authorizing one in possession to bring an action to quiet title, does not deprive a party of his property or rights, and is merely for the purpose of determining conflicting interests. As the petition fails to state facts sufficient to entitle the plaintiff to the relief sought, the judgment of the district court is reversed and the action dismissed.

JUDGMENT ACCORDINGLY.

SARAH E. CASE ET AL., PLAINTIFFS IN ERROR, v. E. F. FREDERICK, DEFENDANT IN ERROR.

Witnesses. Where the testimony is conflicting the question of the credibility of the witnesses is to be determined by the jury.

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

Jesse T. Davis and *J. Wesley Tucker*, for plaintiffs in error.

L. W. Osborn, for defendant in error.

MAXWELL, J.

This is an action by the plaintiff to recover damages alleged to have been sustained by herself and minor children by the death of her husband, which it is alleged was caused by intoxicating liquor furnished to him by the defendant. On the trial of the cause the jury found for the defendant and the court overruled a motion for a new trial and dismissed the action. The only error assigned in this court is, that the verdict is contrary to and against the weight of evidence.

It will subserve no good purpose to review the testimony at length. In our opinion it fully sustains the verdict, And the testimony being conflicting, the question of the credibility of the witnesses was a proper one for the jury. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

SAMUEL BUCHER, PLAINTIFF IN ERROR, V. JENNIE WAGONER AND OTHERS, DEFENDANTS IN ERROR.

Herd Law. A person taking up stock for trespass upon cultivated lands under the provisions of the herd law of 1871, acquires no lien upon such stock unless he comply substantially with the provisions of the act.

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

A. R. Scott, for plaintiff in error.

C. Gillespie, for defendant in error.

MAXWELL, J.

In the summer of 1880, the plaintiff in error was herding a number of cattle for Yeoden and Whitmore for twenty cents per head per month, and while thus engaged sixteen head escaped, and entered the cultivated lands of J. A. Wagoner, and thereby committing injury to his growing crops. Wagoner thereupon caused the trespassing animals to be taken up, and verbal notice thereof was given to the plaintiff. The amount of damages claimed was five dollars. The defendants, at the time of taking up the stock, in an informal manner agreed to select an arbitrator, but afterwards refused to do so, and claimed five dollars damages and refused to surrender the stock unless this sum was paid. The plaintiff offered two dollars, which was not accepted. The cattle were reclaimed by an action of replevin. On the trial of the cause the court found the right of possession of said stock at the commencement of the action to be in the defendants, and assessed the value of the same at $5.

The question for determination is, the right of a party to a lien upon the stock for damages committed by it upon

cultivated lands where he has failed to serve the notice required by law or to select an arbitrator.

Sec. 3 of "An act for a general herd law to protect cultivated lands from trespass by stock," approved April 1, 1871, provides: "That when any such stock shall be found upon the cultivated lands of another, it shall be lawful for the owner or person in possession of said lands to impound said stock; and if the owner of said stock can be found, and is known to the taker-up, it shall be the duty of said taker-up to notify said owner by leaving a written notice at his usual place of residence, with some member of his family over the age of fourteen, or in the absence of such person by posting a copy of such notice on the door of said residence of the taking up of said stock, describing it, and stating the amount of damages claimed; also, the name of his arbitrator, and requiring him within forty-eight hours after receiving said notice to take the said property away, after making full payment of all damages and costs to the satisfaction of said taker-up of trespassing animals. Said notice may be in the following form: Mr. ....., You are hereby notified that on this ..... day of ....., 18..., your stock, of which I now have in my possession (here describe the animal or animals), did trespass upon my land and damaged the same to the amount of ..... You are required to pay the above charges within forty-eight hours from the delivery of this notice or the aforesaid stock will be sold as provided by law. I have appointed Mr..... to act as arbitrator should you not feel satisfied with the amount of damages claimed in the within notice. *Provided*, that no claim for damages shall be maintained by the taker-up without the notice contemplated in this section shall have been given when the owner is known by the taker-up of said such stock."

Sec. 5 provides that: "In case the parties interested cannot agree as to the amount of damages and costs sustained, each party may choose a man, and in case the two

men chosen cannot agree they shall choose a third man, who, after being duly sworn for the purpose herein named, the three shall proceed to assess the damages, possessing for that purpose the general power of arbitrators."

Sec. 6 provides that: "The said arbitrators shall make an award in writing, which, if not paid within five days after the award has been made, may be filed with any justice of the peace in the same county, and shall operate as a judgment, which judgment shall be a lien upon the stock so taken up, and execution may issue upon said stock for the collection of said damages and costs as in other cases; *Provided*, that either party may have an appeal from said judgment, as in cases before justices of the peace." Comp. Stat., 50.

Where stock trespasses upon cultivated lands, the statute gives the party injured a lien upon such stock for the damages sustained, provided he comply with the procedure given in the statute. Thus he must take the stock up and serve a notice thereof upon the owner, if known, stating the amount of damages claimed and also the name of the person selected by him as arbitrator in case the owner of the stock considers the amount claimed to be excessive and desires to submit the matter to arbitration. It is the notice and the subsequent substantial compliance with the statute that give the right to enforce the lien by a sale of stock.

In *Haggard v. Wallen*, 6 Neb., 271, the question arose on the sufficiency of the notice, and it was held sufficient. And in *Shroaf v. Allen*, 12 Id., 109, a verbal notice was held sufficient where the parties in pursuance thereof agreed to arbitrate the matter of damages but had failed to do so, the person taking up the stock being ready at all times to submit the matter. In other words, that the owner of the stock, by appearing and agreeing to select an arbitrator to appraise the damages, had waived the written notice and could not afterwards insist upon the want of notice to defeat the lien. And we adhere to that decision because

the notice, although verbal, was in substantial compliance with the law, and was accepted by the stock owner as sufficient. But in this case the person taking up the stock refused to submit the matter to arbitration to ascertain the amount of damages; in fact, refused to select an arbitrator or submit the matter for adjudication. He made an arbitrary demand for damages, and refused to take the necessary steps to ascertain the actual amount. Suppose the claim had been for one hundred or one thousand dollars, would the owner of the stock have been compelled to pay the amount claimed, without regard to the amount of damages, in order to release the stock? Clearly not. It may be said that the amount claimed did not, in this case, exceed the amount of damages sustained. But who is to determine that question. The law was designed to afford a speedy and inexpensive mode of adjusting damages committed by trespassing animals upon cultivated lands. The arbitrators view the premises soon after the injury and determine the amount to be paid. The owner of the stock may then pay the sum awarded and have his stock released. Where there has been a substantial compliance with the law, the proceedings will be construed very liberally in order to sustain them. But the person taking up stock acquires no lien thereon unless he comply substantially with the terms of the statute, and this the defendants wholly failed to do. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WEBSTER & BURR, PLAINTIFFS IN ERROR, V. JAMES O'SHEE, DEFENDANT IN ERROR.

1. **Evidence,** *Held,* Sufficient to sustain verdict.
2. **Instructions to Juries.** Where instructions are asked which are not applicable to the issue made by the pleadings they should be refused.

ERROR to the district court for Lancaster county. On trial below, before POUND, J., the following instructions asked for on behalf of Webster & Burr were refused and exceptions taken:

A. The notes having been sent to defendant for collection to the order of Sheffler, they are bound to hold the proceeds for him, and he not being made a party in this action, you will find for defendants garnishees and against plaintiff.

B. In this action, if you find it uncertain to whom the money belongs, you will find for the defendants the garnishees and against the plaintiff.

C. In an action at law by attachment like this a garnishee (the defendants) are not chargeable where the ownership of the fund is uncertain, and if you find that the ownership of the fund is uncertain, you will find for the defendants garnishees and against the plaintiff.

D. The jury is instructed that no question is made either in the pleadings or testimony regarding the amount of the fee charged by Burr & Webster to Odenwelder & McKissick for defending McKissick in a criminal prosecution. The evidence shows that the amount of that fee was agreed upon, and therefore the question is, "Did Odenwelder agree or was he liable to pay a fee certain, and if so, how much, at the time this proceeding in garnishment was commenced, or prior thereto?"

E. If the jury find that the money in the hands of Webster & Burr belonged to Odenwelder, and further find

that Odenwelder & McKissick were and are indebted to Webster & Burr on the promissory note set up by Webster & Burr in their answer, then defendants Webster & Burr have a right to set off the debt of Webster & Burr against the claim of Odenwelder to the amount of such indebtedness, and your verdict will be in favor of defendants.

F. If the jury find it to be uncertain to whom the moneys collected by Webster & Burr belonged, the jury must bring in a verdict in favor of defendants, Webster & Burr, because to establish liability against a garnishee, it must clearly appear to whom the indebtedness sought to be reached belongs.

G. The jury are instructed to find a verdict generally in favor of defendants Webster & Burr.

J. A. Marshall, for plaintiffs in error.

A. C. Ricketts, for defendant in error.

MAXWELL, J.

In 1879, the defendant in error commenced an action by attachment against A. J. Odenwelder, before a justice of the peace of Lancaster county, to recover the sum of $100. Webster and Burr were served with notice of garnishment and appeared and answered. Afterwards judgment was rendered against Odenwelder for the sum of $100 and costs, and the plaintiffs in error were required as garnishees to pay the same. From that order they appealed to the district court, where the following stipulation was entered into: "It is stipulated by and between the plaintiff and the said garnishees Webster and Burr, that plaintiff may file petition against garnishees, and that garnishees may answer and defend as garnishees originally brought to this court to answer, and without denying or traversing Odenwelder's indebtedness to plaintiff, may, without prejudice to them of order of garnish-

ment made before the justice of the peace, be heard upon their liability to Odenwelder in any sum whatever and try such question in this court, and in the finding and order in garnishment, if the garnishees are found to have any sum of the defendant Odenwelder in their hands, this court may enter judgment against garnishees as original sureties of defendant Oldenwelder, and execution thereon may issue as if garnishees were original joint debtors and parties defendant in this suit." O'Shee then brought an action on the order. In their answer to the petition, the plaintiffs in error state in substance that in the year 1876 they received from an attorney in Pennsylvania a promissory note of one H. Valliant, for the sum of $162, with interest at 12 per cent. This note was drawn in favor of A. J. Odenwelder and was not endorsed, but was remitted to them for collection as the property of one Sheffler; that they had at that time another similar note drawn payable to Odenwelder and not endorsed, which they were advised belonged to Sheffler. That they collected on these notes the sum of $235.25 and no more, and that the collections were effected to a great extent by legal proceedings, and a just and reasonable charge therefor was the sum of $50, and that they paid costs amounting to $2.50. They also plead that afterwards one McKissick, a son-in-law of Odenwelder, was arrested on the charge of felony committed in Colorado, and that they were employed by Odenwelder to defend him, which they did, and for which Odenwelder promised to pay them the sum of $224, which he has failed to do; therefore they ask to have the amount in their hands applied to the payment of said claims. The reply is a general denial. On the trial of the cause in the court below, the jury returned a verdict in favor of O'Shee for the sum of $122.22, upon which judgment was rendered.

The errors assigned are in substance that the verdict is against the weight of evidence; that the court erred in

the instructions given, and in the refusal to give the instructions asked. Without reviewing the evidence at length, in our opinion it fully sustains the verdict, and the instructions given were certainly favorable to the plaintiffs in error. As to the instructions asked, it is sufficient to say that they were not applicable to the issue made in the pleadings. There is no issue made in the answer that these notes belonged to Sheffler. It is stated that they were received as his, but were drawn in favor of Odenwelder and not endorsed. It is not alleged that the notes were Sheffler's, nor under the most liberal rules of construction could the answer be so construed. The entire purport of the answer is that the notes belonged to Odenwelder, and that under an agreement with him, the plaintiffs in error were entitled to the proceeds. The instructions asked sought to submit the question of Odenwelder's ownership of the notes to the jury. This would have been proper had such ownership been denied, but it is not. Instructions must be applicable to the issue, and if they are not, they should be refused. It is very clear that justice has been done in the case, and the judgment is affirmed.

JUDGMENT AFFIRMED.

MARGARET MCDOUGALL, PLAINTIFF IN ERROR, V. ANTONIO GIACOMINI AND PETER RANK, DEFENDANTS IN ERROR.

1. **Liquors:** ACTION AGAINST SALOON KEEPERS. The wife of M. sued certain saloon keepers for loss of means of support, caused by the intoxication of her husband from liquors alleged to have been furnished by them. The petition contained twelve counts commencing November 30th, 1876, and terminating in October, 1880, and there was testimony which was uncontradicted tending to sustain two of the counts. *Held*, That a verdict for the defendants was against the weight of evidence.

2. ———: EVIDENCE. The sale of intoxicating liquors may be proved like any other fact by circumstantial evidence.

ERROR to the district court for Colfax county. Tried below before GASLIN, J., sitting in absence of POST, J.

Phelps & Thomas, for plaintiff in error, cited *Kearney v. Fitzgerald*, 43 Iowa, 584. Greenleaf Evidence, p. 38, sec. 33. Cooley on Torts., 247.

W. H. Munger, for defendants, cited *Macleod v. Gerger*, 6 N. W. R., 21. *Kreiter v. Nichols*, 28 Mich., 496. *Parker v. The State*, 4 Ohio State, 563.

MAXWELL, J.

This action was brought in the district court of Colfax county by the plaintiff against the defendants to recover damages sustained by her for the loss of means of support by the intoxication of her husband, which it is alleged was caused by liquor furnished by the defendants. On the trial of the cause in the court below, a verdict was rendered for the defendants, upon which judgment was given. The petition contains twelve counts, the causes of action commencing on the 30th day of November, 1876, and terminating on the 10th day of October, 1880. The principal causes of action are for loss of time caused by intoxication of Alexander McDougall, the husband; the whole amount of damages claimed being $5,000. The answers admit that the plaintiff is the wife of Alexander McDougall, and admit that the defendants were licensed saloon keepers at Schuyler, and deny all the other facts stated in the petition.

The action is brought under section 579 of the crim. code of 1873 (Gen. Stat., page 853), which reads as follows: "On the trial of any suit under the provisions hereof, the cause or foundation of which shall be the acts done or

injuries inflicted by a person under the influence of liquor, it shall only be necessary, to sustain the action, to prove that the defendant or defendants sold or gave liquor to the person so intoxicated, or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received; and in an action brought by a married woman, or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendants have given or sold intoxicating drinks to such person in quantities sufficient to produce intoxication, or when under the influence of liquor."

A large number of errors are assigned in the petition in error, but the only error relied upon is that the verdict is against the weight of evidence. Mrs. McDougall testifies that on or about the thirtieth of November, 1876, she saw her husband and Mr. Kenier standing at the bar of Mr. Giacomini's saloon drinking, her husband at the time being "pretty badly under the influence of liquor; they had been drinking all the afternoon." She also states that the same afternoon she saw her husband in the saloon of Peter Rank. She also testifies to the number of times her husband had been intoxicated while in Schuyler between November 30th, 1876, and the commencement of the action, and states a number of instances where he was found intoxicated, generally in connection with the saloon of Mr. Giacomini. A. B. Wilson testified that about October 12th, 1880, he saw Mr. McDougall go into Giacomini's saloon while drunk and "get a drink, him and Tom McGary." One Perrine testified that he drank with McDougall on two occasions, at least once in Giacomini's saloon, in April, the year not being given, when they were all under the influence of liquor. One Stevens testifies that in October, 1880, he saw McDougall go into Giacomini's saloon in the morning sober, and about two o'clock saw him standing

close to the door where he went in "a little drunk." The plaintiff's son testified that in October, 1880, he saw his father in Giacomini's saloon, and about the same time he saw him in the saloon of Peter Rank drinking while under the influence of liquor. The defendants offered no testimony and none of the above is denied. The testimony shows that McDougall is a carpenter and a good workman, and when not under the influence of liquor attends to his business. And also shows that the wife has sustained very great injury by reason of the loss of means of support. Does the testimony tend to show that the defendants, or either of them, furnished the liquor which caused the intoxication? We think it does.

The attorney for the defendants contends that to entitle the plaintiff to recover the evidence must show: *First*, That the defendants, or one of them, gave or sold the husband of the plaintiff liquors. *Second*, That such liquors were intoxicating. This we think is correct. As to the first proposition, it will be seen from the evidence that the proof upon that point is sufficient. Upon the second, we are to consider the facts. The defendants plead that they are licensed saloon keepers in the town of Schuyler. The word "saloon," which originally meant a large public room or parlor, in this state has acquired a more restricted meaning and is usually applied to a place where intoxicating liquors are sold. A licensed saloon keeper in this state, therefore, is a person licensed to sell intoxicating liquors. The proof, too, tends to show that such was the business of both the defendants. This being their business, and their places of business being under their control, if liquor was furnished therein to any person, *prima facie* it would seem to be done with the consent of the defendants.

While every essential fact stated in the petition which is denied by the answer must be proved by a preponderance of evidence, this need not be done by direct proof. These facts may be shown by circumstantial evidence.

People v. Hulbert, 5 Den., 133. *State v. O'Connor*, 49 Me., 594. *State v. Hynes*, 66 Id., 114. Thus, suppose it is shown that a place is a licensed saloon, and that persons go in there sober and come out under the influence of liquor. These facts raise a presumption that such persons obtained intoxicating liquor in the saloon. *Com. v. Van Stone*, 97 Mass., 548. *Com. v. Kennedy*, Id., 224. The business of a saloon keeper is to sell intoxicating drinks by the glass. If, therefore, the proof shows that he has sold or furnished liquor at his place of business, the presumption would seem to be that such liquor was such as his business required him to keep and furnish to his customers—intoxicating liquors. The fact of intoxicating liquor being furnished by a saloon keeper may be proved like any other fact. Suppose a murder was committed in the saloon and no one was present to witness the deed, could the murderer not therefore be proved guilty because there was no direct evidence that he committed the crime? In such case, when the fact of the murder was proved, all the facts and circumstances which tended to show that the person accused committed the crime would be competent evidence, and if this proof reached that degree of certainty required by the criminal law, would justify the conviction and execution of the accused, although no one had seen him commit the offense. If such testimony is sufficient to authorize a conviction for offenses where the punishment involves the life or liberty of the accused, and where the proof must establish the guilt beyond a reasonable doubt, the same kind of proof certainly is sufficient to establish the sale of intoxicating liquors where the punishment is merely pecuniary compensation, and the degree of proof required merely a preponderance of the evidence.

The testimony in this case tends to show that the business of each of the defendants was keeping a saloon where intoxicating liquors were furnished to customers, and also tends to prove at least two counts in the petition. This

was testimony that was uncontradicted and that the jury had no right to disregard, and as the plaintiff had proved damages to some extent at least, she was entitled under the evidence to a verdict for some amount. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

WILLIAM OGDEN, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law**: EXAMINATION OF JURORS: OPINION. Where a juror in his examination on his *voir dire* stated that he had formed an opinion as to the guilt of the accused but did not think he had stated his opinion, and no objection was made to him by challenge or otherwise, it is too late after verdict to object to the juror, notwithstanding there was testimony tending to show that he had expressed an opinion before the trial.
2. **New Trial.** As a general rule a new trial will not be granted for newly discovered evidence which merely tends to discredit some of the witnesses on the opposite side.
3. **Evidence** examined and *held* to be sufficient to sustain the verdict.

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

J. H. Grimm and *Hastings & McGintie*, for plaintiff in error.

C. J. Dilworth, Attorney General, for defendant in error.

MAXWELL, J.

The plaintiff in error was convicted of robbery at the April term of the district court for Saline county, and was

sentenced to imprisonment in the penitentiary for five years. He now prosecutes a writ of error to this court. Three assignments of error are relied upon:

First. It is objected that two of the jurors before the trial had expressed an opinion that the accused was guilty. It appears from the record that one of the jurors named Fraley had expressed an opinion before the trial that the accused was guilty of the crime charged. The examination of Fraley on his *voir dire* is not set forth in the record, but it appears from the affidavits filed to support the motion for a new trial that he stated on such examination that he had formed an opinion but he did not think he had expressed the same. He was not questioned in regard to this opinion. The accused therefore knew very well before the trial that this juror had an opinion in regard to the question of his guilt. It also appears that he probably considered that opinion favorable to himself, as he failed to challenge the juror either for cause or under his peremptory challenges, and that he failed to use all of his peremptory challenges. This being so, the juror was permitted to remain on the jury with his consent, and error cannot be predicated thereon. The evidence fails to show that the juror Stewart had formed or expressed an opinion. The objection as to the competency of the jurors, therefore, is not well taken.

Second. It is claimed that the newly discovered testimony of O. Larson will establish the fact that the prosecuting witness complained of being robbed about four o'clock in the afternoon instead of six as shown by the testimony of most of the witnesses. The exact time at which an offense was committed in many cases might be very material, and newly discovered proof of that kind might be sufficient for granting a new trial. But in this case, if we give it the most favorable construction, it merely tends to impeach the testimony of Morgan, the prosecuting witness, and Newer, the saloon keeper. A new trial will

not, as a rule, be granted for newly discovered evidence merely tending to impeach. Suppose that since the trial the plaintiff in error had discovered that Morgan and Newer were wholly unworthy of belief, and that he had discovered testimony to prove that their general reputation for truth and veracity was bad, would those facts alone justify a court in setting aside the verdict? We think not. Where the object is merely to discredit a witness on the opposite side a new trial will not, as a general rule, be granted. *Com. v. Drew*, 4 Mass., 399. *Com. v. Waite*, 5 Id., 261. *Com. v. Green*, 17 Id., 515. *Bland v. State*, 2 Carter (Ind.), 608. *Levining v. State*, 13 Ga., 513. *Polser v. State*, 6 Tex. Ap., 510. But it would be otherwise if the principal witness should testify that his statement on the trial was a mistake. *Mann v. State*, 44 Tex., 642.

The general rule as to newly discovered evidence may be stated thus: That if, with the newly discovered evidence before them, the jury should not have come to the same conclusion, a new trial will be granted. *Com. v. Flanagan*, 7 W. & S., 423. *Com. v. Manson*, 2 Ashm., 31. *Thompson v. Com.*, 8 Gratt., 637. *State v. Greenwood*, 1 Hayw., 14. *Carr v. State*, 14 Geo., 358. *Roach v. State*, 34 Id., 78. *Jones v. State*, 48 Id., 163. *Young v. State*, 56 Id., 403. *Meeks v. State*, 57 Id., 329. *Ramey v. State*, 53 Ind., 278. *Hauck v. State*, 1 Tex. Ap., 357. In our opinion the newly discovered evidence in this case is not sufficient to justify the court in granting a new trial.

Third. The third objection is that the verdict is not sustained by the evidence. Without reviewing the evidence at length, in our opinion it establishes the guilt of the prisoner. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

JULIA S. BOWEN, APPELLANT, v. BILLINGS, BOISE & CO., APPELLEES.

Partnership Property: LIABILITY FOR INDIVIDUAL DEBTS. In 1874 the firm of B. & L. purchased certain real estate with partnership funds, the title being taken in the name of B. In 1876 the firm became insolvent and the real property was sold to T. for a firm debt, and afterwards sold to the wife of B. While the title was in the name of B., certain transcripts of judgments against B. were filed in the district court and executions issued thereon, which were levied upon the real estate in question as the property of B. In an action by the wife to enjoin the sale, *Held*, That partnership property in case of insolvency was not liable for the individual debts of the members of the firm until the partnership debts were satisfied, and that the judgment was not a lien.

APPEAL from the district court for Adams county. Tried below before GASLIN, J.

A. H. Bowen, for appellant.

1. Land purchased with partnership funds, though conveyed to one partner, is partnership property. *King v. Weeks*, 70 N. C., 372.

2. Though title is taken in name of wife of one partner, the land is subject to the debts of the firm. *Price v. Hicks*, 14 Fla., 565. *Foster's Appeal*, 74 Pa. St., 391. *Thompson v. Egbert*, 3 Thomp. & C. (N. Y.), 474. 1 Hun., 484. *Clark's Appeal*, 72 Pa. St., 142. *In Re Cook*, 3 Bliss., 122. *Evans v. Hawley*, 35 Iowa, 83. *Switzer v. Smith*, 35 Iowa, 269. *Gordon v. Kennedy*, 36 Ib., 167. *Warren v. Wallace*, 38 Texas, 225.

3. Land purchased with partnership funds *must* be applied to firm debts before individual debts. *Bryant v. Hunter*, 6 Bush. (Ky.), 75. *Cornwell v. Cornwell*, Id., 369. *Nat. Bank v. Sprague*, 20 N. J. Eq., 13. *Uhler v. Semple*, Id., 288. *Bank v. Phetteplace*, 8 R. I., 56.

4. It does not matter in whom the title is; equity will regard it as partnership property, and partner as *cestui que trust*. *Hoxie v. Carr*, 1 Sumner, 173. *Sigourney v. Munn*, 7 Conn., 11. *Smith v. Ramsey*, 1 Gilm., 373. *Wilder v. Keelor*, 3 Paige C. R., 167. *Sterling v. Brightbill*, 5 Watts, 229. *Christian v. Ellis*, 1 Gratt., 396. *Lucas v. Atwood*, 2 Stewart, 378. *Topliff v. Vaile*, Harring. Ch., 340.

5. Real estate purchased with partnership funds for partnership purposes, though title be taken in individual name of one partner, in equity treated as personal property so far as is necessary to pay debts of firm. *Collumb v. Read*, 24 N. Y., 505. *Delmonico v. Gilmore*, 2 Sanford Ch., 561.

O. B. Hewett, for appellees.

1. There is no privity of interest which connects Julia S. Bowen or Wm. B. Thorne, her grantor, with the purchase and conveyance of the Eastern Land Association to Adna H. Bowen. The *privity*, as shown in plaintiff's affidavit, as against any interest of Adna H. Bowen in the lot is in favor of the firm of Bowen & Laird, or perhaps James Laird alone.

2. Thorne's unadjudicated debt against Bowen & Laird could not properly be made the base of an equitable claim; and even if it could, whatever interest it attached must be subject to the prior legal right of Billings, Boise & Co., as judgment creditors of Adna H. Bowen, in good faith secured by their lien.

3. The legal title was in Adna H. Bowen when the judgments became a record, and a sale and deed under executions here enjoined would have conveyed a clear title.

4. The plaintiff has a complete remedy against Mr. Thorne for failure of her title.

MAXWELL, J.

This is an action to quiet title. The plaintiff alleges in her petition in substance that she is the owner and in possession of lot 582, in the town of Juniata. She derived the title to the same as follows: That the Eastern Land Association was the owner of said premises on the 21st day of December, 1874, and on said day said association sold said lot to Bowen and Laird, the consideration being paid by them, but by mistake the deed was taken in the name of Adna H. Bowen; that in January, 1876, the firm of Bowen & Laird failed, and being largely indebted to one W. B. Thorne for moneys due from said firm, sold and conveyed said lot to said Thorn, the deed for said premises being made by Adna H. Bowen; that in March, 1878, said Thorne for a valuable consideration sold and conveyed said premises to the plaintiff; that on the 20th day of June, 1879, one S. L. Martin, sheriff of Adams county, by virtue of two executions issued out of the district court of Adams county, on judgments recovered against Adna H. Bowen, levied upon said lot as the property of said Bowen, and has advertised the same for sale, and threatens and is about to sell the same. The prayer is to have the sale enjoined and the title quieted.

Billings, Boise & Co., the judgment creditors, were substituted for the sheriff and filed an answer, wherein they allege that the "plaintiff has no right, title, or interest in or to said lot;" that at the time of filing transcripts of their judgments in said court, the legal title was in Adna H. Bowen, and deny that said lot was conveyed by mistake to said Bowen, or that it was purchased by the firm of Bowen & Laird. The case was submitted to the court on the pleadings, and judgment rendered in favor of the defendants. The plaintiff appeals to this court.

The court made the following special findings:

First. That on the 24th day of June, 1876, the tran-

scripts of judgment in favor of Billings, Boise & Co., plaintiffs, and against Adna H. Bowen, were duly filed for record in this court, upon which the execution, enjoined herein, was issued.

Second. That the legal title to said lot No. 582 in the town of Juniata, Adams county, Neb., was vested at that time in Adna H. Bowen by deed of date December 21st, 1874, from one Eastern Land Association.

Third. That on the 4th day of December, 1876, the said Adna H. Bowen and Julia S. Bowen deeded said lot to William B. Thorne in satisfaction of a debt due said Thorn from the insolvent partnership firm of Bowen & Laird, composed of the said Adna H. Bowen and James Laird.

Fourth. That William B. Thorn afterwards on the 4th day of March, 1878, deeded by warranty deed said lot to the said Julia S. Bowen, plaintiff.

There is no denial in the answer that the lot in question was purchased with partnership funds. This fact therefore stands admitted.

The question presented is, does the lien of judgments against Bowen attach to this real estate? The lien of a judgment is not an interest in the real estate of a debtor. The creditor has neither a *jus in re* nor a *jus in rem* as regards the real estate. The lien merely confers the right to levy thereon to the exclusion of other adverse interests subsequent to the judgment. *Grevemeyer v. Ins. Co.*, 62 Penn. St., 342. *Conard v. Ins. Co.*, 1 Peters, 386. *Kemper v. Adams*, 5 McLean, 507. *Schaffer v. Cadwallader*, 36 Penn. St., 126. *Thelusson v. Smith*, 2 Wheat., 396. *Metz v. State Bank*, 7 Neb., 165. *Galway v. Malchow*, Id., 285. And it attaches only to the interest of a debtor in the lands. *Uhl v. May*, 5 Neb., 157. *Mansfield v. Gregory*, 8 Id., 432. *Mansfield v. Gregory*, 11 Id., 297. In the last case it is said such lien does not exceed the actual interest of the judgment debtor in the land, and is subject

to every equity therein existing against the debtor at the time of its rendition.

If property is bought by a partner in the firm, acting for the firm, the property belongs to the partnership as soon as the sale is complete, because the purchaser is the firm. And the fact that the title to real estate thus purchased is taken in the name of one of the partners will not deprive it of the character of partnership property.

Where a partnership is insolvent the rule is to give to the creditors all the effects of the partnership, if necessary, for the payment of the debts, leaving only the surplus, if any, to private creditors, and to give to private creditors the private assets of the several partners, applying only the surplus to payment of the partnership debts. *Ex parte Crowder*, 2 Vern., 706. *Ex parte Cook*, 2 P. Wms., 500. Parsons on Part., 347–8.

The joint creditors have the primary claim upon the joint fund in case of insolvency, and the partnership debts are to be paid before any portion of such funds can be applied to other purposes. *Murrill v. Neill*, 8 How., U. S., 414. *Converse v. McKee*, 14 Tex., 20. 3 Kent Com., 65. The basis of the rule is, that the credit being given to the firm the assets of such firm will be applied where the credit was given, and not be diverted to the payment of a debt incurred upon the sole responsibility of one member of the firm. 3 Kent Com., 65.

In *Murrill v. Neill*, 8 Howard, 414, the supreme court of the United States say: "The rule in equity governing the administration of insolvent partnerships is one of familiar acceptation and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally, if not universally, received. This rule, with one or two eccentric variations in the English practice, which may be noted hereafter, is believed to be identical with that prevailing in England, and is this: that partnership creditors

shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the creditors with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts until the separate and individual creditors of the respective partners shall be paid. The reason and foundation of this rule, or its equality and fairness, the court is not called on to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule, to stay the hand of innovation at this day; at least, under any motive less strong than the most urgent propriety."

