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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA

1883.

VOLUME XIV.

BY

GUY A. BROWN,

OFFICIAL REPORTER.

LINCOLN, NEB.:
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1883.

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BY GUY A. BROWN, REPORTER OF THE SUPREME COURT,

In behalf of the people of Nebraska.

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OF

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

This volume contains a report of all decisions handed down at the January term, 1883, and a portion of those handed down at the July term, 1883. The balance of opinions of this last term will appear in Vol. 15.

The syllabus in 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 opinions except where specially noted.

Lincoln, Dec. 1, 1883.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1883.

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

LEON LEVI, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Stolen Goods**: RECEIVING OR BUYING. In this state the receiving or buying of stolen goods, with intent to defraud the owner, is not an accessory, but a substantive offense, and a conviction may be had without regard to the person who stole the goods, or from whom they were received.
2. ———. It is not necessary to show that the goods were received from the thief.
3. ———. And where received at several times, in pursuance of a conspiracy as to the particular goods, the values of the receptions may be aggregated in fixing the grade of the offense.
4. **Witness**: CROSS-EXAMINATION. In cross-examining a witness, it is not proper to put words into his mouth, nor to assume by the question that there is evidence of a fact when there is none.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

Walter Bennett, for plaintiff in error.

1. A receiver of stolen property must have received the property from some person who is guilty of the larceny as a principal offender, and if it be shown that he received the property from another receiver, he cannot be convicted. 1 Wharton's Criminal Law, § 990. 2 Bishop's Criminal Law, § 1140 and cases cited. Desty's American Criminal Law, § 1476.

2. The defendant was indicted for receiving property belonging to a corporation. Proof of the corporate existence was necessary, and the refusal of the court to allow the defendant's attorney to cross-examine the witness as to his knowledge that it was an existing corporation was error. *Cohen v. The People*, 5 Parker's C. C., 330. *Wallace v. The People*, 63 Ill., 451. 2 Russel on Crimes, 100. *People v. Schwartz*, 32 Cal., 160. *State v. Mead*, 27 Vermont, 722.

3. Value of receptions cannot be aggregated in fixing grade of offense. 1 Wharton's Criminal Law, § 931.

It must affirmatively appear beyond a reasonable doubt, that the defendant knew that the property received by him had been stolen. 1 Wharton's Criminal Law, § 983. 2 Archbold's Criminal Practice and Pleading, 667.

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

LAKE, CH. J.

The plaintiff in error stands convicted of the crime of receiving stolen goods, and he seeks to reverse the judgment upon several grounds, which we will consider in the order of their presentation.

In this state the receiving or buying of stolen goods is not an accessory, but a substantive offense, as will be seen by reference to the statute by which it is governed.

Section 116 of the criminal code provides that: "If any person shall receive or buy any goods or chattels of the value of thirty-five dollars or upwards, that shall be stolen or taken by robbers, with intent to defraud the owner;" * * * * "every person so offending shall be imprisoned in the penitentiary not more than seven years, nor less than one year." Comp. Stat., 681.

The jury found the value of the stolen property, which consisted of a lot of copper and brasses, to be fifty dollars; and this finding was fully justified by the evidence, although it is suggested indirectly that it was not.

The evidence shows that, but a few days before the prisoner was arrested under the charge of receiving the property, it had been stolen from the Union Pacific railroad company, but by whom does not appear. The prisoner bought and received it from one Bierbaum, but from whom the latter obtained it was not shown. Therefore the point is made that, inasmuch as it was not shown affirmatively that Bierbaum stole the property, the receiving of it from him was not within the statute. In other words that to make the crime of receiving stolen property, it must be shown that it was received from a person guilty of the larceny, and not from another receiver. And in support of this view we are referred to 1 Wharton's Criminal Law (8th Ed.), Sec. 990; 2 Bishop on Criminal Law, Sec. 1140, and Desty's American Criminal Law, Sec. 147.

The first of these citations does not sustain the position taken, and even the other two, although seeming to do so if we look to the text of the works alone, in view of our statute really do not, as will appear from an examination of the cases referred to by the authors in support of that doctrine.

One of these cases, *The State v. Ives*, 13 Iredell, 338, was decided under a statute which, as the court said, contemplated a receiving of the goods from the person who

stole them, who was the principal felon, and who was regarded in the light of an accessory. The court remarked that the statute "makes the receiver an accessory, and in case the principal is not amenable to the process of the law, such receiver may be prosecuted as for a misdemeanor. Consequently it is necessary to point out the principal, and the matter is involved in the doctrine of principal and accessory. This and many other omissions are remedied by the statutes, Will. III. and Geo. II., by which the act of receiving is made a substantive felony, without reference to the person who stole or the person from whom the goods are received."

Evidently this decision is not at all applicable to a statute like ours, which, as did the English statutes before alluded to, makes the act of receiving a substantive felony, without regard to the person who stole the goods, or from whom they were received.

The two Tennessee cases decide an entirely different question, and have no bearing upon the point to which they are cited by Mr. Bishop. They are *Cassells v. The State*, 4 Yerger, 148, and *Wright v. Same*, 5 Id., 154. All that they decide respecting the receiving of stolen property is, that under the statute of that state, "the receiving of goods, knowing them to be stolen, with the fraudulent intent at the time to deprive the owner of them, is a felony, although the guilty party may have been authorized by the owner of the goods to receive them for him." Clearly these cases have no application here.

Wright Nichols, a witness called on behalf of the state, having testified in chief that the property stolen "belonged to the Union Pacific railroad company," and that the company was "a corporation doing business in the state of Nebraska," on cross-examination was asked when he examined "the papers of the corporation?" But the question was rejected as being "improper cross-examination." The object of this question probably was to test the wit-

ness's knowledge of what he had said about the company being incorporated; but inasmuch as by its form the question assumed that he had seen and examined papers of the corporation bearing upon that subject, of which however there was no evidence, it was rightly excluded.

While very great latitude is permissible, and should be given, in cross-examinations, it ought not to be indulged to the extent of assuming that a witness has made a statement which he has not, or that there is evidence upon a particular point when there is none, for this would be equivalent to putting into his mouth the very words which it is desired that he shall acknowledge or repeat by his answer as his own, which is generally regarded as an objectionable mode of examination. 2 Phillips on Ev. (Cowen & Hill's and Edwards' Notes), 910.

There is also one of the instructions given to the jury assigned for error. This instruction pertained to the valuation of the property feloniously received, and was to the effect that if the several acts of receiving were in pursuance of a conspiracy between the prisoner and Bierbaum "to purchase brass and copper stolen from the railway company, then the jury would be justified in finding as the value of the goods received the aggregate sum of the purchases made pursuant to such conspiracy."

We see nothing wrong in this instruction. Besides, it does not appear from the record to have been excepted to. However, we think it stated the law correctly, and was applicable to the evidence. That there was an arrangement between the prisoner and Bierbaum of the character suggested by this charge is pretty evident, even from the testimony given on behalf of the defense. That the prisoner knew very well that the copper and brasses belonged to the railroad company, and were stolen, is placed beyond all reasonable doubt. In addition to the testimony of the detective that he was willing and offered to purchase such goods with the understanding that they had been stolen,

that of the prisoner himself, and of one at least of his own witnesses, is strongly corroborative of the fact that he did so.

The prisoner testified that he saw the mark of the company on some of the brasses. And William Benton, who worked for him at the time, and assisted in packing the goods for shipment, swore that he asked the prisoner "what would he do about it" if he got into trouble. The answer was that he would hold Bierbaum responsible. This witness also testified that the prisoner was in the habit for a while of purchasing these articles from boys "in the night time," which the prisoner, however, denied, and swore that he obtained it all from Bierbaum. But in respect to this matter Benton is fully supported by the witness August Gromm, called on the part of the defense, who swore that the prisoner did receive such articles at his place of business, from boys, "after dark," until "Speigle had told him that he was buying crooked stuff, then he stopped a little while." Gromm also testified, on cross-examination, to having seen Bierbaum and the prisoner carry articles of the description of those in question from the house of the former to that of the latter. That while the property was received by Bierbaum during the night, "they never moved it out of Bierbaum's place until in the morning." But, it is clear from the evidence that there was no necessity for aggregating purchases in order to bring the value of the property above thirty-five dollars. The prisoner himself swore that three checks given by him to Bierbaum, for $49.70, $50, and $40 respectively, were in payment "for the copper and brass." So that taking either one of the three purchases from Bierbaum alone, even at his own valuation, which was much below that of the disinterested witnesses who testified on this point, and probably less than half its real worth, the value exceeded considerably the amount necessary to sustain the conviction. On the whole we see no reason for a new trial, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

MAGENAU & CO., PLAINTIFFS IN ERROR, V. N. H. BELL AND CHARLES C. TURNER, DEFENDANTS IN ERROR.

Payment: BURDEN OF PROOF. Where an account is admitted to be correct, but it is alleged that it is paid, the burden of proof is upon the defendant to prove payment.

MOTION to modify judgment entered in the case reported in 13 Neb., 247.

George L. Loomis, for the motion.

BY THE COURT.

An opinion was filed in this case in September, 1882, which is reported in 13 Neb., 247. In that opinion it was held that a person who is precluded by statute from testifying against an executor, cannot by transferring his interest be rendered competent to testify, and we adhere to that decision. It was also held that a transfer by a plaintiff of his interest in the action to his co-plaintiff during the pendency of the suit, did not justify the court in dismissing the action. The judgment of the district court was thereupon reversed and the case remanded.

The plaintiff in error now moves for a modification of the judgment upon the ground that there is a stipulation as to certain facts and admissions in the record, and also that this court enter final judgment upon the same.

The action is upon an account against the estate of John Riddle, deceased. This account was filed in the county court and disallowed, and on appeal to the district court the proceeding was dismissed. In the stipulation above referred to, it is admitted that the account is correct, but certain facts are stated to show payment.

The evidence of payment is as follows: One Frank C. Stewart testifies that in February, 1879, Riddle and Ma-

genau "were trying to make a settlement. I saw Riddle pay Magenau some money, but don't know how much."

When payment is pleaded the burden of proof is on the party asserting such fact. 2 Greenleaf Ev., § 516. Abbott's Trial Ev., page 446. *Knapp v. Runals*, 37 Wis., 136. *Fullerton v. Bank*, 1 Pet., 604.

In the case of *North Pennsylvania Railroad Co. v. Adams*, 54 Penn. St., 96, it is said: "But payment, tender, and readiness to pay are all affirmative pleas, casting the burden of proof upon the defendant." See also *Gernon v. McCan*, 23 La. Annual, 84. As the burden of proof as to payment is upon the defendant, and as there is a failure of proof upon that point, judgment will be entered in this court in favor of the plaintiffs for the amount of the account.

JUDGMENT ACCORDINGLY.

C. W. & W. W. MARSH, PLAINTIFFS IN ERROR, v. CHARLES SYNDER, DEFENDANT IN ERROR

Judgment: On a verdict for the defendant in the county court, judgment was rendered as follows: "I hereby render judgment against plaintiffs for costs herein. Judgment rendered against plaintiffs for costs." The case was taken on error to the district court, where no objection was made to the form of the judgment. In the supreme court the defendant moved to dismiss the petition in error because there was no final judgment. *Held*, That the objection should have been made in the district court, and that the judgment, although informal, was not void.

MOTION to dismiss petition in error.

Norval Brothers, for the motion.

D. C. McKillip, contra.

BY THE COURT.

This case was tried to a jury in the county court of Seward county, and a verdict was returned that the plaintiff had no cause of action. The court thereupon rendered judgment as follows: "I hereby render judgment against plaintiffs for costs herein. Judgment rendered against plaintiffs for costs." The case was taken on error to the district court, where the judgment was affirmed. No objection was made in that court to the form of the judgment, and the case was heard there upon the errors assigned without objection. But in this court the defendant moves to dismiss the petition in error, because this is no final judgment.

This objection comes too late. It should have been made in the district court. If made there, the court could have remanded the cause for a final judgment; but the judgment as rendered, while informal and incomplete, is not void. *Crowell v. Johnson*, 2 Neb., 155. *Vangeazel v. Hillyard*, 1 Houston (Del.), 515. The motion to dismiss must be overruled.

MOTION OVERRULED.

JOHN A. HARBACH, PLAINTIFF IN ERROR, V. LORIN MILLER, DEFENDANT IN ERROR.

Ejectment: ACTION ON UNDERTAKING GIVEN ON REMOVAL OF CAUSE TO SUPREME COURT. Action on a supersedeas undertaking in an ejectment case, taken to the supreme court on error. The language of the undertaking is, "That the said Harbach during the possession of said property, will not commit or suffer to be committed any waste thereon, and if the judgment be affirmed, he, said Harbach, will pay the said Miller the value of the use and occupation of the property from the date of this undertaking until the delivery of the possession," etc. Evidence on the trial not disputed, that at the date of the undertaking the property consisted of one and six or seven-tenths acres of

land near the center of a large, enclosed, and cultivated field without improvements, except a root-house of but nominal value; but sometime afterwards parties not in privity with either party to the said undertaking, erected two small frame dwelling houses on said premises. The trial court instructed the jury *inter alia* as follows: "2. The fact that the houses in question may not have been on the premises, or been fit for occupancy at the time when the bond was given, should the jury find such to be the fact, does not prevent the plaintiff from recovering the value of the rent and occupation, as found by the jury, after the erection of the houses, and while fit for occupancy," and refused instructions requested by the defendant to the opposite effect. *Held*, error and a new trial awarded.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

John D. Howe, for plaintiff in error, cited Tyler on Ejectment, etc., 848. *Coulter's Case*, 5 Coke R., 30. *Green v. Biddle*, 8 Wheat, 81–82. *Jackson v. Loomis*, 4 Cow., 168. *Hylton v. Brown*, 2 Wash. C. C., 165. Sedwick Meas. Dam. (126), 141, and cit. *Dothage v. Stuart*, 35 Mo., 251. *Morrison v. Robinson*, 31 Pa. St., 456. *Worthington v. Young*, 8 Ohio, 401. *Harrall v. Gray*, 12 Neb., 544. Bouvier's L. Dic., *Mesne Profits*.

E. Wakeley, for defendant in error, cited *Roswell v. Blake*, 2 Pick., 505. *Denny v. Osborn*, 4 Cow., 329. *Schlemmer v. North*, 32 Mo., 206. *White v. Moses*, 21 Cal., 34.

COBB, J.

The question in this case arises upon certain instructions given and refused, and is most fully presented by the instruction numbered 2, given at the request of the plaintiff, in the following words: "The fact that the houses in question may not have been on the premises or been fit for occupancy at the time when the bond was given, should the jury find such to be the fact, does not prevent the

plaintiff from recovering the value of the rents and occupation, as found by the jury, after the erection of the houses and while fit for occupancy." It appears from the record, that at the November, 1873, term of the Douglas county district court, the defendant in error obtained a judgment against the plaintiff in error for the possession of the block of land in question. On the 2nd day of January, 1874, the plaintiff in error, for the purpose of staying the issuance of a writ of possession on said judgment until the same could be reviewed in this court, entered into an undertaking with security to the defendant in error, in the penal sum of five hundred dollars, that the said plaintiff in error, during the possession of said property, would not commit or suffer to be committed any waste thereon, and if this judgment should be affirmed, he, said plaintiff in error, would pay to said defendant in error the value of the use and occupation of the property from the date of the said undertaking until the delivery of the possession pursuant to the judgment, etc. The judgment was affirmed in this court, and the possession of said premises delivered pursuant thereto on the 24th day of April, 1875; and this suit was brought on the said undertaking against the plaintiff in error and his security, for the value of the use and occupation of the property.

It appears from the testimony that at the time of the execution of the undertaking, the premises consisted of one and six or seven-tenths acres of agricultural land in an enclosed field of far greater extent, without improvements except a root-house of merely nominal value. That the said premises were then occupied for gardening purposes by lessees, not under the plaintiff in error, but under a grantee in the second degree of the title thereto, conveyed by the plaintiff in error some years before the giving of the undertaking. The houses referred to by the court, in its instructions, were not in existence at the time of the giving of the undertaking, but were placed on the

premises and made inhabitable between the first day of February and the first day of April, 1874. According to the evidence, the rental value of the premises, including the two houses, was from ten to twenty dollars per month. Without the houses, in the condition in which it was at the date of the undertaking, its rental value was from two and a half to five dollars per acre per annum.

In the brief time at our command we have not been able to find a single adjudicated case which, to our mind, covers the point involved in this case. It is no doubt well settled, independent of any legislation, in the nature of occupying claimants acts, that in an action for mesne profits against a *bona fide* purchaser, he will be allowed, against the plaintiff, in mitigation of damages, the value of permanent improvements made in good faith to the extent of the rents and profits claimed by the plaintiff. But the plaintiff in error does not bring himself within the benefit of that rule, nor could he, for the reason that the improvements were not made by him but by another person, in whose shoes he is made to stand by force of the contract of the undertaking. While the undertaking estops him to deny the possession of the premises, yet as he was not in possession, in point of fact, he could not avail himself of the benefit of these improvements.

While this action is one in the nature of an action for mesne profits, it is not that. It is an action for the breach of a special contract. The fact that the contract is a statutory one, and somewhat compulsory, does not change its nature as a contract, nor the rules for ascertaining the rights of the parties thereto upon its breach. It is to be construed by the same rules as other written contracts between parties. If words are used in a doubtful sense as to their meaning or application, courts should, if possible, give them the meaning and application intended and understood by the parties themselves at the time of making the contract.

The supreme court of Vermont, by Judge REDFIELD, in

the case of *Gunnison v. Bancroft*, 11 Vt., 490, state the rule as follows: "Language used by one party to a contract is to receive such a construction as he at the time supposed the other party would give to it, or such a construction as the other party was fairly justified in giving to it, which is the same thing."

To the same effect is the following: "Every treaty" says Vattel, "should be interpreted as the parties understood it when the act was prepared and accepted." Note to Kent's Commentaries, vol. 2, p. 557.

To apply this rule to the case at bar: The subject-matter was the one and six or seven-tenths acres of land, the possession of which had been adjudged to the defendant in error; the object of the undertaking was to delay the carrying of said judgment into effect until the same could be reconsidered in the appellate court, the language—"would pay * * * the value of the use and occupation of the property."

What property did the plaintiff in error have a right to suppose the other party would construe this language to mean, or what meaning or construction was the defendant in error fairly justified in giving to it? Certainly none other than the one and six or seven-tenths acres of land, the block of ground which had been and still was in litigation between the parties. This is as the parties understood it when the act was prepared, and so the treaty should be interpreted.