In New York this rule has been adopted. It is held that "the partnership property of a firm shall all be applied to the partnership debts, to the exclusion of the individual members of the firm; and that creditors of the latter are to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything therefrom." *Jackson v. Cornell*, 1 Sandf. Ch., 348. *Murray v. Murray*, 5 Johns. Ch., 60. *Wilden v. Keeler*, 3 Paige, 167. *Payne v. Matthews*, 6 Id., 19. *Hutchinson v. Smith*, 7 Id., 26.

In *McCulluh v. Dashiel*, 1 Harr. & Gill, 96, it was held that individual creditors of a partner were entitled to a preference over the partnership creditors in the distributing of the separate estate of the debtor. See also *Woddrop v. Ward*, 3 Dev. Eq., S. C., 203. *Jarvis v. Brooks*, 3 Foster, 136. In Ohio it is held that the rule in equity in the distribution of the joint and separate assets of insolvent partners is, that the individual assets of a partner be first applied to the debts of his individual creditors, and the partnership assets first to the partnership debts. But if there is no joint estate and no living solvent partner, the rule does not apply. *Rogers v. Meranda*, 7 O. S., 180. *Budge*

v. McCullough, 27 Ala., 661. *Daniel v. Townsend*, 21 Ga., 155. That the real estate in question was purchased with partnership funds is admitted. It is also admitted that the firm is insolvent. The partnership creditors, therefore, are entitled to be paid out of the partnership estate before any portion of the same can be applied to the payment of the individual debts of the partners.

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

REVERSED AND REMANDED.

WILLIAM B. THORNE, APPELLEE, V. JULIA S. BOWEN AND BILLINGS, BOISE & CO., APPELLANTS.

MAXWELL, J.

The same question is presented in this case as in that of *Julia S. Bowen v. Billings, Boise & Co.*, just decided.

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

REVERSED AND REMANDED.

JAMES L. GANDY, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Contempt:** JURISDICTION OF DISTRICT COURT. The district court has authority to punish by proceedings for contempt any person who attempts to corrupt or unlawfully influence jurors in a case pending before the court.

2. ———: PRACTICE: TRIAL. Proceedings for contempt not committed in the presence of the court are instituted by filing an information under oath stating the facts constituting the alleged

contempt. An attachment or order to show cause will then be issued, and the party accused brought before the court. As the proceeding is solely to protect public justice from obstruction the accused is not entitled to trial by jury.)

3. ———: REVIEW ON ERROR. A judgment for contempt may be reviewed on error in the supreme court in the same manner as criminal cases.

ERROR to the district court for Richardson county, WEAVER, J., presiding.

E. W. Thomas and *C. Gillespie*, for plaintiff in error, cited: 20 Am. Law Reg., 147. *Whittem v. The State*, 36 Indiana, 204. *Cartwright's Case*, 114 Mass., 239. *State v. Blackwell*, 10 Rich., 35. *Wilson v. The State*, 57 Ind., 73. *Bates' Case*, 55 New Hamp., 325. *State v. Murry*, 14 Cal., 114. *Stephens v. Hill*, 10 M. & W., 28. *State v. Holding*, 1 McCord, 379. 15 Cent. Law Journal, 42. *Ex parte Grace*, 12 Iowa, 215.

C. J. Dilworth, Attorney General, and *W. H. Morris, District Attorney*, for the State, cited: *Bickley v. Commonwealth*, 2 Dall., 574. *Johnson's Case*, 1 Bibb., 578. *Ex parte Kearney*, 7 Wheat., 44. *Cook v. People*, 16 Illinois, 534. *Respublica v. Oswald*, 1 Dall., 343. *State v. Dooty*, 32 N. J. Law, 404. *Bergh's Case*, 16 Abb. Pr., N. S., 266. *Com. v. McDonall*, 5 Cush., 367.

MAXWELL, J.

This is a petition in error to review the judgment of the district court of Richardson county finding the plaintiff in error guilty of contempt and imposing a fine and imprisonment. The proceedings are based upon the following information:

"THE STATE OF NEBRASKA } Before district court in and
v. } for Richardson county.
JAMES L. GANDY. } Hon. A. J. Weaver, Judge.

"The information of Wm. H. Morris, district attorney of the first judicial district of the state of Nebraska, made

this twenty-second day of June, A.D. 1882, gives the court to know and understand that heretofore, to-wit: On the seventh day of June, A.D. 1882, the same being a day of the regular June term, A.D. 1882, of the district court of the first judicial district of the state of Nebraska, holden in and for Richardson county, a certain suit, wherein one M. E. Gandy was plaintiff and one J. P. Pool was defendant, was there depending before said court, and which said suit was on said seventh day of June, 1882, being heard on trial before said court, and a jury having been called and sworn therein, to-wit: In said suit to try the issues joined between said parties thereto, and that the persons called, empaneled, and sworn as jurors in said cause were William Gerdes, Elias Finbaugh, etc. (giving names of the jurors), and that after said jury was empaneled and sworn, and during the pendency and trial of said cause, and that then and there, during said pendency and trial of said suit, the said James L. Gandy (who is the husband of the plaintiff in said suit, to-wit, the husband of the said M. E. Gandy) did willfully attempt to obstruct the proceedings and hinder the due administration of justice in said suit then and there depending and on trial as aforesaid before said district court, in this, to-wit: By attempting to procure one George A. Abbott, Jerry Ackerman, and other persons, whose names are to this affiant and informant unknown, to unlawfully seek, strive, and attempt to corrupt and influence the jurors, to-wit, Wm. Gerdes, Elias Finbaugh, John Penninyh, David Jones, and divers other persons (members of and persons composing the jury aforesaid in said suit aforesaid so depending before said district court aforesaid) in their action, judgment, and decision there to be arrived at in said suit so depending and on trial before said district court, in contempt of this said district court and its dignity, and contrary to the statute in such case provided. "WM. H. MORRIS,

"*District Attorney.*"

The defendant (plaintiff in error) moved to quash the information—

First. Because it did not state facts sufficient to give the court jurisdiction.

Second. Because it charged no specific act.

The motion was overruled. The defendant thereupon demanded a trial by jury, which was refused. The court then heard the evidence in the case, and found the defendant guilty of willfully attempting to obstruct the proceedings and to hinder the due administration of justice. A bill of exceptions was thereupon signed and the case brought into this court.

The offense charged is, in substance, that the defendant willfully attempted to obstruct the administration of justice by attempting to procure Abbott and Ackerman to unlawfully attempt to corrupt and influence certain jurors. Does the information state any offense? The proceeding is in the nature of a criminal prosecution, and the same degree of certainty is required in stating the offense as would be required if the proceedings were instituted under the criminal law. Where an attempt, which is not indictable, becomes so when coupled with an intent to do an act that is indictable, the attempt and intent must be so pleaded as to show a criminal act. 2 Bish. Cr. Pro. (3d Ed.), sec. 86. Therefore it is not enough to charge an individual with attempting to steal goods or generally to commit a criminal act, but the *act itself* must be set out. Bish. Cr. Pro., sec. 88, and cases cited. The reason is stated by BULLER, J., in *Rex v. Lyme Regis*, 1 Doug., 149, who said: "You have only occasion to state facts; which must be done for the purpose of informing the court, whose duty it is to declare the law arising upon these facts, and to apprise the opposite party of what is meant to be proved in order to give him an opportunity to answer or traverse it." See also *The State v. Murray*, 41 Iowa, 580. *Reg. v. Harvey*, 8 Cox, C. C., 99.

The word "attempt" may be defined, an intent to do a thing coupled with an act which falls short of the thing intended. 1 Bish. Cr. Law, sec. 510. *State v. Marshall*, 14 Ala., 411. *Johnson v. State*, 14 Ga., 55. As a rule the intent is to be gathered from what is done, as there must be an act as well as an intent to constitute the offense. *The People v. Murray*, 14 Cal., 159. Hence the necessity of stating the particular acts constituting the alleged attempt.

In the case at bar there is not a single fact alleged showing an attempt on the part of the defendant to improperly influence jurors. That is, there is no statement of what he did. The information therefore fails to state an offense.

Second. To what extent may a court punish for contempt not committed in its presence, in other words, constructive contempt?

Sec. 669 of the code provides that: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: *First*, disorderly, contemptuous, or insolent behavior towards the court, or any of its officers, in its presence; *second*, any breach of the peace, noise, or other disturbance tending to interrupt its proceedings; *third*, willful disobedience of, or resistance willfully offered to any lawful process or order of said court; *fourth*, any willful attempt to obstruct the proceedings or hinder the due administration of justice in any suit, proceedings, or process pending before the courts; *fifth*, the contumacious and unlawful refusal of any person to be sworn or affirmed as a witness, and when sworn or affirmed the refusal to answer any legal or proper interrogatory."

Section 670 of the code provides that: "Contempts committed in the presence of the court may be punished summarily; in other cases, the party upon being brought before the court shall be notified of the accusation against him, and have a reasonable time to make his defense."

Section 671 of the code provides that: "Persons pun-

ished for contempt, under the preceding provisions, shall nevertheless be liable to indictment, if such contempt shall amount to an indictable offense; but the court before which the conviction shall be had may in determining the punishment take into consideration the punishment before inflicted in mitigation of the sentence."

In *Stewart v. The People*, 3 Scammon, 395, the supreme court of Illinois say: "Contempts are either direct, such as are offered to the court while sitting as such, and in its presence, or constructive, being offered not in its presence, but tending by their operation to obstruct and embarrass or prevent the due administration of justice. Into this vortex of constructive contempts have been drawn by the British courts many acts which have no tendency to obstruct the administration of justice, but rather to wound the feelings or offend the personal dignity of the judge."

Erskine, in a letter to a member of the bar, very clearly stated the general principle (27 Howell State Trials, 1019) as follows: "Every court must have power to enforce its own process and to vindicate contempts of its authority; otherwise the laws would be despised; and this obvious necessity at once produces and limits the process of attachment. Wherever an act is done by a court which the subject is bound to obey, obedience may be enforced and disobedience punished by that summary proceeding. Upon this principle, attachments issue against officers for contempt in not obeying the process of courts directed to them as ministerial servants of the law; and the parties on whom such process is served may, in like manner, be attached for disobedience. Many other cases might be put, in which it is a legal proceeding, since every act which tends directly to frustrate the mandates of a court of justice is a contempt of its authority. But I may venture to lay down this distinct and absolute limitation of such process, namely, that it can only issue in cases where the court which issues it has awarded some process, given some judgment, made

some legal order, or done some act which the party against whom it issues, or others on whom it is binding, have either neglected to obey, contumaciously refused to submit to, incited others to defeat by artifice or force, or treated with terms of contumely and disrespect in the face of the court."

The court undoubtedly has power to punish for contempt any attempt to corrupt or unlawfully influence jurors, notwithstanding such party may likewise be indicted for the same offense. This power is necessary to enable the court to administer justice.

Third. The proceeding against a party for constructive contempt must be commenced by an information under oath, specifically stating the facts complained of; an attachment may then be issued, or order to show cause. The person accused has the right to be heard, either personally or by attorney. If the alleged contempt is admitted, the court may render judgment thereon. If the acts complained of are denied, the court should then hear the evidence and determine whether the party is guilty or not. No jury is allowed, as the question involved affects the administration of justice, and may require the prompt action of the court or judge to prevent an obstruction of the law or a failure of justice.

Summary punishment for contempt is held not to be an infringement of the constitution which guarantees to every citizen a trial by jury. *State v. Doty*, 32 N. J. L., 403. *State v. Mathews*, 37 N. H., 450. *Patrick v. Warner*, 4 Paige, 397. *Ex parte Grace*, 12 Iowa, 208. This power, however, is to be exercised only where no other adequate remedy can protect public justice from obstruction. *State v. Anderson*, 40 Iowa, 207. *In re Hirst*, 9 Phila., 216.

Fourth. Can a judgment against a party guilty of contempt be reviewed by this court? We have no hesitation in answering the inquiry in the affirmative. A large number of cases might be cited holding that there can be no

review, but they are not applicable here. At common law a conviction of a criminal offense was final and not subject to review. And the courts applied the same rule to a conviction for contempt. But the court would look into the charge to see if it was such an offense as gave the court jurisdiction. Thus in *Bushell's Case*, Vaughn, 135, where the jury were fined and imprisoned for disregarding the instructions of the court and finding the prisoners not guilty, the jury was discharged on habeas corpus because the proceeding was unauthorized and an arbitrary exercise of power. See also *Burdet v. Abbott*, 14 East, 60–70. There is no good reason shown in any case that we have examined why cases of contempt are not subject to review. *Commonwealth v. Newton*, 1 Grant (Penn.), 453. *Ex parte Rowe*, 7 Cal., 175. *Ex parte Langdon*, 25 Vt., 680. *Regina v. Paty*, 2 Ld. Raym., 1106, 1115. Coke on Lit., 288. *Bickley v. Commonwealth*, 2 J. J. Marsh, 572. *Stuart v. People*, 3 Scam., 395. *Vertner v. Martin*, 10 Smede & Mar., 103. *Baltimore & Ohio R. R. Co. v. City of Wheeling*, 13 Grat., 40. *Ex parte Yates*, 6 Johns., 337. *M'Credie v. Senior*, 4 Paige, 378. *The People v. Craft*, 7 Paige, 325. *Albany City Bank v. Schermerhorn*, 9 Paige, 372. *The People v. Farman*, 2 Am. Law Rev., 353. *The People v. Hackley*, 24 N. Y., 74. *Pitt v. Davison*, 37 N. Y., 235. *Vilas v. Burton*, 4 Am. Law Reg., 168. *In re Hummell*, 9 Watts, 416.

The judgment of the district court is reversed and the defendant discharged.

JUDGMENT ACCORDINGLY.

WILLIAM L. GRAY, APPELLANT, V. CATHERINE B. GRAY, APPELLEE.

1. **Equity:** TITLE TO REAL PROPERTY: HUSBAND AND WIFE: STATUTE OF LIMITATIONS. In an action in equity between divorced husband and wife for the title to two city lots, commenced in 1880, the proof shows that in 1856 Enos Lowe and Jesse Lowe, the latter acting as a member of the Omaha City Company, quit claimed to the plaintiff lot 6, in block 204½, in Jeffrey's addition to Omaha. The plaintiff erected a dwelling house thereon, and with the defendant, they being then living together as husband and wife, went into the occupancy of the same. In 1859, the then mayor of Omaha, who in his official capacity held the legal title thereto from the United States, conveyed the same, together with an adjoining lot, to the defendant. This deed was immediately recorded, and the plaintiff had knowledge of the same. *Held*, Barred by the statute of limitations. Sec. 6, title ii, civil code, p. 531, C. S.

2. ———: ———: ADVANCEMENT TO WIFE. G. having acquired an equitable title to certain real estate, acquiesced in the same being conveyed to his wife by the person holding the legal title thereto. *Held*, That the same will be presumed to have been intended by G. as an advancement to his wife, and to create no trust. In this case such presumption is not overcome by testimony. *Bartlett v. Bartlett, post* p. 456.

APPEAL from the district court for Douglas county. Tried below before SAVAGE, J.

C. A. Baldwin, for appellant.

Albert Swartzlander, for appellee.

COBB, J.

From the testimony in this case, it appears that in 1855 or 1856, before the entry of the town site of Omaha, the parties, husband and wife, came to that place and were by the original proprietors allowed to take up and occupy as a homestead two city lots in the north part of the city. Here

the plaintiff erected a dwelling house, with other structures and appurtenances, and resided thereon for many years. In the first part of the year 1859, the town site of Omaha having been entered under the town site law, the said two lots were by the then mayor of that city, for the consideration of four dollars and sixty cents, conveyed to the defendant. The deed was placed on record January 3, 1859. The testimony is conflicting as to how the property came to be deeded to Catherine B. Gray instead of William L. Gray, the husband and head of the family, but the weight of testimony is to the effect that she had authority, either general or special, from him to take the title in her name, and that he knowing the facts at the time, or shortly after the execution and delivery of the deed, acquiesced therein.

It appears that about the year 1873, the plaintiff on account of domestic infelicity between him and the defendant, the precise nature or cause of which does not appear, separated from the defendant and left the state. On or about the third day of May, 1877, the said defendant commenced an action in the district court of Douglas county against the plaintiff for a divorce on account of the desertion of, and failure to support her, the defendant in this action. Afterwards, on the twenty-third day of June, 1877, the plaintiff herein, as defendant in said action, filed his answer therein, in which he denied that he had deserted or refused to support the said plaintiff in said action, but alleged that she was of so irascible and ungovernable temper as to make it impossible to occupy the same house with her. The said plaintiff herein also, in and by his said answer as defendant in the said action, alleged "that during the continuance of the said marriage, defendant by his industry acquired a large amount of property, to-wit: lots 6 and 7, in block 204½, in the city of Omaha, and built thereon out of the proceeds of the sale of other property by him acquired, and his labor, divers, to-wit: two houses,

and that the said property is of the value of about four thousand dollars. That by repeated solicitations and at plaintiff's request, defendant permitted the title to said property to be made to her, and that she has since so holden it," etc; and the said plaintiff in and by his said answer as defendant in the said action, prayed "that an equitable division of said property be made and plaintiff decreed to convey the premises to the defendant; that in the meantime the court will order that an equitable proportion of the rents and income be paid to this defendant," etc.; and it further appears that, on the twenty-first day of November, of the same year, the said plaintiff, as defendant in the said action, by his attorneys withdrew his said answer in the said action, and then and there allowed the said defendant, plaintiff in said divorce suit, to take a final judgment upon an *ex parte* trial, and in default of an answer from the said plaintiff, as defendant therein.

It appears from the record that the plaintiff is quite an old man and in indigent circumstances, and the defendant is an old woman, insane, and now is, and for the past several years has been, an inmate of the state hospital for the insane. Such being the case, we have examined and considered it with unusual anxiety, hoping that the facts might prove to be such as to afford to the court an opportunity to grant some measure of relief to the plaintiff. But we find more than one insuperable objection to disturbing the decree as made by the district court.

In the first place, the case is barred by the statute of limitations. Section 6 of the code provides that: "An action for the recovery of the title or possession of lands, tenements, or hereditaments, can only be brought within ten years after the cause of action accrued." This is an action in equity for the recovery of the title to lands. The testimony of the witness George Gray, together with the plaintiff's own statement in his sworn answer in the divorce case, forces the conclusion that the plaintiff knew of this

title being in the defendant shortly after the execution and delivery of the deed from the mayor of Omaha to her. That was more than twenty years before the commencement of this action. If the case does not come within the provisions of the statute above quoted, then it is covered by those of the sixteenth section, which provides that: "An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued." In any view of the case, the answer of the guardian *ad litem* setting up the statute of limitations presents a complete answer to the cause of action set up in the petition and established by the testimony. This was in effect a voluntary conveyance from husband to wife, and as this court holds in the case of *Bartlett v. Bartlett*, following, must be presumed to have been an advancement, and there is not sufficient testimony before us to overcome that presumption.

The decree of the district court must be affirmed.

DECREE AFFIRMED.

HENRY BARTLETT, PLAINTIFF AND APPELLEE, V. EDWARD BARTLETT, ADMINISTRATOR, AND JAMES ROBERTS, ET AL., HEIRS-AT-LAW OF ELIZABETH BARTLETT, DECEASED, DEFENDANTS AND APPELLANTS.

Equity: TITLE TO REAL PROPERTY: HUSBAND AND WIFE. B. bought a one-third interest in a nursery business from H. Bros., giving them in payment therefor his promissory note for nearly fourteen hundred dollars, at one year, with interest. Some months thereafter a misunderstanding arose between the partners B. and H. Brothers, whereupon B. left the business to the sole care of the H's, but there appears to have been no formal dissolution of the partnership or settlement between the partners.

There were some debts outstanding against the partnership. Repeated attempts and efforts were made on the part of B. to effect a settlement with the H's, but without avail. Pending this condition of things, B. bought and paid for, out of his own means, several pieces of real estate, and as he expressed it, "For the purpose of scaring Captain Hill into a settlement," had the deeds to said real estate made to his wife. Afterwards there was an arbitration of the partnership and nursery business between B. and the H's, and about fifteen hundred dollars found due the latter, which was paid, the title to said real estate still remaining in E. B., the wife. She died intestate, leaving no child, father or mother, but leaving brothers and a sister, who are the heirs-at-law, defendants and appellants in this action. Action by B. against the heirs-at-law of E. B., for the purpose of declaring a trust in said lands. On appeal, *Held*, That having thus placed his property for the purpose of hindering and delaying his creditor, a court of equity can grant him no relief.

THIS was an action brought in the district court of Thayer county, by Henry Bartlett, who, in his petition claiming title to certain real estate, set up that Elizabeth Bartlett, now deceased, was his wife, that she died in November, 1878, and that there were no children born unto them, having no father or mother living, and that James Roberts and others were brothers and sisters of deceased; that at the date of her death she held deeds to said property; that she never purchased the same, but that plaintiff purchased and paid the consideration therefor; that said deeds were made to said Elizabeth to hold in trust and for use and benefit of plaintiff, etc.; and praying for a decree accordingly. Decree below in his favor by WEAVER, J., and defendant's appeal.

O. H. Scott and *A. R. Scott*, for appellants.

When the facts which tend to show a resulting trust in a person also show a contrivance of such person to hinder, delay, or defraud his creditors, no trust will result from such fraudulent transactions, or be regarded in a court of equity. *Orton v. Knab*, 3 Wis., 510. *Tipton v. Powell*,

2 Coldw. (Tenn.), 19. *Towlks v. Harris*, Central Law Journal, vol. 5, 181. Where, with an intention to defraud or delay creditors, a voluntary conveyance is made, no trust arises which the fraudulent grantor can enforce in equity. *Burleigh v. White*, 64 Maine, 23. *Eyre v. Eyre*, 19 New Jersey Eq., 42. *Vicks v. Flowers*, 1 Murph. (N. C.), 321. *Trimble v. Doty*, 16 Ohio St., 131. *Robinson v. Robinson*, 17 Ohio St., 483. *Tremple v. Barton, Jr.*, Ohio, 423. Perry on Trusts, 133, secs. 164–5. *Blont v. Casten*, 47 Ga., 534.

Colby & Hazlett, for appellee, cited: 1 Perry on Trusts, sec. 143. Hill on Trusts, p. 108. *Kellogg v. Wood*, 4 Paige Ch., 579. *McGoun v. Knox*, 21 Ohio State, 551. *Taylor v. Taylor*, 4 Gilm., 203. *Guthrie v. Gardiner*, 19 Wend., 414. *Jackson v. Matsdorf*, 11 Johns., 91.

COBB, J.

No doubt the law is correctly stated by Mr. Perry in his work on trusts and trustees, in the following words: "Where, upon a purchase of property, the conveyance of the legal title 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 trust immediately arises from the transaction; and the party named in the conveyance will be a trustee for the party from whom the consideration proceeds." "But," (says the author of the same book) "if the purchaser take the conveyance in the name of a wife, or child, or other person, for whom he is under some natural, moral, or legal obligation to provide, the presumption of a resulting trust is rebutted, and the contrary presumption arises, that the purchase and conveyance were intended to be an advancement for the nominal purchaser. The transaction will be regarded *prima facie* as a settlement upon the nominal grantee, and if the payer of the money claims a resulting trust, he must rebut this

presumption by proper evidence." In the case at bar, there is no room for doubt that the real estate in question was purchased by and paid for with the money of the plaintiff, and the title placed in the wife, now deceased, by his direction. These facts, as we have seen, raise the presumption of an advancement. Is that presumption overcome by competent testimony?

From the record before us, it is impossible to say whether the plaintiff's own deposition was received in evidence by the court or not. Its taking was objected to by defendants. It was taken nevertheless, and the objection does not seem to have been renewed at the hearing. Had it been, the deposition must have been excluded, as the defendants were defending as the representatives of a deceased person. Rejecting the deposition of plaintiff, there is, as we think, no evidence at all sufficient to overcome the presumption of advancement. In his deposition he testifies to sufficient probably to overcome such presumption, but at the same time he states as his reason and purpose in placing these titles in his wife's name, "to try to scare Captain Hill into a settlement." In his cross examination he says: "I had it deeded to her because I could not get a settlement out of Captain Hill. He was running the business in his own name for two years after I went out of the business, and I did not know what he was doing, and I wanted a settlement." The deponent puts this in various ways in the course of his deposition, all about to the same effect; he also stated his object in making this disposition of his property to some other witnesses out of court, who were permitted to state the same in their respective depositions. There was also a special finding of the court on this subject. These statements and findings, viewed in the light of the testimony of the other witnesses, all on the part of plaintiff, amount substantially to this: Some two or three years previous to these conveyances to the deceased, plaintiff had bought into a nursery business with Messrs. Hill

Brothers, giving them for the share purchased his note for about fifteen hundred dollars, which remained unpaid at the time of these transactions. Some months after said purchase, plaintiff conceived the idea that he had been defrauded, and went out of the concern, leaving Captain Hill to the sole management of the business. Whether the plaintiff's name continued to be used as a partner in the nursery business after he "went out" does not appear, but it is presumed that it did. There were certain debts owing by said firm when plaintiff bought into it, upon which judgments were afterwards rendered, which were in force and unsatisfied at the date of these transactions. Whether any partnership debts had been incurred by Messrs. Hill while the name of plaintiff was still connected with the business does not appear, but it is evident that plaintiff feared that there had been. Witness the following from his deposition:

"I stated in my examination that I had it deeded to her because I could not get a settlement out of Capt. Hill. He was running the business in his own name for two years after I went out of the business, and I did not know what he was doing, and I wanted a settlement.

"Q. How did you intend to scare Capt. Hill into a settlement by taking the deeds to your wife? What effect would that have?

"A. I thought may be it would bring him to some settlement."

Some time after the real estate in question was purchased and the deeds taken in the name of the wife of the plaintiff, the plaintiff and said Captain Hill submitted their matters of difference to arbitration; the arbitrators found the plaintiff indebted to Capt. Hill in the sum of fourteen hundred ninety-three dollars and forty-two cents, which amount was afterwards paid, partly in land and partly in a note secured by a mortgage on other lands.

Thus we see from the plaintiff's own showing that, be-

ing considerably indebted to Hill, he sought to deceive him as to the amount of his (plaintiff's) property, and thereby induce him to settle.

The law as stated by the author above cited is that: "If a purchaser and payer of the money take the conveyance in the name of a wife or child, for the purpose of delaying, hindering, or defrauding his creditors, the conveyance is void, or a trust results, which the creditors can enforce to the extent of their debts."

It is not the duty of a court of equity to make nice distinctions for the purpose of saving a party from the consequences of his own fraudulent acts [I use the words in their legal and not in their moral sense] nor can they do it without removing those landmarks which have been found necessary to the security of property. The plaintiff sought to do that which, to call it by the softest name possibly applicable to it, was deceitful and unfair toward his creditor; was intended to deceive and mislead, if not to hinder and delay him, in the language of the law. In so doing he has placed his property where equity cannot follow it. In other words, having for such a purpose placed the title where it is, that purpose being presumably accomplished, he cannot be heard to call upon a court of equity to place him where he would have been, in respect to this title, had no such deceitful course been pursued.

In our view, there is not sufficient evidence to sustain the findings or decree of the district court. The decree is therefore reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

H. W. CUNNINGHAM AND CHARLES D. GIBBS, PLAINTIFFS IN ERROR, V. WILLIAM TONNEMAKER, DEFENDANT IN ERROR.

Practice in Supreme Court: AFFIRMANCE OF JUDGMENT. When a cause is submitted to this court on a record so imperfect as to render it impossible to tell therefrom whether the facts assigned for error exist or not, the judgment of the court below will be affirmed.

ERROR to the district court for Harlan county.

John Dawson, for plaintiff in error.

C. O. Whedon, for defendant in error.

BY THE COURT.

The only point made in the petition in error in this case is that "the court erred in affirming said judgment before said action stood for trial."

There was no argument made, nor brief filed in this case by either party. So we do not know upon what provision of law the plaintiff in error relies.

The petition in error to the justice of the peace was filed in the office of the clerk of the district court, on the 11th day of March, and precipe for summons filed on the 13th, but the transcript does not show that any summons was ever issued or served. Neither does the transcript show on what day of any month, or on what day of the term, the proceedings were had in the district court which resulted in the affirmance of the judgment. The record also fails to show the appearance of either party in open court, either in person or by attorney, and of course shows no exception taken to any proceeding by the plaintiff in error. In short, the record is too defective to enable the court to examine the question sought to be raised.

The district court of Harlan county is a court of general jurisdiction. All presumptions are in favor of the regularity of its proceedings. To enable this court to hold them irregular, it must be put in possession of a record thereof sufficiently clear to enable the court to see what that court has done, or what it has failed to do, in the case before it. The record before us being insufficient for that purpose, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

J. E. COBBEY, PLAINTIFF IN ERROR, v. J. H. BERGER AND OTHERS, DEFENDANTS IN ERROR.

1. **Misdemeanor:** COMPLAINT: COSTS. In cases of complaint for misdemeanor, before a magistrate, whether the case is tried on the merits or dismissed before trial, costs can be adjudged against the complainant, only after a finding that the complaint was without probable cause or malicious.

2. ———: ———: ———: ACTION BY OFFICER. Whether under our code an action can be maintained, in any event, by an officer for fees earned in a misdemeanor case before a magistrate, against the complainant or security for costs given under the provisions of sec. 287 of the criminal code—*Quære.* But no such action can be maintained unless it has been found by such magistrate that the complaint in such misdemeanor case was malicious or without probable cause.

ACTION by plaintiff to recover fees due him as county judge, in an action wherein Berger made complaint before him in a misdemeanor case. The defendants acknowledged themselves on the complaint "as surety and responsible for costs in this case." Judgment below before WEAVER, J., in district court of Gage county, for defendants.

J. E. Cobbey, pro se, cited: *Morton v. Bailey,* 1 Scam., 213. *Davis v. Farmer,* 28 Mo., 54. *Moore v. Porter,* 13 Sergt. & Rawle, 100. *Caldwell v. Jackson,* 7 Cranch, 276.

Pemberton & Forbes, for defendants in error, cited: *Sovereign v. The State*, 4 Ohio State, 490. *State v. Campbell*, 19 Kan., 481. *State v. Donnell*, 11 Iowa, 452.

COBB, J.

The complainant, in a misdemeanor case before a justice of the peace or county judge, is responsible for the costs only when the complaint was malicious or without probable cause. In a case like that at bar, where the complaint was dismissed and no trial had on the merits, the complainant (or other person as security) can only be held for costs where, before issuing the warrant, the magistrate shall require, and the said complainant shall, with or without security as required by the magistrate, acknowledge himself responsible for costs in case the complaint shall be dismissed, as provided in sec. 287, Comp. Stat., 710. And then only when the magistrate shall, on entering the order of dismissal, also in some way adjudge, decide, order, or enter the opinion that the complaint was without probable cause. In that case the magistrate should then and there enter a judgment against the complainant or such other person as has, under the provisions of said section, acknowledged himself bound for the costs. The agreement to pay costs, set out in the petition, is not such an one as the law provides for the magistrate to take; and while, had he found that the complaint was without probable cause, and proceeded to enter judgment for costs against the signers of said agreement, the same might have been held binding, it is very clear that, being without the terms and scarcely within the spirit of the statute, no action at law could be maintained upon it, even had there been a finding that the complaint was without probable cause; and without such finding, no liability rests upon such complainant to pay the costs in any event.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

JACOB CASEBEER, PLAINTIFF IN ERROR, V. MARY DRAHOBLE AND JOHN CASEBEER, DEFENDANTS IN ERROR.

1. **Malicious Prosecution:** EVIDENCE. Action for malicious prosecution against two defendants. The record of the alleged malicious prosecution was offered in evidence. It was rejected because the complaint was not signed by both defendants, *Held*, Error.

2. ———: WHEN RIGHT OF ACTION ACCRUES. In a case of malicious prosecution, *Held*, That the right of action accrues "whenever the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one."

ACTION for malicious prosecution, brought in the district court for Gage county. Trial below before WEAVER, J., and judgment for defendants.

Pemberton & Forbes for plaintiff in error, cited 3 Gilm., 306. Cooley on Torts, 187. *Clements v. Ohrly*, 61 Eng. Com. Law, 686. Cooley, 133. *Wells v. Parsons*, 3 Har., 505. Bliss Code Pl., sec. 82. *Miller v. Milligan*, 48 Barb., 30.

George M. O'Brien, for defendants in error, cited: 1 Greenleaf on Evidence, sec. 51. *Malcomson v. Clayton*, 13 Moore, 198.

COBB, J.

The first thing necessary to prove on the part of the plaintiff was that he had been prosecuted for the crime alleged. A proper if not the only way to do this was by producing the record or records of such proceedings. These records, upon being offered by the plaintiff, were excluded on the ground that the complaint in either case was not signed by both defendants. We do not think it necessary that either of the defendants should have actually

made the complaint, but that proof that they caused the plaintiff to be prosecuted would be sufficient on that point. Much less was held to be sufficient by Lord Denman in the case of *Clements v. Ohrley*, 61 English Common Law, 686, cited by counsel for plaintiff in error, but that is rather an extreme case.

We think the allegations of the petition sufficient as to the termination of the alleged malicious prosecutions. While there is a conflict of authorities, the weight of authority as well as of reason is in favor of the position that the right of action is complete whenever "the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one." Such is the rule laid down by Cooley, and we think it correct.

We do not examine the other points raised, because whatever might have been their merits, it is quite obvious that had the district court been right in excluding the records of the county court and justice of the peace, that would have been fatal to the plaintiff's case whatever other evidence was admitted or rejected.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE STATE OF NEBRASKA, EX REL. THOMAS HOPPER, V. SCHOOL DISTRICT NO. 13, IN WEBSTER COUNTY, ET AL.

1. **School District Bonds:** IRREGULARITIES IN ORGANIZATION OF DISTRICT. Irregularities in the organization of a school district are no defense to an application for a writ of mandamus to compel the payment of its bonds. *State, &c., v. School District No. 24, ante* p. 78.

2. ———: ELECTION. An election was held for the purpose of voting school district bonds to raise money to build a school house. Nineteen voters, being all of the male inhabitants of the district over the age of twenty-one years, attended said election and voted, except seven, some of whom were absent in other states and some in a distant part of this state, all of whom had been absent for a period of four months, and none of whom were expected to return within less than a month after said election; and one who knew of said election but did not attend for the reason that he was about to remove from said district In an application for a writ of mandamus to compel the payment of bonds voted at said election, *Held*, That this court would not inquire into the alleged want of a request signed by at least five electors for the calling of such election, or whether the notice therefor was published for the length of time required by the statute.

ORIGINAL action of mandamus to compel the levy of a tax to pay school district bonds.

Mason & Whedon, for the relator, cited: *People v. Newberry*, 87 Ill., 41. *Trumbo v. The People*, 75 Id., 561. *School District v. Cowee*, 9 Neb., 53. *Dean v. Gleason*, 16 Wis., 18. *Ellis v. Karl*, 7 Neb., 389. *Fisher v. S. D. No. 17*, 4 Cush., 494. *Mills v. Gleason*, 11 Wis., 493. *Bank v. Chillicothe*, 7 Ohio, 354.

J. S. Gilham, for respondent, cited: *School D. v. Perkins*, 21 Kan., 534. *School District v. Thompson*, 4 Minn., 280. *Burgess v. S. D.*, 100 Mass., 132. *Jordand v. State*, 38 Wis., 164. *Pratt v. Swanston*, 15 Vermont, 147. *Zottmein v. San Francisco*, 20 Cal., 96. *Taylor v. Dist.*, 26 Ia., 281. *Taylor v. Wayne*, 25 Ia., 447. *Shepherd v. Richland*, 32 Ia., 595.

BY THE COURT.

The respondents in this case seek to deny the existence of said school district as a body politic and corporate at the date of the voting and issuing of the bonds for the payment of which this suit is brought.

In the case of the *State, ex rel. Gregory, v. S. D., 24, ante* p. 78, this court by the C. J., say: "It must be conceded that considerable irregularity attended the organization of the district, but there is nothing to show that there was any bad faith on the part of any one connected therewith. * * * But we are of the opinion that this irregularity is now of no consequence. Nobody objected at the time to the course pursued; all seemed to have been satisfied, and objection now comes too late. As a body politic this school district had its inception in these irregular steps, and has continued an existence then begun until now. Having given to the district its life, the effectiveness of these steps ought not now, after the lapse of over nine years, to be called in question." These views, which are adhered to, apply with equal force to the case at bar. But there is one point urged against said organization upon which considerable testimony was taken, and which perhaps deserves more than a passing notice. The law then in force, after providing for the election of officers at the first meeting after the formation of a new district, their official designations, and terms of office, provides that "within ten days after their election, these several officers shall file with the director a written acceptance of the offices to which they shall have been respectively elected," etc., and section 13 provides as follows: "Every such school district shall be deemed duly organized when any two of the officers elected at the first meeting shall have filed their acceptance as aforesaid;" and section 14 provides that: "In case the inhabitants of any district shall fail to organize the same in pursuance of such notice as aforesaid, the said county superintendent shall give a new notice in the manner hereinbefore provided, and the same proceedings shall be had thereon as if no previous notice had been delivered." Gen. Statutes, 963. According to the record the office of director was accepted in writing by Simeon Brown, and that of moderator in like manner by M. C.

Williamson, on the twenty-eighth day of September, 1872, within ten days after their election at said first meeting, so that according to the record, the organization of said district was complete on the twenty-eighth day of September, 1872. The record is in each instance over the undisputed signature of the officer thus accepting. But the deposition of M. C. Williamson is offered to impeach this record, in which he testifies that he did not in point of fact accept the office of moderator of said district until the third day of February, 1873. If this be accepted as true, then the district was not legally organized. But can Mr. Williamson's deposition be now received to discredit his official record made ten years ago? We think not. He was elected to an office, not of emolument or great honor, but one of onerous and thankless duties, and calling for a high degree of personal integrity of the incumbent. The law made it his duty to accept the same in writing within ten days after his election, and made important results to depend upon such acceptance. Upon the first occasion of his being called upon to act in an official capacity, an interested party, examining in the proper place, would have found the record which he was required to make as the crowning step in the organization of a corporation designed to be perpetual. Now, after this corporation has occupied a place in the educational system of the state for a period of ten years, during which it has enjoyed all the rights and incurred many of the obligations proper to the purposes of its existence, it is proposed by the testimony of this man to put the ban of illegitimacy upon it and all its acts. It is only necessary to state this proposition to show that it is inadmissible.

The proof shows that the first act of the officers of the newly formed district was to complete their own organization by the appointment of a treasurer, the treasurer elected at the first meeting having failed to accept. They went on to call and hold an election upon the question of borrow-

ing money to build a school house, which, being completed sometime in the summer of 1873, has since been used by the said district for all the legitimate purposes of a school house, and has been, and is, the only house owned or used by the said school district. Said school district has hired teachers, levied taxes, held its annual school meetings, and for nearly ten years continued to do and enjoy every act, right, and privilege that appertain to any school district under the laws of this state, and all of this based upon the organization which is here called in question. Certainly the district as a corporation, as well as all of its officers and inhabitants, are now estopped to question the legality of its existence.

The testimony does not show that any request signed by five legal voters of the district was made for the calling of the special meeting at which the said bonds were voted, nor that notice of said special meeting was given in all respects as required by statute, but it does show that the proposed meeting and its purposes was known to every voter then in the district, and what is quite unusual, every one of them (with possibly one exception) attended the meeting and voted for or against the issuing of the bonds. The object of the provision requiring a request signed by at least five voters to be presented before a special meeting may be called, is to prevent the school officers calling such meeting when there is no desire for it or sentiment in its favor in the district, and the object of the provision requiring notice is that no meeting shall be held without all the persons entitled to participate therein having a fair opportunity to know the time and place thereof in time to enable them to attend such meeting. The statute provides, sec. 22, Gen. Stat., p. 965, that: "No district meeting shall be deemed illegal for want of due notice, unless it shall appear that the omission to give such notice was willful and fraudulent." Special meetings to provide for the location or removal of sites for school houses are excepted

from this liberal provision, but such meetings for the purpose of voting bonds or voting on the question of borrowing money are not. It does not appear to this court that the failure to give the statutory notice in this case—if there was such failure—was either willful or fraudulent. However, it must be admitted that the testimony on the part of the respondent goes some length towards developing a motive for fraud on the part of the friends of the measure.

It seems that of the nineteen alleged legal voters of the district seven were young men, without families, who had come to the state from states further east, or from the eastern part of the state to Webster county in the year 1872, had taken up homesteads or pre-emptions within the bounds of this district, and had gone back to their former homes and occupations to spend the winter and early spring, which the very liberal interpretation of the homestead and pre-emption laws then prevailing enabled them to do. It is assumed that all of these were opposed to bonding the district, and it is urged that the calling and holding of said election by the old and permanent inhabitants during such absence is evidence of fraud. But there is an essential element of fraud wanting in this branch of the case even as presented by the respondent. It is not claimed that the absence of these seven persons from the district was in the remotest degree attributable to any act or procurement of any of those who called this election or voted to issue these bonds. And it will scarcely be contended that a minority of one-third can control the acts of the majority by absenting themselves for such period as may suit their convenience. From the testimony it may appear that had all these absentees been present at the meeting and voted, the proposition to issue the bonds in question would probably have been defeated. But we know of no authority for counting votes never cast, and there can be none except where voters are kept from the election or ballot box by violence or fraud.

In addition to authorities cited by counsel, see *State, ex rel. Gregory, v. S. D. 24, ante* p. 78, and *State, ex rel. Kimball, v. S. D. 4, ante* p. 82.

PEREMPTORY WRIT ALLOWED.

EDWARD V. HOLLAND, PLAINTIFF IN ERROR, V. JOHN W. GRIFFITH, DEFENDANT IN ERROR.

1. **Replevin:** MORTGAGED PROPERTY: EVIDENCE. In an action of replevin the defendant justified the taking and detention of the chattels replevied by virtue of a chattel mortgage. Plaintiff replied that the said mortgage, after the same was executed and before it was filed for record, had been altered in a material respect, to-wit: by erasing the description of the property and writing in the description of other and different property without the knowledge or consent of the mortgagor; also, that the note and mortgage were obtained from the plaintiff by the defendant by fraud and false representations, in this, that the said defendant represented to the plaintiff that he had ownership of certain territory for the manufacture and sale of certain patented articles; that for the amount agreed upon, to-wit: three hundred dollars, he, the defendant, would sell and convey to the plaintiff a certain amount of said territory, whereupon plaintiff accepted and delivered the note and mortgage, and for no other consideration; and that said defendant had no right or title to the territory he attempted to convey to the plaintiff. At the trial plaintiff introduced, over the objection of the defendant, a paper, a copy of which is set out in the opinion. *Held*, Error.
2. **Verdict against Evidence.** When the verdict is so clearly against the weight of evidence as to lead to the conviction that it was the result of passion, prejudice, or inadvertence on the part of the jury, it will be set aside and a new trial granted. *Fried v. Remington*, 5 Neb., 525.

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

Hastings & McGintie, for plaintiff in error.

J. H. Grimm, for defendant in error.

COBB, J.

This was an action of replevin brought by Griffith for certain live stock taken on a chattel mortgage executed by the defendant in error to the plaintiff in error, to secure a note given for the right to sell certain patented articles within certain counties of the state. The defendant in error, in and by his reply and supplemental reply in the court below, alleged that the said mortgage, after it was executed and delivered, and before the same was filed for record, had been altered in a material respect, to-wit: by erasing the description of the property and writing in the description of other and different property, and that without the knowledge or consent of the said plaintiff; also that the said note was obtained from the said plaintiff, by the said defendant, by fraud and false representations, in this, that the said defendant represented to the said plaintiff that he had legal ownership of certain territory for the manufacture and sale of certain patented articles. That for the amount agreed upon, to-wit: the sum of three hundred dollars, he, the defendant, would sell and convey to the plaintiff a certain amount of said territory; whereupon plaintiff accepted, and delivered the note and mortgage, and for no other consideration whatever, and that said defendant had no right or title to the territory he attempted to convey to the plaintiff, etc.

On the trial the efforts of the plaintiff were almost wholly confined to proving that the patented articles would not sell, and that the mortgage had been altered without the knowledge or consent of the plaintiff below. There was no testimony as to any representation made by the plaintiff in error to the defendant in error to induce him to buy the right to sell the patented articles mentioned in the reply, nor any evidence that these representations, which are

alleged in the plaintiff's reply to have been made by the defendant, were not true. There was introduced by the plaintiff, and admitted over the objection of the defendant, a paper, of which the following is a copy: "Western, Saline Co., Neb., March 8, 1880. This is to certify I, E. V. Holland, does hereby agree to let J. W. Griffith take the Buckeye churn, spring seat and clothes rack, in Seward, and towns 6, 7, 8, in Saline county, range one east, and he is to do his best to sell the articles for sixty days, and at the end of that time if he thinks he can't make it pay for the right, I will take it back and give up his paper. (Signed), E. V. Holland, Gen. Agent."

This paper was clearly inadmissible under the pleadings, but having been put in evidence by the plaintiff he is bound by its provisions. In his testimony on the stand the plaintiff admits that his sole efforts to sell the patented articles were confined to three weeks and three days, nor does he claim in his testimony that his lack of success in selling them could be attributed to any defect in the patent, or lack of utility in the articles, and he expressly admits that nobody has ever questioned his right to the said territory nor disturbed him in the possession thereof.

There is a conflict of testimony on the point as to whether the alteration in the chattel mortgage was made with the consent of the plaintiff below; but I think the preponderance almost overwhelming in favor of the defendant. It is clearly established by the letter of the plaintiff to the defendant which was put in evidence, that on the twenty-second day of August, 1880, the plaintiff applied to the defendant to have the mortgage changed. He says: "I have traded the mule and colt off for a big team of mares, six and seven years old, and I will transfer the mortgage on them and release the mule and colt, if you will tell me where the mortgage is, and I have a chance to trade the ponies for a span of good young mules, if you are willing," etc. Defendant swears that the alterations in the mort-

gage were made at the house of Squire Newby, in his presence and in the presence of the plaintiff, who consented thereto, on a day between the eighth and twelfth of August, 1880. Plaintiff swears he was at Squire Newby's and in his presence on a day before the writing of the said letter, and that the defendant in his presence and in presence of the justice of the peace made the alteration in the mortgage, but that he did not agree to it. He finally admits that he made no objection. Squire Newby swears that the parties came to his house, and he being absent sent for him. Upon his return home he found them there. Defendant wanted the plaintiff to take up the mortgage and give a new one on other property. That plaintiff refused to "give any new dates," but was willing to have the old mortgage scratched and the ponies and mule written in. Witness does not remember of anything having been said about the colt. The defendant testified that after the mortgage on the span of mares had been given some three or four weeks, plaintiff said he would give other security in its place. He let it run until the first or twelfth of July; then, the plaintiff and defendant, went before Squire Newby, and he, defendant, in the presence of the plaintiff and said Newby, justice of the peace, and at the request of the plaintiff scratched out the original description of property in the mortgage and wrote in the description of the pair of ponies, the mule and colt, the property replevied; that the mortgage was afterwards recorded.

I do not think that any one can read the letter above quoted without feeling quite certain that the writer had given to the defendant a mortgage on a mule, a colt, and a pair of ponies.

The evidence as to both points is so preponderating in favor of the plaintiff in error as to force the conviction that the verdict must have been the result of passion, prejudice, or inadvertence on the part of the jury. For this reason, and for error in the admission of the above men-

tioned paper in evidence under the pleadings, there must be a new trial. The important constitutional question raised not being necessary to a disposal of the case, will not be considered.

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

REVERSED AND REMANDED.

NOTE.—In taxing the costs in the case the clerk will deduct from the amount paid for the transcript the proportion thereof paid for the affidavit in replevin, the precipe for summons, and order of delivery; the summons with the endorsement and return thereof, the order of delivery, the sheriff's return thereof, the appraisement and sheriff's certificate thereon, together with all journal entries relating to any of the said papers, none of the said papers being necessary to the solution or proper understanding of any question or point in the case.

W. S. BLOOM & CO., PLAINTIFFS IN ERROR, v. WARDER, MITCHELL & CO., DEFENDANTS IN ERROR.

1. **Practice:** FINDING NOT AGAINST EVIDENCE. In this case, *Held* That the preponderance of evidence was in favor of the view taken by the district court in its finding and judgment therein, and that it would have to be overwhelmingly opposed to it to justify a reversal of the judgment on that ground.
2. **Guaranty.** A guaranty in the following form: "For value received we guarantee the payment of the within note, and hereby waive protest, demand, and notice of non-payment thereof," *Held*, To be an absolute contract upon a lawful consideration that the money expressed in the note should be paid at the maturity thereof, at all events.

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

D. W. Barker, for plaintiffs in error, claimed that evidence showed that on a day mentioned the parties had made a complete and final settlement of all accounts, indorsements, &c., including liability of plaintiffs in error as indorsers of notes sued on; hence one who accepts with knowledge of all the facts the avails of a compromise made on his behalf, even without authority, thereby ratifies the settlement; and ratification in that manner of a part of the unauthorized transaction is a ratification of the whole. *Winpenny v. French*, 18 Ohio State, 469. The settlement was made by Witt, as agent, and defendants in error are bound by his acts. Swan's Treatise, 338. Story Agency, 135.

H. W. Short, for defendants in error.

COBB, J.

There are but two questions presented by the record in this case: 1. Is the defendant below still bound by his guaranty of the payment of the notes? 2. Are the findings and judgment of the district court sustained by the evidence? Answering the second question first, there is a clear conflict between the testimony of the plaintiff in error on his own behalf, and his witness, Adams, on the one part, and the several witnesses whose depositions were read on the other part. There is some evidence in support of the plaintiff's theory of the case as to each material point; and indeed, taking into consideration the undisputed facts as to the amount of the open account between the parties, the amount of money paid by the defendant, and the circumstances connected with the guaranteed notes, we think the preponderance of testimony is with the view taken by the district court, and it would have to be overwhelmingly against it to justify this court in reversing the judgment on that ground.

As to the first question, we think there can be no doubt the notes sued on were all drawn payable to the order of the plaintiffs, Warder, Mitchell & Co., and were endorsed as follows: "For value received we guarantee the payment of the within note, and hereby waive protest, demand and notice of non-payment thereof. W. S. Bloom & Co."

This is an absolute contract for a lawful consideration, that the money expressed in the note shall be paid at the maturity thereof at all events, and depends in no degree upon a demand of payment of the maker of the note, or any diligence on the part of the holder. See Brandt on Surety and Guaranty, sec. 170, and authorities there cited.

This case must be distinguished from cases of guaranty of collection of notes, in which class of cases it has been held that before an action would lie against the guarantor prompt and exhaustive steps must be taken to collect the money from the maker. See authority above and cases cited at secs. 83 and 84.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE UNION PACIFIC RAILWAY COMPANY v. DAVID SCHWENCK.

Railroads: DAMAGE TO STOCK: FENCING. The farm of S. was bisected by the line of the railroad. The company fenced its line, as required by the act of June 22, 1867. S. used the railroad fence on the south side of the road as the north fence of his enclosed pasture and corral. The corral consisted of about three acres, into which in the evening of the night in question he turned his twenty-three head of cattle. At the same time he looked along the line of the railroad fence part of the enclosure, and it was all up and apparently in good condition. In the

morning a board was found broken off of this part of the fence, by means of which three of the cattle had escaped—gone on to the railroad track, where two of them had been killed and the other crippled by a passing train. The testimony as to the condition of the fence, as to its soundness, was conflicting, some witnesses swearing that it was rotten, others that it was sound. Verdict and judgment for S. On error, *Held*, That S. was not guilty of contributory negligence, and the finding and judgment upheld.

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

A. J. Poppleton and *J. M. Thurston*, for plaintiff in error, cited: *Tonawanda R. R. v. Munger*, 5 Denio, 259. *C. & N. W. R. R. v. Goss*, 17 Wis., 428. *Trow v. Vermont Central*, 24 Vt., 487. *Central Branch R. R. v. Lee*, 20 Kan., 353.

Burnham & Ballet, for defendant in error, cited: *Corwin v. New York & Erie R. R.*, 3 Kern., 42. *Jefferson v. Applegate*, 10 Ind., 49. *Indianapolis v. Hughes*, 10 Ind., 502. *Rogers v. Newburyport*, 1 Allen, 16.

COBB, J.

Sec. 1 of the act of 1867, entitled "An act to define the duties and liabilities of railroad companies," provides that: "Every railroad corporation * * * shall erect and thereafter maintain fences on the sides of their said railroad * * * suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, or villages, * * * and so long as such fences * * * shall not be made after the time hereinbefore prescribed for making the same, shall have elapsed, and when such fences * * * or any part thereof are not in sufficiently good repair to ac-

complish the object for which the same, as herein prescribed, was intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines, or trains of any such corporation, or by the locomotives, engines, or trains of any other corporation permitted and running over or upon their said railroad, to any cattle, horses, sheep, or hogs thereon; and when such fences and guards shall have been fully and duly made, and shall have been kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages unless negligently and willfully done." Comp. Stat., 381.

The testimony shows that the railroad of the plaintiff in error runs through the farm of the defendant in error dividing it into two nearly equal parts east and west. The pasture of the defendant in error is on the south side of the railroad. That some twelve or thirteen years before the killing of the stock in question the railroad company fenced the line of road at this place with a good fence consisting of posts set eight feet apart and three boards sixteen feet in length. This fence on the south side of the railroad constituted the north fence of the pasture in which the defendant in error kept his cattle in the day time, and he had fenced off a corral of about three acres, for one line of which fence he used the railroad fence. The evening before the accident the defendant in error put his cattle, consisting of twenty-three head, into this corral, as was his custom, and looked along the railroad part of the fence, and it was apparently all right. In the morning the railroad fence between the cattle and the railroad track was broken, *i. e.*, the middle board broken off, three of the cattle had passed through and on to the railroad track, where by a passing train two of them were killed and one crippled.

We think that the case turns on the question, did the railroad company at this point "erect and thereafter main-

tain fences * * * suitable and amply sufficient to prevent cattle * * * from getting on the said railroad?" We will not say that the fact that the fence erected by the railroad company did not on this occasion prevent cattle from getting on the railroad track is a conclusive answer to this question. But in addition to the admitted fact of the said fence having proved as against these cattle at this time unsuitable and insufficient, there was testimony on both sides, and we think that by the instructions of the court the point was fairly submitted to the jury.

The court instructed the jury as follows: "1. The statute applicable to this case requires every railroad corporation to erect and maintain fences on the sides of their railroad suitable and amply sufficient to prevent cattle from getting on the track of said railroad.

"2. If you find that in this case the fence on the north side of what the plaintiff calls his corral was of such a character as described in the last paragraph, then you should find for the defendant.

"3. But if you find that the stock in question were killed by engines or cars of the defendant, and that said stock came on said track by reason of any imperfection in, or insufficiency of said fence, then the plaintiff would be entitled to recover."

The point upon which there was any difference in the testimony was as to the condition which the fence was in at the time of the killing. Plaintiff, who was sworn in his own behalf, testified as follows upon that point on his cross examination:

Q. Do you know what condition the fence was in?

A. Yes. At the time I closed it at night, it was all right. I looked along the railroad, and the fence was all up that very evening I put the cattle in.

On his re-direct examination, he said: "There was three boards up. It was all up. It was nailed on, and there

was no boards broken down. I examined the condition of the board that was broken down. It was rotten. There was no posts broken down or other injuries to the fence at that place. Along the line they were pretty near all burned off. A good many only have one inch or two inches to hold the post burned off by prairie fires. The cattle had broken through that fence a good many times. I notified the agent of the company, Mr. Neveman, in April. In April it was in condition to keep cattle that is in the pasture. I didn't notify the agent about the corral fence, but the fence along the pasture. Didn't notify any of the agents about the corral fence. It was a middling good fence. It was all rotten. They never broke through the corral fence before."

George Gudhardt, sworn on the part of the plaintiff, stated as follows: "My business is farming. Live three-quarters of a mile from Papillion, near Mr. Schwenck's farm. I pass his pasture two or three times a week. Lived there thirteen years."

Q. What was the condition of the plaintiff's corral fence on the 18th July, 1881?

A. I think the fence is not so they can keep cattle in. There is a good deal of posts and boards burned off. I have been there thirteen years, and that fence has been there. The posts and boards are rotten. It is not a safe fence to keep cattle. Have measured the fence. It is forty-six inches. The lowest place from the bottom board is twenty-three inches.

On the contrary Edward Nolan, sworn on the part of the defense, testified as follows: "My business is section foreman, and was on the 18th July last * * * I know where Mr. Schwenck's corral was, it was alongside of the track. Track was right close to the corral. I found the center board of the three boards was broken right close to the post. It was broken off from the post and laid on the ground. The other end of the board was fastened to the

post. Only one board broken. My business in respect to the fence was to see that it was all right and to keep it up. It was in good condition, a three board fence. I always paid attention to it and kept it in good repair. I knew that it was a corral. The cattle never broke out of that particular place, but out of the pasture. I notified Mr. Schwenck of that many times. The corral was about forty rods from where he had his cross fence. The fence was constructed of good sound boards, six inch boards, sixteen feet long. The posts were eight feet apart. There were no posts burned in that forty rods of fence. There might have been further along."

On the cross examination he said: "I have six miles of fence to look after. I am prepared to state that every board in that six miles of fence is good. I know them every single board. That is my business to examine them. They were sound last July. Whether a board will rot in eight months will depend on how sound they were. Do not take them off every eight months. I don't believe they are rotten to-day. I wouldn't believe it if a party should say so. Am in the employ of the company, and would lose my position if the fences were not properly kept up."

Here is a pretty sharp conflict of testimony, and thus a case is presented peculiarly within the province of a jury.

But upon the trial the defendant requested the court to instruct the jury as follows: "The law requires a railroad to fence its line of road against cattle running at large and against no other. It also requires the plaintiff to enclose his cattle, and not permit them to run at large in the night time. If you find that the plaintiff's cattle escaped from his enclosure and strayed upon the track of the defendant, and were killed in the night time, the defendant will not be liable," which was refused.

There was no error in the refusal to give this instruction upon the evidence in the case. It is true the law provides that: "No cattle * * * shall run at large during the

night time between sunset and sunrise * * * and the owner or owners of any such animal shall be liable in an action for damages done during the night time." In so far as these cattle were running at large in the night time, it was through no fault or want of care and diligence on the part of the defendant in error, but through the fact that the fence erected by plaintiff in error, and which it was required by statute to keep in sufficiently good repair to accomplish the objects for which the same as by statute required were intended, was not so kept. Let the case be supposed that these cattle, after escaping through the fence, instead of getting on the railroad track and being killed, had gone to the corn crib or hay stacks of the plaintiff in error, and there committed damage, and an action been brought by the plaintiff in error against the defendant in error for such damage, can there be any doubt that an answer and proof, that said cattle had escaped and become at large at the time of committing such damage through the fault or illegal act of the plaintiff in such action, would be a complete defense?

It is not claimed, nor can it be, that the defendant in error was guilty of any contributory negligence. So far as it appears to the contrary by proof, citation, or suggestion, he had the right to treat the railroad fence as a division fence, with the duty of keeping it in repair imposed solely upon the railroad company by statute. He therefore had a right to use his enclosure, one string of the fence of which was the railroad fence, for all legitimate purposes of agriculture, of which the raising, breeding, and keeping of cattle constitute an important part in this state. If the defendant in error put an improper number of cattle into his inclosure for its size, so that by reason of its crowded condition a stronger fence was required to keep the cattle in than is required for an ordinary pasture, that might possibly be considered contributory negligence. But neither by proof nor instruction prayed is that point presented in this case.

The case at bar differs from nearly or quite all of the cases cited by counsel for plaintiff in error in their brief in this, that in all of them the animals have either been permitted purposely, by those having charge of them, to be and run at large, contrary to statute or regulations, or have escaped from the control of their keepers through causes for which the railroad company was in no wise responsible. This may be said of the case of *Central Branch Railroad Co. v. Lea*, 20 Kan., 353, and most of the numerous cases there cited, as well as the Wisconsin cases.

As to the question suggested by the instruction prayed for by plaintiff in error, and stated in the second paragraph of its brief, that a fence, although "suitable and sufficient to prevent cattle * * * from getting on the railroad" in the day time, it might not be sufficient for that purpose in the night, if it be true that it requires a stronger fence to guard against the depredations of domestic animals in the night than in the day time, it was a question for the jury, and had there been testimony before them to warrant it, we must presume that it would have had its proper weight in shaping their verdict.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR, V. ERNEST ARNOLD, DEFENDANT IN ERROR.

1. **Railroads:** RIGHT OF EMINENT DOMAIN: EVIDENCE. Where persons are shown to be familiar with the value of a particular piece of land, across which a railroad has been built, they may be permitted to testify as to the value of such tract immediately before the location of the road, and to the value thereof immediately afterwards.

2. ——: CASE OVERRULED. The third point in the syllabus of the F. E. & M. V. R. R., 11 Neb., 585, modified.

3. **Exception to Evidence.** An exception must be taken to the admission of improper testimony if it is sought to review that question.

4. **Charge to Jury.** Oral statements made by the judge to the jury as to the law of the case must be excepted to, to be reviewed on error.

ERROR to the district court for Franklin county. Tried below before GASLIN, J.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error, cited: *City of Parsons v. Lindsay*, 26 Kan., 430. *F. E. & M. V. R. R. v. Whalen*, 11 Neb., 587. *Alabama R. R. v. Burkett*, 42 Ala., 83. *Harrison v. Iowa R. R.*, 36 Ia., 323. *Farrard v. C. R. R.*, 21 Wis., 435. *Evansville R. R. v. Fitzpatrick*, 10 Ind., 120.

George W. Sheppard and *W. J. Lamb*, for defendants in error.

MAXWELL, J.

The defendant is the owner of the north half of the northeast quarter of sec. 3, town 1, range 15, in Franklin county. The plaintiff located its line of railroad across said land and applied for the appointment of commissioners to appraise the damages occasioned to said land by such location. The commissioners were appointed and appraised the damages at the sum of $77. The defendant then appealed to the district court, where a verdict was returned in his favor for the sum of $450, upon which judgment was rendered. At the time of the location of the road the land above described was nearly all in cultivation, and seems to have been part of a farm of about 160 acres. Testimony showing this fact was offered by the

defendant and excluded, and as he is not here complaining, that question is not before the court.