We therefore reach the conclusion that the district court erred in giving the instruction No. 2 of the plaintiff's requests, and in refusing to give the requests of the defendant containing the opposite principle as the law of the case.

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

REVERSED AND REMANDED.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, V. CHARLES HIGH, DEFENDANT IN ERROR.

Railroads: DAMAGE TO STOCK: FENCING. Action against the railroad company for killing, by means of its engine and train, certain hogs of the plaintiff, at a point on its line where said company had failed to comply with the law requiring it to fence its track, etc. It was stipulated that the hogs were killed by a passing train of defendant at a point on its road not within the limits of any town, city, or village, and at a point where said road was not fenced on either side; that said hogs had escaped from the enclosure of the plaintiff, and were at large without the actual fault of the plaintiff, in the day-time at the time they were killed, but that they were killed without any negligence on the part of said defendant and its agents or employees other than what may be implied from the neglect to fence the line of its road. A finding and judgment for the stipulated value of the hogs for the plaintiff upheld.

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

A. J. Poppleton and *J. M. Thurston*, for plaintiff in error, contended that the act of March 1st, 1875, being subsequent to the act of 1867, is to be given its full force and effect; that the railroad company is not bound to fence against stock restrained from running at large by law; that the law charges the defendant in error with negligence, notwithstanding his hogs escaped without his actual fault; that the plaintiff in error is not charged absolutely, and if at all, only in the absence of contributory negligence on the part of defendant in error; that the defendant in error is chargeable with contributory negligence in suffering his animals to escape, and therefore cannot recover; and that the legislature had no right to say that a railroad company shall be *absolutely* liable for stock killed by its trains regardless of the degree of negligence that may be chargeable to the stock owner. In support of these views cited:

Railroad v. Skinner, 19 Pa. St., 298. *Clark v. Railroad*, 36 Mo., 202. *Dean v. Railroad*, 22 N. H., 316. *Williams v. Railroad*, 2 Mich., 259. *Thorpe v. R. R.*, 27 Vt., 140. *Trice v. R. R.*, 49 Mo., 438. *Tonawanda R. R. v. Munger*, 5 Denio, 259. *C. & N. W. R. R. v. Goss*, 17 Wis., 428. *Stuck v. Railroad*, 9 Wis., 202. *Pittsburg Ft. Wayne, etc., v. Mithven*, 21 Ohio State, 586. *Central Branch R. R. v. Lee*, 20 Kan., 353.

William Marshall, for defendant in error, cited: *F. & P. M. R. R. v. Lull*, 28 Mich., 510, and cases there cited. *Shepard v. Railroad*, 35 N. Y., 641. *Ewing v. Railroad*, 72 Ill., 27. *Gillam v. Railroad*, 26 Minn., 268. *Railroad v. Wiggins*, 24 Kan., 588. *Spence v. C. & N. W. R. R.*, 25 Iowa, 139.

COBB, J.

The question presented by the stipulation and special findings in this case is, whether a railroad company is liable for killing hogs which had escaped from the enclosure of the owner, and were at large without his actual fault, in the day-time, at a point where the railroad was not fenced, not within the limits of any city or village, but which were killed without any negligence on the part of the railroad company, or its agents, servants, or employes, other than what may be inferred from the neglect to fence the line of road.

The legislation bearing on the subject may be stated as follows: The act of 1867, Laws of 1867, p. 88, Comp. Stat., pp. 381–2, 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, and villages, with openings, or gates,

or bars, at all the farm crossings of such railroads for the use of the proprietors of the lands adjoining such railroad, and shall also construct, where the same has not already been done; and hereafter maintain at all road crossings, now existing or hereafter established, cattle-guards suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting on to such railroad; and so long as such fences and cattle-guards shall not be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, is not in sufficient repair to accomplish the objects for which the same is herein prescribed is 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 * * * to any cattle, horses, sheep, or hogs thereon; and when such fences and guards have been fully and duly made and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages unless negligently or willfully done."

The act 1875, Laws of 1875, p. 190, Comp. Stat., p. 51, provides: "That from and after the first day of March, 1875, sheep and swine shall be restrained from running at large in the State of Nebraska," etc.

The act of 1877, entitled: "An act to amend section two of an act to define the duties and liabilities of railroad companies," approved June 22, 1867, Laws of 1877, p. 59, Comp. Stat., sec. 382, provides: "That section 2 of an act to define the duties and liabilities of railroad companies,' approved June 22, 1867, be amended so as to read as follows: 'Any railroad company hereafter running or operating its road in this state, and failing to fence on both sides thereof against all live stock running at large at all points, shall be absolutely liable to the owner of any live stock injured, killed, or destroyed by their agents, employes, or engineers," etc.

From the above, it will be seen that it was the duty of the railroad company, the plaintiff in error, to have fenced its line of railroad. This is admitted by the stipulation not to have been done at the point where the hogs were killed. Section one of the act of 1867 is not repealed or amended in terms. The duty to fence its road on both sides, except at the crossings of public roads and highways and within the limits of towns, cities, and villages, remains unimpaired. It was also the duty of the plaintiff below, defendant in error, to have restrained his hogs from running at large. But it is stipulated that said hogs had escaped from the enclosure of plaintiff, and were at large without the actual fault of the plaintiff, in the day-time, at the time they were killed; also that they were killed without any negligence on the part of defendant and its agents or employes, other than what may be inferred from the neglect to fence the line of road.

The plaintiff in error takes the position, among others, that the law charges the defendant in error with negligence, notwithstanding his hogs escaped without his actual fault. The adjudicated cases bearing on the question of the character of the liability of railroad companies under fencing laws similar to our own are so numerous, and the views therein expressed so various and conflicting, that no attempt will be made to reconcile or even to collate them. But we will content ourselves with stating the conclusion to which we have arrived after a very thorough examination of the authorities.

This being an action against a railroad company for killing by its engine and train certain hogs of the plaintiff, at a point on its line where it had failed to comply with the law requiring it to fence its track, the plaintiff was only required to prove the fact of the killing, the ownership and value of the hogs killed, and that the track at that point was unfenced, to make out his case, *prima facie*. No negligence on the part of the engineers, agents, or em-

ployes of the company was alleged or need be proved. For the purposes of this case it will not be necessary to decide what might have been the effect of evidence showing the defendant in error to have been guilty of actual negligence and had the facts not been stipulated the other way, but it will be sufficient to say that the law does not impute to him such negligence on account of his hogs having escaped from his enclosure against his will.

Under the law, and upon the facts as stipulated, the judgment of the district court was right and must be affirmed.

JUDGMENT AFFIRMED.

WILLIAM HEWERKLE AND OTHERS, PLAINTIFFS IN ERROR V. GAGE COUNTY, DEFENDANT IN ERROR.

County: LIABILITY FOR COSTS. The county is not liable for defendant's witness costs, where he is indicted for a felony.

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

J. A. Smith, for plaintiff in error, cited Const., Art. I, Sec. 11. Comp. Stat., Sec. 437, p. 730. Id., Sec. 541*a*, p. 746.

Colby & Hazlett, for defendant in error.

COBB, J.

Without stopping to inquire into the question of practice suggested by counsel for appellants in their brief, we will proceed to the examination of the case on its merits. The question is correctly stated by counsel: "Is the county liable for defendants' witness costs where they are indicted

for a felony." Appellant cites Sec. 2, Art. 1 of the Constitution. Among the rights guaranteed by that section are the right to "appear and defend in person or by counsel," and "to have process to compel the attendance of witnesses in his behalf." Appellant also cites Sec. 437, Comp. S., p. 730, which provides for the assignment and payment of counsel when defendant is unable to employ and pay the same in all cases of prosecutions for felony, for the purpose, as we suppose, of showing or illustrating that the legislature, having made a provision carrying one clause or portion of the section into effect, it should be construed as carrying the balance of the section into effect in the same manner and as giving it a similar construction. We not only do not agree to this conclusion, but if this action of the legislature be taken to prove anything on the subject now under consideration, it must be taken to prove the very reverse, that the legislature, having passed a law for the payment of the counsel mentioned in the section of the constitution, it would, while considering the section, certainly have provided for the payment of the witnesses therein named, had it been the legislative construction of the constitution that the costs of the defendants witnesses were to be paid by the county. But the constitution deals only with the matters of right, while the law provides for the payment of counsel for certain defendants in criminal cases, not as a matter of right, but of charity, and limits its application to such defendants as are unable to employ and pay counsel.

Again, if it be conceded that it was the intention of the framers of the constitution to make it the duty of the legislature to provide for the payment of the costs of the witnesses of all persons indicted for felonies, it will also be obvious that until that duty is discharged by the legislature, the right thereto on the part of the citizen remains suspended. It cannot be claimed to be one of those rights which vindicate themselves and can be enjoyed without

further grant or limitation by the law-making power. The writer cannot conceive that it could have been the intention of the experienced men who framed the constitution, to place within the uncontrolled hand of every male factor the power to inundate the streets of the county seat, where he is about to be tried for crime, with his friends from the four corners of the state under the pay of the county, upon pretense that they are his witnesses.

But it cannot be claimed, upon any reasonable construction of the language of the constitutional provision in question, that it was the intention of its framers to make it the duty of the legislature to provide for the payment of defendants' witnesses in such cases, and, however that may be, they certainly have never done it.

It is true there is upon the statute book an act providing "that the fees of all the witnesses in criminal cases in the district court shall be paid by the county wherein the indictment is found." Comp. Stat., Sec. 541*a*, p. 746. But the object and purpose of this act evidently was to settle as between the county from which, and the one to which, a criminal case had been removed on change of venue, which should pay the witness fees for which either county was liable and not to create or declare any new liability. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

ANDREW E. SPENCER, PLAINTIFF IN ERROR, V. WILLIAM J. THISTLE, DEFENDANT IN ERROR.

Practice in Supreme Court. A motion for a rehearing must distinctly specify the grounds upon which it is based.

APPLICATION for rehearing of case reported 13 Neb., 227.

Burr & Marshall, for the application.

BY THE COURT.

A motion for a rehearing was filed in this cause as follows: "Now comes the defendant in error by his attorneys, Burr & Marshall, and upon the grounds stated in the brief for a rehearing, and substantiated by the additional portion of the record, both herewith filed, moves the court to grant a rehearing of this action, and for such other further or different relief in the premises as this court may deem just."

Rule 16 provides that: "A motion for a rehearing may be filed as of course at any time within thirty days from the filing of the opinion of the court in the case. Such motion must distinctly specify the ground upon which it is based, and be accompanied by a printed brief of the argument of counsel, and the authorities cited in its support," etc.

A motion is a pleading, and as such goes upon the record, but a brief is supposed to contain merely the argument of counsel and the authorities in support of the motion. The motion must contain the reasons why a rehearing is desired, so that if it is sustained, the adverse party may be advised of the questions to be reconsidered on the rehearing. Under the code a motion must distinctly specify the object sought. The motion in this case is too indefinite to justify the court in granting a rehearing. It must therefore be overruled.

MOTION OVERRULED.

THE STATE, EX REL. FIRST NATIONAL BANK OF BEATRICE, V. THE BOARD OF COUNTY COMMISSIONERS OF GOSPER COUNTY.

1. **Levy of Taxes by County Commissioners:** ESTIMATES. County warrants having been drawn on a fund in the treasury or tax levied for their payment, county commissioners have no authority to include in their estimates, and levy taxes in excess of the maximum fixed by law, an additional sum for the payment of such warrants as have not been paid out of former levies. In such case when the ordinary taxes are insufficient to pay the claim, the remedy provided by statute is to fund the debt.

2. ———: ———. In a proper case, county commissioners will be compelled to include in their estimate of taxes for the current year a sufficient amount, within the limits fixed by law, to pay claims against the county.

ORIGINAL application for mandamus.

J. S. Gilham, for the relator.

A. E. Harvey, for the respondents.

BY THE COURT.

This is an application for a mandamus to compel the defendants to include in their estimate of taxes to be levied for the current year a sufficient amount in excess of the highest rate allowed by law to pay a certain warrant of said county for the sum of $743.00.

The relator alleges in the affidavit, that in the year 1874 the county commissioners of Gosper county levied certain taxes for the general fund of said county, and thereafter, in October of that year, purchased certain blank books of the S. W. Paper Co., which were duly delivered, and the account for the same audited and allowed, and the warrant in question drawn for said account, and thereafter assigned

to the relator. It is also alleged that said warrant was presented to the treasurer of said county, and not paid for want of funds, and that the same is now registered; that there are no funds in the treasury to pay the same, and said warrant will not be paid unless the defendants are compelled by mandamus to include in the estimate of and levy of taxes for this year a sufficient amount to pay the same.

The defendants demur to the application upon the ground that the facts stated therein are not sufficient to entitle the relator to the relief sought.

Sec. 5, art. IX of the Constitution, provides that "county authorities shall never assess taxes the aggregate of which shall exceed one and a half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county."

The present constitution took effect November 1, 1875, but the warrant in question was issued prior to that time. The question presented therefore is, is a county warrant such an evidence of debt as to justify the county commissioners in levying a tax in excess of the maximum fixed by law for the payment of the same?

In 1859 an act was passed by the legislature providing that it should be unlawful for county commissioners to issue warrants in excess of the amount levied by tax for the current year. This act continued in force until 1879, when the commissioners were restricted to fifty per cent, which in 1881 was extended to seventy-five per cent. There are also provisions for funding warrants in certain cases, by submitting the question to a vote of the people. Construing these several provisions together, it is very clear that warrants which were properly drawn upon a tax duly levied, but which from some cause have not been collected, do not, until they are funded under the provisions of the statute, constitute such a debt against the county as to jus-

tify the commissioners in levying a tax in excess of the maximum fixed by the statute for their payment.

In a proper case the commissioners will be compelled by mandamus to make sufficient estimates, within the limits fixed by law, of the amount to be levied to meet the expenses and indebtedness of the county; but the case at bar does not justify them in making an estimate or levying the tax prayed for. The writ must therefore be denied.

WRIT DENIED.

EX PARTE GUSTAV R. WOLF.

1. **Liquor License:** POWER OF CITY COUNCIL. A city council in regular session adjourned to a particular time for the purpose of considering certain remonstrances against licenses to sell intoxicating liquor. *Held*, That the council at the adjourned session might act upon any matter proper to come before it in regular session.

2. **City Ordinances:** CONSTRUCTION. Where an ordinance contains a provision plainly repugnant to a former ordinance, to the extent that there is a conflict, the former ordinance is repealed by implication.

3. ———: CLOSING SALOONS. An ordinance of a city of the second class requiring saloons to close at ten P.M., and remain closed to five A.M. next day, is valid and within the authority conferred upon the mayor and city council.

ORIGINAL application for a writ of habeas corpus.

J. L. Caldwell, for the application.

1. The pretended amendment was pretended to be passed at a special meeting of the city council, which pretended special meeting was void for want of a sufficient call and notice of the time, place, and object of said special meeting, and for want of a journal record of the submis-

sion of said call and object, and the disposition made thereof. *Dey v. Jersey City*, 19 N. J. Eq., 412. *Baltimore v. Prouty*, 25 Md., 18. 1 Dillon Corp., sec. 264. *Rex v. Hill*, 4 Barn. & Cress., 644. *Rex v. Grimshaw*, 10 Q. B., 747. *Sherwin v. Bugbee*, 16 Verm., 444.

2. Amendment is void. *Cowley v. Town of Rushville*, 60 Ind., 327. *Canton v. Nest*, 9 Ohio State, 440.

3. Council have no power to fix time for closing saloons. 1 Dillon, p. 364. Cooley Const. Lim., sec. 195. *Savannah v. Hussey*, 21 Ga., 80. *In re Burnett*, 30 Ala., 461.

W. R. Kelly and *A. C. Ricketts*, contra.

MAXWELL, J.

The petitioner is a licensed saloon keeper in the city of Lincoln, and alleges that he is unlawfully deprived of his liberty by the jailor of that city.

In April, 1882, the mayor and council of the city of Lincoln passed an ordinance as follows: "It shall be unlawful for any person under this ordinance, whether by himself or his clerk, to sell or give away any intoxicating, malt, spirituous, vinous, mixed, or fermented liquors to any minor under the age of twenty-one years, or to any Indian, idiot, insane person, or habitual drunkard, or to keep open, or to vend, sell, or give away any malt, spirituous, vinous, or fermented liquors in his place of business on the day of any general or special election held in said city of Lincoln, or after the hour of ten o'clock P.M., and on any day before the hour of five o'clock A.M. on the following day, or after the hour of ten o'clock P.M. on Saturday and before the hour of five o'clock A.M. of the following Monday; and every such person to whom a license shall be granted as aforesaid, shall keep his bar or place of vending such liquors in the front room nearest the principal street of the building, to be designated in such license as

the place where such vending and giving away may take place, and shall keep such bar or place of vending such liquors at all times exposed to the street, and the view thereof from the street upon which such building fronts, and also of the whole inner side of the rear wall of such room, wholly unobstructed by screens, temporary partitions, paint, frosting, curtains, or any other obstacle from such street; and shall allow or permit no gambling or gaming in any room, cabin, or sub-division of any room in or connected with the room in which said bar is kept, or in any other place, cellar, outhouse, or other place over which the person having such license shall have any control or authority; and all the conditions and regulations of this section shall be plainly written or printed in every license so granted, in addition to such as are contained in the form prescribed in section eight of this ordinance. And whosoever shall be convicted of any violation of the provisions of this section shall be fined in any sum not less than ten dollars nor more than one hundred dollars, and costs of prosecution, and stand committed to the city jail until such fine and costs shall be paid, and said section, as heretofore existing, is hereby repealed.

"SEC. 2. This ordinance shall take effect and be in force from and after its passage and publication according to law.

"Passed April 11, 1882; approved April 11, 1882.

"JOHN DOOLITTLE, Mayor.

"Attest: R. C. MANLEY, City Clerk."

The petitioner kept his saloon open later than ten o'clock P.M. and was tried and convicted of the offense, and sentenced to pay a fine of twenty-five dollars and costs and to stand committed until the same was paid. Having failed to pay the fine he was committed to jail, from which he now asks to be discharged on *habeas corpus*.

It is contended on behalf of the petitioner that the or-

dinance in question is void for want of a sufficient call signed by the mayor or any three councilmen stating the object of the special meeting at which it was passed. The following is the record of the proceedings of the council:

"LINCOLN, NEBRASKA, April 10, 1882.

"Council met—present, Mayor Wright, Councilmen Doolittle, Grimes, Harley, Linderman, and Munson.