The character of the road bed across this land is stated by the defendant in his testimony as follows:

On the east there is a 400 foot cut and 12 feet deep; then a fill 567 feet long and 22½ feet high, sloping both ways; then a cut 472 feet long and 11½ feet deep; then bridge; then fill 243 feet long, 14½ feet high in highest place; then a cut 189 feet long and 5 feet deep at the deepest place; then a fill 162 feet long and 9½ feet deep; then a cut 135 feet long and 4 feet deep; then a fill 162 feet long and 9 feet deep or high; then another cut 350 feet long and 5 feet high or deep."

This is not denied.

The first error relied upon is that the court permitted Arnold and his witnesses to testify to the amount of damages he had sustained, and in not confining them to a statement of facts and allow the jury to find the amount of damages from the facts thus detailed. A complete answer to this objection is found in the fact that no objection was made to this mode of proof.

We do not find an exception on that ground in the record. The objection therefore was waived. Aside from this the writer desires to say that a pretty full examination of the authorities since the case of the *F. E. & M. V. R. R. v. Whalen*, 11 Neb., 587, was decided, has convinced him that the proper mode of assessing damages in such cases is by calling experts—men acquainted with the land and its value, and who are capable of estimating the injury sustained. It still devolves upon the jury to harmonize the testimony as far as possible, and in case of conflict to determine which witness or witnesses have correctly estimated the damages. Unless persons familiar with the value of the land and the damages sustained are allowed to give their evidence, satisfactory verdicts cannot be expected, because the jury, unless familiar with the value of

land in that particular locality, which in most instances will not be the case, will be left entirely to conjecture as to damages, and will place them high or low as they may feel inclined or as whim or caprice may impel them. And a verdict obtained in such manner ordinarily cannot be reviewed upon the facts, because the basis upon which the jury estimated damages is not before the court. In an action for the conversion of property, experts will be allowed to testify as to its value. Likewise in an action for injury to personal property. The same rules certainly apply to the appraisement of damages for right of way. The rule in the case above cited, therefore, should be so modified as to permit experts to testify.

The second objection relied upon is that the court allowed the defendant to testify as to the particular business he was in, and to estimate the damages upon the basis of use he intended the land for. The testimony as to the business—that of brewer—in which the defendant was engaged was not improper, because he carried on the business upon the tract of land in question. And there is no testimony to which objection was made showing damages to his business. This objection, therefore, is not well taken.

The third objection relied upon is that during the progress of the trial the judge said to the jury: "I will state to the jury that they are only to consider the account for damages to the building of the brewery, if any, and not to the benefits or profits in the future." Under our system of practice it is not intended that the judge during the progress of the trial shall make oral statements or give directions to the jury calculated to affect their verdict. And if he do so and exception is taken thereto, it may be sufficient to cause the reversal of the case. The reason is, the law requires the court to state the law applicable to the facts of a case in writing, and does not permit an oral statement. But this is an error that may be waived, and will be unless exception is taken at the time. *Fry v. Tilton*, 11

Neb., 456. *Horbach v. Miller*, 4 Neb., 43. Even had this statement of the law been excepted to, it would not have been sufficient to cause the reversal of the judgment, as it did not prejudice the plaintiff. It is pretty clear that justice has been done and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR, V. R. J. E. HAYES, DEFENDANT IN ERROR.

1. **Railroad:** EMINENT DOMAIN: DAMAGES: EVIDENCE. Where no objection was made in the court below to direct proof showing the amount of damages sustained by a land-owner by reason of the location of a railroad across his land, the objection is not available on error.

2. ———: ———: OWNERSHIP OF LAND. Where a railroad company condemns real estate as the property of a person named, it cannot on appeal from the award, at least without tendering an issue to that effect, disprove such ownership.

3. ———: ———: APPEAL: PLEADINGS. Where on appeal the only question is the amount of damages, no pleadings are necessary; but if other issues are involved they must be pleaded to be available.

4. **Motion for New Trial.** Objections to the introduction of evidence not assigned in the motion for a new trial cannot be considered by the supreme court.

5. **Error:** INTRODUCING TESTIMONY WITHOUT OBJECTION. Where testimony proving the facts complained of was introduced without objection, error cannot be predicated upon objections to the same testimony afterwards introduced.

ERROR to the district court for Franklin county. Tried below before GASLIN, J.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error.

George W. Sheppard and *W. J. Lamb*, for defendant in error.

MAXWELL, J.

This case is brought here on certain alleged errors in the assessment of damages caused by the location of the plaintiff's railroad across the defendant's land. The errors relied upon in the plaintiff's brief are: *First.* As to the nature of the evidence introduced on the question of damages. *Second.* That the court erred in refusing to permit the plaintiff to show that the defendant had no title to the land in question. *Third.* That the defendant and his witnesses were permitted to magnify the amount of damages by reason of the plaintiff failing to put in certain crossings. *Fourth.* That the defendant and his witnesses were permitted to show the damages sustained on account of the use or purpose of the land.

It appears from the record that in October, 1878, the plaintiff, by its agent J. W. Heisey, filed its petition in the county court of Franklin county, alleging that certain parties refused to grant the right of way over their land, and asking that six commissioners be appointed to appraise the damages. The commissioners were appointed, and on the twenty-third day of January, 1879, reported the damages sustained by the defendant by reason of the location of said road across lots 1, 2, and 3, in section one, town one, range 15 west, to be the sum of $203. The defendant appealed to the district court, where a verdict was rendered in his favor for $406.

The *first* objection is as to the mode of proof of damages. All of the witnesses that testified as to the amount of damages, were permitted to testify without objection as to what

in their opinion was the damage sustained by the defendant. And this is true, not only of the witnesses called by the defendant, but also by the plaintiff. On cross-examination they were asked in what manner they apportioned the damages, and testified freely without objection as to the mode. This being the case, error cannot be assigned upon the admission of such testimony.

Second. The railroad company having applied for appraisers and condemned the land as the defendant's, can it be permitted on appeal, where no issue of want of title is tendered, to prove a want of ownership? We think not. Where the only question at issue is the amount of damages sustained, no pleadings are necessary, because the only question to be determined is, whether the damages awarded by the commissioners shall be increased or diminished. *Neb. Railw. Co. v. VanDusen*, 6 Neb., 160. But when other questions are involved in the case, they must be put in issue. As there was no issue presented as to the defect in the defendant's title, the evidence offered by the plaintiff to impeach it was properly rejected. *Peoria R. R. Co. v. Bryant*, 57 Ill., 473.

Third. The defendant, in answer to the question how many crossings the railroad company had put in in the three-fourths of a mile it extended across his land, answered but one. This is assigned for error; but on turning to the motion for a new trial we find no objections to the verdict on that ground. The objection cannot therefore be considered.

Fourth. Objection is made to proof of the purpose and use to which this land was intended to be put by the defendant—grain and stock farm. It is not necessary to enter into a discussion of the question, as much of this proof was offered without objection, and a portion of it given by the witnesses for the plaintiff.

An examination of the testimony convinces us that the verdict is a fair award of damages for the injury sustained,

and that substantial justice has been done. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

JEREMIAH K. ROSS, PLAINTIFF IN ERROR, V. CYRUS LANGWORTHY, DEFENDANT IN ERROR.

Malicious Prosecution: EVIDENCE. In an action for malicious prosecution, where the testimony shows that the object of the criminal proceedings was not to vindicate the law and punish crime, but to coerce the payment of a debt, a malicious motive may be inferred.

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

George B. France, for plaintiff in error.

W. T. Scott and *M. C. Frank*, for defendant in error.

MAXWELL, J.

This is an action for malicious prosecution. On the trial of the cause in the court below a verdict was returned in favor of the defendant, upon which judgment was rendered. The principal error relied upon is that the verdict is not sustained by the evidence.

It appears from the testimony that in the winter of 1877-8 the plaintiff purchased or traded for a pair of horses from one Forster, the horses being valued at $260. The plaintiff, in payment of said horses, delivered to Forster a yoke of oxen valued at $120, and to secure the remainder executed a chattel mortgage upon the horses, due in October, 1878. Before this mortgage became due the plaintiff purchased a

wagon of an implement firm in Central City, for the sum of $80, due in one year, and to secure the payment of the same executed a chattel mortgage upon the horses and wagon. Just before the time that Forster's mortgage became due the plaintiff applied to the defendant for a loan of $100, to pay the Forster mortgage. After various conversations with the defendant in regard to the matter the plaintiff procured a loan of $100 for sixty days, with which he immediately satisfied the Forster mortgage; and to secure the payment of the loan from the defendant the plaintiff executed a chattel mortgage upon the horses above referred to. A suggestive circumstance in connection with this mortgage, in view of the claim of the defendant, is the fact that the words, "the above described chattels are now in my possession, are owned by me and free from all incumbrances in all respects," were stricken out. These words are on one line in the printed form of the mortgage and a pen has been run across them to erase them. The mortgage was not paid when it became due, and the time was extended thirty days, the plaintiff paying $3 interest. The plaintiff appears to have been making every effort possible to a man of limited means to pay the debt, and if his own testimony is to be credited, would have succeeded in a short time. About this time the plaintiff wrote to the defendant as follows:

"MR. LANGWORTHY:

"I have been trying for the the past two weeks to get the money for you and got disappointed all round. I can't get it no place. I have done all that I could do and can't do any more. Veerig and Wilder, at Central City, have closed in on me now, but would not have done it if you had waited on me. They said that if you was agoing to take the team from me they would come it first. Now if we can compromise and you give me a chance I will pay you as quick as I can. I would have come down to-day and seen you about it myself. I am going to mill to-mor-

row and could not get back in time to go if I went to town. Let me know the best you can do with me. I can make the first mortgage all right if you would give me a chance, and keep my team; and if you don't give me a chance I can't, that is all there is about it. I have been running around so much that I am sick and discouraged.

"Answer and let me know.

"(Signed.) J. K. Ross."

And in reply the following:

"York County Bank,

"Edward Bates Attorney,

"York, Nebraska, Feb. 4, 1879.

"J. K. Ross:

"*Dear Sir*—You can make my note all right by paying me the money or giving me extra security that is clear for the amount, and if you don't make the matter good I shall have to deal according to law with you, and under the circumstances on which you obtained the money it will place you in a bad place. I will give you until February 8 to make the matter good, and I want you for your own interest to attend to it. Yours,

"(Signed.) C. Langworthy."

On the tenth day of February, 1879, the defendant caused the plaintiff's arrest and imprisonment, upon the ground "that the crime of obtaining money under false pretenses has been committed in the county of York, and that J. K. Ross committed the same." The plaintiff was thereupon arrested and imprisoned for twenty-six days. The alleged false pretenses are said to consist in the representation that the property was free from incumbrances. That is, that plaintiff represented to the defendant at the time he borrowed the money that the property was free from incumbrances as an inducement to loan the money upon the security. This the plaintiff denies, and further states that he informed Langworthy of the mortgage, and Langworthy then asked him what the horses were worth, and he informed

him $250, and he said that was sufficient. And this is not denied. And we think it is pretty clear from all the testimony that the plaintiff did not conceal the execution of the chattel mortgage for the wagon. It is very clear, too, from the testimony of the defendant himself, that this imprisonment was a mere means of collecting a debt. On cross examination Langworthy testified as follows:

Q. What started you up to swear out a warrant just at that time?

A. A man would be naturally started; because I saw the property was going, and I had to protect myself.

Q. Where was the property going?

A. Going to be sold under this mortgage.

Q. And this is what started you up to make this first complaint?

A. Yes, sir.

Q. That is all that started you to make this first complaint?

A. Yes, sir.

Q. You had no other reason nor motive but that?

A. No, sir.

Probable cause is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty. *Boyd v. Cross*, 35 Md., 197. *Cooper v. Utterback*, 37 Id., 282. The question of probable cause is one of law and fact composing two distinct inquiries. The one, for the jury to say what facts are proved, and it is for the court to say whether those facts constitute probable cause. *Turner v. O'Brien*, 5 Neb., 547–8. *Johns. v. Marsh*, 9 Rep., 143. *Boyd v. Cross*, 35 Md., 194. Probable cause does not depend upon mere belief, however sincerely entertained. Because if that were so, any citizen would be liable to arrest and imprisonment without redress, whenever any person, prompted by malice, saw fit to swear that he believed the accused was guilty of the offense charged.

The law, therefore, has imposed an additional ground, viz., such knowledge of facts as would induce a reasonable man to believe that the accused was guilty. Nothing short of this will justify the institution of a criminal charge against another. Cooley on Torts, 182. The defendant's own testimony shows very clearly that the object he had in causing the plaintiff's imprisonment was to aid him in collecting his debt and not to vindicate public justice. The rule of law is, that a prosecution instituted for any other purpose than that of bringing the party to justice shows a malicious motive. *Johns. v. Marsh*, 9 Rep., 143. *Mitchell v. Jenkins*, 5 B. & Ad., 594. The reason is, the prosecution was not instituted to vindicate the law and punish crime, but as a means of coercing the accused to comply with the wishes of the prosecutor.

The court also erred inexcluding the deposition of Forster. There is testimony tending to show that the attorney who prepared the mortgage in question was acting for the bank as its attorney, and that he wrote the mortgage in question at the request of the cashier. Forster's testimony shows that the plaintiff informed this attorney of the existence of the mortgage of $80 before the mortgage was drawn or the money paid. This was material testimony to which the plaintiff was entitled.

The court also erred in excluding the deposition of Edgeworth, the attorney, showing that he had been employed by the bank to draw the mortgage in question.

Some reliance is placed by the defendant on the advice of counsel, but we think it is not sufficient for two reasons: *First*, There does not appear to have been a full statement of all the facts to such counsel; and, *Second*, It is pretty clear that the defendant knew at that time that there was no intent to defraud. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

W. D. DAVIS, PLAINTIFF IN ERROR, V. ANDREW HENRY, DEFENDANT IN ERROR.

1. **Promissory Note:** CONTRACT. A contract upon the same paper with a negotiable promissory note, which contract modifies and qualifies it, cannot be detached from the note. In such case the note, if detached and transferred to an innocent purchaser before maturity, will not entitle the holder to recover thereon. COBB, J. dissenting.

2. ———: ALTERATION. Where by the terms of a promissory note it was not to draw interest, and the payee without the consent of the maker adds the figure "7" to the note to indicate the rate of interest, *Held*, To be a material alteration, and to avoid the note.

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

Whitmoyer, Gerrard & Post, for plaintiff in error.

John G. Higgins, for defendant in error.

MAXWELL, J.

This action was brought before a justice of the peace of Platte county upon a promissory note, of which the following is a copy:

"$90 PLATTE CO., NEBRASKA, NOV. 11, 1879.

One year after date, I promise to pay Laird & Dezendorf, of Nebraska City, Nebraska, or bearer, Ninety Dollars, at Nebraska City, Nebraska. Value received. With interest at 7 per cent from date. P. O., Cherry Hill.

"No. 171. "W. D. DAVIS.

"645. Due Nov. 11, 1880."

An appeal was taken from the judgment of the justice to the district court, where Davis filed an answer, in which

he states that at the date of the instrument sued on, Laird and Dezendorf represented to him that they were the corporation known as "The Eureka Iron Fence Co.," engaged in the business of manufacturing iron fence posts and barbed wire at Nebraska City and Lincoln. That said wire and posts were manufactured by an improved method, and they were anxious to procure him to act as agent for them, to sell their products in his neighborhood, and in consideration of his acting as such agent, they would furnish him with wares of their own manufacture of the value of $90. And that they would furnish him all the posts and wire he might require at much less than the regular prices, the same to be sold on commission at a large profit or used by himself. That the commissions were to be applied in payment of the $90, and that this contract and note were embodied in one agreement, but that the note has since been separated from the agreement, and the action is brought thereon as a separate instrument. That no such company as "The Eureka Iron Fence Company" existed, and he has received no consideration whatever for said instrument. There is also an allegation that "the $90 was to draw no interest, but since the signing and delivery of said instrument, an alteration has been made by inserting 7" as the rate of interest it was to bear.

It appears from the testimony that the plaintiff in error is a man in fair circumstances, and abundantly able to pay his debts, and the defendant in error knowing these facts, purchased this note from a stranger a few days after it was given, paying therefor the sum of $50. The plaintiff in error, his wife, and son testified on the trial that the note was a part of a paper purporting to be a contract, the note being on the bottom part thereof, and the signature being at the foot of such agreement, and what now purports to be a promissory note has been separated from the remainder of the agreement. There is no contradiction of this testimony, but it appears that the defense was not made before

the justice, and also that Henry notified the plaintiff that he had purchased the note soon after he obtained the same, and that the plaintiff called upon him, but said nothing about the note being separated from the contract. These are facts that the plaintiff has failed to explain in his testimony.

Where there is a contract written upon the same paper and qualifying the terms of a negotiable promissory note, and such note is severed from the contract, it is invalid even in the hands of innocent holders. The reason is, it is not the instrument which the maker signed. Thus in *Wait v. Pomeroy*, 20 Mich., 425, a negotiable promissory note was given for a machine to be delivered, and below the note these words were written: "If the machine should not be delivered this note not to be paid." These qualifying words were cut off and the note transferred to an innocent purchaser for value before maturity. The machine was not delivered. The court held that the memorandum formed a part of the contract, and as it had been removed it was not the contract of the maker.

Scofield v. Ford, 9 N. W. R., 309, was similar to the case at bar. In that case the defendant undertook to sell seeders and cultivators as agent of one Woodard, and signed a paper as a contract setting forth the terms of the agency. He had no intention of signing a promissory note, but the paper signed contained in the lower right hand corner words which, taken by themselves, constituted a note. After the signing of this instrument the note was detached from the contract and transferred. The court held that the plaintiff was not entitled to recover.

In *Palmer v. Largent*, 5 Neb., 225, this court say: "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." See also *Benedict v. Cowden*, 49 N. Y., 396.

If the jury should find that the contract was as claimed by the plaintiff in error, and that this note was severed from the contract, there can be no recovery thereon even if it is admitted that Henry is an innocent purchaser.

The court instructed the jury as follows: "You are instructed, as a matter of law, the alteration of the note by inserting the figure '7' above the place where the figures '10' had been crossed out, was an immaterial alteration, and did not affect the legal obligations between the parties to the note. It is therefore your duty to disregard all testimony relating to the same in making up your verdict."

This clearly is incorrect. To change a promissory note which was not to draw interest to one drawing interest, without the consent of the maker of the note, is a material alteration that will avoid it. *Patterson v. McNeely*, 16 Ohio State, 348. *Ivory v. Micheal*, 33 Miss., 393. *Hart v. Clouser*, 30 Ind., 210. *Fay v. Smith*, 1 Allen, 477. *Neff v. Horner*, 63 Penn. St., 327. Daniels on Neg. Inst., sec. 1385. The judgment of the district court is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

COBB, J., dissents from the first clause of the syllabus in its terms, but concurs in the order granting a new trial.

WILLIAM DIETRICH, PLAINTIFF IN ERROR, V. THE LINCOLN & NORTHWESTERN R. R. CO., DEFENDANT IN ERROR.

A motion to quash a bill of exceptions will not be entertained after a case, which has been reached in the regular order of business, is submitted.

MOTION to quash bill of exceptions.

Whitmoyer, Gerrard & Post, for the motion.

McAllister Brothers, contra.

MAXWELL, J.

This case was argued by the attorney for the plaintiff in error when the case was reached in its regular order on the call of the docket, and there being no appearance on behalf of the defendant in error, the case was submitted. Afterwards the attorneys of the defendant, upon showing sufficient excuse for their default, were permitted to enter an appearance with leave to make an oral argument and file briefs. They thereupon suggested diminution of the record, and upon the record being perfected moved to quash the bill of exceptions upon the ground that it is signed by the clerk of the court and not by the judge before whom the case was tried. Without entering into a discussion of the merits of the motion, it is sufficient to say that it is filed too late. Objections to a bill of exceptions must be filed before the case is submitted, and should be at the earliest opportunity. Such objections are not favored, and usually are merely technical, and he who objects upon merely technical grounds must himself be free from fault. Besides it is but justice to the adverse party that the objections should be made at the earliest opportunity, so that if it is apparent they are well taken, and the case depends upon the bill of exceptions, no further expense will be incurred in continuing the prosecution. The motion must be

OVERRULED.

EO EDWARDS, PLAINTIFF IN ERROR, V. FRANK E. KEARNEY, DEFENDANT IN ERROR.

Unless a bill of exceptions is authenticated in the manner required by law, the supreme court cannot receive and consider it.

MOTION to quash bill of exceptions.

Sam. L. Savidge and *E. C. Calkins*, for the motion.

Hamer & Conner, contra.

MAXWELL, J.

This is a motion to quash the bill of exceptions because it is not signed by the judge. The following is a copy of the certificate:

"Presented to me this third day of January, 1881, and rejected because not presented to counsel for plaintiff in fifteen days from the rising of the court. And this bill of exceptions is ordered to be made part of the record in this case. "WILLIAM GASLIN, JR.,

"*Judge.*"

Until a bill of exceptions is authenticated in the manner required by law, the court cannot receive it, because there is no legal evidence before the court that it contains a correct record of the proceedings. If the officer whose duty it is to sign the bill should unreasonably refuse to sign the same, the court, in a proper proceeding, would compel him to do so by mandamus. In this case, however, he had no authority. The record shows that the trial was had on the eighth day of December, 1880, and the court adjourned next day. The plaintiff did not ask for an extension of time in which to prepare the bill; he was therefore limited to fifteen days from the ninth day of December, 1880. The law in relation to settling and signing bills of exceptions should receive a very liberal construction in order to

save the rights of parties and prevent a failure of justice. But the party preparing the bill must have been diligent, and the failure to procure the same within the time limited not be caused by his own neglect. The motion must be sustained.

MOTION SUSTAINED.

JEROME B. BROOKS, PLAINTIFF IN ERROR, v. JAMES S. HIATT, DEFENDANT IN ERROR.

1. **Improvements on public lands** are property, and a sufficient consideration to sustain a promissory note given for the purchase of the same.
2. **Promissory Note:** DEFENSE. The defense to a promissory note was, that it was given for property to which the title had failed. There was testimony tending to show that there was not an entire failure of title. *Held*, That the plaintiff was entitled to recover for such property, as the title had not failed, and a verdict for the defendant was set aside.

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

George B. France, for plaintiff in error.

W. T. Scott and *M. C. Frank*, for defendant in error.

MAXWELL, J.

This is an action upon a promissory note executed by the defendant to the plaintiff. The amended answer admits the making of the note, but states that it was given for a frame house 20 by 24 in size, standing upon the northeast quarter of sec. 28, town 11, range 2 west, and the improvements on the east half of the northeast quarter of the same section; that said property did not belong to the

plaintiff, but to one Myron L. Grant, and the defendant was compelled to pay him over $500 therefor. On the trial of the cause a verdict was returned in favor of the defendant, upon which judgment was rendered dismissing the action.

It appears from the testimony that the note in question was given for the improvements, including the house upon the land above described; that at the time of the execution of the note the plaintiff executed a contract wherein he in effect covenanted to protect the defendant in the possession of said house and improvements.

The plaintiff had entered one eighty acre tract of the above described lands as a timber culture claim, and seems to have made some improvements thereon, which he surrendered to the defendant. He seems also to have asserted a claim to the remaining portion of the land, but upon what ground does not appear. Eighty acres of the land had been claimed by Myron L. Grant, and it is clearly proved that after the sale to the defendant the plaintiff obtained a release from Grant of his interest therein, paying therefor the sum of $150. The release itself was lost, but there seems to be no doubt of the fact. The defendant entered into possession of the improvements purchased from the plaintiff, and has entered a portion of the land as a homestead under the United States statute. No one has disturbed his possession, and before the alleged payment of $500 for the improvements he made no complaint to the plaintiff or claim of want of title.

The testimony also shows that Grant is the son-in-law of the defendant.

The contract above referred to amounts to this: that in case of a failure of title to the house or any part of the above improvements, the defendant shall not be required to pay for the same, but of course is to pay for whatever he may have received. This is but justice. To the extent, therefore, that these improvements belonged to the

plaintiff he was entitled to recover. And as the testimony shows some value the verdict cannot be sustained.

Our statute provides that: "All contracts, promises, assumpsits, or undertakings, either written or verbal, which shall be made hereafter in good faith, without fraud, collusion or circumvention, for sale, purchase, or payment of improvements made on the lands owned by the United States, shall be deemed valid in law or equity, and may be sued for and recovered as in other contracts. Comp. St., 299.

Improvements on the public lands are property, and a sufficient consideration to sustain a promise to pay for the same. It is unnecessary to notice the other errors assigned.

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

REVERSED AND REMANDED.

JOHN CROOK, PLAINTIFF IN ERROR, V. JOSHUA VANDEVOORT, DEFENDANT IN ERROR.

1. **Ejectment:** PARTIES. In ejectment by a tenant in common against a mere disseizor to recover possession of undivided premises he may maintain the action in his own name if no objection is made for defect of parties. As the recovery of possession inures to the benefit of all, a failure to plead a defect of parties plaintiff is a waiver of that objection.
2. **Real Property:** TENANTS IN COMMON. Where one tenant in common conveys his interest in undivided real estate by metes and bounds, it will be sufficient to pass all his title therein within the boundaries described in the deed.

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

A. Schoenheit and *E. W. Thomas*, for plaintiff in error.

J. D. Gilman and *A. R. Scott*, for defendant in error.

MAXWELL, J.

This is an action of ejectment brought by the defendant in error in the district court of Richardson county, to recover from the plaintiff the possession of sixty acres off the north end of the west half of the southwest quarter of section 28, township 2, range 15, in Richardson county. The answer admits the possession but denies the other facts stated in the petition. On the trial of the cause judgment was rendered in favor of Vandevoort, and providing that upon the payment by him of the sum of $85.40 to the plaintiff a writ of restitution should issue.

It appears from the record that Crook claims title under a tax deed executed by the treasurer of Richardson county in March, 1880. This deed was excluded, and no objection is now made on that ground, so that he is in possession without right.

The west half of the southwest quarter of sec. 28, town 2, range 15, was entered by the plaintiff, Crook, but the date of the entry does not appear. In December, 1861, Crook and wife conveyed by warranty deed to one David R. Holt. In August, 1862, Holt conveyed to Thomas R. Hare. In February, 1865, Hare conveyed the undivided half of said land directly to his wife. In March, 1870, Hare executed a power of attorney to one James M. Hirn, authorizing him to sell and convey all the real and personal property belonging to said Hare in Richardson county. Under this power of attorney Hirn, as attorney in fact for Hare, in March, 1871, sold the west half of said section to E. S. Towle, and executed a deed in the name of Hare for the same. A few days thereafter Towle and wife conveyed to Hirn the sixty acres in dispute. In September, 1868,

Hirn obtained from the treasurer of Richardson county a tax deed for the west half of the southwest quarter of sec. 28, town 2, range 15. This deed was ruled out, whether properly so or not is not before the court. In December, 1875, Hirn and wife sold and conveyed the land in controversy to the defendant in error. As Mrs. Hare is not before the court, and as the plaintiff in error is clearly shown not to have any title or right of possession, it is unnecessary to pass upon the validity of a conveyance from the husband directly to his wife. Such conveyance will be upheld whenever equitable grounds exist for sustaining the same.

In the view we take of the case the plaintiff is entitled to recover, even if Mrs. Hare is a tenant in common with him. Tenants in common are persons who hold by unity of possession; and they may hold by several and distinct titles, or by title derived at the same time, by the same deed or descent. In this respect the American law differs from the English common law. 4 Kent. Com., 363.

The seizin and possession of one tenant in common are the seizin and possession of the others. *Burns v. Byrne*, 45 Iowa, 285. *Buckmaster v. Needham*, 22 Vt., 617. 4 Kent. Com., 370. And the taking of the whole profits by one is not an ouster of his co-tenants. 4 Kent Com., 370, and cases cited. And as against a mere disseizor one tenant in common of undivided real estate may recover the possession of the premises, as his recovery of possession will inure to the benefit of all the co-tenants. *Stark v. Barrett*, 15 Cal., 363. *Collier v. Corbett*, Id., 183. *Touchard v. Crow*, 20 Id., 150. *Treat v. Reiley*, 35 Id., 129. *Chesround v. Cunningham*, 3 Blackf., 82. In such case there would be a mere defect of parties plaintiff, which if not objected to would not defeat a recovery. The plaintiff below was entitled to recover therefore, as against the defendant, even if he is a tenant in common with Mrs. Hare.

Second. The fact that Towle and wife conveyed to Vandevoort by metes and bounds will not defeat a recov-

ery. Such a conveyance is sufficient to convey all the interest of the grantors within the boundaries described in the deed. *Lessee of White v. Sayre*, 2 Ohio, 110. *Campau v. Godfrey*, 18 Mich., 39. *Robinett v. Preston*, 2 Robin., 273. It is very clear that justice has been done and that there is no error in the record. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

JOHN S. LEE ET AL., PLAINTIFFS IN ERROR, V. HASTINGS & MCGINTIE, DEFENDANTS IN ERROR.

1. **Replevin:** JUDGMENT. A judgment in an action of replevin, under the act of 1873, must be in the alternative—for a return of the property, or in case a return cannot be had the value thereof, unless it is shown by the record that a return could not have been had.

2. ———: ———: LIABILITY OF SURETIES. While an action of replevin was pending, the attorneys for the plaintiff and defendant stipulated that there could be no return of the property, and that the value thereof was $157.50, and judgment was thereupon rendered for that sum, but not for a return of the property An execution was then issued and returned unsatisfied, and an action brought upon the undertaking for the amount of the judgment. The sureties answered that the property was then in possession of the plaintiff in the county where the action was pending. *Held*, That as the action was for the recovery of specific personal property the answer stated a defense, as the sureties were not liable for the value of the property unless a return thereof could not be had.

3. ———: ———: ———. An answer that $44.00 upon an open account between the plaintiff and defendant was improperly included in a judgment for the value of the property, is available to a surety as a defense *pro tanto*.

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

J. R. Webster, for plaintiff in error.

Hastings & McGintie, pro se.

MAXWELL, J.

This is an action upon an undertaking in replevin in an action commenced before a justice of the peace. The undertaking is dated May 8th, 1880, and was given in an action wherein one John C. McDonald was plaintiff and Thomas B. Parker defendant, Lee and Hitchcock signing the same as sureties. As the value of the property exceeded $100, the cause was certified to the district court, where a stipulation was entered into between the attorneys for McDonald and Parker, as follows:

"JOHN C. D. McDONALD
vs. } *Stipulation.*
THOMAS B. PARKER.

"It is hereby stipulated and agreed that at the commencement of this action the interest of the said defendant Thomas B. Parker in the property mentioned and described in plaintiff's petition was $157.50, and that the said property was of the value of two hundred dollars, that said property cannot be returned, and that said defendant recover of and from said plaintiff the sum of $157.50 and costs.

"M. B. C. TRUE,
"*For Plff.*
"HASTINGS & McGINTIE,
"*Attys. for Deft.*"

Judgment was thereupon rendered on the stipulation against McDonald and in favor of Parker for the sum of $157.50 and costs, and execution was issued thereon, which was returned unsatisfied. Judgment is prayed for $157.50 and costs.

To the petition stating the above facts, the defendants below (plaintiffs in error) answered in substance that the

above stipulation was made in a cause to which they were not parties, and without their knowledge or assent, and that the property at the time the stipulation was entered into was in possession of McDonald, in the town of Wilber, and so continued for a long time thereafter, and was then in good condition and capable of being returned, which said attorneys well knew.

Second. That in the settlement of the terms of stipulation taken between Parker and McDonald an unsecured debt of $44, owing by McDonald to Parker, was included in the stipulation and judgment rendered thereon, although that liability did not grow out of the action in replevin.

Third. Parker's interest in said mortgaged property was that of mortgagee under a chattel mortgage dated May 27, 1879, to secure certain promissory notes for the sum of $200; that said mortgage was duly filed for record, and at the date of the stipulation was a first lien on the mortgaged property; that on the fifteenth day of April, 1881, Parker, by his attorney, released said mortgage and thereby defrauded the defendants of the right to be subrogated to the lien of said Parker to the property. A demurrer to each count of the answer was sustained, and judgment rendered against the plaintiffs in error for the sum of $182.

The first question presented is as to the form of judgment in replevin.

Sec. 190 of the code (Comp. Stat., 553) provides that: "If the property has been delivered to the plaintiff, and judgment be rendered against him on demurrer, or if he otherwise fail to prosecute his action to final judgment, the court shall, on application of the defendant or his attorney, impanel a jury to inquire into the right of property and right of possession of the defendant to the property taken. If the jury shall be satisfied that said property was the property of the defendant at the commencement of the action, or if they shall find that the defendant was entitled to the possession only of the same at such time, then, and

in either case, they shall assess such damages for the defendant as are right and proper; for which, with costs of suit, the court shall render judgment for the defendant."

Sec. 191 provides that: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant."

Sec. 191 (a) provides that: "The judgment in the cases mentioned in sections 190 and 191 and in section 1041 of said code, shall be for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property, and costs of suit."

The act requiring judgment to be rendered for a return of the property, or the value thereof in case a return cannot be had, was passed in 1873. Since that act took effect, judgment in all cases, either before a justice of the peace or in the district court, must be in that form unless it is shown by the record that a return could not have been had. The object of an action of replevin is to recover specific personal property, and the liability for the value of the property accrues only where a return of the property cannot be had. *Mitchum v. Stanton*, 49 Cal., 302. *Clark v. Norton*, 6 Minnesota, 277. *Ladd v. Brewer*, 17 Kas., 204. A surety on a replevin undertaking assumes all the liability which the law gives to the same, and no more. The statute requires judgment to be rendered in a particular manner—for a return of the property, or its value if a return cannot be had, and this was what the obligors in this case agreed that McDonald should do. Sureties on a replevin undertaking undoubtedly are concluded by the judgment in re-

plevin—that is, if the court finds the right of property or right of possession in one of the parties, the surety cannot attack such judgment collaterally, where there is no collusion or fraud, to evade his liability on his undertaking. But they are liable only to the extent they are made so by law, and such liability cannot be increased by any agreement of the attorneys for the parties to which the sureties do not consent. Even where such a stipulation is entered into it does not preclude the necessity for a formal judgment in the form required by statute. *Dorrington v. Meyer*, 8 Neb., 211, has no application to the facts of this case.

The first count of the answer states in effect that the property taken on the writ was then in the possession of McDonald, and was susceptible of being returned to the defendant in replevin. This, for the purpose of the action, is admitted by the demurrer. This would seem to be a defense in favor of the sureties in an action against them for the value of the property. The court therefore erred in sustaining the demurrer to the first count.

The allegation in the second count that $44 was included in the judgment, for which the sureties were not liable on the undertaking, is also admitted, and to that extent is a defense. The third count fails to state a defense by reason of the failure to state facts showing the right of the sureties to be subrogated. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TEMPLE & LOVE, PLAINTIFFS IN ERROR, v. SMITH & CRITTENDEN AND OTHERS, DEFENDANTS IN ERROR.

1. **Parties:** TRANSFER OF INTEREST. In case of a transfer of interest during the pendency of a suit, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted. This substitution may be made as often as there is a transfer of interest.
2. **Sale:** FRAUD. To avoid a sale, upon the ground that it is fraudulent as to creditors, the purchaser must have knowledge of the fraudulent purpose of the seller, or have notice of such facts tending to show a fraudulent purpose as would put a man of ordinary prudence on inquiry.

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

Hastings & McGintie, for plaintiffs in error.

Brown & Ryan Brothers, for defendants in error.

MAXWELL, J.

In July, 1880, Parker & Sawyer were doing business at Dorchester, and were indebted to various parties from whom they had purchased goods in a very large amount. On the nineteenth day of July, of that year, at about 8 o'clock P.M., they sold their entire stock of goods to the plaintiffs, on credit, for the sum of $2,600, taking their unsecured notes therefor, payable in three, six, nine, and twelve months without interest. The inventory was taken between the hours of 8 P.M. on the 19th and 9 A.M. of the 20th, and the plaintiffs thereupon took possession of the goods. The plaintiffs, prior to this time, were in the grain business at Dorchester, and possessed property, the exact value of which does not appear, but of about the value apparently of $2,000. On the twenty-second of that month, certain

creditors of Parker & Sawyer commenced actions against them, and caused the goods in question to be attached as the property of Parker & Sawyer. The plaintiffs thereupon recovered the possession of the same by a writ of replevin. On the trial of the cause the jury returned a verdict in favor of the creditors and against the plaintiffs for the value of the goods, being the sum of $2,600.

The errors deemed material will be noticed in their order.

It appears from the record that at the October term of the district court of Saline county, Smith & Crittenden appeared and claimed to have an assignment of all the claims of the creditors, and asked to have the cause transferred to the U. S. circuit court, upon the ground that they were non-residents of the state. This was done. Afterwards the cause was remanded to the district court of Saline county, and the attaching creditors reinstated as parties. This is assigned for error.

Sec. 45 of the code provides that: "In case of the transfer of interest the action may be continued in the name of the original party, or the court may permit the party to whom the transfer is made to be made a party."

This is not limited to one transaction, but may be continued as often as a transfer is made. There is no error therefore in that regard.

We fully agree with the attorneys for the plaintiffs in error that to render a sale void as against creditors the fraudulent intent of the seller must have been participated in or at least known to the purchaser. *Tootle & Maule v. Dunn*, 6 Neb., 93. *Wake v. Griffin*, 9 Id., 47. *Preston v. Turner*, 36 Iowa, 671. *Drummond v. Couse*, 39 Id., 442. But where a purchaser has notice of the fraudulent intent of the person from whom he purchases, or has notice of such facts as would put men of ordinary prudence upon inquiry which would have led to a knowledge of the fraudulent purpose of the person selling the goods, he is not a *bona fide* purchaser. *Zuver v. Lyons*, 40 Iowa, 510.

Jones v. Hetherington, 45 Id., 681. *Bradford v. Beyer*, 17 Ohio State, 388. *Brown v. Cutler*, 8 Ohio, 142. When the intention of the person purchasing is to defraud the creditors of the seller, the sale is void as to such creditors, because the purchase was made in bad faith.

Nothing would be gained by an extended examination of the errors assigned. The testimony of the plaintiffs themselves shows that they had sufficient knowledge of the insolvency of Parker & Sawyer, and that the effect of the purchase would be to defraud the creditors of that firm. The knowledge that Parker & Sawyer were indebted in a very large amount, and that their creditors were pressing them, is clearly shown. The inability of the plaintiffs to pay for the goods is also proved, and the facts that the invoice was taken at night, and the bill of sale hastily prepared, are circumstances tending to show the want of good faith. Under the testimony in this case the jury would not have been justified in rendering a different verdict. It is very clear that justice has been done in the premises, and the judgment is affirmed.

JUDGMENT AFFIRMED.

HENRY LAWRENCE, PLAINTIFF IN ERROR, V. MATILDA CURTIS, DEFENDANT IN ERROR.

Jurisdiction of Justice. In an action of replevin commenced in 1880, before a justice of the peace, the property was delivered to the plaintiff. On the trial the jury found that the plaintiff was entitled to the possession only of the property, and that the value of such possession was $107.50. The justice thereupon rendered judgment in favor of the plaintiff for costs. *Held*, That the justice had jurisdiction.

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

Sedgwick & Power, for plaintiff in error.

Montgomery & Harlan, for defendant in error.

MAXWELL, J.

This is an action of replevin commenced in July, 1880, before a justice of the peace of York county, to recover the possession of an iron safe. There is no copy of the appraisement set out in the record, but the undertaking was taken in the sum of $110. The property was then delivered to the plaintiff. On the trial of the cause the jury returned the following verdict: "We, the jury, in the above entitled case, duly impaneled and sworn, find that the right of possession of said property only, when this action was commenced, was in the plaintiff, and assess the value of said possession at $107.50. One hundred and seven $\frac{50}{100}$ dollars." The court thereupon rendered judgment, to which the defendant excepted. The case was taken on error to the district court, where the judgment of the justice was reversed and the cause retained for trial.

Sec. 1037 of the code provides that: "The officer shall not deliver to the plaintiff, his agent, or attorney, the property so taken, until there has been executed, by one or more sufficient sureties of the plaintiff, a written undertaking to the defendant, in at least double the value of the property taken, but in no case less than fifty dollars, to the effect that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him."

Sec. 1038 provides that: "For the purpose of fixing the amount of the undertaking, the value of the property taken shall be ascertained by the oath of two responsible persons, whom the officer shall swear truly to assess the value thereof."

Sec. 1039, as it existed at the time this case was tried,

read as follows: "Whenever the appraised value of the property so taken shall exceed one hundred dollars, the justice shall certify the proceedings upon the said writ to the district court of his county, and thereupon shall file the original papers, together with a certified transcript of his docket entries in the clerk's office of said court; the case there to be proceeded in as if said suit had commenced in said court."

The principal error relied upon is that the justice erred in rendering judgment on the verdict. The property had been returned to the plaintiff, so that the justice did not render judgment for $107.50, but merely for costs without damages. Neither did the jury find the value of the property, but the value of the possession. It is stated that this possession consisted of a special ownership as mortgagee. If so, the jury should have found the facts. But the failure to do so can make no difference in this case. The effect of the verdict is that the plaintiff's claim upon the property amounts to the sum of $107.50. This may have exceeded the value of the property, and probably did, as the appraisers' estimate probably was one half of the amount stated in the undertaking, viz., $55. The justice therefore had jurisdiction, and the district court erred in reversing his judgment. The judgment of the district court is reversed, and that of the justice reinstated.

JUDGMENT ACCORDINGLY.

NATHANIEL BRAY, PLAINTIFF IN ERROR, V. JOSEPH SAAMAN, DEFENDANT IN ERROR.

Attachment: TRIAL OF RIGHT OF PROPERTY. Where goods are levied upon under an attachment issued by a justice of the peace, and are claimed by another than the defendant in the attachment, and such claimant institutes proceedings for a trial of the right of property, in which the jury find against him, and judgment is rendered thereon, he cannot afterwards maintain replevin against the officer.

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

F. E. Brown, for plaintiff in error.

Stevenson & Murfin, for defendant in eroor.

MAXWELL, J.

On the seventh day of October, 1879, the defendant claims to have purchased from one E. S. Mathews, certain personal property, and taken a bill of sale of the same, the bill being filed for record in the county clerk's office at 8:40 A.M. of that day. On the same day, one John M. Parry commenced an action by attachment against E. S. Mathews before a justice of the peace of Otoe county, to recover the sum of $72.45. An order of attachment was thereupon issued and delivered to the plaintiff, who on the same day, at six o'clock P.M., levied the attachment upon the property which the defendant claimed to have purchased from Mathews. On the eighteenth of that month the defendant instituted proceedings under the statute for a trial of the right of property. The case was continued from time to time until the thirteenth of December, 1879, when a trial was had, and the jury found against the defendant and in favor of the plaintiff. The justice there-

upon rendered judgment sustaining the attachment and that the claimant had failed to establish his right to the property, and for costs of the proceeding.

On the twenty-seventh of November, 1879, Parry recovered a judgment in his action against Mathews for the sum of $72.45. There is no record of any order made to sell the attached property, but the property seems to have been held under the attachment, and on the thirteenth of December of that year an execution was issued on the judgment in favor of Parry and levied upon the property in question, and it was advertised for sale as the property of Mathews. The defendant then brought an action of replevin against the officer, and reclaimed the property, and on the trial of the cause judgment was rendered sustaining the replevin. The only question for determination is, can the claimant of the property, after being defeated in a trial of the right of property, maintain replevin against the officer?

Section 996 of the code provides that: "When a constable or sheriff shall levy on or attach property claimed by any person or persons other than the party against whom the execution or attachment issued, the claimant or claimants shall give three days notice in writing to the plaintiff or his agent, or if not found within the county, then such notice shall be served by leaving a copy thereof at his usual place of abode in such county, of the time and place of the trial of the right to such property, which trial shall be had before some justice of the county, at least one day prior to the time appointed for the sale of such property."

Sec. 997 provides that: "If on the trial, the justice shall be satisfied from the proof that the property, or any part thereof, belongs to the claimant or claimants (or in case when a jury is demanded, the jury so find), such justice shall render judgment against the party in whose favor such execution or attachment issued, for the costs, and issue execution therefor, and shall, moreover, give a written

order to the officer who levied upon, or who may be charged with the duty of selling such property, directing him to restore the same, or so much thereof as may be found to belong to such claimant or claimants."

Sec. 998 provides that: "But if the claimant or claimants fail to establish his or their right to such property, or any part thereof, the justice shall render judgment against such claimant or claimants for the costs that have accrued on account of such trial, and issue execution therefor; and the officer shall not be liable to the claimant for the property so taken."

The question here presented was before this court in the case of *Storms v. Eaton*, 5 Neb., 453, and it was held that where the jury found against the claimant he could not thereafter maintain an action against the officer. This is the language of the statute, which was copied from Ohio, and the courts of that state in a long course of decisions have denied a right of action in such cases. In *Abbey v. Searls*, 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." We approve of that language, and when the verdict is in favor of the officer he is entitled to protection. This seems to be conceded by the attorneys for the defendant in error, but they contend that the attachment was abandoned, and that the sale being made upon execution, the trial of right of property was not in the same case, therefore the defendant is not concluded. The case in that regard is substantially the same as that of *Day v. Thompson*, 11 Neb., 123. The court acquired jurisdiction by the levy of the attachment and the lien acquired thereby. The proper course in such case is for the court to order the attached property to be sold; but where it is in

fact retained or sold to satisfy the judgment, in that case, the possession of the officer being continuous, one trial of the right of property is sufficient as against the claimant to justify the officer in selling the property. The question of the rights of the defendant in error as against the judgment creditor is not before the court. As the claimant of the property cannot maintain replevin against the officer, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THOMAS SCALES, APPELLEE, v. C. N. PAINE & CO., IMPLEADED WITH HERMINE LEPIN ET AL., APPELLANTS.

1. **Husband and Wife:** AGENCY. Where a husband, having general authority as agent of his wife to do business for her, entered into a contract with P. & Co. for lumber and building material to erect a hotel on a lot owned by her, *Held*, That P. & Co. were entitled to a mechanic's lien on the premises.
2. **General Agent:** POWER. The power of a general agent cannot be restricted by secret instructions of which the party dealing with him has no notice.
3. **Evidence** examined and judgment reversed as being against the evidence, and the cause remanded for the entry of judgment in favor of P. & Co.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Lamb, Billingsley & Lambertson and *Batty & Ragan*, for appellants.

James Laird and *B. F. Smith*, for appellee.

MAXWELL, J.

This action was brought in the district court of Adams county to foreclose a mechanic's lien upon certain real estate owned by Hermine Lepin. C. N. Paine & Co. were made defendants upon the ground that they claimed a mechanic's lien upon the same real estate. On the trial of the cause in the court below judgment was entered in favor of the plaintiff for the sum of $690, and the same was declared a lien upon the premises, and the court found against the defendants C. N. Paine & Co., and dismissed the cross petition. They appeal to this court.

The principal objection is that the judgment is against the weight of evidence. It appears from the testimony that Hermine Lepin is the wife of Herman Lepin, who was her agent, and seems to have had full power and authority to enter into contracts in relation to the building in question (a hotel) in her name. All the testimony tends to show a general agency on his part, and this being so no secret limitation of the power can restrict his authority, unless it was known to those with whom he was dealing. *Furnas et al. v. Frankman*, 6 Neb., 429. As there is no proof of such knowledge on the part of Paine & Co., Mrs. Lepin, as principal, is bound by the contracts in relation to the hotel made for her by her husband.

Second. The Lepins contend that they made a contract with the plaintiff to erect the building and furnish all the material; but Paine & Co. deny that they sold any portion of this material to the plaintiff. They allege that they sold the material to Herman Lepin for his wife, and that they refused to credit the plaintiff, who was then indebted to them. This view of the case is sustained by the testimony of a number of witnesses, and is not specifically denied by any. Both the plaintiff and Herman Lepin make general denials, but material facts which are not denied show beyond question the truth of the claim of Paine & Co. No-

thing would be gained by a recapitulation of the testimony. In our opinion it shows beyond controversy that Paine & Co. sold the lumber and building material to Herman Lepin for his wife for the purpose of erecting the hotel in question, and that Paine & Co. have a valid mechanic's lien upon the real estate for the amount of their claim.

The cause is remanded to the district court to enter a judgment in conformity to this opinion.

REVERSED AND REMANDED.

BOARD OF COUNTY COMMISSIONERS OF LANCASTER COUNTY, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, EX REL. J. G. MILLER, DEFENDANT IN ERROR.

1. **Constitutional Law.** The act approved February 20, 1879, for the repayment of taxes levied upon school lands the title of which was in the state, *Held*, Not in conflict with the constitution. *Washington county v. Fletcher*, 12 Neb., 356, adhered to. LAKE, CH. J., dissenting.
2. **Mandamus against County.** County commissioners will not be compelled by mandamus to act upon claims against the county, where no estimates have been made for taxes to be levied to pay the same, unless there are funds in the treasury for the payment of such claims.
3. **County Commissioners** have no authority to audit claims against the county unless there are funds in the treasury or sufficient taxes have been levied for the payment of the same.

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

Harwood & Ames, for plaintiff in error.

Ricketts & Wilson, for defendant in error.

MAXWELL, J.

On the 5th day of August, 1879, the relator filed a duly verified claim for the sum of $753.75 against Lancaster county for taxes levied and paid upon school lands in said county, the title to which was in the state. No action being taken by the board upon the claim, in May, 1882, the relator obtained an alternative writ of mandamus from the district court of Lancaster county, to compel them to act upon the claim. To this writ the commissioners answered in substance that they were ready and willing to audit said claim whenever there were funds in the treasury of the county for the purpose of paying the same; that prior to the decision of this court in the case of *Washington County v. Fletcher*, 12 Neb., 356, there was doubt as to the validity of the law approved February 20th, 1879, for the repayment of said taxes, in consequence of which no estimate of the amount required for the repayment of the same was made in January, 1882, or at any other time, and that there are no funds in the county treasury for the payment of warrants drawn on such fund. A demurrer to the answer was sustained in the court below, and a peremptory writ awarded.

The question of the validity of the act of February 20th, 1879, for the repayment of taxes paid upon school lands, the title of which is held by the state, was before this court in the case of *Washington County v. Fletcher*, 12 Neb., 156, and it was held by a majority of the court that the act was not in conflict with the constitution, and was valid. And after a careful review of the question, we see no reason to change our views. We therefore adhere to our decision as to the validity of the act.

The sixth subdivision of the act of 1879, concerning counties and county officers, provides that: "At their regular meeting in January of each year, to prepare an estimate of the necessary expenses of the county during

the ensuing year, the total of which shall in no instance exceed the amount of taxes authorized by law to be levied during that year, including the amounts necessary to meet outstanding indebtedness as evidenced by bonds, coupons, or warrants legally issued, and such estimate containing the items constituting the amounts shall be entered at large upon their records, and published four consecutive weeks before the levy for that year in some newspaper published and of general circulation therein, and no levy of taxes shall be made for any other purpose or amounts than are specified in such estimate as published; but any item or amount may be stricken from such estimate, or reduced at the time the levy is made. If any levy shall be made in excess of such estimate, the tax shall not therefore be void, but the members of the county board and their sureties shall be jointly and severally liable upon their official bonds for the full amount of such excess, which shall be collected by civil action as in other cases, for the use of the school fund of the county. If the members of the said board neglect to comply with any other provisions of this section, the tax shall not therefore be void, but they shall each be liable to a penalty of five hundred dollars, to be recovered by civil action as in other cases, for the use of the school fund of the county." Comp. Stat., 179.

It will be seen that the board are prohibited from levying any taxes not included in the estimate, and are personally liable for the amount thus levied. The proper construction of this subdivision was before this court in the case of the *State v. Wise*, 12 Neb., 313, and it was held that a tax levied for bridge purposes under the provisions of an act passed after the estimates for that year were made, was not void, but that the county commissioners thereby subjected themselves to liability. Such is undoubtedly a proper construction of the act. But this court will not compel county commissioners to violate the law and levy taxes for a particular purpose, where no estimates for that

purpose have been made. The question whether a creditor can compel the commissioners by mandamus to make an estimate sufficiently large to include his account is not before the court. But no warrant can be drawn on the treasury unless there are funds in the treasury, or a sufficient tax has been levied to pay the same.

Sec. 33 of the act above referred to provides that: "Upon the allowance of any claim or account against the county, the county board shall direct the county clerk to draw a warrant upon the county treasurer in payment thereof, such warrant to be signed by the chairman of the county board, countersigned by the county clerk, and sealed with the county seal, but the same shall not be deliverd to the party until the time for taking an appeal has expired, and if such appeal be taken, then not until the same shall have been determined." Comp. Stat., 180.

Sec. 34 provides that: "It shall not be lawful for any warrant to be issued for any amount exceeding in the aggregate seventy-five per cent of the amount levied by tax for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same. Nor shall the county board issue any certificate of indebtedness in payment of any account or claim in any form whatever, but all accounts against a county which cannot be paid by warrant as herein provided, shall be filed, numbered, and recorded, and paid as aforesaid in the order of their entry upon the record, whenever a warrant can be drawn under the provisions of this section.

Sec. 35 provides that: "Each warrant shall specify the amount levied and appropriated to the fund upon which it is drawn, and the amount already expended of such fund."

Sec. 36 provides that: "Any warrant drawn after seventy-five per cent of the amount levied for the year is exhausted, and where there are no funds in the treasury for the payment of the same, shall not be chargeable as against

the county, but may be collected by civil action from the county board making the same, or any member thereof."

A fair construction of these provisions shows that the legislature did not intend that a claim should be allowed until a warrant could be drawn for the payment of the same; in other words, unless there are funds in the treasury or a tax levied upon which a warrant can be drawn. As it clearly appears that there are no funds in the treasury, or taxes levied upon which a warrant can be drawn to pay the relator's claim, the commissioners will not be compelled to audit his account. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

LEWIS MORRISON, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law**: EVIDENCE. Where the evidence fails to connect the accused with the commission of the crime a verdict of guilty cannot be sustained. Mere suspicion, however strong, will not authorize a jury to return a verdict of guilty.
2. ———: SENTENCING PRISONER. The supreme court will not review a sentence passed in conformity to law by the district court, although it may seem excessive, unless there is a clear abuse of discretion.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

A. H. Bowen, for plaintiff in error.

The Attorney General, for defendant in error.

MAXWELL, J.

The plaintiff in error was found guilty of horse stealing, at the May, 1882, term of the district court of Adams

county, and sentenced to imprisonment in the penitentiary for ten years.

The principal error relied upon in this court is, that the verdict is not sustained by the evidence. The attorney general states frankly to the court that the proof fails to show that Morrison committed the theft or aided in committing the same, and that at the most it merely raises a strong suspicion of guilt. This being so, the attorney for the state has properly brought this fact to the attention of the court. To protect the innocent is one of the chief ends of government, and there can be no greater wrong committed against a person than to convict him of a crime of which he is not guilty. And unless the evidence reaches that degree of certainty as to exclude reasonable doubt, it is not sufficient to convict. The word evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted for investigation, is established or disproved. Matters of fact are proved by moral evidence alone, by which is meant not only that kind of evidence which is employed on subjects connected with moral conduct, but all the evidence which is not obtained either from intuition or demonstration. 1 Greenleaf Ev., sec. 1.

In *Horbach v. Miller*, 4 Neb., 44, Judge GANTT, in speaking of circumstantial evidence, says: "This presumption, however, must rest upon facts proved, for, when the main fact in respect of the subject matter in controversy cannot be proved by direct testimony, such fact is arrived at by the proof of other facts so associated with the fact in question that in the relation of cause and effect lead to a satisfactory and certain conclusion. Therefore presumptive evidence consists in the proof of minor or other facts incidental to or usually connected with the fact sought to be proved, which, when taken together, inferentially establish or prove the fact in question to a reasonable degree of certainty."

This, in our view, is a correct definition of this kind of evidence. It is an inference to be drawn from facts proved. These facts must not only be consistent with the prisoner's guilt but be inconsistent with any other rational conclusion. 1 Greenleaf Ev., sec. 34. If no facts are proved tending to show the guilt of a person accused of crime the jury must acquit, no matter how strong their grounds of suspicion may be.

Second. The sentence seems excessive. The law fixes the minimum of punishment in such cases at three years imprisonment. A discretion is given to the judge to increase the term of imprisonment in cases where it seems proper to do so. This discretion to a great extent rests with the trial court; but experience has demonstrated that it is the certainty and not the severity of punishment that deters from crime, but unless there is gross abuse of discretion this court will not interfere. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THE STATE OF NEBRASKA, EX REL. SAMUEL R. GLENN, v. ROBERT P. STEIN.

1. **Quo Warranto:** JURISDICTION OF SUPREME COURT. The supreme court has jurisdiction in a proceeding by *quo warranto* to try the right of the relator in the cause to the office of county treasurer. In such case the information must state facts showing that the relator is entitled to the office of which he claims to be unlawfully deprived.

2. ———: WHO MAY PROSECUTE. A private person cannot appear as relator where he does not claim the right to the office. In such case the prosecution is on behalf of the public, and must be conducted by the proper public officer.

3. **Elections**: COUNTY TREASURER. Section 10 of the election law of 1879, which provides that county treasurers shall be ineligible for more than two consecutive terms, has no retroactive effect.

ORIGINAL information in nature of *quo warranto*.

V. Bierbower and *Joel Hull*, for relator.

Marquett, Deweese & Hall, for respondent.

MAXWELL, J.

This is an information filed in this court by Samuel R. Glenn against the defendant to oust him from the office of treasurer of Kearney county.

The relator states the cause of action as follows:

"*First.* The relator, Samuel R. Glenn, on the eighth day of November, 1881, and for the last past five years prior thereto, was a citizen of the United States and of the State of Nebraska, and a continuous resident, taxpayer, and qualified elector of Kearney county, Nebraska.

"*Second.* On the eighth day of November, 1881, at the last general election of county officers, as shown by the return of the board of canvassers of said election, the following were the number of votes cast for county treasurer for said county, to-wit: For relator, Samuel R. Glenn, 308 votes; for the defendant, Robert P. Stein, 510 votes; for C. A. Ericson, 1 vote; total, 819 votes for said office.

"*Third.* Defendant Robert P. Stein was, on the sixth day of July, 1875, by the board of county commissioners duly appointed to fill the vacant office of county treasurer, which office he then accepted, qualified, used, and held during said unexpired term. Afterwards, to-wit, at the general election of the years 1875, 1877, and 1879 for the election of county officers, each time said Robert P. Stein was declared to be and was duly elected to said office of county treasurer of said county, and each several said terms

did accept and qualify to hold and did take and hold said office, and has held and exercised said office continuously during said three full terms and fractional term from the sixth day of July, 1875, until the fifth day of January, 1882."

There are also allegations of fraudulent voting at the election in November, 1881, which it is not necessary to notice, as it is not alleged that said votes affected the result. There is no allegation that a majority of the legal votes cast at said election were cast for the relator.

The defendant demurred to the information, *first*, because the court has no jurisdiction; *second*, because the facts stated in the information are not sufficient to constitute a cause of action.

The question of jurisdiction was before the court in the case of *The State, ex rel. Valentine, v. Griffey*, 5 Neb., 161; and after a very full examination of the authorities the court held that it had jurisdiction. And we adhere to that decision.

Second. Does the information state a cause of action?

Sec. 707 of the code provides that: "Such information shall consist of a plain statement of facts which constitute the grounds of the proceeding, addressed to the court, which shall stand for an original petition."

Sec. 708 provides that: "Such statement shall be filed in the clerk's office, and summons issued and served in the same manner as hereinbefore provided for the commencement of actions in the district court."

Sec. 709 provides that: "The defendant shall appear and answer such information in the usual way, and issue being joined, it shall be tried in the ordinary manner."

Sec. 710 provides that: "When the defendant is holding an office to which another is claiming the right, the information should set forth the name of such claimant, and the trial must, if practicable, determine the rights of contesting parties."

Sec. 711 provides that: "If judgment be rendered in favor of such claimant, he shall proceed to exercise the functions of the office after he has qualified as required by law."

Sec. 717 provides that: "When an information is upon the relation of a private individual, it shall be so stated in the petition and proceedings, and such individual shall be responsible for costs in case they are not adjudged against the defendant. In other cases the title of the cause shall be the same as in a criminal prosecution, and the payment of costs shall be regulated by the same rule."

An information when filed by an individual to oust the incumbent from an office and instate the relator therein, is a personal remedy, although the state is the nominal party, still it is on the relation of the individual claiming to be aggrieved. In such case the information must state facts showing the right of the relator to the office. *State v. Boal,* 46 Mo., 528. *Miller v. Palermo,* 12 Kas., 14. *The People v. Walker,* 23 Barb., 304. *People v. Ryder,* 2 Kernan, 433. *Respublica v. Griffiths,* 2 Dall., 112. *Com. v. Jones,* 12 Penn. St., 365. *Com. v. Cluley,* 56 Penn. St., 270. The case last cited was similar to the one at bar, a defeated candidate for sheriff having sought to oust the defendant from the office without showing that he was entitled to the same.

The court held that he had no such interest as entitled him to be heard. That the question was exclusively a public one, and could only be raised by the attorney general.

Where a private person has no direct interest in the result of the action, it cannot be maintained by him because the public alone are interested. At common law the information was filed by the attorney-general on his own motion, or by the master of the crown office, but since the statute of 4 and 5 William and Mary, ch. 18, by the direction of the court of King's Bench. Stat. quo Warranto,

6 Edw. I., sec. 5. 18 Edw. I., Stat. 2, 3. *Strata Marcella*, 9 Rep., 29. *Rex v. Trinity House*, 1 Sid., 86. *Rex v. Trelawney*, 3 Burr, 1616. *State v. St. Louis Perpetual Mar., Fire, and Life Ins. Co.*, 8 Mo., 330. Angell and Ames on Corporations, sec. 731.

Our statute has not changed the common law in that regard as to the law officer of the state, except that it permits prosecuting attorneys to institute proceedings on cases arising in their respective districts. But where the state at large is interested, the attorney general, as at common law, is the proper party. As the information fails to state facts showing the relator's right to the office in question, it does not state facts to constitute a cause of action.

Third. Sec. 10 of the election law of 1879 provides that the county treasurer shall be ineligible for more than two consecutive terms. This act took effect on the 1st day of June, 1879, and is to be construed prospectively—that is, county treasurers thereafter elected should not hold more than two consecutive terms. A court will not give a retrospective effect to a statute, unless it is clear from the language used that the legislature intended to give it that effect. *Bartruff v. Remey*, 15 Iowa, 257. *McIntosh v. Kilbourne*, 37 Id., 420. The election law of 1879, therefore, did not render the defendant ineligible. Comp. Stat., 258.

As the information fails to state a cause of action, the demurrer is sustained and the action dismissed.

JUDGMENT ACCORDINGLY.