"Councilmen elect, Baum, Krone, and Shaberg were sworn in by the City Clerk. Mayor Wright administered the oath of office to John Doolittle, Mayor elect. Council adjourned, and Mayor Doolittle called the new council to order—present, Councilmen Baum, Harley, Krone, Linderman, Munson, and Shaberg.

"The matter of remonstrance of H. W. Hardy et al., against the granting of liquor licenses to H. W. Woltemade et al., came up. Mr. Scott, for the protestants, asked further time. Attorneys Billingsley and Kelly asked immediate consideration. On motion Councilman Munson, Tuesday afternoon at — P.M. was set to hear the case in issue, and the clerk was instructed to issue subpœnas, etc. * * * * * Council adjourned."

"LINCOLN, NEBRASKA, April 11, 1882.

"Adjourned session.

"Council met—present, Mayor Doolittle, Councilmen Baum, Harley, Krone, Linderman, Munson, and Shaberg.

"On motion the reading of minutes of last meeting was dispensed with.

"Business was taken up under order of unfinished business.

"On motion Councilman Linderman, the testimony in case of remonstrances against applicants for liquor license, if testimony should be heard, was authorized to be taken by a short-hand reporter.

"On motion Councilman Munson, applications and bonds for liquor license and the remonstrances were read.

"Mr. N. S. Scott, for the committee, stated that negotia-

tions were pending looking toward a withdrawal of the remonstrance, and upon his suggestion council took a recess for a few minutes. When council came to order again the petition of H. Woltemade was taken up. L. W. Billingsley, attorney for applicants, stated that the parties in interest had agreed to a settlement on the following basis: Remonstrants withdrawing their protest, applicants agreeing to an ordinance causing saloons to be closed at ten P.M., and the removal of all curtains, screens, painted or frosted windows and doors, and all other obstructions to view from the street.

"On motion Councilman Munson, adjourned to meet immediately in special session to consider said ordinance, and pass upon applications—ayes, Councilmen Baum, Harley, Krone, Linderman, Munson, and Shaberg.

"Adjourned.

"R. C. MANLEY, City Clerk."

"LINCOLN, NEBRASKA, April 11, 1882.

"Council met immediately in special session—present, Mayor Doolittle, Councilmen Baum, Harley, Krone, Linderman, Munson, and Shaberg, for purpose as stated above. Councilman Harley presented an ordinance, to amend section nine of an ordinance entitled "An ordinance to license and regulate the sale and giving away of any malt, spirituous, or vinous liquors in the City of Lincoln. Approved, Nov. 22, 1881.

"The ordinance was read first time.

"On motion Councilman Baum, the rules were suspended—ayes, Councilmen Baum, Harley, Krone, Linderman, Munson, and Shaberg. The ordinance was read second and third times by title, and declared passed on the vote—ayes: Councilmen Baum, Harley, Krone, Linderman, Munson, and Shaberg."

It is said that as the council adjourned on the 10th of April until the 11th, for the purpose of hearing the remonstrances against granting a license to Woltemade, and the

clerk was instructed to issue subpœnas for witnesses, and that the council thereafter adjourned, that at the adjourned meeting they were restricted to the business of hearing remonstrances. In other words, that the council having adjourned for the purpose of considering and disposing of special business, had no authority to transact any other business than such as they had designated for consideration. It is a sufficient answer to this objection to say that there was no such restriction upon the powers of the council. It is true that the record shows that it adjourned for the purpose of considering the remonstrances, but that did not limit the power of the council to take up other legitimate business. It was fixing a time for the hearing of a matter in relation to granting licenses, so that an opportunity would be given those interested therein to attend with their witnesses.

The meeting at which this adjournment was had was a regular one, and the rule as to adjournment in such cases is stated by an eminent writer thus: "A regular meeting, unless special provision is made to the contrary, may adjourn to a future fixed day; and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is, indeed, but the continuation. Unless such be the special requirement of the charter or by-law, the adjourned regular meeting would not, it is supposed, be limited to completing particular items of business which had been actually entered upon and left unfinished at the first meeting, but might, if the adjournment was general, do any act which might have been done had no adjournment taken place." Dillon Mun. Cor., § 225, and cases cited in note 3.

That is, if a regular meeting is adjourned, any business which would have been proper for the council to consider at that meeting, may be considered and acted upon at the adjourned meeting, but if it is a special or called meeting, which is adjourned, nothing can be considered at such ad-

journed meeting unless it could have been considered and acted upon at the special meeting.

This being a regular meeting of the council, which was adjourned, it had authority to consider any matter which was proper to come before the city council. The motion to adjourn and immediately go into special session to consider an ordinance and pass upon applications was equivalent to a motion to suspend other business, and dispose of the matters embraced in the motion. Although the word adjournment was used, it was not intended to adjourn, but to remain in session and dispose of the business designated in the notice. The council was acting upon questions proper for it to consider, and the court will construe its proceedings, which have been fairly conducted and within the scope of its powers, with great liberality. The first objection is untenable.

Second. It is objected that the ordinance is void because it amends section eight of the same ordinance, and does not contain section eight, and is therefore in conflict with section seventy-nine of the act in relation to cities of the second class, which reads as follows: "All ordinances and resolutions, or orders for the appropriation or payment of money, shall require for their passage or adoption the concurrence of a majority of all members elected to the council or board of trustees; ordinances of a general or permanent nature shall be fully and distinctly read on three different days, unless three-fourths of the council or trustees shall dispense with the rule; ordinances shall contain no subject which shall not be clearly expressed in its title, and no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section as revised or amended, and the ordinance or section so amended shall be repealed."

The requirement as to repealing the section amended is substantially the same as in section eleven, article three of the state Constitution of 1875, and section nineteen, article two

of the Constitution of 1867, yet it has never been supposed that where a statute was properly passed, which contained provisions repugnant to those of a former statute, but not as an amendment thereof, that there must be an express repeal of such former statute to give validity to the latter. The law does not favor a repeal by implication, but a later statute, which contains provisions clearly repugnant to a former, repeals it as completely as though it contained express words to that effect. *Johnson v. Hahn*, 4 Neb., 146. *Goddard v. Boston*, 20 Pick., 410. *Whitney v. Blanchard*, 2 Gray, 208. *Pierpont v. Crouch*, 10 Cal., 316. So far as the provisions of section eight are in conflict with section nine, the same are repealed, and the ordinance is not void because it does not repeal section eight in express terms.

The third objection is that the ordinance in question contains provisions in conflict with the state law—that is, it provides a different form of license from that given in the statute. The authority cited to sustain this proposition is *Canton v. Nist*, 9 Ohio State, 439. Whatever may be thought of the reasoning of the court and the conclusion reached in that case, it fails to show the invalidity of the ordinance complained of.

Fourth. The attorney for the petitioner contends that the city council has no power to regulate the closing of saloons. Section thirty-nine of the act creating cities of the second class provides that the city council may pass ordinances:

"To restrain, prohibit, and suppress billiard tables and bowling alleys kept for public uses, houses of prostitution and unlicensed tippling shops, gambling and gambling houses, and other disorderly houses and practices, and all kinds of public indecencies, and all lotteries or fraudulent devices and practices for the purpose of obtaining money or property.

"To prevent any desecration of the Sabbath day, com-

monly called Sunday, and to prohibit public amusements, shows, exhibitions, or ordinary business pursuits upon said day.

"To prevent intoxication, fighting, quarreling, dog-fights, cock-fights and all disorderly conduct.

"To forbid, punish, and prohibit the selling or giving away of any intoxicating malt, vinous, mixed or fermented liquor to any minor, apprentice, or insane, idiotic or distracted person, habitual drunkard, or person in the habit of getting intoxicated." Comp. Stat., 107, 108.

Section sixty-nine authorizes the mayor and council to pass ordinances "To license, regulate, and prohibit the selling or giving away of any intoxicating malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license; *provided,* that the city council or board of trustees may grant permits to druggists for the sale of liquors for medicinal, mechanical, sacramental, and chemical purposes only, subject to forfeiture, and under such restrictions and regulations as may be provided by ordinance; *provided further,* that in granting licenses such corporate authorities shall comply with whatever general law of the state may be in force relative to the granting of licenses." Id., 115.

It is contended that the latter portion of the section takes away the power of the city council to impose any condition upon the selling of liquor not imposed by the state law. The effect of the language of the statute is, that license shall be granted in the manner provided by the state law —that is, upon petition signed by thirty resident freeholders of the precinct or town where the liquor is to be sold. The application is to be filed with the proper officer, notice thereof to be given, a hearing had thereon, the amount to be paid for the license, which in no case can be less than $500, to be paid, and a bond given as required by law, etc. That the authority to regulate the opening and closing of

saloons, where it is exercised in a reasonable manner, is conferred upon the mayor and council of a city of the second class, there is no doubt. And where such saloons are permitted to keep open during ordinary business hours it will not be deemed an abuse of such authority. Ordinances relating to the health, comfort, convenience, good order, and general welfare of the inhabitants of a municipality are authorized under the police power of the city. Every citizen, while protected in the ownership of his property, which cannot be appropriated to the use of the public without just compensation, nor to private use at all without the consent of the owner, yet is held subject to the police regulation that it shall be so used as not to prove pernicious to his immediate neighbors or to citizens generally. These regulations rest upon the maxim "that regard be had to the public welfare, is the highest law." Dillon on Mun. Cor., § 93. Broom's Legal Maxims, I. The ordinance in question is valid, and the petitioner having been convicted of its violation cannot be discharged on habeas corpus.

The writ is denied and the proceedings dismissed.

JUDGMENT ACCORDINGLY.

PETER A. MCDOWELL, APPELLEE, V. E. MARY GREGORY ET AL., APPELLANTS.

Foreclosure of Mortgage: DECEIT BY ATTORNEY. One P. employed certain attorneys to foreclose a mortgage in his favor upon certain real estate. They thereupon commenced an action and obtained a decree of foreclosure. Afterwards they claimed to have discovered that a portion of the mortgaged premises had been released and other real estate taken in lieu thereof, and they thereupon employed another attorney to obtain a decree setting aside the decree of foreclosure, to have the property claimed to be released declared discharged from the mortgage,

and to foreclose the mortgage upon the remainder of lands first mortgaged, and upon that taken in lieu of that released. A decree was obtained as prayed. On appeal to the supreme court the plaintiff filed an affidavit wherein he stated that the second action was commenced and carried on without his knowledge or authority; that he was satisfied with the first decree; which facts were not denied. He also stated that he was informed and believed that his attorneys had purchased the land released, in another's name, for a trifling sum. *Held*, That the decree in the second action would be set aside and the petition dismissed.

APPEAL from Lancaster county. Tried below before POUND, J.

John S. Gregory, for appellant.

No appearance for appellee.

MAXWELL, J.

This is an action to vacate a decree of foreclosure, correct a mistake, and foreclose a mortgage. 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 the year 1875, John S. Gregory and wife executed a promissory note to the plaintiff for the sum of $1,000, due in one year from date, and to secure the payment of the same executed a mortgage upon the south-west one-fourth of section 20, town 12, range 6, and the east one-half of the south-east one-fourth of section 27, town 10, range 6. The defendants claim that in February, 1876, the mortgage upon the east one-half of the south-east one-fourth of section 27 was released under an agreement that John S. Gregory and wife would execute a mortgage in lieu thereof upon lot 7, in block 122, in the city of Lincoln, and there is testimony tending to show that such a release was obtained through the plaintiff's attorneys. Upon the release of the land above described, the Gregorys conveyed said land to one Martin L.

Powell, he conveying to them said lot 7, but the deed for said lot was not filed for record until the twenty-third of May, 1878. The Gregorys thereupon executed a mortgage upon lot 7 in block 122, and the west half of lot 3 and east half of lot 4 in block 121, in lieu of the mortgage released. The plaintiff is a resident of the state of New York, who had not at the date of these transactions been in the state, the business having been transacted through agents. In 1877, an action to foreclose the first mortgage was instituted by the plaintiff's attorneys upon all the lands described in the first mortgage, including that claimed to be released and conveyed to Powell, the plaintiff's attorneys alleging that they were not aware of the release, as it had not been recorded, nor aware that the mortgage on lot 7 was made to secure the above described note. While this action was pending, Gregory and wife obtained a stipulation from the plaintiff's attorneys providing that no stay should be taken, and that the attorneys for the plaintiff would look alone to the mortgaged premises for satisfaction of the decree, and not ask for a personal judgment in case of deficiency. A decree of foreclosure and sale was then rendered. The decree of foreclosure recited the stipulation—that the plaintiff would look to the mortgaged premises alone for satisfaction of the debt. While this decree was in force, John S. Gregory and wife conveyed lot 7 in block 122, in the city of Lincoln, to Welthy P. Gregory, the mother of John S., and she claims to be a *bona fide* purchaser of said lot. A sale under the decree of foreclosure being about to take place, the plaintiff's attorneys claim that they discovered the mistake. The order of sale was recalled, and this action instituted by an attorney employed by the plaintiff's attorneys to foreclose both mortgages. The Gregorys plead the stipulation, and that Welthy P. Gregory is a *bona fide* purchaser of said lot. A decree foreclosing both mortgages was entered in the court below, from which the defendants appeal to this court.

After an appeal was perfected, the plaintiff filed an affidavit in the cause, wherein he states in substance that he never released the east half of the south-east one-fourth of section 27, town 10, range 6, from the mortgage; that he never authorized his attorneys to employ an attorney and have said real estate decreed to be released, and foreclose the mortgage upon the property alleged to have been mortgaged in lieu thereof, and that said proceedings are wholly without his authority and are against his interest; that he is satisfied with the decree obtained on the first mortgage; and asks that all subsequent proceedings be declared null and void. He also states that he is informed and believes that before the commencement of the second action of foreclosure his attorney purchased said land for the sum of $250, although it was worth from $2,000 to $2,500, and caused it to be conveyed to a sister of one of said attorneys, to be held in trust for them. No counter-affidavits denying these facts are filed, although certain correspondence of the plaintiff is submitted to the court which really tends to sustain the plaintiff's affidavit. This being the case, the second action must be held to have been commenced and carried forward without the plaintiff's knowledge or authority, and is therefore void. Should the alleged facts stated upon information and belief be brought to the attention of the court in the proper manner, and clearly established, the proper remedy will be applied to prevent the abuse by officers of the court of their proper functions. The decree of foreclosure in the second action is reversed and the petition in that case dismissed.

JUDGMENT ACCORDINGLY.

MARTHA E. STUART, PLAINTIFF IN ERROR, V. WILLIAM ALEXANDER ET AL., DEFENDANTS IN ERROR.

Chattel Mortgage: JUDGMENT CREDITOR OF MORTGAGOR. In November, 1876, a chattel mortgage upon personal property, including "sixty hogs of an average weight of 175 lbs. each," was executed by H. and wife to S. The mortgage was duly filed for record, and before the expiration of a year was refiled. In December, 1877, an attorney, agent for L. & B., caused an execution on a judgment in their favor against H. to be levied upon the hogs in question, and they were sold as his property, and purchased by them. Their attorney and agent, who went upon the ground, pointed out the property, and directed a levy thereon, having actual as well as constructive notice of the mortgage to S. *Held*, That S. was entitled to the possession as against L. & B., the debt secured by the mortgage being past due.

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

Brown & Ryan Brothers and *A. J. Sawyer*, for plaintiff in error.

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

MAXWELL, J.

This case was before this court in 1880, and is reported in 10 Neb., 224. The cause being remanded, the plaintiff amended her petition, and issue was joined thereon. On the trial of the cause in the district court a verdict was returned in favor of the defendant, upon which judgment was rendered.

It appears from the record that on the 30th day of October, 1876, W. W. House and Zeruah House, his wife, executed a chattel mortgage to the plaintiff upon a large amount of personal property, including "60 hogs will average 175 pounds each," to secure the payment of the sum

of $490.50. The mortgage was acknowledged by W. W. House as required by the statute in force at that time, but not by his wife, and was filed for record November 6, 1876. The testimony shows that this mortgage was made in good faith, the money being actually paid. It was made to secure the note of House and wife due in three months from date, and authorized the mortgagees to take possession. The testimony tends to show that the mortgage was delivered and the money paid in the office of L. C. Burr, and that a portion of the money was paid to him to satisfy a mortgage in favor of Mrs. Kennard and one to R. E. Moore, the mortgage of Moore being upon a portion of the hogs afterward mortgaged to Mrs. Stuart. On the 3d day of November, 1877, the mortgage was refiled for record, with a statement that the interest had been paid to July 29, 1877. There is testimony tending to show that the hogs mortgaged were kept in a pen by themselves. On the 3rd day of December, 1877, an execution on a judgment in favor of Leighton & Brown and against W. W. House, was by the direction of Burr levied upon 57 of the hogs in question to satisfy said judgment. Zeruah C. House thereupon instituted proceedings for a trial of the right of property under the statute, and verdict and judgment were rendered in her favor, but the plaintiff in the execution gave an indemnifying bond and caused 34 head of said hogs to be sold and the same were purchased by Burr for Leighton & Brown. What became of the other hogs levied upon does not appear. One Alexander had a mortgage upon the hogs in question made by Zeruah C. House to secure the sum of $50. The hogs were sold subject to this mortgage, but Mr. Burr, according to his statement, was entirely ignorant of the plaintiff's mortgage.

After the hogs were sold the plaintiff took out a writ of replevin and reclaimed the property, and the contest in this case is between the mortgagee and execution creditors. The plaintiff claims the property upon two grounds, either

of which being found in her favor will entitle her to recover.

First. That Mrs. House was the owner of the property levied upon, and therefore it was not liable for the debts of her husband. There is a large amount of testimony tending to show that such was the fact, and the jury would have been justified in so finding. Undoubtedly one cause of the failure to do so was the exclusion of the chattel mortgage made by her to the plaintiff, upon the ground that it was not acknowledged. There was testimony tending to show that Mr. Burr had actual notice of this mortgage at the time of the levy, sufficient to submit the question to the jury as to his knowledge. But the exclusion of this mortgage is not assigned in the petition in error. The question therefore cannot be considered.

The second question relates to notice to the execution creditors of the plaintiff's mortgage. That Mr. Burr, the creditor's attorney and agent, who went upon the ground, pointed out the property and directed a levy thereon, had actual notice of this mortgage at the time he caused the execution in question to be levied, is clearly and fully proved by the decided weight of testimony, and that he had constructive notice from the record is undeniable. This being so the plaintiff's rights are entirely unaffected by the sale of the property to Leighton & Brown. The plaintiff was therefore entitled to the possession of the property at the commencement of the action.

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

REVERSED AND REMANDED.

JAMES E. JONES, PLAINTIFF IN ERROR, V. CENEK DURAS, DEFENDANT IN ERROR.