W. H. PRESCOTT, PLAINTIFF IN ERROR, V. THEODORE M. JONES, DEFENDANT IN ERROR.

Setting Aside Verdict. To justify the court in setting aside the verdict of a jury because it is not sustained by the evidence, it is not sufficient that the court, if sitting as a jury, would have reached a different conclusion from that arrived at by the jury, but the verdict must be clearly wrong.

ERROR to the district court for Adams county.

A. H. Bowen and *James Laird*, for plaintiff in error.

Batty & Ragan, for defendant in error.

MAXWELL, J.

The only error assigned in this case is that the verdict is not sustained by the evidence. In such case, in order to justify the court in setting the verdict aside, it is not sufficient that the court, if sitting as a jury, would have reached a different conclusion from that arrived at by the jury. If such was the law, it would virtually abolish trial by jury. It is only where the verdict is clearly wrong that it will be set aside.

The testimony in this case is conflicting, and there is no such preponderance against the verdict as would justify the court in setting it aside. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

WILLIAM J. McGAVOCK, APPELLANT, v. JOHN W. POLLACK, APPELLEE.

1. **Tax Sale:** REDEMPTION: TAX DEED. Sec. 64 of the Revenue act, Gen. Statutes, 922, gave two years from the day of sale for redemption. The sale was made June 15th, 1874, and the treasurer's deed June 15th, 1876. *Held*, That the deed was made before the time for redemption had expired, and was therefore void. *Held, also*, That the deed was void for not showing where the sale was made, and also for the reason that the sale was for a part only of the taxes then delinquent.

2. ———. A sale of land for taxes must be for all that are delinquent at the time, or it is void.

3. ———. A valid deed cannot be made under a void tax sale.

4. **Practice:** PLEADING: JUDGMENT. A judgment rendered upon a petition open to general demurrer is not void and subject to collateral attack, but merely erroneous and liable to be reversed by proceedings in error.

5. ———: CONSTRUCTIVE SERVICE: PUBLICATION OF NOTICE TO DEFENDANT. Constructive service of notice to the defendant of the commencement of an action must be preceded by an affidavit as directed by sec. 78 of the code of civil procedure.

6. ———: ———: ———. Where the affidavit fails to show that the person to be served was then a non-resident of, and that service of a summons could not be made upon him within this state, the publication is void.

7. ———: LIMITATION. The special limitation of time for the commencement of an action by the revenue act is not available where the tax deed is *prima facie* void.

APPEAL from the district court of Wayne county, BARNES, J., presiding. The action was to cancel certificates of tax sale, and tax deed issued thereon and to set aside proceedings in foreclosure of a pretended tax lien upon section 30, township 25, range 4 east, and to quiet plaintiff's title to said real estate. Judgment below for defendant.

J. C. Crawford, for appellant.

M. McLaughlin, for appellee.

LAKE, CH. J.

The first question presented relates to the tax deed executed on the fifteenth day of June, 1876. On behalf of the plaintiff it is claimed that the deed was void for want of authority on the part of the treasurer to make it at the time he did. It appears that the sale in question took place on the fifteenth day of June, 1874. The treasurer's certificate, to which the deed subsequently issued conformed, declared that, unless redemption were made as provided by law, the purchaser, or his heirs or assigns, would be entitled to a deed of the land, "on and after the fifteenth day of June, 1876."

Governing this matter, sec. 64, Gen. Statutes, 922, provided that: "The owner or occupant of any lands sold for taxes, or any other person, may redeem the same at any time within two years after the day of sale," etc. And sec. 67 that: "If no person shall redeem such lands within two years, *at any time after the expiration thereof*, and on production of the certificate of purchase, the treasurer of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold," etc.

Taken together, the plain import of these two sections is, that the owner of land sold for taxes, or other interested person, shall have two full years "*after the day of such sale*" within which to redeem it. In excluding the day of sale from the period within which redemption may be made, this statute is analogous to the rule of the code of civil procedure, sec. 895, which is that: "The time within which an act is to be done, as herein provided, shall be computed by excluding the first day," etc. By observing this rule in fixing the period of redemption, the sale having been made on the fifteenth, the first day of the two years,

time given for redemption was the sixteenth day of June, 1874, and the last the fifteenth day of June, 1876, the very day on which the deed was made. It is very clear, therefore, that the deed was unauthorized, and, being so, necessarily void. The right to redeem continued to the very last moment of the time given. And it cannot be doubted that this right, and the right to have the treasurer's deed, could not possibly co-exist.

And this deed was void for at least two other reasons. *First.* It fails to show where the sale was made. This the statute required, and the omission was fatal to the deed. *Haller v. Blaco,* 10 Neb., 36. *Howard v. Lamaster,* 11 Id., 582. *Second.* It appears that the sale was made for the taxes of 1872 alone, while those of 1871 and 1873 were at the same time delinquent. The treasurer was not authorized to sell the land except for all of the taxes then delinquent, together with the interest, penalty, and costs. *State v. Helmer,* 10 Neb., 25. *Tillotson v. Small, ante* p. 202. And for this last reason the deed subsequently made to cure the defects of the first one is also void. A valid deed cannot be made under a void tax sale.

The ruling of the court below, by which the proceedings to enforce the statutory lien for taxes paid under the void sale were held invalid, was right. The fact, however, that the petition was open to a general demurrer, which it clearly was for not showing a failure of the tax title, did not render the judgment void and subject to collateral attack, but merely erroneous and liable to be reversed by proceedings in error.

The reason of the judgment being void is, that the court in pronouncing it was without jurisdiction of the subject matter of the suit for want of notice to the defendant. It seems that constructive service was sought and an affidavit to that end made. But the affidavit was totally wanting in several particulars, some of which, at least, were jurisdictional, as this court has heretofore held. Doubtless the

subject of the action belonged to one of the classes mentioned in section 77 of the code of civil procedure, in which constructive service by publication may be made, where the defendant is a non-resident of this state.

But section 78 provides that: "Before service can be made by publication, an affidavit must be filed that service of a summons cannot be made within this state." * * * * "And that the case is one of those mentioned in the preceding section. When such an affidavit is filed, the party may proceed to make service by publication." In order to have shown that the case was one of those included "in the preceding section," the affidavit must have stated, in addition to what it did, at least that the defendant was then a non-resident of, and that service of a summons could not be made upon him "within, this state." Without an affidavit showing the existence of these two facts, as well as that the subject matter of the suit was such that constructive service was proper, the publication of notice was void, and the judgment based thereon open to collateral attack. *Atkins v. Atkins*, 9 Neb., 191.

The plea of the special limitation given by the revenue act for the commencement of an action cannot be sustained.

In *Sutton v. Stone*, 4 Neb., 319, we held that this defense is available only where the tax deed is *prima facie* good, but, for some defect in the tax proceeding, voidable, that this defense can be made. For these reasons the judgment is reversed.

REVERSED AND REMANDED.

JOEL HULL, PLAINTIFF, V. THE COMMISSIONERS OF KEARNEY COUNTY ET AL., DEFENDANTS.

1. **Tax**: IRREGULARITY IN LEVY NOT A VALID OBJECTION TO. In June, 1872, Kearney county, which till then had been attached to Adams county for election, *revenue*, and judicial purposes, was organized, and prepared to transact its own business. On the thirteenth of July following, the commissioners of Adams, as they had been accustomed to do, and in good faith, made a formal levy of a tax for Kearney county, upon the property therein, which levy the commissioners of Kearney adopted, and caused to be extended upon their own tax books. *Held*, That this adoption of the levy by the commissioners of Kearney county made it their own; and, although irregular, was not a valid objection to the collection of the tax in an equitable point of view.

2. **Bridge**: COUNTY INDEBTEDNESS FOR: TAX TO PAY FOR: INJUNCTION. The collection of a tax levied for the payment of county warrants issued in settlement of an amount found to be due for building a bridge under a contract with the county, will not be enjoined at the suit of tax-payers on the ground that the commissioners exceeded their authority in letting the contract, the contract having been let, the bridge built, and the settlement made in good faith and without objection at the time.

ORIGINAL application for injunction.

Joel Hull and *Marquett, Deweese & Hall*, for plaintiff.

J. S. Gilham and *George W. Doane*, for defendants.

LAKE, CH. J.

This is an original action, and was brought to restrain the payment of certain county warrants, and also the collection of a tax levied for that purpose. The ground upon which the supposed right to this relief is based is that the warrants were issued without lawful authority, and are void. No fraud on the part of any one in the issue or proposed payment of said warrants is charged, but every

step taken respecting them seems to be conceded to have been in the utmost good faith.

These warrants appear to have been issued in due form by the commissioners of said county, on the fourth day of June, 1873, and in payment to Henry T. Clark of the balance found to be due him on settlement for building a bridge across the Platte river, between the towns of Gibbon and Lowell. The grounds of their alleged invalidity are, *first*, that there was then no existing fund against which to draw them; *second*, that the contract with Clark for the building of the bridge was unauthorized; and, *third*, that the bonds were in excess of the amount actually due for the work under the contract.

The want of a fund is claimed chiefly on the ground that, for the year 1872, there was no levy of a road tax by the commissioners of Kearney county. It appears from the petition that, instead of taking upon themselves the making of a formal levy, the commissioners simply ordered the county clerk to transfer to his own books a formal levy which had been made by the commissioners of Adams county, to which Kearney county had been attached for election, *revenue*, and judicial purposes. From the averments of the petition, it appears quite clear that Kearney county was completely organized when the commissioners of Adams county assumed to make a levy for it. This was done probably under the supposition that the organization of Kearney had not yet been fully perfected, and that it was their duty under the law to do it. At any rate there is nothing to show that it was not done in the utmost good faith. Under these circumstances we are of opinion that the action of the commissioners of Kearney, in the adoption of the work of the commissioners of Adams, made it their own, and that, although the desired result was reached somewhat informally, it was not at all different, at least when equitably considered, from what it would have been if made by the commissioners of Kearney independently, and after the

ordinary method. We look upon this irregularity as of no consequence. And it is objected further to this levy that the larger portion of the land on which it was placed was not then subject to taxation, viz., about eight hundred and sixty quarter sections, which had been selected by railroad companies under grants from the United States, and, under the law, still untaxable. This point is urged as showing that there was not only no fund provided for at the time the warrants were issued, from which they could ultimately be paid, but also that the contract with Clark for the building of the bridge was unauthorized for want of a fund on which to base it, as held in *The People v. The Commissioners of Buffalo county*, 4 Neb., 150. But, even if the levy were illegal, this objection comes too late to find favor with a court of equity. According to the showing made, the tax-payers of Kearney county were perfectly willing to have the bridge built by Clark, under the contract, and to have the use of it—in other words, to accept the benefits that were to flow to them from Clark's performance of the agreement on his part—but unwilling to give anything in return. As to the building of the bridge, and the terms upon which it was being done, the people of that county were at the time fully advised, but without objection suffered the work to go forward to completion. So, too, they knew of the settlement between Clark and the commissioners respecting it, but took no appeal, nor at any time during the eight years intervening between that and the commencement of this suit sought to have rectified any mistake therein. Under such a state of facts it would ill become a court of equity, as it seems to us, to decree what is here sought. It would be inequitable rather than equitable. *Brown v. Otoe county*, 6 Neb., 111. *Clark v. Dayton*, Id., 192. That the tax-payers of Kearney county had a remedy at the time of the letting of the contract to Clark, if they were unwilling to incur the obligation of paying for the work, is clear. *Normand v. Otoe*

County, 8 Id., 18. But, having chosen to waive it then, they cannot have it now. There being no cause for equitable relief shown, the temporary injunction must be vacated and the action dismissed at the costs of the plaintiff.

JUDGMENT ACCORDINGLY.

CYRUS R. CLAPP ET AL., PLAINTIFFS IN ERROR, V. E. M. MAXWELL & CO. ET AL., DEFENDANTS IN ERROR.

1. **Foreclosure of Mortgages.** A leading principle of our statutes relative to the foreclosure of mortgages upon real property is, that a mortgagor shall not be answerable for the debt secured upon the mortgage, and personally, at the same time, without leave of the court.

2. ———: POWER OF THE COURT IN. By a decree of foreclosure of a mortgage upon real estate, a court possesses no power to give a lien upon, or to affect any other property of the mortgagor until that included in the mortgage is exhausted.

3. ———: EXECUTION AGAINST OTHER PROPERTY. A general execution cannot be issued on a decree of foreclosure, except by order of the court, made on the report of sale, and for a deficiency ascertained after the mortgaged property is exhausted.

ERROR to the district court for Buffalo county. Tried below before GASLIN, J.

Hamer & Conner, for plaintiffs in error.

Sam. L. Savidge, for defendants in error.

LAKE, CH. J.

The action below was brought to obtain an injunction against the sale of certain real estate under an ordinary ex-

ecution. The judgment on which this execution was issued was rendered in an action brought by the said E. M. Maxwell & Co. against Lucretia E. Altaffer and others, for the foreclosure of a mortgage upon real property other than that now in controversy. The decision of the question of the plaintiffs' right to the injunction sought, independently of the incidental question of homestead, depends entirely upon the effect that must be given to the judgment in the foreclosure suit. If, as its form in part might indicate, it is really a judgment *in personam*, and effective as such, then it follows that the execution was properly issued, and the plaintiffs' right to relief is contingent upon the possibility of the property levied upon being found to have been exempt from forced sale when they purchased it from the said Lucretia Altaffer.

The proceedings to foreclose this mortgage were taken under, and are controlled by, title XXVII of the code of civil procedure, a leading principle of which seems to be that, ordinarily, a mortgagor shall not be answerable for a secured debt upon the mortgage and personally at the same time, and that, one of these remedies having been selected, it must be exhausted before the other can be resorted to, unless first specially authorized by the court. This we think is made clear by a reference to three or four sections of the title just referred to.

Section 846 provides, that in an action for the foreclosure of a mortgage, "the court shall have power to decree a sale of the mortgaged premises, or such part thereof as may be sufficient to discharge the amount due on the mortgage, and the cost of suit."

Section 847 provides that the court, in such case, "shall not only have the power to decree and compel the delivery of the possession of the premises to the purchaser thereof, but on the coming in of the report of sale, * * * to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied

after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary execution, as in other cases, against other property of the mortgagor."

Section 848 declares that: "After such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court."

Section 850 requires the plaintiff in a petition for the foreclosure of a mortgage to state therein "whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof," etc.

And section 851 declares that: "If it appear that any judgment has been obtained, in a suit at law, for the money demanded by such petition, or any part thereof, no proceedings shall be had in such case, unless, to an execution against the property of the defendant in such judgment, the sheriff, or other proper officer, shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy the execution, except the mortgaged premises."

It is not claimed that the court has, at any time, authorized the mortgagees to proceed against any other than the mortgaged property, but the right to do so independently of such order is claimed on the sole ground of the form of the judgment rendered in the foreclosure suit. The ground taken in support of this claim is that, although the judgment may be broader than the statute authorizes, it is at most only erroneous, and therefore not open to collateral attack—that, until reversed or modified by an appellate tribunal, it must stand and be executed as judgments for the recovery of money only usually are.

In support of this view the case of *Murdock v. De Vries*, 37 Cal., 527, is cited. But that case, as we view it, although in some of its features somewhat analogous to the

one at bar, does not aid the defendants. It appears that the action there was brought to quash an execution, and to perpetually enjoin the enforcement of the judgment on which it was issued. The proceeding in which the judgment, thus assailed, was rendered, was to enforce the lien of a street assessment against certain real estate. The judgment provided that if the return of the sheriff upon the special execution "should show a deficiency, the clerk should enter a personal judgment for the amount of such deficiency against the defendants." A deficiency was thus shown, a personal judgment entered, and an execution for its collection issued. Relief was sought on the single ground of fraud in obtaining the judgment. The claim of fraud rested solely on the fact that the plaintiff, in taking a personal judgment, had obtained greater relief than he was entitled to. Of this claim the court said: "We are unable to perceive how fraud can be predicated of such a transaction. The act charged upon the plaintiff as a fraud was the act of the court. There was no promise, misrepresentation, or understanding between the parties, outside of the record, by which the defendants were deceived or misled in any way. * * * Of such a transaction nothing more can be predicated than that the plaintiff has obtained an erroneous judgment, which will be reversed or modified on appeal, or possibly one which is, *pro tanto*, absolutely void."

The question there decided being one of fraud in procuring the judgment, very clearly the case has no special application as an authority here, where no fraud is charged, the judgment standing unquestioned, and the only complaint respecting the legality of the execution is that, not having been authorized by the court, it was simply void.

And counsel for the defendants seems to concede that, but for the peculiar wording of the decree, if it were in the usual form of an equity decree of foreclosure, no general execution could have gone out until specially authorized

as the statute directs. But he contends that, inasmuch as it was formally "considered by the court that the said plaintiffs recover," etc., it is both a special and general judgment, and consequently a lien not only upon the particular property covered by the mortgage, but also upon the other real estate of the defendants from the time of its rendition. We cannot accept this as being a correct view of the case, for, giving to the provisions of the statute above quoted the force which they were evidently intended to have, the court, in a decree of foreclosure, seems to possess no power to give a lien upon or to affect any other property of the mortgagor until that included in the mortgage is exhausted. The affirmative declaration in sec. 846, that in a foreclosure suit "the court shall have power to decree a sale of the mortgaged premises," taken in connection with the provision in the next section, that "on the coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt," must be taken in a restrictive sense, and as equivalent to a positive denial of power to the courts by decree to bind or affect property outside of a mortgage until that within it is exhausted.

To hold as requested by the defendants' counsel, would require us to shut our eyes to all of the decree save the clause from which we have quoted. This we have no right to do. To construe the judgment of a court properly, the ordinary rule applied in the construction of instruments generally, by which all of their parts are considered together, must be observed, for in no other way can a safe conclusion be reached as to what was really intended by it. Taking the entire decree together, we find that the court, after considering that "the said plaintiffs recover," etc., went on and provided minutely just how it should be done, but it was not by means of an ordinary execution. The decree provides that payment shall be made from the proceeds of a sale of the mortgaged premises, after the satis-

faction of a prior lien. No provision is made for a deficiency, nor could there properly have been at that time. It is only "on the coming in of the report of sale" that a deficiency can be ascertained and provided for. Therefore, taking the whole decree together, we are of opinion that, although in its wording somewhat informal, in effect it conforms substantially to the statute governing the foreclosure of mortgages, was not a lien upon property not embraced in the mortgage, and did not authorize the issue of the execution complained of.

This view of the case renders an examination of the homestead question unnecessary, and we pass it.

The judgment is reversed, and a decree may be entered here as prayed for in the petition.

REVERSED AND DECREE.

CHARLES SEELEY, APPELLEE, v. BRIDGES & JOHNSON, APPELLANTS.

Mills and Mill Dams. In 1869, B. & Co. erected a mill at C., and built a dam across the Blue river for the purpose of obtaining sufficient power to propel the machinery of said mill. In 1870, they acquired the right to raise the dam to ten feet and two inches above low water mark. In 1879 the mill was burned and they then commenced the erection of a larger mill near the former site. In January, 1880, S. commenced the erection of a dam across the same river at a point some considerable distance above that of B. & Co. In July, 1881, B. & Co sought to raise their dam to eleven feet above low water mark, thereby overflowing the mill-site of S. *Held*, That they had no authority to raise their dam above ten feet and two inches.

APPEAL from Saline county. Tried below before WEAVER, J.

Dawes & Foss, and *T. M. Marquett*, for appellants.

O. P. Mason, for appellee.

MAXWELL, J.

The defendants are the owners of a mill on the Blue river near the city of Crete, the machinery being propelled by water. They, or at least Bridges and his then partner, Baltzly, built a mill, and erected a dam across the river in 1869, the exact height of which does not appear; but in the fall of 1870, it was raised to ten feet two inches. In 1879, the mill was burned, and the defendants commenced the erection of a larger mill, and in 1881, sought to raise their dam to eleven feet. The plaintiff is also the owner of a mill site on the same river above that of the defendant, on which he has commenced to erect a mill and mill dam and sought to enjoin them from raising their dam, alleging that by doing so the back water from the defendant's mill would render his mill site of no value. The defendants in their answer and cross petition asked for an injunction restraining the plaintiff from erecting a mill dam at that point, alleging that it is within their mill dam and they will thereby be greatly injured, etc.

The court found the following facts: "That the plaintiff, Charles Seeley, is the owner of real estate as stated in the petition, and that the defendants are the owners of real estate as set forth in their answer, and that the Big Blue river flows through both tracts of land, first through the lands of plaintiff and then through the lands of defendants. The court further find that one of the defendants, Bridges, with one Baltzly, purchased the lands which the defendants own at the present time, in the year of 1869, and in that year built a mill and mill dam thereon. That in the year 1875, Baltzly sold his interest in said mill property, and that in the same year, the defend-

ant Johnson, by purchase, became the owner of an undivided one-half interest in such mill, mill dam, and mill site, and that since that time the defendants have been the owners of said mill, mill dam and mill site. The court further find that in the fall of 1879, the mill belonging to the defendants was burned down, that said mill had cost and was worth from twelve to fifteen thousand dollars. That in August, 1880, defendants commenced to lay their plans for rebuilding a new mill on the old site, and that up to the time of the injunction in this case was served, they had expended in building the new mill for machinery, flume, and dam upon said premises, forty-one thousand dollars, and they have now expended the sum of forty-four thousand dollars. The court further find that the land described in the petition, and upon which is situated the proposed mill site and dam of the plaintiff, Charles Seeley, belonged to and was owned by J. C. Bickle on the 24th day of December, 1880, and that on that day it was agreed in writing between the said J. C. Bickle and Bridges, and Baltzly, the then owners of defendants' mill dam and site, that for certain valuable consideration paid by Bridges and Baltzly to J. C. Bickle, the dam which had been recently raised could be maintained at its then present height, and should not be raised so as to further flood said Bickle's land. The court further find that in the fall of 1870, the dam of defendants was raised from eight and one-half feet to ten feet and two inches, and that the dam has from that time been sinking and frequently been repaired and raised by building on the top; that the dam has not been kept up to the height to which it was built in the fall of 1870; but the court is unable to find from the proofs just how high the dam has been at particular dates since the year 1870, and the time of commencing this action, further than it is clearly shown that the dam now, which the court finds to be ten feet two inches high from low water mark on the level of the stream below the dam at low water, is higher than it has been for several

years past. The court further finds that on the 23rd and 24th days of June, 1881, the defendants raised their dam by building on the top eighteen inches, and that the course is now ten feet two inches, and the same height it was in the fall of 1870, after it had been raised at the time of the contract of December 24th, 1870. The court further find that the said dam of defendants backs the water of the stream and increases the depth of the water at the point claimed by Seeley for a mill site, and that the defendants have the right to maintain and keep their dam at its present height, viz., ten feet two inches, and no higher. The court find that Charles Seeley commenced work upon his proposed mill site in December, 1880, and continued to do some work and expended some money up to the time of commencing this action; that in digging race, he expended about three or four hundred dollars, and in excavating for building, twenty-five or fifty dollars, and had laid upon the ground one car load of lumber worth about six hundred dollars, and that since the commencement of the suit, said plaintiff has placed upon said site about three thousand dollars' worth of material and had a small amount of work done. The court further find, that the plaintiff Seeley sued out a writ of *ad quod damnum*, to condemn land above this proposed site January 18th, 1881, and that defendant sued out a like writ to condemn land that might be overflowed by reason of their dam, to eleven feet from low water mark, on the 24th day of January, 1881."

In *Nosser v. Seeley*, 10 Neb., 468, it is said the law favors diligence and gives priority to the person who in good faith first commences the erection of a mill or dam. The law, however, is to receive a reasonable construction. The object is to utilize the water power of the state, and not to create monopolies. The defendants in 1870 acquired the right to raise their dam to ten feet two inches, and this seems to have been as high as they desired to have it, until after the plaintiff commenced the erection of a dam.

There is reason to believe that the object in raising this dam was to prevent competition, as much as to increase the power of their mill; but however this may be, they have failed to make a case entitling them to raise the dam more than ten feet two inches above low water mark. As to the defendant's cross petition, it is sufficient to say that the facts stated therein are not sufficient to entitle them to the relief sought. It is very clear that justice has been done, and the judgment is affirmed.

JUDGMENT AFFIRMED.

NEW ENGLAND MORTGAGE SECURITY CO., APPELLANT, v. STEPHEN B. HARRIS ET AL., APPELLEES.

Usury: EVIDENCE. Where a loan for $350 was made by the C. Banking Company, and $70 retained for commission, and the testimony of the plaintiff showed that in addition to ten per cent interest the borrower was to pay certain other expenses to the Banking Company, *Held*, That as the amount paid by the borrower to the Banking Company greatly exceeded 12 per cent, it devolved on the plaintiff to show that the value of said services rendered to it, when added to the ten per cent reserved, did not exceed the maximum rate allowed by law. LAKE, CH. J., dissents.

APPEAL from Butler county. Heard below before POST, J.

D. G. Hull and *R. D. Stearns*, for appellant.

C. J. Phelps, for appellees.

MAXWELL, J.

This is an action to foreclose a mortgage. The defendants in their answer admit the execution of the note and mortgage set out in the petition, but allege that while they were made for the sum of $350, the plaintiffs actually paid the defendants only the sum of $280, the plaintiff retain-

ing $70 out of said sum of $350, and charging ten per cent interest on the entire amount. There is also an allegation that the money being payable in New York, the contract is governed by the laws of that state, but as this point is not discussed in the brief of the appellee, it will not be considered. There is also an allegation that the defendants have paid on said note and mortgage in the aggregate the sum of $107.14. On the trial of the cause, the court found that the Corbin Banking Co. acted as the agent of the plaintiff in negotiating the loan, and that the defendants received only the sum of $280 thereon, and have paid as interest the sum of $107.14. A decree was therefore rendered in favor of the plaintiff for the sum of $172.86. The plaintiff appeals.

That $70 of the $350 borrowed was retained, and the defendants received only $280, and that 10 per cent interest was charged on the whole $350 is proved beyond question. The only question, therefore, for consideration is, does the proof sustain the finding of the court, that the Corbin Banking Co. acted as the agent of the plaintiff in making the loan? The following is a copy of the note:

"$350.00. SUMMIT, NEB., 8 MCH., 1876.

"Value received, on the eighth day of March, 1881, I promise to pay the New England Mortgage Security Company or order, three hundred and fifty dollars with interest from date until paid at 10 per cent per annum as per coupons attached at the office of Corbin Banking Company, 61 Broadway, New York City. Unpaid interest shall bear interest at 10 per cent per annum. On failure to pay interest within five days after due, the holder may collect the principal and interest at once.

"No. 14999. "STEPHEN B. HARRIS.

"This note secured by a first mortgage on the S. E. 32, 15, 1 E., in Butler county, Nebraska."

Five coupons were also given, of which the following is a copy, except as to the time of payment:

"$35.00. 1st April, 1880, I promise to pay the New England Mortgage Security Company or order thirty-five dollars interest to that date on my note for three hundred and fifty dollars. STEPHEN B. HARRIS.

"No. 14999.

"Payable at the office of the Corbin Banking Company, 61 Broadway, New York."

It appears from the testimony of Henry Saltonstall that the plaintiff is a corporation organized under the laws of Connecticut, in 1875, "for the purpose of loaning its funds upon improved farms in the west—and its principal office is Boston, Massachusetts, where most of its business is transacted." The manner in which it was to make loans to farmers in the west from its office in Boston is not stated, nor does it appear that it ever made a loan except through the Corbin Banking company. The number of the note (14999) is somewhat suggestive. The deposition of Mr. Saltonstall was taken by the plaintiff, and on cross-examination he testified as follows:

First cross int. Is it not a fact that all loans, or at least many of them, heretofore made through the Corbin Banking company, in which the New England Mortgage Security company is mortgagee, and made payable at the office of the said Corbin Banking company, in New York city, by virtue of an arrangement or agreement between the said New England Mortgage Security company, and the said Corbin Banking company?

Answer to first cross int. If your question is whether or not all or nearly all of the loans made by the New England Mortgage Security company to the Corbin Banking company, as agents of the western farmers who applied for the loans, were to be paid at the office of the Corbin Banking company, in New York, I answer yes. There was not, however, any special agreement to that effect, but no corporation or individual here would lend their money on the security of western farmers unless the persons or company

that acted as agents of the owners of such farms, in soliciting loans, agreed to look after the collection thereof, free of expense to the lender.

Second cross int. Who, for and on behalf of the said New England Mortgage Security company, made an arrangement with the Corbin Banking company by which the note in question, principal and interest, should be made payable at the office of the Corbin Banking company in New York city; and was the arrangement made at the time the application in this case was submitted to you or your said company?

Second answer. I never made any such arrangement, nor did any other officer of the New England Mortgage Security company, to my knowledge. General Osborne, reasurer of the Corbin Banking company, as a part of the inducement to me to make the loan, without which I should have refused to make it, agreed to make it payable, principal and interest, at the office of the Corbin Banking company in New York. I did not offer or agree, on behalf of the New England Mortgage Security company, to pay the Corbin Banking company anything for collecting either principal or interest.

Third cross int. Where was it arranged between the New England Mortgage company and the said Corbin Banking company that all loans made through the Corbin Banking company should be made payable at the office in New York city.

Answer. No special agreement was ever made that all loans made by the New England Mortgage Security company, at the solicitation of the Corbin Banking company, should be made payable at the New York house of the Corbin Banking company.

Fourth cross int. Has not your company, prior to the making of the loan in suit, made other similar loans through the said Corbin Banking company?

Fourth answer. Our company never made a loan through the Corbin Banking company acting as its agent. Other

western farmers have obtained loans from us through the Corbin Banking company, having in their applications appointed said company their agents.

Fifth cross int. Has not your company, prior to the making of the loan in suit, had, and did not your company at the time this loan was made have, other like notes and mortgages in the hands of the Corbin Banking company, where, by the terms of said notes and mortgages, the interest was payable at said Corbin Banking company's office in New York city, with an agreement between the said New England Mortgage Security company, should collect the interest and perform other acts for the New England Mortgage Security company in collecting interest or perform other services?

Answer. No. The New England Mortgage Security company keeps its notes and mortgages in its own possession. The general custom of the Corbin Banking company is to solicit loans for its principals in the west, and as an inducement to the person or company to which the officer of the Corbin Banking company applies to make the loan, the Corbin Banking company volunteers to look after collecting the interest and principal as they fall due. There has been no special agreement between the companies, but there is the general understanding, without which we should have been unwilling to make any loans in the west, that the agent of the borrower should collect the interest free of charge. This understanding is not peculiar to or confined to the Corbin Banking company and the New England Mortgage Security company, but is the general understanding and agreement between every eastern lender and every western borrower so far as I know, as a part of the business, and without which no money could be borrowed in the east by western farmers.

Mr. Saltonstall was the president of the Mortgage Security company at the time the loan in question was made, and from his own admission the moment a loan was made

that instant the Corbin Banking company became the agent of the Security Company to collect the amount with the interest. This agency existed not only in this case, but in all others where loans had been effected, and there seems to have been many of them. The borrowers, Mr. Saltonstall states, in effect, were to pay the plaintiff's agent for the services rendered to the plaintiff in making collections; in other words, the plaintiff was to have ten per cent interest net, being three or four per cent above the legal rate in Massachusetts, and the borrower was to pay, in excess of ten per cent, for the services rendered by the banking company to the plaintiff. And we do not know what those services were valued at, nor what proportion of the $70 retained was kept for these services. But as the whole amount retained greatly exceeded twelve per cent interest, the highest legal rate permissible in this state when the loan was made, it devolved upon the plaintiff to show that the value of these services did not, with the ten per cent reserved, exceed twelve per cent. The statute fixes the maximum rate of interest, and a party cannot evade the law by exacting so much in money and an additional sum in valuable services, the aggregate exceeding the maximum allowed by law. The statement that no loans would have been made except in that way, shows that the services were regarded as valuable, and probably exceeded the highest rate fixed by law. But in our opinion the proof clearly shows the agency of the banking company before the loan was made.