1. **Practice:** ACTION AT LAW. As a general rule, no one can be subjected to a suit and judgment at law unless he, or one whose legal representative he is, has done some unlawful act, either of commission or omission, or failed in the discharge of some duty.

2. **Taxes:** TAX SALE: PAYMENT OF TAXES UNDER PROTEST. Plaintiff failed to pay the taxes on his lands for the years 1875-6-7. The lands were sold for the taxes of 1875, the purchaser at tax sale paid the taxes of 1876-7 as allowed by statute. Plaintiff, during the whole time was the owner of sufficient personal property within the county, known to the county treasurer, out of which the taxes could have been made. Shortly before the expiration of two years from the date of sale, plaintiff tendered to the then county treasurer the amount of the taxes, with interest thereon at the rate of twelve per cent per annum, which was refused. He then paid the taxes, with interest at the rate of forty per cent per annum, under protest, and brought this action for the excess of interest over twelve per cent. In the district court a demurrer to a petition setting out the above cause of action was sustained and on error judgment affirmed.

3. ———: NOTICE TO OCCUPANT. The petition failed to state that the statutory notice required by section 3, of article IX of the constitution, had been served on the occupant of the lands. *Held*, that redemption without such notice was voluntary.

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

M. B. C. True, for plaintiff in error.

1. Action at law is proper remedy. *Turner v. Althaus*, 6 Neb., 54. *Erskine v. Van Arnsdale*, 15 Wallace, 75. *Stephan v. Daniels*, 27 Ohio State, 527.

2. Sale was illegal and void. *Johnson v. Hahn*, 4 Neb., 189. *Lynam v. Anderson*, 9 Id., 368.

3. The payment of a demand under compulsion of le-

gal process, accompanied by a protest, is not a voluntary payment. *Atwell v. Zeluff*, 26 Michigan, 118. Cooley on Taxation, pp. 568–9. *Parcher v. Marathon Co.*, 9 N. W. Reporter, 1, 23. *Stephan v. Daniels*, 27 Ohio State, 527. *State, ex rel. Myers, v. Richardson Co.*, 11 Neb., 403. *Findlay v. Adams*, 2 Day (Conn.), 369.

W. G. Hastings, for defendant in error.

Defendant is not concerned with any illegalities in prior proceedings of the former treasurer. Cooley on Taxation, pp. 559 and 560. Cooley on Torts, p. 459. *McGuinty v. Herrick*, 5 Wend., 240. *Leroy v. East Saginaw Ry.*, 18 Mich., 233. *McLean v. Cook*, 23 Wis., 364.

COBB, J.

This action is brought against Mr. Duras, county treasurer of Saline county, in his individual capacity. The petition charges that plaintiff was the owner of certain parcels of real estate in said county, which were assessed for taxes in 1875; and the said taxes not being paid, the then treasurer of said county sold the said parcels of land therefor. That at and during the said time the plaintiff owned and had within the said county, and known to the then treasurer of said county, a large amount of personal property, amply sufficient out of which the said taxes could have been made by distress and sale thereof. That in the years 1876 and 1877, the said lands remaining unredeemed from such sale, the purchaser thereof paid the subsequent taxes on said lands for the said last named years. That on the 13th day of December, 1878, the defendant having become treasurer of said county, was about to execute deeds to such purchaser to said lands, upon the said sales for taxes. That thereupon the plaintiff tendered to the said defendant a sum of money equal to the several amounts paid by the purchaser of said parcels of land, as well at the

purchase thereof as for the said subsequent taxes, together with interest on the said several sums from the several dates of the payment thereof at the rate of twelve per cent per annum, that the said defendant refused to take the same in full redemption of said lands from taxes, and that plaintiff, in order to prevent the deeding of said lands for said taxes, was compelled to pay, and did pay under protest, the amount of said several sums paid by the said purchaser at the said sale for taxes of 1875, as well as for the taxes of 1876 and 1877 and interest thereon, at the rate of forty per cent per annum on the said several sums. And plaintiff's claim for which this suit was brought is for the interest paid by him in excess of twelve per cent. The district court sustained a general demurrer to the plaintiff's petition, and he brings the cause to this court on error.

We think that it may be stated as a general proposition of law, that no one can be subjected to a suit and judgment at law, unless he, or one whose legal representative he is, has done some unlawful act, either of commission or omission, or failed in the discharge of some duty. Applying this rule to the case at bar, we fail to see wherein the defendant has violated any law or failed in the discharge of any duty. Let it be conceded that his predecessor in office wrongfully sold the plaintiff's lands and gave the purchaser a certificate therefor. The only connection which the defendant appears ever to have had with the matter was to refuse the offer of the plaintiff to redeem said lands by the payment of the original taxes and interest thereon, at the rate of twelve per cent per annum only. Was it the duty of the defendant to accept such tender? The law then in force, sec. 64, p. 922 of the General Statutes, provided for such redemption only upon the payment of such taxes and interest thereon at the rate of forty per cent. But it is insisted that the sale was void by reason of the former county treasurer having made the same without having first exhausted the personal property of the plaintiff. In reply

to this it must be said that the defendant is in no degree responsible for the acts of his predecessor in office. The law had invested him with no power to enquire into the facts upon which the record of said sale was made, nor to alter or revise it in any event. His duties were purely ministerial and the law pointed them out very clearly. To "enter a memorandum of the redemption in the list of sales, and give a receipt therefor to the person redeeming the same, for which he may charge a fee of fifty cents, and shall hold the redemption money paid subject to the order of the purchaser," etc. Thus the law pointed out the duties of the county treasurer upon redemption being made. In this case there was no redemption made, nor offer to make one which the defendant could consider, until the final one which was accepted by him.

Counsel for plaintiff cites the case of *Andrew Stephan, Treasurer of Lucas Co., v. Daniels et al.*, 27 Ohio State, 527. In that case it seems that Daniels was the owner of certain property in the city of Toledo which was assessed, to improve Maumee avenue in said city, in the sum of $461.33, which was duly certified under the statute to the county auditor, and by him placed on the duplicate for collection by the treasurer, as other taxes are collected. By reason that no resolution was passed and published by the city council declaring the necessity for such improvement, the assessment was illegal and void. Before December 20, 1868, plaintiff, who it seems had other taxes past due and coming due on that day as well as one-half of this assessment, tendered to the treasurer his other taxes, which the defendant declined to receive, unless the amount due on the assessment was also paid. This being declined by the plaintiff the property was returned delinquent for both taxes and assessment, and the real estate advertised to be sold, January 19, 1869, at delinquent tax sale to pay the same. On the 13th of January the plaintiff, in order to release the land and prevent its being sold at such sale,

and to save the penalties incident to such sale, paid the taxes and said illegal assessment then due, under protest, and brought suit against the treasurer for the money paid on the illegal assessment. The judgment of the lower court, which was for the plaintiff, was sustained by the supreme court. But in their opinion the court say that before the passage of a certain act of the legislature (April 29, 1854) "there was no action against the *treasurer* unless the *law* was invalid, or he acted without color of law."

But the case at bar differs from the Ohio case in its most essential features. There the treasurer held a legal tax and an illegal assessment against the same property, which he was about to sell for the two sums. The owner of the property tendered the amount of taxes, but claimed that the assessment was void for the want of certain precedent steps to its levy, required by law to be taken and which had not been taken. The treasurer says—no, unless you pay both sums, the land will be sold. Thereupon the tax-payer, protesting, paid the two sums and sued the same treasurer for the amount of the illegal assessment. It is reasonable to suppose that the treasurer thus having notice that the legality of the assessment was denied would retain the money for his own security, until the question should be decided. In the case of *Meek v. McClure*, 49 Cal., 628, cited by the Ohio court in its opinion, the court say: "It is said the object of a notice of such suit, or of payment under protest, is that the officer may protect himself. If on inquiry he finds the demand illegal, he may decline to proceed, or if he collects, he may withhold the money from payment over until the question is settled."

In the case at bar the defendant was, by virtue of his official position, the trustee of the purchaser of the property at tax sale. It was his duty to receive the redemption money, with the interest, if tendered to him, whether with or without protest, and the moment that he received it, it was the right of the holder of the certificate to demand it,

and if not paid over to sue the treasurer and his securities therefor. In all the numerous cases cited by the court in the Ohio case there is none, nor have we been able to find one, which holds that the payment of money in the redemption of lands sold for taxes constitutes compulsory payment, and we would hesitate to hold that it does. In many cases which hold that payment to an officer holding a tax warrant and threatening to seize chattels is compulsory payment, much stress is laid upon the fact that the party has had no day in court. In the case at bar the plaintiff had two years in which to seek redress in court after the public sale of his lands, and longer than that from the time when it was his duty to pay his taxes.

There is another and material point in respect to which the plaintiff's petition fails to state a cause of action. The proviso to section 3 of article IX of the constitution is: "That occupants shall in all cases be served with personal notice before the time of redemption expires." The petition fails to state that any notice had been personally served on the occupant of said lands. So that, although all the steps stated in the petition had been taken by the defendants, unless the holder of the certificates of purchase of the lands at tax sale had served this constitutional notice, the plaintiff was not in danger of losing his lands, and the payment of the redemption money and interest must be held to have been voluntary. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

SCHOOL DISTRICT NO. 36 IN YORK COUNTY, PLAINTIFF IN ERROR, V. JOHN MCINTIE, DEFENDANT IN ERROR.

1. **Pleading:** DEPARTURE. In an action of replevin commenced and tried before a justice of the peace, no bill of particulars was filed by the plaintiff, nor objection made by the defendant on that account. On appeal to the district court the plaintiff filed its petition, in which the property replevied was described differently from the description thereof in the plaintiff's affidavit in the justice's court. *Held*, No departure.
2. **Replevin:** PRACTICE. The affidavit in an action of replevin before a justice of the peace described the property as "one school-house about 14x24 feet in size, composed of sod and lumber, now situated on the south-west quarter of section 29," etc. On appeal to the district court plaintiff filed its petition, in which the property is described as "All the boards, planks, and lumber, and windows, benches, doors, and desks, which form a part of a certain school-house composed partly of sod and dirt, and partly of lumber, the dimensions of said school-house being about 24 feet in length, and 14 feet in width, and situate on the south-west quarter of section 29," etc. *Held*, Not to set forth a different cause of action.
3. **Pleadings in District Court on Appeal from Justice of the Peace.** In an action in the district court on appeal from a justice of the peace, the plaintiff filed its petition, to which the defendant filed his answer in the nature of a plea of the general issue, and afterwards filed a motion to strike the said petition from the files "for the reason that the said petition contains and sets forth a different cause of action than that set forth in the court below," which motion was sustained. *Held*, Error.

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

George B. France, for plaintiff in error.

W. T. Scott, for defendant in error.

COBB, J.

This is an action of replevin originally commenced before a justice of the peace. The plaintiff, by its treasurer,

made and filed the usual affidavit in replevin, in which the property is described as "one school-house, about 14x24 ft. in size, composed of sod and lumber, now situated on the south-west quarter of section twenty-nine," etc. Upon the return day of the writ, the parties appeared and went to trial without the plaintiff filing any bill of particulars or the attention of the court being called thereto. Nor did the defendant make any answer or denial whatever in the case. The verdict and judgment in the justice's court being for the defendant, the plaintiff appealed to the district court. In the district court the plaintiff filed its petition in the usual form, in which the property is described as "all the boards, planks, and lumber, and windows, benches, doors, and desks which form a part of a certain school-house composed partly of sod and dirt and partly of lumber, the dimensions of said school-house being about 24 feet in length and 14 feet in width, and situate upon the south-west quarter of section twenty-nine," etc. Said petition was filed the eleventh day of September, 1880; its filing out of time being waived in writing by the attorney for the defendant. On the twenty-ninth day of September, 1880, the defendant filed his answer in said action, consisting of a general denial. On the twentieth day of December, 1880, defendant filed his motion to dismiss the appeal, assigning six several grounds, which, after argument and consideration, was overruled. Afterwards, on the same day, the defendant filed his motion to strike the plaintiff's petition from the files of the court, "for the reason that said petition contains and sets forth a different cause of action than that set forth in the court below," which motion was sustained. Finally, after two continuances, on the third day of May, 1882, the cause came on to trial to a jury.

It appears that the plaintiff *asked the privilege* of opening the case to the jury, which was denied by the court, to which plaintiff excepted. "Plaintiff then asked the *privi-*

lege of introducing witnesses to prove the right of property and to prove that the right of property is not in the defendant," which was by the court denied, and exception taken. Witnesses for the defendant were then sworn, and testified, and witnesses for the plaintiff were permitted to give testimony only in rebuttal.

The jury having returned their verdict in favor of the defendant, a motion for a new trial on the part of the plaintiff having been overruled and judgment rendered against it, it brings the cause to this court on error.

There are several errors assigned, but one of which will be considered. The ground upon which the motion to strike the plaintiff's petition from the files was, "that said petition contains and sets forth a different cause of action than that set forth in the court below." There having been no pleading or bill of particulars filed by either party in the justice's court, the person drafting the motion must have referred to the description of the property contained in the original affidavit of William Search, treasurer of the plaintiff, upon which the order of replevin was issued. This affidavit is not a pleading, nor does it stand in the place of one. Had the plaintiff been held to a strict compliance with the law and required to file his bill of particulars in the justice's court, such bill of particulars must have conformed substantially to the affidavit, otherwise the affidavit may have been quashed on motion, but it is the bill of particulars and not the affidavit that will control on a question of departure. And the defendant having tacitly waived the filing of a bill of particulars by the plaintiff in the justice's court, could not raise the question of departure in the district court. See §§ 181 and 182, pp. 552 and 553, Comp. Stat.

But let us suppose that we are wrong in this view, and that in an action of replevin before a justice of the peace this affidavit does stand in lieu of a bill of particulars; was there a departure in this case? The thing in controversy

was a school-house, composed of sod, with a pine lumber roof and floor, with a door and two windows, door and window frames, sash, and lights. This house, as appears by the testimony, had been built by the school district, but on land to which the district had no title. The defendant, by some means not fully disclosed by the testimony, obtained the possession of this school-house, and while it does not appear that he claimed to own it, he refused to give it up. The school district commenced this action, and in the affidavit for replevin the property was described as above set forth. For all purposes of identity this description and that contained in the petition in the district court are identical. In the one case it is called "one school-house, about 14x24 ft. in size, composed of sod and lumber, now situated on the south-west quarter of section twenty-nine," etc.; and in the other as "All the boards, planks, and lumber, and windows, benches, doors, and desks which form a part of a certain school-house composed partly of sod and dirt and partly of lumber. The dimensions of said school-house being about 24 feet in length and 14 feet in width, and situated upon the south-west quarter of section twenty-nine," etc. In the one case it is called a house composed in part of lumber, etc.; in the other it is described as the lumber, etc., composing a part of the house. These descriptions must be interpreted by the light of the testimony in the case, as well as by the universal experience and observation of the people of the country in relation to sod houses. The testimony informs us that the sod walls of this house were put up nine or ten years ago. One witness describes it, at the time of the commencement of the suit, in the following words:

Q. How was the sod? What condition was it in?

A. The sod was torn to pieces. Some children had dug holes through it and the cattle had pulled it down.

None of the witnesses attach any value whatever to the sod body of the house. They differ all the way from fif-

teen to fifty dollars as to the value of the lumber. The sod house of Nebraska must not be confounded with the *sodded cabin* of the early days of Northern Illinois and Wisconsin, nor with the *adobe* of the country south-west of us. The sod house is, or was when that style of architecture prevailed to some extent in the new settlements of this state, composed of the tough sod, as turned over by the breaking-plow, cut into convenient sections and laid in the wall without mortar or backing of any kind. The life of a wall thus composed is very short anywhere, but grows somewhat longer as we go farther west, in proportion to the diminished annual rain-fall. In York county, ten years must be its extreme old age. In speaking of such a building, therefore, in connection with the question of its value, we do not deem it entirely inadmissible to describe it as so much lumber, constituting the roof, floor, etc., of a sod house. The thing itself being susceptible of two descriptions, although different, they are not inconsistent.

Again, we believe it to be a rule of pleading, without an exception, that a plea or answer to the merits waives all defects of a formal or technical character in the paper pleaded or answered to. So, after filing an answer to the merits in the nature of a plea of the general issue, by the defendant, he could not be permitted to move to strike the plaintiff's petition from the files. Whatever view we take of the case, the conclusion is irresistible that the district court erred in sustaining the motion to strike the plaintiff's petition from the files.

The judgment of the district court is therefore reversed, the plaintiff's petition restored to its place in the files of the case, and the cause remanded for further proceeding in accordance with law.

REVERSED AND REMANDED.

THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA, PLAINTIFF IN ERROR, V. BUFFALO COUNTY, DEFENDANT IN ERROR.

Payment of Taxes under Prctest: ACTION TO RECOVER BACK: DEMAND. Under the provisions of section 144 of the revenue act, when an alleged illegal tax is paid under protest to a county treasurer, the said treasurer receives it as the agent of the state school district, etc., for the benefit or under the authority or by the request of which the same was levied, as well as of the county, and in order to lay a foundation for legal proceedings to recover such illegal taxes paid under protest, demand thereof must be made of state treasurer, school district treasurer, etc., within the time limited by statute.

ERROR to the district court for Buffalo county. Tried below before GASLIN, J.

Marquett & Deweese, for plaintiff in error.

Sam L. Savidge, for defendant in error.

COBB, J.

This action was originally commenced in the county court of Buffalo county, and taken by appeal to the district court, where a judgment was rendered for the defendant on a demurrer by the plaintiff to defendant's answer. Plaintiff brings the cause to this court on error.

The following is the substance of the petition: Certain property of the plaintiff's, situated in Buffalo county, was doubly assessed for the purpose of taxation for the year 1879; that is to say, was once duly assessed by the state board of equalization, and included in the value per mile of the plaintiff's property, which was afterwards duly certified by the auditor of state to the county clerk of said county, and was by him entered on the assessment rolls. That notwithstanding the above facts, the said property,

consisting of one section house, one-half of depot, one water tank and wind mill, was, by the assessor of Kearney precinct, in said county, entered and valued upon his assessment roll for the same year's taxes, and returned the same to county clerk. That such proceedings were afterwards had by the commissioners and clerk of said county that both the valuations per mile so as aforesaid returned by said auditor, as well as the valuation of the said property last above described as returned by said assessor of Kearney precinct, were entered upon the tax list of said county, and that in pursuance of the levies made by said board of commissioners a tax was extended on both valuations, and that the tax extended upon the valuation as aforesaid wrongfully made by said assessor of Kearney precinct, amounted to the sum of one hundred and thirty-eight and fourteen-one-hundredths dollars, that sum being in addition to the amount levied upon said property as aforesaid returned by the auditor of state. That heretofore, and on the tenth day of May, 1880, the plaintiff paid the tax levied upon the assessment so as aforesaid certified by the auditor of state to the county clerk of said county, and on the same day paid under protest the said sum of one hundred and thirty-eight and fourteen-one-hundredths dollars so as aforesaid wrongfully levied upon the wrongful assessment of the said assessor of Kearney precinct aforesaid. That afterwards, and on the same day, and within thirty days after such payment, the plaintiff demanded the repayment of said sum of $138.14, so as aforesaid paid upon said wrongful assessment, from the treasurer of Buffalo county, in writing. That more than ninety days have elapsed since said demand was made, but that said sum has not been refunded nor any part thereof except the sum of ninety-two dollars, etc. With demand of judgment for $46.14.

The following is the substance of the defendant's answer:

1. The assessor of Kearney precinct in said Buffalo

county for the year 1879, for the purpose of taxation, returned one section house, one-half of depot in the city of Kearney, and one water-tank, windmill, etc., the property of the plaintiff, situate in said precinct, and upon such assessment amounting to the sum of $2,875, taxes were levied for the year 1879 as follows:

State	$ 17.39
County	57.50
Kearney precinct special	34.50
School district No. 7 of Buffalo county	28.75
Amounting in all to the sum of	$138.14

2. The said plaintiff paid the taxes levied upon the assessment as aforesaid under protest, of which the

state received	$17.39
The county received	57.50
Kearney precinct received	34.50

And soon thereafter plaintiff presented a claim for the entire amount of said tax to the Board of County Commissioners of said county for payment, and on the 5th day of October, 1880, the said Board allowed the sum of $92 on said bill or claim, being the amount levied for and received by the county and precinct aforesaid, and the said Board rejected the balance of said claim. From the action of said Board there has been no appeal, and said order of the Board now remains in full force and effect, in no wise annulled or set aside. The plaintiff received the sum of $92 allowed as aforesaid.

3. The plaintiff has not at any time demanded in writing of the treasurer of the state of Nebraska or the treasurer of school district No. 7 of Buffalo county, the respective amounts received by them of said tax for the benefit and by the authority of whom the several amounts were levied and collected, etc.

The following are the provisions of law applicable to the case:

"SEC. 144 * * * but in every case the person or persons claiming any tax, or any part thereof, to be for any reason invalid, who shall pay the same to the tax collector or other proper authority, in all respects as though the same was legal and valid, such person may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state, or of the county, city, village, township, district, or other subdivision, for the benefit, or under the authority, or by the request of which the same was levied, and if the same shall not be refunded within ninety days thereafter may sue such county, city, village, township, district or other subdivision for the amount so demanded, and if upon the trial it shall be determined that such tax, or any part thereof, was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases."

It can scarcely be doubted that within the intent and meaning of the language of this section the state taxes were levied for the benefit and under the authority, if not at the request, of the state, or that the school district taxes were levied for the benefit and at the request, if not by the authority, of the school district. It therefore seems to be quite clear that in order to lay a foundation for legal proceedings to collect back the state and school district taxes, the plaintiff must have demanded the same from the state and school district treasurers within the time limited by the statute. By no other construction can effect be given the language of the law. It will not do to construe the language of the section to mean that state and school district taxes could be paid under protest and reclaimed from the county after the same has passed out of the hands of the county treasurer and into the state and school district funds; to do so would be to reject nearly all of the complex language of the section and thus violate the well known rules for construing statutes.

Had the legislature provided for settling the validity of the entire assessment by one suit, it would have been more in accordance with the general policy of the law which seeks to discourage a multiplicity of suits and the accumulation of costs; but it has not, and it is the duty of the courts to administer the law as it is.

The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

OMAHA AND NORTHERN NEBRASKA RAILROAD COMPANY, PLAINTIFF IN ERROR, V. JOHN I. REDICK, DEFENDANT IN ERROR.

Bill of exceptions. Where an attorney of record, to whom a bill of exceptions is presented for examination, proposes amendments thereto without objection, he cannot afterwards be heard to complain that it was not presented to him within the statutory time.

MOTION to quash bill of exceptions.

Redick & Redick, for the motion.

John D. Howe, contra.

BY THE COURT.

The defendant moves to quash the bill of exceptions in this case because it was not presented to him within the time required by law.

It appears that the cause was tried to the court on the first day of March, 1882, and a decision rendered on the tenth of that month. A motion for a new trial was filed on the third day after the decision was made. This motion was taken under advisement. On the seventh of

April, 1882, the court adjourned *sine die*. At the next term of the court, to-wit, July 10th, 1882, a decision was rendered overruling the motion for a new trial, and forty days were allowed in which to settle a bill of exceptions. Court adjourned *sine die* on the eleventh of that month, and on the twenty-first a bill of exceptions was submitted to the defendant for correction. The defendant proposed various amendments, and they were returned with and incorporated into the bill, which was signed by the judge without objection.

When a party without objection proposes amendments to a bill of exceptions, thereby treating the same as valid, and makes no objection to the same being signed by the judge, he will waive all objections as to the *time* within which the bill was presented to him for examination and amendment. The objection at the most is merely technical, and should not be sustained in any case unless the moving party is himself free from fault.

Under our present statute, where the proposed bill is required to be submitted to the adverse party for correction and amendment before it is presented to the judge for his signature, and the bill is thus supposed to become an accurate record of the trial, or at least of the exceptions presented, justice requires that it should be sustained unless there has been such a disregard of the law in settling the same as not to justify the judge in signing it. But if no objections are made and the adverse party assists in perfecting the bill, he will be held to have assented to it. The motion must be overruled.

MOTION OVERRULED.

C. AULTMAN & CO., PLAINTIFF AND APPELLEES, V. P. C. PATTERSON ET AL., DEFENDANTS AND APPELLANTS.

Bill of exceptions. A bill of exceptions in a cause tried in the district court must be filed in that court, and if the original bill is used in the supreme court, the clerk of the district court must attach his certificate to the same that it is the original bill.

MOTION to quash the bill of exceptions.

H. J. Evans, for the motion.

Sibbett & Fuller, contra.

BY THE COURT.

This cause is submitted to the court on a motion to quash the bill of exceptions. First, because it was not filed in the district court; and, second, because there is no certificate of the clerk attached to the same. The bill was signed by the judge and was ordered to be made a part of the record in the cause, and there is no evidence before the court that it was not properly filed. The first objection therefore is untenable. The second objection is more serious. The statute permits the original bill to be filed in this court, but requires the clerk to certify that it is the original bill. This requirement cannot be dispensed with, but the court on proper application will permit the bill to be withdrawn for the purpose of having the certificate attached if desired. The motion must be sustained.

MOTION SUSTAINED.

SAME V. SAME.

Review of questions of fact on appeal. Even in equity cases this court will not disturb a finding of fact, unless it is found to be clearly against the weight of evidence.

APPEAL from Butler county. Tried below before POST, J.

Sibbett & Fuller, for appellants.

H. J. Evans, for appellees.

LAKE, CH. J.

We see no reasonable excuse for bringing this case here. It is an ordinary action for the foreclosure of a mortgage, wherein the defense made by the answer is, simply, that an additional credit of fifty dollars should be allowed on one of the notes, and that the mortgage itself, which was in fact given to secure one note only for $494.60, had been so wrongfully changed as to purport to secure three notes, amounting in the aggregate to the sum of $1417.60.

The evidence submitted upon the issue joined on this answer was overwhelmingly against the defendants' claims, and fully justified the decree. Indeed so satisfactory is it, that no room is left for doubt that the mortgage as sued on is in all respects the same as when executed by the defendants.

It should be borne in mind that, even in equity cases, this court will not disturb a finding of fact unless it is found to be clearly against the evidence on which it is based. *Courtnay v. Price*, 12 Neb., 189. *Jennings v. Simpson*, Id., 558. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

JOHN CATTLE, SR., PLAINTIFF AND APPELLEE, V. M. D. HADDOX ET AL., DEFENDANTS AND APPELLANTS.

1. **Referee:** BILL OF EXCEPTIONS. A trial was had before a referee, who made a report, and the testimony and exceptions taken before him were returned to the court, but not signed. Exceptions were filed to the report, which were overruled, and judgment entered on the report, and the judge signed the bill of exceptions taken before the referee. *Held*, That as no objection was made in the district court to the bill of exceptions because not signed by the referee, the objection will not be considered by the supreme court.
2. **Bill of Exceptions.** The fact that the certificate of the judge does not show that the bill of exceptions contains all the testimony is not ground for quashing the bill.
3. ———. Where a bill of exceptions purporting to contain all the testimony is submitted to the adverse party for amendment, and such party certifies that he has no amendments to propose to the same, the court will presume that such bill contains all the evidence, notwithstanding the certificate may not fully so certify.

MOTION to quash bill of exceptions.

Norval Brothers, for the motion.

Sibbett & Fuller and *Burr & Kelly*, contra.

BY THE COURT.

This case was referred to a referee, who, after due notice to the parties, heard the testimony and made a report of his findings to the court. The testimony was taken by the court reporter, apparently by consent, as it stated that fees were paid by the parties equally. The bill of exceptions was served upon the attorneys of the appellee, and their certificate that they had no amendments to propose is in the record. Exceptions were filed to the report of the referee, which were overruled, and judgment entered on the report. The judge thereupon signed the bill of exceptions,

but it is not signed by the referee. The appellee now moves to quash the bill, first, because it was not allowed and signed by the referee, and second, because it does not purport to contain all the testimony. No objection was made to the bill in the district court, and one of the grounds of objection to the report in that court was, that the findings were against the weight of evidence. The bill was before the district court without objection, and it is too late to raise the objection for the first time in this court. A referee should sign a bill of exceptions in any case tried before him, if so required by either party; but objections to the bill or its form must be made in the district court, and unless so made cannot be considered here. The second ground of the motion, even if true, would not justify the court in quashing the bill, although in a proper case it might refuse to set aside the finding as being against the weight of testimony. But where the attorneys of the adverse party, when called on to propose amendments, certify on a bill which purports to contain the testimony, that they have no amendments to propose, the court will presume that the bill contains all the testimony. The motion must be overruled.

MOTION OVERRULED.

HENRY PARRISH, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law:** INSTRUCTIONS TO JURY. It is not essential to the ends of justice that the judge, in charging a jury, should rehearse the sayings of law writers as to the policy of the law in the punishment of criminals.

2. ———: ———. Instructions ought to be as few as practicable, in view of the evidence, couched in plain, simple language; and where they are, and conform to the principles and policy of the law, it is enough.

3. ———: JURY NOT THE JUDGES OF THE LAW. In criminal trials jurors are not judges of the law. While jurors have the power to disregard the law as given by the judge, they have neither a legal nor moral right to do so.

4. ———: ———. It is not error to refuse an instruction, correct in principle, where the evidence is not such as to make it applicable.

5. ———: PRESUMPTION FROM ACT DONE. It is a presumption of law, applicable in criminal trials, that a person intended to do that which he voluntarily and willfully did in fact do.

6. ———: PERSONAL CONFLICT: SELF-DEFENSE. In case of personal conflict resulting in death, in order to prove the defense of justifiable homicide, it must appear that the party killing had endeavored by all reasonable means, before giving the fatal blow, to escape from the scene of the difficulty.

7. ———: SUFFICIENCY OF PROOF. If the proof of guilt be of such moral certainty as convinces the minds of the jury, as reasonable men, beyond all reasonable doubt, it is sufficient.

8. ———: TECHNICAL ERROR. Although it may be found that detached portions of a charge are not technically correct, yet if, taking the whole charge together, the law was fairly given, and no prejudice done to the accused, the judgment will not be disturbed.

ERROR to the district court of Johnson county. Tried below before WEAVER, J.

Appleget & Son and *Pinero and Selby*, for plaintiff in error.

On refusal to give ninth instruction asked for, cited: *State v. Crotean*, 24 Ver., 14. 4 Broom & Hadley's Com., 631. *Fisher v. The People*, 23 Ill., 294. *Nelson v. The State*, 2 Swan, 237. *Falk v. The People*, 43 Ill., 331. Wharton's Crim. Practice, sec. 711. On refusal to give fifth instruction asked for, cited *Lyons v. The People*, 68 Ill., 271. Seventh instruction given by court was erroneous. Wharton's Ev., secs. 716, 734. Court's ninth instruction was misleading. 2 Whart. Crim. Law, secs. 1019–1021.

C. J. Dilworth, Attorney General, for the state, cited *Olive v. The State,* 11 Neb., 1.

LAKE, CH. J.

It is not claimed by the prisoner's counsel that the evidence was not ample to support a conviction. The only errors alleged relate to the charge given to the jury.

First. The refusal of the judge to give three of the instructions, the fifth, ninth, and tenth, requested for the accused.

Second. The giving of the seventh, ninth, tenth, and eleventh, on the judge's own motion; and

Third. The giving of the fifth, seventh, ninth, and tenth of those requested by the prosecution.

Of the fifth instruction, requested on behalf of the prisoner, all we care to say is, that its substance—in fact all of it except the sentimental aphorism found in some of the works on criminal law, "that it were better that ninety and nine, or any indefinite number of guilty persons, should escape, than that one innocent man should be convicted"—was all included in the instructions which were given, and a repetition was unnecessary. The criminal law abounds in such maxims equally as applicable as this, and they are usually sufficiently indulged in, and made prominent in the arguments of counsel, without reinforcement by the judge's charge. What the policy of the law is respecting the punishment of criminals, the judge ought to inform himself, and is expected to know and properly apply; but it is not essential to the ends of justice that on all occasions he should rehearse it to juries. To quote extensively in a charge the sayings of law writers, although they may be entirely correct in principle, not unfrequently tends rather to confuse than to enlighten jurymen. Instructions ought to be as few as practicable, in view of the evidence; couched in plain simple language, addressed as

they usually are to common understandings; and where they are, and conform to the principles and policy of the law, it is enough. Every step taken by the judge beyond this can do no good, but may do positive harm.

The ninth instruction requested for the prisoner was rightly refused. It was to the effect that the jury were at liberty to disregard the charge if they believed the law different from what the judge had stated it to be. Such, fortunately, is not the rule here, notwithstanding it is so held in some of the states by force of peculiar statutes on the subject. Doubtless a juror has the power to disregard the law as given by the judge, but he has neither a legal nor moral right, and violates his oath to do so. Besides, how exceedingly farcical the spectacle of a judge saying to a jury "the law of the case is as I have charged; that is the criterion by which the parties have the right to be judged, but if you think otherwise, why you may hold it to be as you like."

With such the rule, must not the administration of justice rest on a very uncertain and insecure basis? What is held to be the law in one case upon a given state of facts very likely may not be enforced as the law in another case when the facts are not materially different. And then, too, when the determination of the law of a case is left to the whims and caprices of jurymen, there is no way of knowing with certainty what they have held it to be. And thus the door is opened to the worst of abuses, without the means of locating and remedying the wrongs which are at hand where it is made certain by being embodied in a written charge of the judge.

The third request refused was that, "If the jury believe from the evidence that, but for the bleeding and trephining of Elmer Parker, he would have recovered from the wound inflicted by the prisoner, then the jury must acquit the prisoner." As a proposition of law this is doubtless correct. If it were found that the wound was not mortal

—that the death of the deceased was occasioned by the surgical operation—the prisoner was certainly entitled to an acquittal. The trouble with this instruction is, however, that the evidence did not call for its application. The united testimony of all the medical experts who gave opinions on this subject was that they considered the wound itself mortal, and that the deceased died of it. Not one of them expressed the belief that death was occasioned, or even hastened, by the surgical treatment.

Dr. Lyle, a physician of over twenty years' practice, was present when the injury was inflicted upon the deceased. In answer to—"What caused his death?" said, "I think the stone crushed the brain, and produced infusion in the brain. When we took out a piece of the skull, there was two or three ounces of blood came out, showing infusion on the brain."

Dr. Thurber was present soon after the injury; found the patient unconscious, and was of opinion he "was going to die," and that nothing could be done only to get him in an easy position and let him remain so. The breathing was "heavy and stertorous." Thought he would not have trephined him, "because it could do no good."

Dr. Chubbuck swore that he "found a fracture of the right parietal bone, with undoubted evidence of infusion of blood, and separation of the coronal suture." The pulse "was very irregular, sometimes running, as I now recollect, to perhaps ninety and one hundred, then again dropping down to thirty-five." As to the trephining, he said that, although consenting to it, "there was nothing expected to come of it," as it was believed to be "impossible for him to live."

Dr. Thurman was called later, and says he found the case to be "a fracture of the skull." As to a recovery he "thought it doubtful."

These were the medical witnesses called by the prosecution, and such was the substance of their testimony respecting the character of the wound, and its probable effect.

On behalf of the defendant, Drs. Fairrill and Thurber were called. Their testimony, however, does not conflict with that given for the state as to the fatal character of the injury, but is devoted almost exclusively to the subject of trephining—the propriety of resorting to it, the best mode of performing, and the chances of success in the operation —which, although somewhat interesting, threw no light upon the question in issue before the jury. Neither of these witnesses expressed the opinion that the wound given by the prisoner was not mortal, nor that the medical treatment in the remotest degree contributed to the death of the deceased. The instruction was therefore properly refused.

And in this connection it may be well to dispose of the objection to the tenth instruction, in which the judge used this language: "There has been an attempt to show that the deceased was not skillfully treated after the alleged injury," etc. This, it is claimed, gave the jury to understand that, in the opinion of the judge, unskillful treatment, although attempted, had not been shown. The instruction is open to this criticism, and had the evidence been such as would have justified the conclusion that, but for the treatment, the injury done by the prisoner would not have proved fatal, it would have been prejudicial error. As we find the evidence, however, no other reasonable conclusion was possible than that the wound inflicted by the accused was the immediate and sole cause of death.

It is also objected that in his seventh instruction the judge told the jury "that one is presumed to intend to do that which in fact he actually does do." Although rather too broadly stated for this case, the proposition is doubtless true where there are no attendant circumstances brought to light, and nothing but the naked result shown. In view of the evidence, and the whole charge which the judge gave, we are satisfied that the prisoner was not prejudiced. The kind of instrument used, the injury inflicted, and all

the circumstances were such that the natural and probable result must have been death, or at least great bodily harm. The rule to which the judge most likely referred and intended to give is, that "a person is presumed to intend to do that which he voluntarily and willfully does in fact do." *Curry v. The State*, 4 Neb., 545. Here, however, there is not even the shadow of a doubt that the blow was both voluntarily and willfully given, so that, although not strictly correct, the instruction could have produced no injury.