To show an agency it is not necessary to show an express contract to that effect. It is sufficient if the acts are done for the principal and are accepted as such by him. This the proof in this case clearly tends to prove. It is unnecessary to review the testimony further. The finding and judgment of the district court are sustained by the testimony, and are affirmed.

JUDGMENT AFFIRMED.

LAKE, CH. J., dissents.

GILBERT P. YOUNGLOVE, PLAINTIFF IN ERROR, V. WILLIAM LIEBHARDT, DEFENDANT IN ERROR.

Partnership. As a general rule an action at law cannot be maintained between partners for work and labor or money expended on account of the partnership.

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

Agee & Hellings, for plaintiff in error.

E. J. Hainer, for defendant in error.

MAXWELL, J.

This action was brought by Liebhardt against Younglove in the district court of Hamilton county, to recover the sum of $365, being $270 for work and labor and $95 for money expended. The defendant below (plaintiff in error) states in his answer that in August, 1878, the plaintiff and defendant entered into partnership for the purpose of buying horses in the state of Illinois and shipping them to this state and selling them; that it was agreed between them that each partner was to contribute one-half of the capital, bear one-half of the expenses, and devote his time to the prosecution of the business; that the labor performed and money expended by said Liebhardt were performed and expended in and about the prosecution of said partnership business, which has not yet been settled. On the trial of the cause in the court below, judgment was rendered in favor of Liebhardt for the sum of $188 and costs. The principal error relied upon in this court is, that the judgment is not sustained by the evidence.

All the testimony tends to sustain the allegations of the answer; that the labor was performed and money expended as stated in the petition, for the benefit of the partnership,

there seems to be no doubt; but until the settlement of the partnership accounts, or a direct promise to pay the claim, no action can be maintained for the same.

As a general rule no action at law can be maintained between partners for work and labor or money expended on account of the partnership. *Holmes v. Higgins*, 1 B. & C., 76. *Millburn v. Codd*, 7 Id., 419. *Fromont v. Coupland*, 2 Bing., 170. And as a general rule a partner is not entitled to compensation for his services as partner; but for advances and outlays on behalf of the firm he is entitled to a proper credit. But he cannot recover for the same in an action at law against the firm, because he cannot be both plaintiff and defendant, nor against his co-partner because until an account is taken it is impossible to determine what amount is due. If there was a partnership between the plaintiff and defendant, as the proof in this record shows, and the accounts are still unsettled, an action at law cannot be maintained. But as Liebhart is entitled to a settlement of the partnership accounts and a considerable portion of the assets seem to be in the hands of Younglove, therefore Liebhardt will have leave to amend his petition and ask for an accounting. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

IRVIN CATLIN, PLAINTIFF IN ERROR, v. LYMAN WRIGHT, DEFENDANT IN ERROR.

1. **Lease:** FORFEITURE. In a lease for a term of years of a farm and a lot of cattle there was a condition that on the failure of the lessee to furnish the stock with "sufficient care, food, and water during the winter or feeding season," the lessor had the right, "at his option," to terminate it "and take immediate possession of said premises and stock." *Held*, That this option could be lawfully exercised only within a reasonable time after the lessor learned of the lessee's default.

2. ———. Case examined, and the verdict found to be contrary to evidence, and the instructions to the jury in conflict with the rule here stated.

ERROR to the district court for Stanton county. Tried below before BARNES, J.

H. C. Brome, for plaintiff in error.

John A. Ehrhardt, for defendant in error.

LAKE, CH. J.

The first of the alleged errors is, that the verdict is not sustained by sufficient evidence.

The right of the defendant in error to recover in the action depended altogether upon the fact being established that, under the lease, he was entitled to declare it terminated, and reclaim the cattle at the time he did. We think there can be no doubt whatever that he would have been entirely justified in doing so at almost any time during the winter months; for the testimony is pretty strong to the fact of the cattle not having been then suitably cared for. But it is contended on behalf of the plaintiff in error that, for causes which he might have taken advantage of during those months, he had no right to terminate the lease and assert a forfeiture so late as the month of June following.

The particular clause of the lease which gave to the defendant in error the right to terminate it and take back his stock, was this, that "if the said party of the second part fails to take good care of said stock, and provide them with sufficient grasses, water, and salt during the summer or grazing season, and sufficient care, food, and water during the winter or feeding season, then the said Lyman Wright shall have the right, at his option, to declare this lease at an end, and thereby cancel and annul the same, and take immediate possession of said premises and stock."

As we understand the law governing this provision, the option given to the lessor was to be exercised, if exercised at all, within a reasonable time after learning of the lessee's default in caring for the stock. In other words, it was possible for the lessor, by neglecting to assert his right at the time of a known default, or within a reasonable time afterwards, to waive it. In this particular we are aware of no distinction between leases and other contracts. It seems to be a general rule that if a party become entitled to rescind or terminate a contract, or claim a forfeiture, by reason of the default of another, he must do it within a reasonable time. Chitty on Contracts, *641.

Referring to the evidence contained in the bill of exceptions, we find no difficulty in saying that there was probably ample cause shown by the lessor for terminating the lease long before he undertook to do so. Even so early as the last of October, 1880, and from thence to the fore part of January, 1881, it is possible that he would have been justified in demanding back his stock. Wright himself testified that, in October, 1880, he was at the place and found that "the stock had been in the yard two days without a mouthful to eat, and stood in the mud just about knee deep." Having some words at this time respecting the care of the cattle, Catlin, he says, offered to give them up, to which he replied that he was "not prepared to take them now." Wright says he next saw the cattle about the seventeenth of January, at which time they "had no place to lie down," because of the filthy condition of the yard in which they were kept. And in this he is corroborated by other testimony which he produced, although it was denied by Catlin. If, however, what Wright says were true, he would doubtless have been upheld in at once, or within a reasonable time thereafter, demanding back his stock. But he did not see fit to take that course. On the contrary, he says he remained with Catlin about a month, and assisted him in feeding and caring for the animals, and that while

he was there they improved. At the end of this time, which must have been about the seventeenth of February, Catlin's "brother had come up from Ponca" to help him, and there being no further need of Wright's services he left. From this time on to the second day of June, whenthe notice of Wright's election to terminate the lease was served, and the cattle demanded, there is a total absence of evidence to show a want of "sufficient care, food, and water."

Now, according to our understanding of the law applicable to this state of facts, Wright could not wait until the month of June, and after the grazing season had commenced, and then insist upon a forfeiture of Catlin's right to the stock because of neglect occurring in October or January, or indeed at any time during the winter months. To permit him to do so would be exceedingly unjust. Perhaps if the property to be reclaimed through the forfeiture were such that the possession of it during the delay would have been of a present benefit to the lessee, the rule might be otherwise. The possession of this stock, however, attended as it necessarily was by considerable labor and expense, was a burden, which the lessor could not lawfully impose upon the lessee, without at the same time waiving his right to a forfeiture for any previous neglect.

The testimony, we think, seems to show pretty clearly that, notwithstanding Catlin's neglect to live fully up to the requirement of the lease, Wright was quite willing he should have the cattle until the arrival of the grazing season, when further feeding was unnecessary, and the expense of taking care of them inconsiderable in comparison with that of the winter season. Such being the showing made by the record, we are of opinion that the verdict is in direct conflict with both the evidence and the law of the case.

It is further claimed that the instructions given to the jury were erroneous, and also that the instructions requested on behalf of the plaintiff in error ought to have been given. By the first instruction the jury were told that "the only

question" for them "to consider and determine" was "whether or not defendant so neglected to care for said stock, or perform the conditions of said lease, as to justify the plaintiff in declaring said lease forfeited, and take possession of said stock." The second instruction was to the effect that if the jury found "that the defendant took good and sufficient care of said stock," * * * "and kept and performed the conditions of said lease on his part," then they should return a verdict in his favor. And by the third instruction that if they found he did not take "such care" they should return a verdict for the plaintiff. These instructions were clearly erroneous in making the result dependent alone upon the single fact of want of proper care of the stock, at any time while in charge of the lessee, and in ignoring altogether the question of waiver which was pointedly raised by the evidence, and brought directly to the attention of the judge by the instructions which he refused.

As to the instructions tendered on behalf of the lessee, our views are that, in requiring the lessor to exercise his option "*immediately* upon the fact coming to his knowledge" that the cattle had not been properly cared for, they called for the application of an unreasonably restrictive rule, there was no error in refusing to give them.

The only remaining matter of complaint is the admission of the testimony of the two witnesses named Mack, relative to their own stock during the winter in question. What they said as to the number they wintered was proper as showing their experience and competency to give opinions respecting the care of such animals during the winter season. But the condition in which their stock came out in the spring was wholly immaterial, and their testimony as to that ought to have been excluded.

For the errors we have pointed out the judgment is reversed and a new trial awarded.

REVERSED AND REMANDED.

ROBERT E. MOORE, TRUSTEE, APPELLEE, v. WEALTHY P. GREGORY AND OTHERS, APPELLANTS.

Attorney's Fee: EVIDENCE: WANT OF TO SUPPORT FINDING. In the foreclosure of two mortgages, the court below having found, as against all of the defendants, that the plaintiff was entitled to recover an attorney's fee, on a review of the evidence, *Held*, That as to two of the defendants the finding was unsupported, and the judgment erroneous.

APPEAL from Lancaster county. Tried below before POUND, J.

John S. Gregory, for appellants.

Marquett, Deweese & Hall, for appellee.

LAKE, CH. J.

Of the several matters in this record complained of, the only tenable one is the finding of the court that, "in the body of the second and third mortgages" the "defendants agreed to pay to the plaintiff a reasonable attorney's fee for the foreclosure of the same." Referring to these mortgages we find that, as to the *second*, this finding was untrue, from which it follows that, as to defendants E. Mary and John S. Gregory, the judgment for the payment of the seventy dollars attorney's fee is erroneous.

Taking the mortgages in the order of their execution and delivery they were as follows: The *first*, January 4th, 1877, executed by E. Mary and John S. Gregory alone, to secure the sum of six hundred dollars, the agreed consideration for an assignment to said E. Mary Gregory of certain interests in three several judgments then held by the mortgagee as agent. In this mortgage an attorney's fee was provided for in case of foreclosure.

The *second* mortgage was given January 5th, 1877, as

additional security to the preceding, and was executed by John S. Gregory, senior, Wealthy P. Gregory, E. Mary Gregory, and John S. Gregory, jointly. In this no provision for an attorney's fee is found.

The third mortgage was given by John S. Gregory, senior, and Wealthy P. Gregory alone, on the twenty-ninth day of April, 1878, for the purpose of securing the payment of the said judgments, so as aforesaid partially assigned, and to secure the release of the one given by E. Mary and John S. Gregory alone. In this last mortgage provision is made for the payment of an attorney's fee.

From this statement of the order and purpose of the several mortgages, it will be seen at a glance that the only agreement made by E. Mary and John S. Gregory to answer for an attorney's fee, was in the *first* instrument, the release of which, by the execution of the *third*, left them, and also their property embraced in the *second* mortgage, wholly relieved from all liability in that respect. The claim of E. Mary and John S. Gregory, that under the arrangement for giving the last mortgage the second one was to have been released also, cannot be allowed. The evidence does not sustain them in it. No witness save John S. Gregory so testifies, and he is completely overborne in this by the testimony of the witnesses Cobb, McMurtry, and Moore, sustained as they are by the recital in the last mortgage that the release was "of a certain mortgage executed by John S Gregory, jr., and E. Mary Gregory to said R. E. Moore," which appears to have been done, and the release recorded. Save in the matter of attorney's fee the court below seems to have taken a correct view of the evidence, and rendered the proper judgment.

The judgment is reversed, and one will be entered here conforming to this opinion.

REVERSED AND JUDGMENT.

SAMUEL TIGARD AND OTHERS, APPELLANTS, V. ANDREW J. MOFFITT AND OTHERS, APPELLEES.

1. **Injunction:** TRESPASS. In case of a mere trespass, unless the threatened harm will be great, or the loss therefrom irreparable, and such as cannot be recompensed in damages by an action at law, an injunction will not be granted to prevent it.
2. ———. Under this rule the petition examined, and *Held* not to state a cause of action for an injunction.
3. ———. Evidence examined and *Held* not sufficient to warrant an injunction.

APPEAL from Saline county. Tried below before WEAVER, J.

Hastings & McGintie, for appellants.

W. H. Morris, for appellees.

LAKE, CH., J.

This case comes here by appeal from the district court for Saline county. The action was brought by the appellants to have the appellees enjoined in the attempted removal of a church building from the town of Pleasant Hill to Dorchester, in said county.

The case might very properly be disposed of, and the judgment of dismissal entered by the court below affirmed, on the sole ground that no facts which would justify equitable cognizance are stated in the petition. At most, the removal of the house as threatened could be but a mere trespass, for which complete redress is attainable by means of an ordinary action for damages. And it has been said to be an established principle that a court of equity will not lend its aid to restrain by injunction the commission of any act injurious to the complainant, when he has an adequate remedy at law. 3 Wait's Actions and Defenses, 684. Or as stated in *Hart v. The Mayor of Albany*, 3

Paige, 213, the court does not interfere to prevent a mere trespass, unless the complainant has been in the previous undisturbed enjoyment of the property under a claim of right, or where from the irresponsibility of the defendant, or otherwise, the complainant could not obtain relief at law. Such is the rule of equity courts under the common law practice, and it does not appear to have been changed by the provisions of our code of civil procedure relative to injunctions, as will be seen by reference to some of the decisions of the courts of Ohio, from whence our code was derived. It is there held that unless the threatened harm will be great, or the loss therefrom irreparable and such as cannot be recompensed in damages by an action at law, courts will not interfere by injunction to prevent it. *The Commercial Bank of Cincinnati v. Bowman*, 1 Handy, 246. *Mechanics and Traders Bank v. Debolt*, 1 Ohio St., 591.

It is true the petition charges that the threatened injury will be irreparable, and that the "plaintiffs will be left wholly without any remedy at law." This, however, is a conclusion merely, and one that is not justified by anything that is alleged. It is not charged that the defendants were unable to make good any damage which the plaintiffs might sustain if the removal were found to be wrongful. All that is alleged as to the irresponsibility of any one is in these words, viz., that "the said defendants have already caused the beginning of the removal of said building, and the parties engaged therein are irresponsible and unable to make good any loss that may arise." We do not think it was intended by this language to charge that the defendants were irresponsible. Fairly construed, it seems to import, not that the defendants were engaged personally in the work of removal, but simply that they had "caused" other persons to undertake it for them, and that these latter were the ones who were irresponsible.

But even if this language be considered sufficiently com-

prehensive to include the defendants also, then we have only to go to the evidence to find another and insurmountable objection to the plaintiff's claim to equitable relief. The fact of irresponsibility, if alleged against the defendants, is denied, and not only denied but also shown affirmatively and beyond any question to be untrue. Besides, it was very clearly shown on the trial that the building was the property of the Methodist Episcopal Church of the United States of America, and subject to the control of said church, as determined under its usage and discipline by a conference of the particular circuit in which it was situated. That at the regular quarterly conference of the Dorchester circuit, the one having authority in the matter, held on the 3d day of July, 1880, it was duly ordered that said building then "located at Pleasant Hill," be moved "to Dorchester, of said county and state." And it was under and in pursuance of this order that the defendants were acting in the attempted removal complained of, while the only interest which the plaintiffs or any of them had, was simply that of individual members of said church organization at Pleasant Hill, or as residents of that place or vicinity, who had made donations to aid the church in the erection of the building. Such being the condition of the case, the judgment was clearly right, and must be affirmed.

JUDGMENT AFFIRMED.

R. L. McDONALD AND OTHERS, PLAINTIFFS IN ERROR, v. HENRY ATKINS AND OTHERS, DEFENDANTS IN ERROR.

Clerk of Court: OFFICIAL ACT: SURETIES OF. The receipt of money by the clerk of a court of record upon a judgment in his office, whether paid voluntarily or made by the sheriff on execution, is an official act, and his failure to faithfully account for such money is a breach of his bond, for which his sureties are liable in an action upon it.

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

Marquett, Deweese & Hall, for plaintiffs in error.

Burr & Kelly, J. R. Webster, and *D. G. Courtnay*, for defendants in error.

LAKE, CH. J.

The principal question in this case is whether the facts alleged in the petition make a good cause of action. The court below answered this question in the negative, and accordingly refused to permit the introduction of any evidence by the plaintiffs. We have bestowed considerable reflection upon the arguments of counsel, and examined the authorities cited to support them, and have reached the conclusion that the learned judge of the district court was in error in holding as he did.

The petition is based upon an official bond given by R. N. Vedder as clerk of the district court for Lancaster county, upon which the defendants are sureties. In apt words it charges that while Vedder was holding said office and discharging the duties thereof, he received from the sheriff of Pawnee county a sum of money made on an execution issued from said court in favor of the plaintiffs, a

part of which he had failed and refused to account for, having converted it to his own use. The point made by the defendants' counsel is, that the money was not received by Vedder in his official capacity—in other words, that he had no authority as clerk to receive it. And so the court below held.

No one can doubt, we think, that this ruling was in direct conflict with the general understanding of the legal profession of this state as to the duty of court clerks in the receipt and disbursement of money paid upon judgments, from the first organization of our judicial system, through all its changes, down to the present time. Indeed, we doubt exceedingly that any one, especially a practicing lawyer, has ever supposed that upon the rendition of a money judgment, the defendant could not prevent a further accumulation of costs and interest, and have a satisfaction legally entered of record, by at once paying to the clerk of the court the amount which it calls for. If he could not —if clerks are really without authority to receive money on judgments in their custody, then to whom, in the absence of the plaintiff and his attorney, could payment be legally made? Suppose, for instance, that the judgment creditor is a non-resident and without an attorney or agent here authorized to take the money, must the debtor hunt him up and make payment to him personally on pain, if he do not, of having the judgment stand indefinitely a growing incumbrance upon his estate? Such surely would be the debtor's dilemma, if payment to the clerk would not release him from further liability.

While it is true that we have no statute which in express terms declares that the clerks of the several courts shall accept payment of judgments in their custody, it is very evident that the legislature contemplated and intended that they should do so. Indeed, unless the legislature did so intend, their design in the enactment of several provisions of statute is not apparent. Take, for instance, sec. 514 of

the code of civil procedure, which declares that "If any clerk of a court shall neglect or refuse, on demand made by the person entitled thereto, his agent, or attorney of record, to pay over all money by him received in his official capacity for the use of such person, every such clerk may be amerced," etc.

Again, the direct authorization of clerks of courts to receive fees, other than their own, is as wanting as is that to receive the principal of judgments; and yet the nearly uniform practice has been and is for them to do so for disbursement to the several parties entitled thereto. And in direct recognition of this practice, provision is made for the payment of such fees as may remain in the hands of the clerks a certain length of time uncalled for, to the several county treasurers, for the use of common schools. Sec. 40, ch. 28, Comp. Statutes.

Then, too, there are numerous provisions made for the payment of money "into court" for the use of persons entitled thereto, as in cases of garnishment, code, sec. 222, and the foreclosure of mortgages, same, secs. 854, 857, 858. And even in the absence of such provision, can it be doubted that a party against whom a money judgment is sought by action may, upon being summoned, pay the amount demanded "into court," and thereby prevent the making of any further costs? But how is it to be effected? In the case of inferior courts—those not of record, and unprovided with clerks—the payment can, of course, only be made to the judge or magistrate in person; but in courts of record, where all the steps taken in the progress of a case, from the commencement to the satisfaction of final judgment, are recorded and preserved, and where a clerk for the performance of this duty is specially provided, it is otherwise. In these courts payments of money are never made to the judge, but the uniform practice in this state has always been to make them to his clerk, to whose custody and care the files, records, and whatsoever else relates

to cases in court, are confided. And this practice, so universal, although not positively directed by any act of the legislature, conflicts with none, and, as we have shown, is recognized by and in perfect harmony with several. For these reasons, we must hold that the receipt of the money in question by Vedder was an official act, and clearly within the purview of the bond which the defendants signed.

The judgment is therefore reversed, and the cause remanded to the district court for further proceedings conformable to law.

REVERSED AND REMANDED.

COBB, J., having been of counsel in the case in which the money was received, did not sit on the trial or participate in this decision.

ADAM BAX AND WIFE, APPELLEES, V. JOSEPH H. HOAGLAND AND OTHERS, APPELLANTS.

Foreclosure: ASSIGNMENT OF JUDGMENT IN SATISFACTION. In 1872 a decree of foreclosure for the sum of $1,866.60 was rendered against B. and wife and in favor of B. & Co. In 1873 the wife of B. recovered a judgement for the sum of $872.60 against M. & M., which was stayed. After the expiration of the time for reviewing the case on error, no bill of exceptions having been assigned or filed, B. & Co. accepted $400, and released a portion of the mortgaged premises, and received the judgment against M. & M. for the remainder. Afterwards the attorney for B. and wife, in pursuance of a secret agreement with the attorneys of M. & M., agreed that a bill of exceptions should be signed in that case and filed as of the date of the rendition of the judgment. The judgment was thereupon taken to the supreme court and reversed, and on a new trial judgment was rendered iu favor of M. & M. *Held*, That B. & Co. were entitled to enforce the decree of foreclosure to the extent of the judgment against M. & M.

APPEAL from Lancaster county, POUND, J., presiding.

Burr & Kelly, for appellants.

A. J. Sawyer, for appellees.

MAXWELL, J.

This is an action to enjoin the defendants from selling lots 5 and 6 in block 47, in Dawson's addition to the city of Lincoln, and the south half of the northwest quarter of section 14, township 11, range 4 east, in Seward county, upon an order of sale issued on a decree rendered in the district court of Lancaster county in 1872, in an action wherein Barhydt and company were plaintiffs and the plaintiffs herein defendants. On the hearing of the cause the injunction was made perpetual. The defendants appeal to this court.

There is but little dispute as to the principal facts in this case, which are in substance as follows: At the April term, 1872, of the district court of Lancaster county, Barhydt & Co. obtained a decree of foreclosure upon the above described real estate against Bax and wife for the sum of $1,866.72. The title of the lots was in the wife and of the land in Seward county in the husband. On the second day of May, 1873, Lousia E. Bax recovered a judgment against May & Monteith for the sum of $872.60. On the twenty-ninth day of November of that year, and after the time for filing a bill of exceptions in the case had expired, the plaintiffs and defendants entered into the following agreement: That Barhydt & Co. were to release the mortgage upon the land in Seward county upon consideration of the sum of $400, and were to accept an assignment of the judgment against May & Monteith and release the decree of foreclosure upon the lots. May & Monteith had taken a stay upon the judgment against them, which at that time did not preclude them from having the case

reviewed on error, but prevented an execution being issued until one year from the rendition of the judgment. Several months after the time for filing a bill of exceptions in the case of Bax against May & Monteith had expired, the attorney for Mrs. Bax, in pursuance of a secret agreement with the attorneys for May & Monteith, consented to a bill of exceptions, being signed and filed in the district court as of May 2, 1873. The case was then taken on error to the supreme court, where Mrs. Bax appeared and contested the case. The judgment was reversed and remanded, and at the next trial judgment was rendered in favor of May & Monteith. A very large amount of testimony was taken to show that Bax and wife did not agree that the case should not be reviewed on error, and in effect going to show that Barhydt and Company took the judgment subject to all contingencies. A full and sufficient answer to these objections is that at the expiration of six months from the date of the judgment, within which time proceedings in error must be instituted, no bill of exceptions was signed or filed in the district court. This left the judgment of Bax v. May & Monteith in full force, and it would have so continued but for the interference of Mrs. Bax's attorney. By this stipulation to which Barhydt & Co. were not parties, and which it is clear they had no notice of, and which was not disavowed by Mrs. Bax, Barhydt & Co. lost the avails of the judgment.

For the purposes of this action the act of Mrs. Bax's attorney is her act and she is bound thereby. Now suppose she had released a security in favor of Barhydt & Co., would she not have been answerable to them for the amount thus released? There is no doubt of her liability in such case. To the extent therefore that Barhydt & Co. were deprived of their judgment lien by the act of Mrs. Bax they are entitled to retain the same amount out of the security which they surrendered in consideration of such judgment.

A court of equity requires those who seek its aid to show that they are not seeking to enforce an undue advantage gained by questionable or improper means. He that seeks justice must be willing to render justice, and must not rely upon grounds which are in contravention of honesty and fair dealing. To the extent of the judgment against May & Monteith, viz., the sum of $872.60 and interest, Barhydt & Co. are entitled to enforce their decree against the plaintiffs. The defendants having received $400 from the avails of the sale of the real estate in Seward county, it would be inequitable to enforce the decree against that land.

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

DECREE ACCORDINGLY.

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

NEW ENGLAND MORTGAGE SECURITY COMPANY, APPELLANT, V. HENRY HENDRICKSON ET AL., APPELLEES.

Usury: PRINCIPAL AND AGENT. Where a person holding himself out as agent made a loan of $250, and retained $61 out of that sum for commissions, *Held*, That in the absence of a special denial by the alleged principal of such agency, a judgment finding that such agency existed will not be disturbed. LAKE, CH. J., dissents.

REHEARING of case reported, *ante* p. 157.

Hull & Stearns, for appellant.

Montgomery & Harlan, for appellees.

MAXWELL, J.

A decision was rendered in this case which is reported *ante* page 157. Afterwards a rehearing was granted and the case argued on behalf of the appellant, the principal claim being that the Corbin Banking Company was not plaintiff's agent in making the loan.

It appears from the record that in September, 1876, the following advertisement was published in the York *Republican*:

"*Money to loan* on five years time: on well improved farms of 80 acres and upward, in York county, at 10 per cent interest per annum; and a commission of 20 per cent is charged by the company. Final receiver's receipts are as good as patents to secure these loans, and money can be had in from 10 to 30 days from the date of proving up.

"F. W. LIEDTKE."

The testimony shows beyond question, that Liedtke stated to the defendant that he was loaning money for the plaintiff (see testimony of Reed, page 14 of the record), and also shows that the defendant did not employ the Banking Company or Liedtke as agent to procure a loan for him. Hendrickson testifies: "I asked him (Liedtke) if he had money to loan, and he said he had, and said he would like to loan me some money. He said he knew I had a good place and could get money on it, and I said all right; and we talked the matter over how much I wanted, and he said he thought I could get it. That is all that was said at the time I made the application, that I remember of."

Q. State what was said and done when the money came and you were notified?

A. I came up for it when I was notified the money was here, and he fixed up the papers, and I and my wife both signed them, and he handed me a draft for $200, and I looked at it a little bit and said is that all the money?

Q. What papers do you mean were fixed up?

A. The note and mortgage. And I said how do you make that out, and he said that is the way the company do. The fair and square understanding between him and me was as we talked it over, that he was to have 20 per cent commission on the money I got, and he took 25 per cent. He took $50 dollars out of the money. The draft was right there, but I never touched it; and he said there is $11 more to come out of it; and I said where will I get the money on it, and he said at McWhirter's, a little bank over there, and then he said I guess I can give you the money for it, and he took $11 out of that, $9 for making out the papers, and $2 for an abstract of title.

Q. How much did you give your note for at the time?

A. For $250.

Q. The coupon interest notes?

A. Yes sir.

Q. State what was done when he first presented this note and mortgage and said to you how much he would take out, what you did?

A. I had them all signed before I knew anything about it; and I told him he could just take the whole thing if he was going to take out $20 or $25 more than he agreed to; and I did not take the money for an hour or two, and told him I would not take the loan at all; and he said it did not matter to him whether I did or not, but that I would be compelled to pay the $50 anyhow. I thought may be I had better take it if I had to pay it anyhow, that is, this $50.

Q. Then did you accept the loan under that condition, taking $50 and $11 for expenses?

A. Yes, sir.

Q. How much money did you actually get?

A. I think $189. It lacked $11 of being $200.

The defendant was told that he must sign an application for the money, and this so-called application being on a

printed form and presented by a gentleman in good standing in the community and holding an important public office, was signed without being read by the defendant, evidently supposing it to be what it was represented—an application. He had no thought of employing the Corbin Banking Company as agent to procure a loan for him, and the Corbin Banking Company did not, so far as appears, hold itself out to the public, in York county at least, as a mere agency. There was no contingency about the loan. If the security was satisfactory, which Liedtke stated it was, all that the borrower was to do was to apply for and receive the money upon the execution of the note and mortgage. The defendant also called the county clerk of York county and offered to prove that the plaintiff had a large amount of money loaned on mortgages on real estate in York county, and that the business was transacted through Liedtke. This testimony was excluded, but upon what ground does not appear. In this the court erred, as it was testimony tending to prove that Liedtke was the plaintiff's agent. There is sufficient in the record, however, to show that the plaintiff has loaned a large amount of money in York county, and that this money was loaned through F. W. Liedtke. These are facts that are not specifically denied, in fact most of them not denied at all. To merely deny that the plaintiff had any agents or brokers, in view of the testimony in this case, is not such denial, because it is apparent from Saltonstall's testimony that he relies entirely on the fact that the plaintiff had not specially appointed agents, and that is as far as his denials extend.

It is very clear that this is a cunningly devised scheme to evade the usury laws. Such subterfuges certainly should not be favored, nor should such grasping rapacity as is shown in this case be encouraged. The judgment of the district court is clearly right and is affirmed.

JUDGMENT AFFIRMED.

LAKE, CH. J., dissents.

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1. Creditor claiming adverse to mortgagee, on ground of fraud, must allege it by proper pleading. *Ensign v. Roggencamp* 30

2. Question of fraud, under sec. 11, Comp. Stat., ch. 32, by whom raised. *Ransom v. Schmela*..... 73

3. Whether payment of a portion of purchase money on parol contract will take it out of the statute of frauds—*Quære. Potvin v. Curran*..... 303

4. Deceit in sale of railroad eating house, fixtures, etc.; method of computing damages; evidence of receipts, amount of travel, stoppage of trains, etc. *Markel v. Moudy*..... 322

5. Fraudulent conveyance of property as to creditors; evidence. *Leffel & Co. v. Schermerhorn*..... 342

6. Insolvency of grantor in a deed of conveyance, although a circumstance which may be taken together with other material facts to show a fraudulent design in disposing of property, is not of itself sufficient to establish it. *Leffel & Co. v. Schermerhorn*..... 342

7. Conveyance by husband to wife. *Thompson v. Loenig*..... 387

8. Exempt property not susceptible of fraudulent alienation. *Boggs v. Thompson*..... 403

9. To avoid a sale, upon the ground that it is fraudulent as to creditors, the purchaser must have knowledge of the fraudulent purpose of the seller, or have notice of such facts tending to show a fraudulent purpose as would put a man of ordinary prudence on inquiry. *Temple v. Smith*... 513

Garnishment.