The ninth and eleventh instructions were excepted to on the ground of their being misleading. The objection is untenable. The ninth, after a brief but fair reference to the leading facts of the case, tells the jury that the circumstance of the deceased having thrown a stone at the prisoner, would not justify the latter "in making the assault in the manner as charged in the indictment," if it were found that "at the time of the alleged assault" the deceased, having left the scene of their former trouble, was on his "way home, and not in the pursuit of difficulty." And by the eleventh, the jury were told that the term "reasonable doubt" implies neither an "imaginary" nor a "possible doubt," but such a condition of the mind that, "after a careful and full examination of all the facts," they could not say they "had an abiding faith in the truth of the charge" against the prisoner. We see nothing in these instructions to complain of, and pass them without further comment.

Complaint is made also of the fifth instruction given at the request of the prosecutor. It was in substance that it was "no justification of a homicide resulting from an affray which the defendant commenced; that when it was committed, he, the defendant, was acting on the defensive." In view of the evidence, which showed beyond all reasonable doubt that the deceased was retreating and endeavoring to escape from the crowd, of which the prisoner was one, by which he and his father were followed and beset

when the fatal blow was given, this instruction was not inappropriate.

There is nothing in the evidence that tends even to bring the prisoner's case within the principle of justifiable homicide in self-defense. In cases of personal conflict resulting in death, in order to prove this defense, it must appear that the party killing had endeavored by all reasonable means, before giving the fatal blow, to escape from the scene of the difficulty. Here it is not pretended that this was done, but on the contrary he followed up, and as it were, pushed the deceased to the wall and killed him.

The ninth instruction given on behalf of the prosecution was not strictly applicable, inasmuch as there were "explanatory circumstances" respecting the killing before the jury, and had the conviction been of murder in the second degree, it is possible that the giving of it would have been cause for a new trial. The error of this instruction was in its suggestion of the possible want of any such "circumstances," when in fact there were many of them, as would lower the homicide to the grade of manslaughter. But the conviction being of manslaughter only, the error was not prejudicial, and therefore no cause for reversing the judgment.

There is no error in the tenth instruction given for the state. It was simply this: "that although the proof may not be unequivocally and absolutely certain," yet if it "be morally satisfactory and convincing, this is all that the law requires." As we have already said, absolute demonstration or mathematical certainty is not required. If the proof of guilt amount to a moral certainty, or such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt, it is sufficient. 3 Greenleaf on Ev., sec. 29. Looking to the entire charge bearing upon the question of the sufficiency of the evidence, we are convinced that the law was correctly given.

JUDGMENT AFFIRMED.

FRANK STAMAN, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

Criminal law. A verdict of guilty cannot be sustained where the evidence fails to show that the accused committed the offense charged.

ERROR to the district court of Adams county. Tried below before GASLIN, J.

Laird & Smith, for plaintiff in error.

Isaac Powers, Jr., Attorney General, for the State.

MAXWELL, J.

The plaintiff was indicted with one Lewis Morrison for stealing a horse belonging to one Asa Birdsall, and on the trial was found guilty and sentenced to imprisonment in the penitentiary for ten years. It is unnecessary to consider in detail the very large number of errors assigned, as in our opinion the evidence wholly fails to warrant the verdict of guilty. The horse is alleged to have been stolen from a farm about two miles west of Hastings, on the night of September 21, 1881, and with one stolen from a neighbor named Nash, is supposed to have been taken to the Platte river and secreted on an island about 600 yards from the south bank of the river, the water in the channel between the south bank and the island being about knee deep except in places where it was much deeper. The theory of the prosecution is, that the plaintiff and Lewis Morrison stole the horses in question on the night of the 21st of September, 1881, took them to said island in the Platte and secreted them, and returned home before daylight on the morning of the 22nd. If the proof on this point fails the whole case falls to the ground. No one pretends to have seen either of these parties with or near the horses on

the night of the 21st, while five witnesses testify that the plaintiff and Morrison were in a saloon in Hastings until about 11 P.M. on the night on which the horses were stolen. And this testimony is not denied. Two other witnesses testify that Morrison called at their residence a short distance from Hastings, between 11 o'clock and 12 o'clock on the night of the 21st. Clark Morrison, the father of Lewis Morrison, testifies that the plaintiff in error and his son returned to his house about 2 o'clock on the morning of the 22nd, while the only witness for the prosecution on that point testifies that he resides near Hastings, and that Morrison and another man called at his house between 3 and 4 o'clock of the morning of the 22nd.

All the testimony tends to show that the plaintiff and Morrison were at home on the morning of the 22d. There is no evidence that the horse that the plaintiff rode the night of the 21st had been in water, as it necessarily would have been if fording the Platte river. It also appears from the testimony that on the afternoon of the 22d one Jones informed Nash, in the presence of the plaintiff and Morrison, that two men with four horses had been seen between 11 and 12 o'clock P.M. of the 21st but a few miles from the aforesaid island in the Platte. The testimony also tends to show that Nash stated to the plaintiff in error that he was going to the Republican valley to look for his horse, and the plaintiff advised him to go toward the Platte river. This was after the information given by Jones. Various rewards for the recovery of the horses, amounting in the aggregate to about $200, were offered on Thursday and Friday succeeding the theft.

It also appears that the plaintiff in error had made various inquiries about the rewards offered, and on Friday, the 23d, he rode to the Platte river in search of the horses, and found them in the possession of one Martin, who had taken them up. The plaintiff in error then took the horses to a stable in Hastings, and seems to have claimed the re-

ward. It is very clear that the plaintiff in error could not have taken the horses in question to the Platte river, a distance of about twenty miles, after eleven o'clock on the night of the 21st, and returned even as late as three or four o'clock in the morning of the 22d, and he could not have waded or forded the river without his horse showing that such had been the case. And there is nothing in claiming the rewards offered, as far as appears, which is inconsistent with honesty of purpose.

The testimony certainly fails to connect the plaintiff with this theft, and the law does not permit mere suspicion to sustain a conviction. *Morrison v. The State,* 13 Neb., 475. The testimony does tend to show that the plaintiff and Morrison were in some of the saloons in Hastings on the night of the 21st until about eleven o'clock, and that they were intoxicated, and they seem to have groped along the road towards home in that condition, enquiring the way; but it does not necessarily follow that because intoxicated they were thieves.

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

REVERSED AND REMANDED.

THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA, PLAINTIFF IN ERROR, V. C. H. BRINKMAN, DEFENDANT IN ERROR.

Railroads: DAMAGE TO STOCK. Under the act of June 20, 1867, a railroad company is liable for stock killed upon its track while running at large in the night-time at a point where the company was required but failed to fence its track, notwithstanding stock is prohibited by statute from running at large in the night-time.

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

Marquett & Deweese, for plaintiff in error, cited: *Kirch v. B. & W R. R.*, 17 Maryland, 32. *Giles v. B. & M. R. R.*, 55 N. H., 552. *McDonnell v. P. & N. A. R. R.*, 115 Mass., 564. *Railroad v. Champ*, 75 Ill., 577. *Perkins v. Railroad*, 29 Me., 307. *Jackson v. Railroad*, 25 Verm., 150. On contributory negligence, cited: *Munger v. T. R. R. Co.*, 4 N. Y., 349, 359. *Curry v. C. & N. W. R. R. Co.*, 43 Wis., 670. *Lawrence v. R. R.*, 42 Wis., 322. Albany Law Journal, 430. *D. & M. R. R. Co. v. Miami Co., Ohio*, 6 Central Law Journal, 436. *Pittsburg, Ft. W. & C. R. R. v. Methven*, 21 Ohio State, 586. *B. & M. R. R. v. Wendt*, 12 Neb., 77.

Pinero & Chapman, for defendant in error, cited, *inter alia: Hinman v. Railroad*, 28 Iowa, 491. *Bay City v. Austin*, 21 Mich., 390. *Railroad v. Cory*, 39 Ind., 48. *Walsh v. Railroad*, 8 Nev., 110. *Railroad v. Peacock*, 25 Ala., 229. *Corwin v. Railroad*, 13 New York, 42.

MAXWELL, J.

This is an action by Brinkman against the railroad company to recover for the loss of stock killed by the locomotive and cars of said company, the railroad at the place where the stock was killed having been built and in operation more than six months. To the petition the railroad company filed the following answer: "Now comes the defendant above named and for answer to the petition filed herein by the plaintiff admits that it is a corporation; that on or about the eleventh day of October, 1881, it was operating a line of railroad through Johnson county, known as the Atchison and Nebraska Railroad; that a train running on said railroad ran over two calves belonging to the plaintiff, killing one and wounding the other so that it died, both being of the value of twenty-eight ($28) dollars as set forth in plaintiff's petition; that said road was not fenced at the point where said calves entered on the defendant's track

and where the injury occurred; that the plaintiff served notice on the defendant of the value of said property, and that the same has not been paid. Further answering said petition, the defendant says that the plaintiff permitted said calves to run at large in the night-time, between sunset and sunrise, at the time of said accident, on or about the eleventh day of October, 1881, and that the train operated by the defendant's agents ran against and upon said calves in the night-time, after sunset and before sunrise of the night following October 11th above mentioned; that the plaintiff was guilty of contributory negligence in not restraining said calves from running at large and in permitting the same to wander upon defendant's line of railroad, without any fault of this defendant. Whereupon defendant demands judgment for costs."

Brinkman demurred to the second count upon the ground that the facts stated therein were not sufficient to constitute a defense to the action. The demurrer was sustained and judgment rendered in his favor for the amount claimed in the petition. The only objection in this court is, that the court erred in sustaining the demurrer.

The "Act to define the duties and liabilities of railroad companies," which was passed and took effect in June, 1867, is as follows: "That every railroad corporation whose lines of road or any part thereof is open to use, shall, within six months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open to use, shall, within six months after the lines of such railroad or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad, or the part thereof so open for use, 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 and villages, with opens, or gates, or bars at all the farm crossings of such railroads, for the use of the propri-

etors of the lands adjoining such railroad, and shall also construct, where the same has not already been done, and hereafter maintain at all road crossings now existing or hereafter established, cattle guards suitable and sufficient to prevent cattle, horses, sheep, hogs, from getting on to such railroad, and so long as such fences and cattle guards shall be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, is not in sufficiently good repair to accomplish the objects for which the same is herein prescribed is 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 corporations, or by the locomotives, engines, or trains of any other corporations permitted and running over or upon their said railroad, to any cattle, horses, sheep or hogs thereon; and when such fences and guards have been fully and duly made, and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages, unless negligently or willfully done."

"SEC. 2. Any railroad company hereafter running or operating its road in this state, and failing to fence on both sides thereof against all live stock running at large at all points, *shall be absolutely liable to the owner of any live stock injured, killed or destroyed by their agents, employes or engineers*, or by the agents, employes or engines belonging to any railroad company running over and upon such road, or there being; *Provided*, That in case the railroad company liable under the provisions of this section, shall neglect or refuse to pay the value of any property so injured or destroyed, after thirty days' notice in writing given, accompanied by an affidavit of the injury or destruction of said property, to any officer of the company, or any station agent or ticket agent employed in the management of its business, in the county where the injury complained of shall have been committed, such railroad company, their

agents and employes, shall, in an action brought to recover damages therefor, be held and they are hereby declared to be liable to pay double the value of the property so injured, killed or destroyed as aforesaid. *Provided further*, That if the railroad company do not object to the value of the property so injured or destroyed, as set forth in the notice aforesaid, within ten days, it shall be considered and taken as the true value; but if the said railroad company are dissatisfied with the value as set forth in said notice, they shall within ten days leave a written notice to that effect at the residence or place of business of the owner of the stock so injured or destroyed, and the value shall then be ascertained and determined in accordance with the provisions of section five of the general herd law." Comp. Stat., 381.

In 1879, section 14 of the herd law was amended to read as follows: "No cattle, horses, mules, swine or sheep shall run at large during the night time, between sunset and sunrise, in the State of Nebraska, and the owner or owners of any such animal shall be liable in an action for damages done during such night time." Comp. Stat., 51.

It will be seen that there is no allegation that the company was free from fault, or that the accident was unavoidable. Even if the animals were trespassing on the track, and were killed by the negligence of the company's employes in running trains, the company would be liable. A railroad company like an individual is bound to use ordinary care and diligence, so as not unnecessarily to injure the property of others. *Ill. Cent. R. R. Co. v. Middleworth*, 46 Ill., 494. *Bemis v. Com.*, 42 Vt., 375. *Isbul v. N. Y. R. R. Co.*, 27 Conn., 393. *C. & Z. R. R. Co. v. Smith*, 22 Ohio State, 244. The answer is defective in failing to state facts showing that the company was not negligent. The demurrer therefore was properly sustained. But we do not rest our decision upon this ground. The question to be determined is, Was the failure of Brink-

man to restrain said animals at night a justification of the railroad company for neglecting to fence its track? We are not without the aid of authority on this question.

In *Spencer v. C. & N. W. R. R. Co.*, 25 Iowa, 139, the case was submitted to the court on the following agreed statement of facts: "The defendant is a corporation, and during the year 1865 was running and operating a railroad in this state and through the county of Tama. On the tenth day of October, 1865, in Salt Creek township, in said county, a train of cars, running on said defendant's railroad, ran against and killed a hog of the plaintiff's of the actual value of forty-five dollars, which hog at that time was running at large. Said railroad was not fenced on either side thereof at the point where said hog was killed, and the defendant had the right to fence said road at said point. More than thirty days before the commencement of this suit, the plaintiff served on the defendant a notice, accompanied by an affidavit of the killing of said hog, in which he stated and claimed the value of said hog at sixty-five dollars. The defendant did not pay or offer to pay to the plaintiff the value of said hog, or any part thereof, before the commencement of this suit. At the general election held in and for said county of Tama, in November, 1864, it was determined by a vote of the legal voters of said county that hogs and sheep should be prohibited from running at large in said county from and after the first day of August, A.D. 1865; and said vote, determination and prohibition was in force and effect in said county at the time said hog was killed."

The statute of Iowa was as follows: "Sec. 6. Any railroad company hereafter running or operating its road in this state, and failing to fence such road on either or both sides thereof, against live stock running at large, at all points where said roads have the right to fence, shall be absolutely liable to the owner of any live stock injured, killed or destroyed, by reason of the want of such fence or

fences as aforesaid, for the value of property so injured, killed or destroyed, unless the injury complained of is occasioned by the wilful act of the owner or his agent; and in the cases contemplated by this section, in order to recover, it shall only be necessary for the owner of the property to prove the injury or destruction complained of."

It will be seen that the facts in the Iowa case were substantially the same as in that under consideration, and that the statute contains the same provisions in substance as ours as to the liability in case of neglect to erect fences.

The court by COLE, J., say (page 141): "Under the ordinary and well recognized rules of law, it is very clear that since this plaintiff was himself guilty, not only of negligence but of the violation of a positive regulation or law, in suffering or allowing his hog to run at large, he could not recover. But our statute quoted above makes the railroad company absolutely liable for stock killed on its road if not fenced. This liability exists regardless of the question of negligence. * * * The agreed statement is silent as to whether the hog was running at large by accident, or by the careless or wilful act of the plaintiff. Unless it was the latter, plaintiff may recover; and this latter fact must be shown or the right to recover is not defeated. It is not shown in this case. * * The only fact shown is that the hog was at large contrary to the regulation in that county. This alone, under our statute, wi'l not defeat the plaintiff's right to recover."

This case seems to be adhered to by that court, and is cited in 27 Iowa, 284; 32 id., 562; 34 id., 338; 37 id., 348.

The Iowa statute contains the words "unless the injury complained of is occasioned by the wilful act of the owner or his agent," which ours does not contain; but these words neither increase nor restrict the liability of the company, as it will not be contended that the company would be liable for a wrong willfully committed by one not representing the company.

In *Corwin v. The N. Y. & E. R. R. Co.*, 13 N. Y., 42, the plaintiff was the owner of a pair of oxen worth $110, that were killed by the cars on the track of the defendant, the road at that point not being fenced, nor were cattle guards put in at the highway crossings. The New York statute was as follows:

"Every corporation formed under this act shall erect and maintain fences on the sides of their roads, of the height and strength of a division fence required by law, with openings or gates or bars therein, and farm crossings of the road for the use of the proprietors of lands adjoining such railroad; and also construct and maintain cattle guards at all railroad crossings, suitable and sufficient to prevent cattle and animals from getting on to the railroad. Until such fences and cattle guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon; and after such fences and guards shall be duly made and maintained, the corporation shall not be liable for any such damages, unless negligently or wilfully done."

The court say: "By the common law, the owner was bound to take care that his cattle did not leave his own lands and trespass upon those of his neighbor (*Promfret v. Ricroft*, 1 Wm's. Saund., 321), if they did, he was himself liable for damages in an action of trespass. It has long been settled in this state that there can be no recovery in an action on the case for negligence, where the negligence or misconduct of the plaintiff contributed to the injury; hence it was repeatedly decided prior to the general railroad act of 1848, that one whose cattle were trespassing upon the railroad at the time they received the injury, could not recover damages of the railroad company." * * * * * * * * * * "But a new state of things has arisen. A power, but recently discovered and applied to the uses of man, has been appropriated as a motive

power to the moving of large and heavy bodies at a velocity before unknown, acquiring a momentum and speed endangering the lives of all animals coming in contact with the moving mass, whether locomotive or cars, and at the same time putting in jeopardy the lives and limbs of all those who are connected with the train. The danger to passengers, as science will demonstrate and as experience has shown, is great and imminent whenever the locomotive or cars in their rapid movement come in collision with any substance disturbing the regularity of the motion or speed acquired. An ox, cow, or horse upon the track presents a substance sufficient often to throw the engine and cars from the track, and thus cause a general wreck in which many lives are lost and limbs broken. To guard against these dangers it is necessary that all animals should be kept from the track. This can only be done by securing the track by fences and cattle guards at road crossings, or in some other way. Was it safe to leave this important matter to the thousand proprietors of lands along the road? Experience had shown that it was not. It had also shown that there was and would be much litigation growing out of the killing and injuring of cattle along the road, producing irritation and exciting angry, and at times vindictive passions. Under these circumstances the statute in question was enacted, and in my opinion, it changed very essentially the law. The general duty of erecting and maintaining fences on the sides of their roads is now imposed upon the railroad corporations. This duty is to be performed for the public benefit and security, and also for the benefit of the owners of cattle generally. In short, the corporations are to erect and maintain the fences; and until they do so, they and their agents are liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon. The language of the statute is general; it is not limited to damages done to cattle, etc., of the adjoining proprietor, or to cattle, etc.,

which were lawfully upon an adjoining premises, but it extends where there is no fence erected, to all cattle, horses, or other animals. The statute says nothing about negligence in either of the parties. It is, however, immediately added, that after such fences, etc., shall be duly made and maintained, the corporation shall not be liable for such damages, unless negligently or wilfully done."

DENIO, J., while concurring in the conclusion reached, filed a separate opinion, wherein he says (page 54): "Having imposed this general and public duty, the legislature has proceeded to declare some of the consequences of its omission. The corporation in that case is to be liable for all damages which shall be done by their agents or engines, to cattle, horses, or other animals thereon. The defendant neglected to make cattle guards and fences; and for want of these safeguards, the plaintiff's cattle came upon the track of the railroad and were destroyed. * * * I am satisfied that the design of the section is to require the railroad companies to inclose their track within substantial fences, and guard it by ditches, by cattle guards, from the approach of animals wandering on the highway, and one method provided for securing that object is the provision charging the companies with damages for all injuries done to animals where they have disregarded the statute."

In *Fawcett v. The York & N. M. Rw. Co.*, 2 Eng. Law and Eq., 289, the plaintiff's horses being in the highway, passed through an open gate on to the railroad track and were killed. The statute required the railway company to erect gates across the highway at the crossings of the railway, and to keep them closed, except, etc. The defendant claimed that as the horses were unlawfully in the highway that therefore the company was not liable, because it was not bound to keep the gates closed against them; but the court held the company liable, as the law had imposed the duty of erecting gates and keeping them closed on the company, which duty it had failed to perform; the court would

not inquire how the horses came into the highway. See also *Shephard v. The B., N. Y. & E. R. R. Co.*, 35 N. Y., 641. *Bradley v. The same*, 34 Id., 427. Many other cases to the same effect might be cited.

In the case of the *Kansas P. Rw. Co. v. Mower*, 16 Kas., 573, it was held that a statute requiring a railroad company to fence its track was constitutional, being a power under the police power of the state. The first and second sections of the Kansas act are as follows:

"Section 1. Every railroad company or corporation in this state, and every assignee or lessee of such company or corporation, shall be liable to pay the owner the full value of each and every animal killed, and all damages to each and every animal wounded by the engine or cars on such railway, or in any other manner whatever in operating such railway, irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railroad company or corporation, or the assignee or lessee thereof, or not.

"Sec. 2. In case such railway company or corporation, or the assignee or lessee thereof, shall fail for thirty days after the demand therefor by the owner of such animal, or his agent or attorney, to pay such owner or his agent or attorney, the full value of such animal if killed, or damages thereto if wounded, such owner may sue and recover from such railway company or corporation, or the assignee or lessee thereof, the full value of such animal or damages thereto, together with a reasonable attorney fee for the prosecution of the suit, and all costs in any court of competent jurisdiction in the county in which such animal was killed or wounded."

The third section provides upon what officers a demand for compensation may be made.

The fourth section authorizes the allowance of an attorney's fee when judgment is rendered for the plaintiff.

The fifth section is as follows: "This act shall not ap-

ply to any railway company or corporation, or the assignee or lessee thereof, whose road is inclosed with a good and lawful fence to prevent such animals from being on such road."

It will be seen that the statute does not provide that a railway company shall be absolutely liable for stock killed. In *Kansas Pacific Rw. v. Landis*, 24 Kas., 406, the railroad running through the defendant's enclosure was not fenced, and a mule belonging to the defendant, in such enclosure, strayed upon the track in the night time and was killed. There seems to have been a night herd law in force at that time requiring stock to be confined during the night time.

The court say: "The theory of the defendant is, that both parties were equal violators of the law, and that therefore plaintiff cannot recover; that of the plaintiff is that the defendant was alone the transgressor, and must therefore pay for the injury which it is conceded was done. The case really turns upon the question, whether the plaintiff was, as to the defendant, confining the animal at the time of the injury. That the defendant had not fenced its right of way, and was therefore liable under the stock law of 1874, is conceded, unless it appears that plaintiff was in equal wrong, and therefore within the case of *C. B. U. P. Rd. Co. v. Lea*, 20 Kas., 353, not entitled to a recovery. The language of the night herd law is, that the animal must be confined in the night time; in this case the animal was loose in a quarter-section, which as to the general public, was enclosed with a sufficient fence." The decision of the court turns upon the question of the defendant's alleged negligence.

In the case of the *C. O. R. R. Co. v. Lawrence*, 13 Ohio State, 66, cited by the plaintiff in error, the action was to recover for stock killed by negligence, and that was the issue.

In *P., Ft. W. & C. Ry. Co. v. Methven*, 21 Id., 586, the action was for killing stock, and the answer that the plaintiff permitted the animal to run at large contrary to the

statute. It was held in effect that the answer stated a defense.

The court say, page 594: "In support of the opposite view, the strongest case to which our attention has been called is *Corwin v. The New York & Erie Railroad Co.*, 3 Kernan, 42. The facts of that case are on all fours with the case in hand, but the difference between the terms of the statute of New York on the subject of fencing railroads and of our own, is quite sufficient to justify the difference in the conclusions. After requiring railroad corporations to fence their roads, the statute of that state declares that "until such fences and cattle guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon." By that statute it will be observed the immediate cause of the injury, to-wit: the act of "their agent or engines," is made the ground of liability, and that, too, without any reference to the fact whether the want of fences does or does not contribute thereto. Yet it is conceded by the judges delivering opinions in that case, that "should it appear that the plaintiff drove his cattle upon the road, or in the neighborhood of the road, and left them there, or did any other positive act increasing the danger to his cattle, a very different question would arise. The maxim, *Volenti non fit injuria*, would then apply." But by our statute the liability is only incurred when the injury results "by reason of the want or insufficiency of fences, road crossings or cattle guards, or by any carelessness or negligence of such company, party, agent or agents thereof." In the case of *D. & M. R. R. Co. v. Miami Co.*, 6 Central Law Journal, 436, the supreme court commission of Ohio rendered a decision in effect affirming that above cited from 21 O. S. In none of the cases cited by the plaintiff in error does the statute appear to be similar to ours.

The first section of our statute seems to have been copied

substantially from that of New York, while the second section is in effect the same as that of Iowa. The decisions of both of those states, therefore, are directly applicable. Indeed there is no room for a different construction. The statute requires all railroad companies which have been in operation six months to fence their track and put in cattle guards at road crossings, and provides that in case of failure to do so "they shall be absolutely liable to the owner of any live stock injured, killed, or destroyed by their agents, employes, or engines," etc.; and also declares that when such fences and guards have been fully and duly made, and shall be kept in good and sufficient repair, such railroad shall not be liable for any such damages, unless negligently or willfully done. Where they have failed to fence their track therefore, the question of negligence of the owner of the stock killed or injured does not enter into the case. The defendant in error, by merely permitting the animals killed to run at large in the night time, is not thereby deprived of the right to recover. The judgment must be affirmed.

JUDGMENT AFFIRMED.

E. O. EDWARDS, PLAINTIFF IN ERROR, v. FRANK E. KEARNEY, DEFENDANT IN ERROR.

Practice: BILL OF EXCEPTIONS NECESSARY. When it is sought to present to this court alleged errors, occurring upon the trial of a cause in the district court, a bill of exceptions, settled and signed as required by statute, is indispensably necessary, and no other paper, record, or showing can be made to take its place.

ERROR to the district court for Buffalo county. Tried below before GASLIN, J.

Hamer & Conner, for plaintiff in error.

Sam. L. Savidge and *E. C. Calkins*, for defendant in error.

COBB, J.

The bill of exceptions in this case having been stricken from the files of this court, in accordance with the opinion reported in 13 Neb., 502, the record is simply here for our examination without such bill.

Where it is sought to present to this court alleged errors occurring at a trial in the district court, a bill of exceptions, settled and signed as required by law, is indispensably necessary. And while in a proper case, upon timely application, this court would by mandamus compel the signing of such a bill by a trial judge, yet no other paper, record, or showing can be made to take its place. There being no error assigned, other than those depending upon the bill of exceptions, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

SOLON T. GLIDDEN ET AL., PLAINTIFFS IN ERROR, V. FRANK MOORE, ADMR., DEFENDANT IN ERROR.

Negligence: S. T. G. was the owner of a tract of uninclosed land used for grass and pasturage, across which there was a neighborhood road, not laid out as a highway, but which had been used as such by the public since the early settlement of the country. He was also the owner of a vicious and dangerous bull which he knew of having attacked and gored several different persons. July 22, 1879, he caused this bull to be lariated near to the said road on the said land. So that W. D. M., an old man 63 years of age, while passing along said road, was by the said bull attacked, gored, and killed. *Held*, That S. T. G. was guilty of such negligence and want of ordinary care, as rendered him liable, in an action by the administrator of W. D. M., and that it made no difference that W. D. had, several years before, been forbidden by S. T. G. to use the said road.

ERROR to the district court for Washington county. Tried below before SAVAGE, J.

W. H. Munger, Ballard & Walton, and *E. F. Gray,* for plaintiffs in error.

On deposition of March, cited *Payne v. Briggs,* 8 Neb., 75. Verdict contrary to evidence, deceased being guilty of contributory negligence. *Michigan Central v. Colman,* 28 Mich., 447. Cooley on Torts, 346. *Simmons v. Railroad,* 6 Ohio State, 105. *Warner v. N. Y. Central R. R.,* 44 N. Y., 465. *Railroad v. McLaren,* 62 Ind., 566.

L. W. Osborn, for defendant in error.

Cases cited by plaintiff in error are railroad cases and not applicable. Shearman & Redfield on Negligence, 225 *et seq.* Id., 30–40. *Murray v. Young,* 12 Bush, 337. Cooley on Torts, 666–670.

COBB, J.

While in this case there are a great number of errors assigned by the petition in error, there are but four insisted on in the brief, and our examination will be confined to them.

1. That the deposition of William T. March should have been suppressed and not admitted in evidence, etc.

The objection to this deposition is as to the certificate of the notary public before whom it was taken, and which it is claimed is within the objection sustained in the case of *Payne v. Briggs,* 8 Neb., 75. The certificate is in the following words: "I, O. W. Rice, a notary public, duly appointed and qualified, residing in and for Knox county, and state of Nebraska, do hereby certify that William I. March was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced

to writing by myself in the presence of the witnesses, and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed notice specified; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit. And said deposition was commenced at the time in said notice specified and completed as above stated.

"In testimony whereof witness my hand and seal of office this 30th day of April, 1881.

[SEAL] "O. W. RICE, *Notary Public.*"

The "annexed notice" was for the taking of the deposition "at the office of O. W. Rice, in the town of Creighton, county of Knox, and state of Nebraska," etc.

The objection to this certificate is technical. It is strange that a notary should neglect or fail to place the common and perfunctory words called the venue at the head of the certificate, but it has, we think, always been held sufficient where the same appeared in the body of the certificate, as it does here. The trouble with the certificate in *Payne v. Briggs* was that it nowhere appeared that the notary signing the certificate was appointed by the authority of, or resided within the jurisdiction of, the state of Colorado, where the deposition was to have been taken according to the notice.

2. The verdict is contrary to the evidence and law of the case.

The cause of action against the plaintiff in error (defendant in the court below) was for keeping and negligently and inefficiently tethering a certain vicious bull, known to be dangerous to mankind, near to a certain highway or path along which persons were accustomed to travel and pass. By which bull plaintiff's intestate, while lawfully passing along said highway, was attacked, gored, and killed.

The evidence is sufficient as to the vicious and dangerous character of the bull, owned and kept by plaintiff in error, which was well known to him. That on the day in

question the bull was tethered by a rope, in which was a wooden swivel, near to but out of reach of the path leading across the land of plaintiff in error, and near by where said path crosses a small stream of water. That some time in the afternoon defendant in error's intestate and father, an old man sixty-three years of age, living on the adjoining farm, started from his residence on foot to go to the neighboring village on business; that his way to said village was along the said path; that towards evening he was found in a bruised, wounded, and dying condition, near the said path where it crossed the said small stream of water, at which time said bull, having loosed himself by breaking the said wooden swivel, was found standing in the water of said stream near the said path. The injured man died before ten o'clock that evening.

It is not questioned, nor could it be, from the medical and other testimony, that deceased received the fatal injuries from the said bull. It is contended by counsel upon the evidence that the deceased was guilty of contributory negligence. There was some evidence of deceased having heard of the dangerous character of said bull; also evidence of his having been some years before forbidden to use the said path across the land of plaintiff in error. There was also evidence that after the injury the straw hat of the deceased was found on the ground, within the length of the bull's tether of the point at which he had been fastened. The bull in question was a crippled animal, having but a partial use of one of his fore legs. There was considerable and conflicting testimony as to how fast he could run or move. Undoubtedly if the deceased was guilty of negligence, which contributed directly to the fatal injury, that would be a defense. But the consideration of this question falls more properly within the third head of the brief of plaintiff in error, which is that the fifth instruction given in charge to the jury by the court was erroneous. Said charge was as follows: "5. The plaintiff, however, cannot recover if the deceased was on his

part guilty of a want of ordinary care, which directly contributed to the injury sustained by him. If the deceased carelessly and negligently put himself in the way of the bull, knowing him to be vicious and dangerous, then he could not recover if injured. But the mere passing along a usually traveled way, even though upon the defendant's premises, and even though he was a trespasser, would not of itself be such negligence as would deprive him of the right to recover."

Plaintiff in error objects to this instruction because, as he alleges, it assumes that the only act of negligence on the part of the deceased was that of merely passing along a usually traveled way upon the premises of defendant, etc. The witness, Mrs. Mary Glidden, wife of the plaintiff in error, testified that she drove along the road in question about half-past three o'clock that afternoon. She saw the bull lying down about fifteen or twenty feet from the road on the east side, and perhaps thirty feet from the bridge; that he was tied with a rope about fifteen feet long; that the length of the rope would allow him to get within six or eight feet of the road; that he could not get clear to the road, and that he could *just go to the creek so he could drink.* A half or three-quarters of an hour afterwards she returned the same way. She then saw the deceased on the north side of the road, on the west side of the creek, perhaps thirty feet from the creek, and about a rod from the road. He was sitting there with his arm on his knee and his hand up to his head; he seemed to be hurt; he asked me to help him; he said "help;" that she stopped; he said the bull had hooked him. At this time the bull, having broken from his fastening by breaking out the end of the wooden swivel, was standing in the water of the small creek, thirty or forty rods from where he was lying when she went up. Witness states that deceased at that time did not have his hat on; that just before or just after the buggy in which her son and hired man conveyed the deceased to his home

started, her husband went and picked up deceased's hat—a common straw hat—which was found within the circle that the bull had eaten off while tied; she thinks not more than three feet from the place where the bull was lying when she went up; she thinks a little further from the center than where he was lying.

Spencer Morely, a witness for defendant in error, testified that he was working for plaintiff in error at the time of the accident; was in the field near by; knew where the bull was tied; that he was tied so he could come within four rods of the bridge; was about a rod from the road. On cross-examination witness said that in his opinion the bull was lariated so that he could not get nearer than a rod to the road, but that he could get nearer to the road than to the water in the small creek.

This is all the testimony which can possibly shed the least light upon the enquiry as to how the injury was received. Counsel for plaintiff in error lay considerable stress upon the circumstance of the finding of the hat of deceased a few feet from the path, and within the circle fed off by the bull while he was tied; and upon that they build up the theory that the deceased must have left the road, gone close to the bull, and while there received the injury by being struck, by the bull making one sudden and quick jump, and there lost his hat.

Whatever weight this evidence and theory was entitled to in the minds of the jury, it is presumed they gave it, as it was their duty to do under the instructions of the court. If, as is substantially claimed by the plaintiff in error, the instruction assumes that there was no sufficient evidence of the deceased having left the road, we think that such assumption is justified by the evidence.

The fourth and only remaining point urged by plaintiff in error is that the third and fifth instructions prayed by him should have been given. Said instructions were in the following words:

"3. It is not negligence nor want of ordinary care for a person to keep a vicious bull upon his own premises at a place remote from where other persons have a right to go."

"5. If you find from the evidence that the defendant, Solon I. Glidden, had notified Wm. B. Moore, the deceased, prior to the receiving of the injuries complained of to keep off from his land, and not cross the same, and that the deceased, in violation of this notification, did go upon said land, at or near where the bull was, and in consequence thereof was attacked by said bull, and received the injuries complained of, then, in that case, plaintiff can not recover."

The third instruction was properly refused, as it does not state the law correctly, nor is it applicable to the evidence in the case. It is negligence and want of ordinary care for a person to keep a vicious bull or other dangerous animal insecurely fastened, upon his own premises at a place where other persons are known to go, whether they have a right to go there or not. 1 Thompson on Negligence, 222, and cases there cited.

The same is true of the fifth instruction. If the plaintiff in error allowed the general public to use a road, though not laid out as a highway, across his land, and it was so used by the public for a long time, and the plaintiff in error insecurely tethered the said bull near the said road, knowing him to be vicious and dangerous, and the said bull broke his fastening and set upon and killed the deceased while passing along the said road, it would make no difference as to the liability of the owner of said animal that he had forbidden the deceased to use the said road. See authority above cited. Also Id., p. 300, *et seq.*

We therefore reach the conclusion that there is no error in the record, and that the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

EDMUND JOSLIN, APPELLANT, V. ROSWELL D. MILLER, ET AL., APPELLEES.

1. **Promissory Note:** LEX LOCI. A promissory note made in Nebraska, but payable in New York, *Held*, That its validity is to be determined by the laws of Nebraska.

2. **Usury.** A party who makes a usurious loan through an agent takes the contract subject to all the instrumentalities employed by the agent in its consummation.

APPEAL from the district court of Colfax county. Tried below before POST, J.

Hull & Stearns, for appellant.

Phelps & Thomas, for appellees.

MAXWELL, J.

This is an action to foreclose a mortgage. The following is a copy of the promissory note which the mortgage was given to secure:

"$400. LEIGH, NEBRASKA, April 1st, 1876.

"Value received on the first day of April, 1881, I promise to pay Edward Joslin, or order, four hundred dollars, with interest from date until paid at ten per cent per annum, as per coupons attached at the office of the Corbin Banking Company, 61 Broadway, New York City; until paid, interest shall bear interest at ten per cent per annum. On failure to pay interest within five days after due the holder may collect principal and interest at once.

"ROSWELL D. MILLER."