1. Notice how served; notice on agent of a non-resident firm who took possession of goods under a chattel mortgage, *Held* good. *Mathews v. Smith & Crittenden*..... 178

2. Defined. *Id*..... 188

3. A garnishee who answered, "I have under my control notes, judgments, and other evidences of indebtedness" of the debtor, is not liable as garnishee in an action for money, unless he has money belonging to the debtor in his hands, or has converted some of the securities to his own use. *Tingley v. Dolby*..... 371

4. License money. *Pundt v. Clary*..... 406

Grant.

1. To two persons or corporations in the alternative insufficient to pass title, unless power of election is given. *Jones v. Hurlburt*..... 136

Guaranty. See NEGOTIABLE INSTRUMENTS, 6.

Guardian and Ward.

1. License to guardian to sell may be granted at chambers. *Stewart v. Daggy*..... 290

Habeas Corpus.

1. A petition for a writ of habeas corpus must state the facts which constitute the illegal restraint. It is not sufficient to allege that the petitioner is illegally restrained of his liberty. Where no copy of the petition is set forth in the record, error cannot be predicated on the refusal of the court below to admit certain evidence offered. *State v. Ensign*..... 250

2. Where a petition for habeas corpus is presented for alleged want of probable cause, it should set forth all the testimony taken before the examining magistrate. *Id*..... 250

Herd Law.

A person taking up stock for trespass upon cultivated lands, under the provisions of the herd law of 1871, acquires no lien upon such stock unless he comply substantially with the provisions of the act. *Bucher v. Wagoner*..... 424

Homestead.

1. Acquired under U. S. law not liable to be sold on execution or attachment for debt contracted before patent issued. *Smith & Crittenden v. Steele*..... 1

2. Right of owner to convey. *Id*..... 4

3. Facts stated and judgment *held* not to be a lien. *Kruger v. Adams & French Harvester Co*..... 97

4. Mortgage upon, signed by husband alone, is void. [Laws 1877, 34.] *Bonorden v. Kriz*..... 121

Husband and Wife.

1. Marriage formal, but void; cohabitation; liability of husband to support wife; husband cannot recover for support from separate estate of wife. *Gerhold v. Wyss*..... 90

2. Removal to this state with intention of residing here, attachment does not lie. *Swaney v. Hutchins*..... 266

3. Creditor's bill to declare property *held* in trust by defendant as property of husband against whom judgment was rendered. *Bemis v. Davis*..... 269

4. Husband cannot sue for death of wife unless there are "next of kin." *Warren v. Englehart*..... 283

5. Where property is transferred by a husband to his wife after a debt is contracted, as against that debt she must show by a preponderance of proof that she is a *bona fide* purchaser. *Thompson v. Loenig*..... 386

6. Suit between divorced husband and wife, as to title of property conveyed to wife by a third party, with knowledge of husband; presumption as to advancement. *Gray v. Gray*..... 453
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7. Purchase by husband of real estate; deeds to wife, who afterwards died; suit by husband against heirs-at-law of wife for purpose of declaring a trust. *Held*, the husband having deeded said property for the purpose of hindering and delaying his creditor, a court of equity can grant him no relief. *Bartlett v. Bartlett*..... 456

8. Husband as agent of wife; contract for building; mechanics' lien enforced. *Scales v. Paine & Co.*..... 52

Illegitimacy. See BASTARDY.

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Injunction.

1. Obligations of party to obey. *Jones v. Hurlburt*..... 139
2. Enjoining collection of taxes. *Earl v. Duras*..... 234
   Hull v. Kearney County..... 540
3. A petition which states that the plaintiff is the owner of certain real estate by tax deeds, and that the defendants hold a prior judgment which was a lien upon the land before the sale and conveyance, and seeking to enjoin the sale under an execution issued on such judgment, does not state a cause of action. *Rickards v. Coon*..... 420
4. In such case the defendants have a right to complete the sale and contest the validity of the tax deeds in an action at law, and a court of equity will not enjoin a sale under the execution unless some equitable ground exists for its interference. *Id*..... 421
5. In cases of trespass. *Tigard v. Moffit*..... 565
6. Petition and evidence for, *held* insufficient. *Id*..... 565

Instructions to Jury.

1. Should not be given by county judge or justice of the peace. *Ives v. Norris*..... 252
2. Judge must be requested to give, when. *Gettinger v. The State*..... 313
3. Correct as an abstract proposition of law, is good ground for reversal if it submits a question not at issue and misleading. *Smith v. Evans*..... 314
4. Complaint that instruction is "vague and general," it not appearing that one more explicit was requested, will not be entertained. *S. C. R. R v. Brown*..... 317
5. The want of precision of expression in charging a jury is not a sufficient ground for setting aside the verdict where there is no reason to believe they were misled by it. *Dunbar v. Briggs*..... 333
6. If one of the paragraphs misstate the law upon a material point, such error will not be cured by another paragraph which states the law correctly, because the jury would be left in doubt as to which paragraph was correct. *Wasson v. Palmer*..... 376

7. *Held* applicable to issue and proof. *King v. Bell*..... 409

8. Not applicable to issue made by pleadings, should be refused. *Webster & Burr v. O'Shee*..... 428

9. Orally given, must be excepted to, to be reviewed on error. *R. V. R. R. v. Arnold*..... 486

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1. Allowed on appeal from award of damages for right of way. *S. C. R. R. v. Brown*..... 317

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1. Donations of county; unpaid interest on former donations should not be considered in making up aggregate which county is entitled to vote. *Jones v. Hurlburt*..... 125

2. Proposition for submission of question to vote examined and *held* invalid. *Id*..... 125

3. Bonds properly voted in aid of railroad not void because signed and sealed in an adjoining county, although not delivered on account of service of writ of injunction. *Id*... 126

Judgment.

1. Conclusive only as to matters put in issue. *Miller v. Hurford*..... 16

2. In excess of endorsement on summons, where defendant fails to appear, is erroneous. *McKay v. Hinman*..... 33

3. Non-suit proper, when. *Manzy v. Hardy*..... 36

4. Facts stated and judgment *held* not to be a lien on homestead. *Kruger v. Adams & French Harvester Co*..... 97

5. Against principal and sureties on official bonds. *Van Sickle v. Buffalo County*..... 120

6. Without finding, not void but voidable. *Crossley v. Steele*..... 219

7. Entry on Sunday by justice of peace. *Thompson v. Church*..... 287

8. Decree enjoining sale of real estate is final. *Rickards v. Coon*..... 419

9. Lien of. *Bowen v. Billings*..... 442

10. In contempt proceedings; review on error. *Gandy v. The State*..... 446

11. In replevin. *Lee v. Hastings*..... 508

12. A judgment rendered upon a petition open to general demurrer is not void and subject to collateral attack, but merely erroneous and liable to be reversed by proceedings in error. *McGavock v. Pollock*..... 536

Judicial Sale.

1. Levy by mistake on wrong property; motion to set aside; practice. *Ziegler v. McCormick*..... 25

2. Applying proceeds where there are several liens. *Pettit v. Black*..... 156

3. Certain property levied on, *Held* not included in a sale under a decree of foreclosure. *Marsh v. Burley*..... 261

Jurisdiction.

1. Confirmation of sale in vacation. *McMurtry v. Tuttle*..... 232

2. Granting license, at chambers, to guardian to sell real estate of ward. *Stewart v. Daggy*..... 290

3. Claims against county. *Dixon County v. Barnes*..... 294

4. Of justice. *Lawrence v. Curtis*..... 515

5. Supreme court; quo warranto. *State, ex rel. Glenn, v. Stein*..... 530

Justice of the Peace.

1. Bill of particulars. *McKay v. Hinman*..... 36
Crossley v. Steele..... 219

2. Jurisdiction in forcible entry and detention. *Pettit v. Black*..... 142

3. Where jury is waived, and trial had before justice, there must be a finding of facts. *Crossley v. Steele*..... 219

4. No authority to instruct jury on law of the case. *Ives v. Norris*..... 252

5. Has no authority to appoint a person to serve summons in error. *R. V. R. R. v. Sayer*..... 280

6. May enter judgment on Sunday, when. *Thompson v. Church*..... 287

7. No jurisdiction in claims against a county. *Dixon Co. v. Barnes*..... 294

8. In an action of replevin commenced in 1880, before a justice of the peace, the property was delivered to the plaintiff. On the trial the jury found that the plaintiff was entitled to the possession only of the property, and that

the value of such possession was $107.50. The justice thereupon rendered judgment in favor of the plaintiff for costs. *Held*, That the justice had jurisdiction. *Lawrence v. Curtis*..... 515

Landlord and Tenant.

1. A parol lease for two years is valid for one year if tenant enter into possession. *Friedhoff v. Smith*..... 5

2. K. and N. leased certain premises for six months from the sixth day of December, 1881, for $750, to be paid in installments of $125, on the first of each month. It was stated in the lease that it would terminate May 6th, 1882. *Held*, There was no ambiguity in the lease; that it ran for six months from December 6th, 1881, and the date May 6th, 1882, as the time of the termination, was an error in computation. *Nindle v. The State Bank*..... 245

3. Lease defined; rent not essential. *Folden v. The State*... 328

4. Lease of farm and cattle; forfeiture, on failure of lessee to care for stock; option to terminate, when exercised. *Catlin v. Wright*..... 558

Lands—Public.

1. One S., in 1871, entered a tract of land as a homestead under the United States statute. In 1876 he made final proof, and has resided on the land since 1871, claiming the same. After S. made final proof the commissioner of the general land office, without notice, on his own motion, canceled the entry of S., upon the ground that a filing had been made thereon in 1863 which was uncanceled. In 1881 R. entered the land as a timber culture claim, and sought to evict S. by an action of forcible entry. *Held*, That the action would not lie. *Streeter v. Rolph*..... 388

2. Improvements on, sufficient consideration for note. *Brooks v. Hiatt*..... 503

Larceny. See CRIMINAL LAW, 3, 4, 5, 6.

Lien. See JUDGMENT, 4.

1. Of taxes, how proved. *Miller v. Hurford*..... 14
2. Of judgment. *Bowen v. Billings*..... 442

Limitation.

1. Effect of statute, on boundary lines. *Trussel v. Lewis*..... 415

2. Action between divorced husband and wife, *held* barred. *Gray v. Gray* 455

3. As to tax deeds. *McGavock v. Pollock* 536

Liquors.

1. The law [Comp. Stat., ch. 50] fixes no time in which to appeal from order granting license. *Held*, That appeal must be taken as soon as with reasonable diligence the transcript could be prepared and filed; and where an appeal was not perfected until sixty days from the date of the order appealed from, the appellate court acquired no jurisdiction. *Lydick v. Korner* 10

2. A license issued after a reasonable time to take an appeal has elapsed, but before the same is taken, is valid, notwithstanding a notice of intention to appeal. *Id* 10

3. License issued by proper authority, and not void upon its face, cannot be attacked collaterally. *Pundt v. Clary* 407

4. In an action against partners as saloon keepers for injury caused by the sale of liquor by them, the action does not abate by reason of the death of one member of the firm. *King v. Bell* 409

5. Carlisle tables of expectancy of life, *Held*, Properly admitted in evidence in an action for loss of means of support. *Id* 409

6. Action against saloon keepers; petition contained twelve counts, commencing November 30th, 1876, and terminating in October, 1880, and there was testimony which was uncontradicted tending to sustain two of the counts. *Held*, That a verdict for the defendants was against the weight of evidence. *McDougall v. Giacomini* 431

7. Sale proved by circumstantial evidence. *Id* 432

Malicious Prosecution.

1. Action against two defendants; record of alleged prosecution offered in evidence and rejected because the complaint was not signed by both defendants. *Held*, Error. *Casebeer v. Drahoble* 465

2. When right of action accrues. *Id* 465

3. Where testimony shows that the object of criminal proceedings was to coerce payment of a debt, and not punish crime, a malicious motive may be inferred. *Ross. v. Langworthy* 492

4. Probable cause defined. *Id* 495

Mandamus.

1. Reviewable only on error, not by appeal. *State, ex rel. Miller, v. Lancaster County*..... 223
2. Application must show that relator is entitled to writ. *State v. Wallichs*..... 278
3. Does not lie to compel commissioners to act on claims not included in estimates. *Lancaster Co. v. The State*..... 523

Married Women. See HUSBAND AND WIFE.

Mechanic's Lien.

1. In November, 1880, one M. contracted with G. to erect a house and furnish the material. M. thereupon purchased lumber for the erection of said dwelling in his own name, the credit being given to him, and after the erection of the building left the state without paying for the lumber. A mechanic's lien was thereupon filed against the lot on which the building was erected and appurtenances, for the amount of the claim, and judgment was thereafter rendered against G. for the amount, and the premises were sold. *Held*, That as the testimony failed to show that M. was the agent of G., the judgment and lien could not be sustained under the lien act in force at that time. *Doolittle v. Goodrich*..... 296

Mills and Mill Dams.

1. Rights of conflicting claimants; overflow of mill site higher up river by owner of dam below. *Seeley v. Bridges* 547

Mistake. See PAYMENT.

Mortgage—Chattels.

1. Fraud must be plead. *Ensign v. Roggencamp*..... 30
2. Re-filing and recording. *Ransom v. Schmela*..... 73
3. Mortgage in good faith defined. *Id*..... 73
4. Question of fraud, by whom raised. *Id*..... 73
5. In a contract between the trustee of a mortgage and certain creditors of a railroad company, *Held*, The property levied upon was not included in the mortgage. [LAKE, CH. J., dissenting.] *Millard v. Burley*..... 259
6. Under sec. 11, chap. 32, Comp. Stat., mortgage, although filed for record, is *prima facie* fraudulent as to creditors and

bona fide purchasers, if the mortgagor retains possession of the mortgaged property. And the person claiming under such mortgage must make it appear that the same was made in good faith, in order to recover. *Marsh v. Burley*.. 261

7. On stock; increase. *Boggs v. Stankey*..... 40

8. Alteration. *Holland v. Griffith*..... 473

Mortgage—Real Property.

1. On homestead, signed by husband alone, is void. *Bonorden v. Kriz*..... 121

2. Certain property levied on, *Held*, Not to be included in a sale under a decree of foreclosure. *Marsh v. Burley*..... 262

3. Foreclosure of; general principles; power of court. *Clapp v. Maxwell*..... 542

Motion.

1. Should point out objections distinctly. *Casey v. Peebles*.. 9

2. For new trial not necessary where court merely construes pleading, etc. *O'Donohue v. Hendrix*..... 255

Municipal Corporations. See CORPORATIONS.

Negligence.

1. Suit against railroad to recover damages occasioned by killing of stock; owner not held guilty of contributory negligence. *U. P. v. Schwenk*..... 484

Negotiable Instruments. See SCHOOLS, 3.

1. It is only where protest is necessary in order to fix an indorser's liability, that he can be subjected to the costs thereof. *McKay v. Hinman*..... 33

2. Agent may sue on note, when. *Stoll v. Sheldon*..... 207

3. A provision in a note secured by mortgage that, "Upon a failure to pay any of said interest within thirty days after due, the holder may *elect* to consider the whole note due, and it may be collected at once," *Held*, To control a general provision in the mortgage, and to restrict the right, in case of default of payment of interest, to declare the debt due to the holder of the note. *Fletcher v. Daugherty*..... 224

4. The holder of a promissory note is not required to resort to his remedy against the maker before he may proceed to collect it from the indorser, and when the indorser has

waived a demand, protest, and notice of non-payment, a right of recovery accrues against him as soon as the note is due. The indorser cannot, like a surety, call upon the holder of the note to proceed and collect it of the maker. *Gibson v. Parlin*..... 292

5. Warrants of county are not commercial paper. *B. & M. R. R. v. Clay County*..... 370

6. A guaranty in the following form: "For value received, we guarantee the payment of the within note, and hereby waive protest, demand, and notice of non-payment thereof," *Held*, To be an absolute contract upon a lawful consideration that the money expressed in the note should be paid at the maturity thereof, at all events. *Bloom v. Warder, Mitchell & Co*..... 476

7. A contract upon the same paper with a negotiable promissory note, which contract modifies and qualifies it, cannot be detached from the note. In such case the note, if detached and transferred to an innocent purchaser before maturity, will not entitle the holder to recover thereon. [COBB, J., diesenting.] *Davis v. Henry*..... 497

8. Where by the terms of a promissory note it was not to draw interest, and the payee, without the consent of the maker, adds the figure "7" to the note to indicate the rate of interest, *Held*, To be a material alteration, and to avoid the note. *Id.*..... 497

9. Improvements on public lands are property, and a sufficient consideration to sustain a promissory note given for the purchase of the same. *Brooks v. Hiatt*..... 503

10. The defense to a promissory note was, that it was given for property to which the title had failed. There was testimony tending to show that there was not an entire failure of title. *Held*, That the plaintiff was entitled to recover for such property, as the title had not failed, and a verdict for the defendant was set aside. *Id.*..... 503

New Trial. See TRIAL.

Non-Suit. Proper when. *Manzy v. Hardy*..... 36

Notes. See NEGOTIABLE INSTRUMENTS.

Oath.

1. Without venue; presumption. *Miller v. Hurford*..... 23

Parties.

1. Where a promissory note is made to an agent in his own name as promisee, he may maintain an action thereon without joining the person beneficially interested in the note. *Stoll v. Sheldon*..... 207

2. A transfer by a plaintiff of his interest in the action to a co-plaintiff will not justify a court in dismissing the action. *Magenau v. Bell*..... 247
But action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted. This substitution may be made as often as there is a transfer of interest. *Temple v. Smith*..... 513

Partnership. See LIQUORS, 4. PLEADING, 11.

1. In 1874 the firm of B. & L. purchased certain real estate with partnership funds, the title being taken in the name of B. In 1876 the firm became insolvent, and the real property was sold to T. for a firm debt, and afterwards sold to the wife of B. While the title was in the name of B., certain transcripts of judgment against B. were filed in the district court and executions issued thereon, which were levied upon the real estate in question as the property of B. In an action by the wife to enjoin the sale, *Held*, That partnership property, in case of insolvency, was not liable for the individual debts of the members of the firm until the partnership debts were satisfied, and that the judgment was not a lien. *Bowen v. Billings*..... 439

2. Action between partners. *Younglove v. Liebhardt*..... 557

Payment.

1. Recovery of money paid under mistake. *Manzy v. Hardy*..... 36

Pleading. See INJUNCTION.

1. Illegal assessment of taxes; burden of proof. *Miller v. Hurford*..... 14

2. Facts showing illegality of bonds must be stated. *Id*..... 14

3. By creditor of mortgagor on ground of fraud. *Ensign v. Roggencamp*..... 30

4. Corporate existence not put in issue by general denial. *Dietrichs v. L. & N. W. R. R.*..... 43

5. Habeas corpus cases. *The State v. Ensign*..... 250

6. Where the facts stated in a petition do not constitute a cause of action, merely filing an answer is not a waiver of that defect. *O'Donohue v. Hendrix*..... 256

7. In suit by husband for death of wife, under chap. 21, Comp. Stat. *Warren v. Englehart*..... 283

8. Construction; must be taken most strongly against pleader. *Gibson v. Parlin*..... 292

9. Bankruptcy as a defense. *McCormick v. Raymond*..... 306

10. Fact inferable from pleadings need not be proved. *Leffel & Co. v. Schermerhorn*..... 342

11. Where in the title of a cause the individual names of partners are given, followed by the word "partners," it is unnecessary to repeat the names in the body of the petition. *King v. Bell*..... 409

12. Where a motion is sustained to strike certain matter out of a pleading, it is the right of the adverse party to have such matter erased, or an amended pleading filed; but if this is not insisted upon, it will be sufficient to treat the objectionable matter as stricken out. *Id*..... 409

13. On appeal from award of damages for right of way. *R. V. R. R. v. Hayes*..... 489

Practice.

1. Motion to set aside levy under execution on wrong property, accompanied by affidavits and notice, is proper. *Ziegler v. McCormick*..... 25

2. In a proceeding to reverse judgment of an inferior court, where the only error is that costs of protest of note on which suit was brought were included in excess of endorsement on summons, and same is remitted, judgment should be affirmed as to residue, but without costs. *McKay v. Hinman*..... 33

3. When there is no disputed material fact for the jury to pass upon, it is not error for the court to refuse to permit counsel to address them. *Neidig v. Cole*..... 39

4. Objections to depositions when filed. *Dietrichs v. L. & N. W. R. R.*..... 43

5. Setting aside default. *Hale v. Bender*..... 66

6. When defendant files a motion to set a judgment, rendered by default, aside, and for leave to answer, he must accompany his motion with his proposed answer duly verified. *Spencer v. Thistle*..... 227

7. Confirmation of sale in vacation. *McMurtry v. Tuttle*..... 232

8. A writ commencing "The State of Nebraska, Lancaster County," is sufficient without repeating the words "The State of Nebraska" before the name of the officer addressed. *Moore v. Fedawa*..... 379

9. Service by publication. *McGavock v. Pollock*..... 536

Practice in Criminal Cases. See CRIMINAL LAW.

Practice in Supreme Court.

1. Error without prejudice. *Ensign v. Roggencamp*..... 30
School D. No. 6 v. School D. No. 9 178

2. Question discussed by counsel, but not in record, will not be considered. *Dietrichs v. L. & N. W. R. R.*..... 43

3. Evidence *held* to sustain verdict and judgment. *Pettit v. Black*..... 142
Bloom v. Warder..... 476
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4. Remanding cause with direction to enter judgment, *School D. No. 6. v. School D. No. 9* 167

5. Appearance for argument. *State, ex rel. Richardson, v. Fritz* 197

6. Transcript. *Galley v. Galley*..... 200

7. Amending petition in error. *Spencer v. Thistle*..... 201
H. & G. I. R. R. v. Ingalls 279

8. *Alias* summons issued after one year from date of judgment, does not confer jurisdiction. *Baker v. Sloss*..... 230
R. V. R. R. v. Sayer..... 280

9. Objections to bill of exceptions not considered after cause submitted. *Atkins v. Atkins*..... 271
Dietrichs v. L. & N. W. R. R...... 500

10. Verdict not set aside unless clearly wrong. *Gibson v. Cleveland Paper Co*..... 277

11. Service of summons in error. *R. V. R. R. v. Sayer* 280

12. Decree enjoining sale of real estate is final, and may be reviewed on error and appeal. *Rickards v. Coon* 419

13. Review of judgment in contempt proceedings. *Gandy, v. The State* 446

14. When a cause is submitted on a record so imperfect as to render it impossible to tell therefrom whether the facts

assigned for error exist or not, the judgment of the court below will be affirmed. *Cunningham v. Tonnemaker*..... 462

15. Taxing costs..... 476

16. Jurisdiction in quo warranto. *State, ex rel. Glenn, v. Stein* 530

Presumptions.

1. Presence of prisoner during trial. *Folden v. The State*... 328

Principal and Agent. See AGENCY.

Principal and Surety. See BONDS. SURETY.

Proceedings in Rem.

1. Sale of land for lien of taxes. *Pettit v. Black*..... 154

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1. Caption to writs. *Moore v. Fedawa*..... 379

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Purchaser. See FRAUD. SALE.

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1. Jurisdiction of supreme court; contents of information; who may prosecute. *State, ex rel. Glenn, v. Stein* 530

Railroads.

1. Donations of county to aid; proposition for submission to vote; bonds signed and sealed in adjoining county. *Jones v. Hurlburt*..... 125

2. Certain property of, levied on, *Held*, Not included in a sale under a decree of foreclosure. *Marsh v. Burley*..... 262

3. Damages for right of way; appeal from award; interest. *S. C. R. R. v. Brown*..... 317

4. Sale of railroad eating house; damages for deceit; evidence. *Markel v. Moudy*..... 322

5. A witness not shown to have any knowledge in the matter of the construction or operation of railroads, is not competent to give an opinion as to the needs of a railroad company in respect to its depot or other grounds. *Dietrichs v. L. & N. W. R. R.*..... 361

6. The decision of the general manager of a railroad company is *prima facie*, and in the absence of all evidence to the contrary, a just measure of what is essential to the convenient and proper conduct of its business, and sufficient to warrant the exercise the power of eminent domain in its behalf. *Id.* 361

7. In the exercise of the right of eminent domain by a railroad company for right of way, depot and other grounds under the statute of this state, one appropriation does not exhaust its power, but new appropriations may be made from time to time as the necessities of the road may require. *Id.* 361

8. Where one of the grounds upon which it was sought to enjoin the condemnation of land was that the company, in whose name the proceedings were conducted, had leased its road for a term of years not yet expired, *Held*, That the proceedings were properly taken in the name of such company. *Id.* 361

9. Damage to stock; fencing by company; verdict and judgment for plaintiff sustained. *U. P. R. R. v. Schwenck*..... 478

10. Right of eminent domain; evidence; testimony of experts; 11 Neb., 585, modified. *R. V. R. R. r. Arnold* 485

11. Where no objection was made in the court below to direct proof showing the amount of damages sustained by a land-owner by reason of the location of a railroad across his land, the objection is not available on error. *R. V. R. R. v. Hayes*..... 489

12. Where a railroad company condemns real estate as the property of a person named, it cannot on appeal from the award, at least without tendering an issue to that effect, disprove such ownership. *Id.* 489

13. Where on appeal the only question is the amount of damages, no pleadings are necessary; but if other issues are involved they must be pleaded to be available. *Id.* ... 489

Real Property.

1. Effect of purchase subject to incumbrances. *Kruger v. Adams & French Harvester Co.* 100

2. Title by will. *Pettit v. Black*..... 142

3. In a real action brought by the heirs at law of a deceased person against one holding simply under an invalid tax deed, the seizin of the deceased ancestor is sufficiently proved to

warrant a recovery, by showing his actual possession of the premises at the time of his death. *Spitznagle v. Vanhessch* 338

4. In March, 1873, one U. sold to R. lots 3 and 4, in block 65, in Falls City, and a house standing on lots 1 and 2 in the same block. R. entered into possession, but paid no part of the purchase price; but in February, 1879, executed a mortgage upon lots 1 and 2 to H., to secure a debt, and afterwards, in July of that year, sold and conveyed said lots to one D., who perfected his chain of title by deeds running back to the mayor. U. had no record title, nor was there anything in the record to charge H. and P. with notice of his rights, and there was testimony tending to show that they had no notice that U. had any interest in the premises. *Held*, In a contest between them and U. that they had the prior right to the house. *Uhl v. Rau*..... 357

5. Boundary lines; statute of limitations. *Trussel v. Lewis* 415

6. Where one tenant in common conveys his interest in undivided real estate by metes and bounds, it will be sufficient to pass all his title therein within the boundaries described in the deed. *Crook v. Vandevoort*..... 505

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1. Failure to file report within time fixed does not invalidate it. *Dietrichs v. L. & N. W. R. R.*..... 43

2. A case was referred to a referee, who heard all the testimony and made his report, which was afterwards set aside by the district court, to which exception was taken. A trial was then had before a jury, a verdict, and judgment. *Held*, That the court had no authority to set aside the report of the referee, except for cause; and none appearing, the order was reversed. *Tingley v. Dolby*..... 371

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4. On application for mandamus to pay school district bonds voted, issued, sold, and avails used by district, *Held*, That the court will not inquire into qualifications of persons signing request for meeting, or voters at the election. *The State v. School District*, 82; nor whether notice was published for length of time required by statute..... 467

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4. Foreclosure of tax lien; act of 1875 [Comp. Stat., chap. 77, art. V] applies to all cases to which lien for taxes had attached prior to Sept. 1, 1879. *Miller v. Hurford*..... 20

5. Voting taxes is not a levy. *School D. No. 6 v. School D. No. 9*..... 173

6. Sale for, treasurer has no authority to sell, except for *all* delinquent, with penalty, interest, and costs. *Tillotson v. Small*..... 202
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7. Enjoining collection. *Earl v. Duras*..... 234
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8. For court house and jail. *B. & M. R. R. v. Clay County* 367

9. Sinking fund, levied to pay other than bonded indebtedness, may be enjoined. And the fact that the county commissioners, after the levy of the tax, formally rescinded the same, will not defeat the action, where the tax is an apparent lien upon real property. *The B. & M. R. R. v. Clay County* 367

10. Under sec. 64, Gen. Stat., 922, sale made June 15, 1874, and deed issued June 15, 1876, *Held*, That deed was issued before time for redemption expired, and that deed was void. *Held, also*, That deed was void for not showing place of sale and because sale was for part only of taxes then delinquent. *McGavock v. Pollock*..... 536

11. Valid deed cannot be made under a void sale. *Id.* 536

12. The special limitation of time for the commencement of an action by the revenue act is not available where the tax deed is *prima facie* void. *Id.*..... 536

13. In June, 1872, Kearney county, which till then had been attached to Adams county for election, *revenue*, and judicial purposes, was organized, and prepared to transact its own business. On the thirteenth of July following, the commissioners of Adams, as they had been accustomed to

do, and in good faith, made a formal levy of a tax for Kearney county, upon the property therein, which levy the commissioners of Kearney adopted, and caused to be extended upon their own tax books. *Held*, That this adoption of the levy by the commissioners of Kearney county made it their own; and, although irregular, was not a valid objection to the collection of the tax in an equitable point of view. *Hull v. Kearney County* 540

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1. Action commenced before justice of the peace to recover $30 on an interest coupon. The defendant in open court tendered $535, the amount due on a note and mortgage. *Held*, That the justice was not the agent of the plaintiff, and had no authority to receive payment in excess of the amount involved in the suit, and that the tender was unavailing. A tender must be made to a party entitled to receive payment. *Fletcher v. Daugherty* 224

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1. Only granted after judgment, on motion. *Spencer v. Thistle* 227

2. Motion for, necessary only when trial has been had; not necessary when court has merely construed pleadings, etc. *O'Donohue v. Hendrix* 255

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6. General rules concerning granting of. *Id.* 374

7. Order granting may be reviewed on error. *Tingley v. Dolby* 375

8. Witness sick; defendant proceeding to trial without applying for a continuance or delay; *Held*, No ground for new trial. *Goracke v. Hintz* 391

9. It is not sufficient to allege in an affidavit for a new trial on the ground of newly discovered evidence, that the party could not, with reasonable diligence, procure such testimony before the trial. The affidavit must state what particular effort the party has made to procure such testimony. *Id* 391

10. Motion for, must include objections to evidence. *R. V. R. R. v. Hayes* 489

11. Not granted on the ground of newly discovered evidence, when such evidence, if produced, could have no greater effect than to discredit a party as a witness in his own behalf. *Id.*, 391; or discredit some of the witnesses on the opposite side. *Ogden v. The State* 436

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1. General rule where conveyance of legal title is taken in name of one person, while consideration is paid by another. *Bartlett v. Bartlett* 458

Usury.

1. Where an agent entrusted with the money of his principal to loan exacts a bonus or commission from the borrower in addition to lawful interest the contract will be tainted with usury. *New England Mortgage Security Co. v. Hendrickson* 157

2. Where a person holding himself out as agent made a loan of $250, and retained $61 out of that sum for commissions, *Held*, That in the absence of a special denial by the alleged principal of such agency, a judgment finding that such agency existed will not be disturbed. LAKE, CH. J., dissenting. *Id*..... 574

3. Where a loan for $350 was made by the C. Banking Company, and $70 retained for commission, and the testimony of the plaintiff showed that in addition to ten per cent interest the borrower was to pay certain other expenses to the Banking Company, *Held*, That as the amount paid by the borrower to the Banking Company greatly exceeded 12 per cent, it devolved on the plaintiff to show that the value of said services rendered to it, when added to the ten per cent reserved, did not exceed the maximum rate allowed by law. LAKE, CH. J., dissenting. *New England Mortgage Security Co. v. Harris*..... 551

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