The defendant, Miller, in answer to the petition, alleges in substance that he received but $340, sixty dollars being retained by Perkins & Newton and the Corbin Banking Company as commissions, and that said parties were the agents of the plaintiff. He also pleads payment of the sum

of $110. There is also an allegation that the contract is to be governed by the laws of New York, and that by the laws of that state there can be no recovery whatever on the note, the contract being void for usury. The defendants, other than Miller, are lienholders on the mortgaged premises. The case was referred by consent to Hon. W. H. Munger, who heard the testimony and found as follows:

"The undersigned referee, to whom the above cause was referred as sole referee to try the issues, fixed on the ——— day of ———, 1882, at Lincoln, Nebraska, as the time and place for the trial of said cause, and notified the parties thereof. At the time and place the parties appeared by their attorneys, and after hearing the evidence I do find:

"*First.* That the defendant Roswell D. Miller executed the note and mortgage in plaintiff's petition mentioned.

"*Second.* That the defendant Roswell D. Miller only received the sum of $340 on said note and mortgage.

"*Third.* That the plaintiff paid the full sum of $400 for said note and mortgage.

"*Fourth.* That the sum of $60, a part of said sum of $400 paid by the plaintiff, was retained by Messrs. Perkins & Newton and the Corbin Banking Company, as their commissions for their services in the matter of the loan from plaintiffs to defendant Roswell D. Miller, for which said note and mortgage mentioned in plaintiff's petition were given.

"*Fifth.* That defendant Roswell D. Miller obtained said loan, for which said note and mortgage was given, through the Corbin Banking Company of New York.

"*Sixth.* That said Corbin Banking Company in making said loan was agent for plaintiff.

"*Seventh.* That defendant Roswell D. Miller has paid on said note and mortgage the sum of $110.

"*Eighth.* That the defendants L. W. White & Co., Hughes & McKenzie, O. I. & L. C. Smith, Adolph Dworak, Frank H. Manny, who have answered, setting up their

cross-bills, are entitled to a decree for the amount due as stated in their answers.

"*Ninth.* That the priority of liens are as follows: 1st, Plaintiffs; 2d, L. W. White & Co.; 3d, Hughes & McKenzie; 4th, O. I. & L. C. Smith; 5th, Adolf Dworak and the defendants in amount as stated in their several answers and cross petitions.

"*Tenth.* That defendants recover costs of this action, except costs of defendants' filing cross bills, which should be taxed to defendant Roswell D. Miller.

"*Eleventh.* That said loan from plaintiff to defendant Roswell D. Miller was usurious."

Exceptions were filed to the report, which were overruled and a decree entered on the findings. The plaintiff appeals to this court. In the argument of the case the attorneys for the appellee insisted very strenuously that the contract was to be governed by the laws of New York, and that as by the laws of that state, which are set out in the answer, a usurious contract is void, therefore the plaintiff is not entitled to recover. The same question on substantially the same facts was before this court in the case of *Olmstead v. N. E. Mtge. Co.*, 11 Neb., 493, and it was held that the validity of the contract was to be determined by the laws of this state and not of New York. And we adhere to that decision.

Is the report of the referee sustained by the testimony? We think it is. It is true the plaintiff swears that the Corbin Banking Company was not his agent, and such agency is attempted to be denied by the Banking Company, but F. W. Dunton, the cashier of the Corbin Banking Co., on cross-examination testified as follows:

Q. Is this the only money that the plaintiff ever loaned through the agency of the Corbin Banking Company?

A. We have negotiated other applications than this with him.

Q. Had he similar loans through your company previous to this loan to Miller?

A. We had negotiated applications with him previous to this negotiation.

Q. About how many?

A. I should say twenty.

Q. In what amount in the aggregate?

A. Perhaps ten thousand dollars.

Q. How many since the loan to Miller?

A. I think none at all.

This, with the other testimony, which we will not review at length, clearly establishes the fact that the Corbin Banking Company was the agent of the plaintiff for the purpose of loaning the $10,000, of which the money borrowed by Miller was a part.

The statute fixes the maximum rate of interest and declares the penalty of taking a greater rate—the loss of all interest. It applies to all persons loaning money. The language is: "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," etc. The plaintiff therefore who affirms a contract made for him by his agent must adopt all the instrumentalities employed by his agent to bring it to a consummation. *N. E. Mtge. Sec. Co. v. Hendrickson*, 13 Neb., 575. *Elwell v. Chamberlain*, 31 N. Y., 619. *Fuller v. Wilson*, 3 Ad. & E. (N. S.), 56. *Nat. Exp. Co. v. Drew*, 32 Eng. Law and Eq., 1. The reason is, the law will not permit the principal to adopt that which he thinks is beneficial and reject the remainder. The contract must be adopted as a whole. With what reason therefore can a party say that a contract which he affirms, made for him by an agent whom he authorized to loan his money, is not usurious because *he* has not received directly an amount in excess of the legal interest? The person authorized by him to make the loan, however, did receive

such excess, and that was a portion of the contract by which the loan was effected.

The statute is clear and unambiguous, and applies to all persons loaning money. To permit an agent to charge a rate of interest in excess of what his principal could do, would practically abolish the law regulating the rate of interest and offer a premium for devices and subterfuges for the evasion of the statute. It is clear that the referee's report is sustained by the weight of evidence, and the decree must be affirmed.

JUDGMENT AFFIRMED.

THE B. & M. R. R. CO., APPELLANT, V. GERRIT ABINK, APPELLEE.

Railroad Land Grant. The word "claim," in section 19 of the act of Congress granting lands to the Burlington and Missouri Railroad Company, approved July 2d, 1864, is not restricted to such claims as shall afterwards ripen into perfect titles, but includes all that are made in due form, whether they are afterwards either perfected, abandoned, or forfeited, or not.

APPEAL from the district court of Lancaster county. Tried below before POUND, J. It was an action of ejectment brought by the railroad, their title being derived by patent from U. S. Government, of date June 28, 1875. Defendant claimed by virtue of pre-emption entry made by Daniel Doyle, Nov. 5, 1864, and from whom, the same having passed through several hands, the defendant finally acquired the improvements, and in 1872 homesteaded the land.

Marquett & Deweese, for appellant, cited: *Fenwick v. Gill*, 38 Mo., 510. *Quinn v. Kenyon*, 38 Cal., 499. *Moore v. Robins*, 96 U. S., 530. *Marquez v. Frisbie*, 101

Id., 476. *Frisbie v. Whitney*, 9 Wallace, 191. *Flint v. Gordon*, 41 Mich., 430.

Brown & Ryan, for appellee, cited: *Leavenworth v. United States*, 92 U. S., 733. Copp's Land Laws, 392. *Newhall v. Sanger*, 92 U. S., 761. *Atherton v. Fowler*, 96 Id., 513.

LAKE, CH. J.

This is an appeal from the district court for Lancaster county. The controlling question is whether or not, at the time of the definite location of the plaintiff's road, a pre-emption "claim" had "attached" to the land in controversy.

The line of the road was definitely fixed June 15th, 1865. Of this fact there is no dispute. If at this time the land were within the operation of the grant to the plaintiff, as declared and limited by section 19 of the act of congress approved July 2d, 1864 (13 U. S. Statutes at Large, 364), then the judgment of the district court should be reversed, but, otherwise, not.

The decision of the principal question must necessarily turn upon the true meaning of the word "claim," in this clause of said section; "and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." If by the use of this word congress intended that such an interest must have attached as should afterwards ripen into a perfect title or right to a patent from the United States, then the company was entitled to the land, under the grant, for no such claim is shown.

But, on the other hand, if it were intended to include all claims to pre-emption or homestead, formally entered and recognized by the land department, without regard to their continuance, or final perfection, as against the government, then the company was not entitled to the land, for it is

abundantly proved that such a pre-emption claim had attached at the time of the definite location of the line of the road.

We regard the latter of these views as the correct one, and in taking it we believe we are supported by the ruling of the supreme court of the United States upon similar questions, especially by the decision in *Newhall v. Sanger*, 92 U. S., 761, where in construing the word "*claimed*," in a statute which, in terms, excluded from pre-emption and sale all lands claimed under any foreign grant or title, this language was used: "It is said this means lawfully claimed; but there is no authority to import a word into a statute to change its meaning. Congress did not prejudge any claim to be unlawful." See also *Wood v. Railroad Co.*, 104 U. S., 329. So, too, here in the statute we are considering, congress by using the word "claim" simply, not "lawful claim," must have intended it to be taken in its ordinary sense, and as implying "a demand of a right or supposed right; a thing claimed or demanded * * * as a settler's claim."—Webster. It must have been the intention of congress that it should be known with certainty, at the date of the location of the road, by reference to the records of the land department, what lands were included in the grant, and that the right of the company, as against the United States, in the selection of their lands, should not be dependent upon the validity or invalidity of claims then existing, nor upon the contingency of their being afterwards either perfected, abandoned, or forfeited by the claimant; these matters being of concern to the government alone.

In construing this language, it must be borne in mind that being of grant, it must be taken most strongly against the grantee. Such was the rule applied by the supreme court of the United States, in *Leavenworth, etc., R. R. Co. v. The United States*, 92 U. S., 733. In that case, speaking of scope and effect of grants similar to this one, the court

said: "Private entries, pre-emption, and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant the same as if it had not been made; but they ceased when the routes of the roads were definitely fixed; and if it appeared that a part of the lands within those limits had been either sold at private entry, taken up by pre-emption, or reserved by the United States, an equivalent was provided" by permitting other lands in equal quantity to be taken in their stead. "Having thus given lands in place, and by way of indemnity, congress expressly declared, what the act already implied, that lands otherwise appropriated, when it was passed, were not subject to it."

In the court below considerable time was devoted to the question of whether the pre-emption claims of Daniel Doyle were valid. As we view the grant to the railroad company this inquiry was unnecessary, and could have no influence upon the result of the case. It is enough that he had made a settlement upon the land, and in due time filed in the proper land office his declaratory statement of his intention to pre-empt it. This constitutes a claim, and, as we must hold, was sufficient to take the tract in question out of the operation of the plaintiff's grant.

JUDGMENT AFFIRMED.

M. E. GANDY, PLAINTIFF IN ERROR, v. J. P. POOL, DEFENDANT IN ERROR.

1. **Replevin:** EVIDENCE. A defendant in replevin, under an answer alleging that he is the owner of the property and that he does not unlawfully detain the same, may prove that a mortgage under which the plaintiff claims title and possession was a forgery.
2. **Verdict against Evidence.** Where a verdict is against the clear weight of evidence it will be set aside.

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

E. W. Thomas and *C. Gillespie,* for plaintiff in error, cited: *Gray v. Earl,* 13 Iowa, 188. Bliss on Code Pleading, sec. 339. *Frisbie v. Langworthy,* 11 Wis., 376.

Isham Reavis, for defendant in error, cited: *Richardson v. Steele,* 9 Neb., 483.

MAXWELL, J.

This is an action of replevin brought by the plaintiff against the defendant to recover the possession of "ten head of steers, eighteen months old, 22d of October, 1881, bought by A. F. Pool of J. W. Beamis, also eight head white and spotted steers, then eighteen months old, bought by said A. F. Pool of various parties." It is alleged that the plaintiff's right to the possession of said steers is derived from a mortgage on the same, executed on the twenty-second of October, 1881, by A. F. Pool to the plaintiff, to secure the payment of a promissory note of said Pool for the sum of $231, which mortgage was duly filed in the county clerk's office, and according to the terms of which the plaintiff is entitled to the possession of the property.

The defendant in his answer pleads property in himself, and denies the unlawful detention. On the trial of the cause a verdict was returned in favor of the defendant, upon which judgment was rendered.

The errors assigned in this court are:

First. That the court erred in admitting evidence tending to show that the mortgage in question was a forgery.

Second. Because the verdict is against the evidence.

The attorneys for the plaintiff contend that as they in the petition have stated the facts in relation to the chattel mortgage under which they assert the right to recover, that

therefore the failure to plead in the answer that such mortgage is a forgery is a waiver of that question.

The action of replevin will lie only for the recovery of specific chattels. The plaintiff in all cases must have a general or special property in the goods which he seeks to recover, together with the right to the immediate possession of the same. See sec. 94 in Wells on Replevin, and cases cited in note 1. The question to be determined is, in whom was the right of possession at the commencement of the action. If, therefore, a plaintiff claiming a special ownership in the property states the facts as to such special ownership and right of possession, and alleges that the property is wrongfully detained by the defendant, he merely shows by his pleadings his right to maintain the action, but the cause of action against the defendant is the unlawful detention of the property.

At common law *non cepit* was the general issue. Bac. Abr., title Replevin. And was a sufficient answer when the charge was for the wrongful taking of the property, but for wrongful detention of the goods, *non detinet* was the proper plea. The code has abolished the technical distinctions between these defenses, which frequently defeated the ends of justice, and permits the defendant, under a general denial or plea that he does not unlawfully detain, to prove his right to the possession of the property. *School District No. 2 of Merrick Co. v. Shoemaker*, 5 Neb., 36. *Creighton v. Newton*, Id., 100. *Hedman v. Anderson*, 8 Id., 180. *Ferrill v. Humphrey*, 12 Ohio, 113. *Oaks v. Wyatt*, 10 Id., 344. *Richardson v. Steele*, 9 Neb., 483. *Zandle v. Crane*, 13 Kas., 344. *Holmberg v. Dean*, 21 Id., 73. *Bailey v. Bayne*, 20 Kas., 657.

We have no doubt, therefore, that under the plea that he did not unlawfully detain the property in controversy the defendant could prove any fact tending to show his possession was lawful, including the right to prove that the plaintiff based her claim to the possession upon an instrument

that was a forgery. The first objection is therefore untenable.

Second. We are of the opinion, however, that the verdict is against the clear weight of evidence. A. F. Pool, who is claimed to have executed the mortgage in this case, is a son of the defendant, and at the time the mortgage in question is alleged to have been executed was about twenty-two years of age. The testimony tends to show that about that time he did purchase eleven head of the animals mortgaged, from one Beamis, and claimed to own the same, although the money to purchase said animals was furnished by his father.

There seems to have been an agreement between the father and son as to the repayment of the money that does not enter into this case. The weight of testimony also tends to show that A. F. Pool was indebted to the plaintiff. He swears positively that he did not sign the mortgage in dispute, and this without doubt was the controlling question with the jury. The testimony of Pool upon that point, however, is disproved by a number of disinterested witnesses, and so completely that the jury would have been justified in applying to his testimony the maxim, *falsus in uno, falsus in omnibus.* It is unnecessary to review the testimony at length as there must be a new trial.

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

REVERSED AND REMANDED.

WILLIAM LAMB, PLAINTIFF IN ERROR, V. CHARLES HOTCHKISS, DEFENDANT IN ERROR.

Verdict not against evidence: JUDGMENT AFFIRMED. In the case made, *Held*, That the court having submitted the only question involved to the jury by a fair instruction, and there being evidence to sustain the verdict, and not the clear preponderance of evidence against it as might justify a reversal, the judgment must be affirmed.

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

Colby, Hazlett & Bates, for plaintiff in error.

Boyle & Lindley, for defendant in error.

COBB, J.

This action was brought by the plaintiff in the court below for the price of certain flour delivered by him to the defendant, as is alleged by said plaintiff, in payment of a certain note and mortgage made and executed by R. A. & P. H. Hotchkiss to one John J. Dunbar, but then owned by and in the possession of said defendant. But that after the delivery of said flour to the said defendant, he refused to credit the amount thereof on the said note and mortgage, and it appeared that he had sold and assigned the same to one John Ellis, who being about to foreclose the said mortgage, the plaintiff, for the protection of the said R. A. & P. H. Hotchkiss, paid off the same, etc.

The defendant answered, admitting the receipt of the flour at the price set out in plaintiff's petition, but denying that he received the same to apply on the said note and mortgage, and alleging that the same was paid and delivered by the said plaintiff, and received by him, the said defendant, to apply on a certain note given by R. A. Hotchkiss to John J. Dunbar, and then owned by and in the

possession of him, the said defendant, and that the price of said flour was by him duly credited on the said note. Plaintiff by his reply denied the same, and alleged that the said last-mentioned note had been fully paid by the said R. A. Hotchkiss, while in the hands of the said John J. Dunbar. The plaintiff had a verdict and judgment, and defendant brings the cause to this court on error.

The first point made by plaintiff in error is, that the court erred in refusing to give the second paragraph of the instruction asked by the defendant, etc., as follows: "The agent who was intrusted with the possession of the flour, with power to sell it, carried with it the power to sell the flour, and have the purchase price endorsed on the note in question; and if you should find that at the time the flour was sold it was agreed between the defendant and the agent—this plaintiff—that the purchase price of the flour was to be indorsed on the note on which the indorsement was in fact made, then you will find for the defendant."

The depositions of R. A. Hotchkiss and Preston Hotchkiss were taken and introduced on the part of the plaintiff below. Before they were introduced, the defendant moved to suppress the answers to several of the interrogatories, which motions were sustained as to most of them, and overruled as to some; but in most cases where they were overruled no exception was saved. The record as to this part of the case is quite imperfect, rendering it difficult to apply the defendant's objections and exceptions. We think, however, that the court excluded all of those portions of the depositions which, if admitted in evidence, may have rendered the above instruction proper and applicable.

The question of agency, however, does not properly enter into the consideration of the case. The whole case turns on the simple question of fact, which note was the flour delivered on—the note of the firm or the note of one of the individual partners? And this question was quite

fairly submitted to the jury by the following instructions: "If you shall find from the evidence that by the agreement of the parties to this suit the contract price of the flour was to have been endorsed on the note secured by mortgage, then you will find for the plaintiff for the full contract price of the flour, delivered by the plaintiff to the defendant, together with interest on that amount from the time the same was to have been endorsed on the said note up to the present time, at seven per cent per annum.

"2. But on the other hand, if you shall find from the evidence that it was agreed, between the parties to this suit, that the price of the flour was to have been indorsed on the individual note of R. A. Hotchkiss, and that said indorsement was accordingly made, then you will find for the defendant."

As the main question in the case was fairly submitted by these instructions, we do not think that it was error on the part of the court to refuse the instructions prayed for by the defendant, but that such instruction would have had a tendency to mislead and confuse the jury.

The court also gave the following instruction, the giving of which is made the second point in the brief of plaintiff in error.

"4. If you shall find from the evidence that the defendant, Lamb, did not come into the ownership and possession of the R. A. Hotchkiss note until after it was due, then any payment made to Dunbar on the note, whether indorsed or not, would be applied in the payment of the said note, and then even if you find the proceeds of the flour were to be applied on this note you could not apply any more than enough to satisfy the balance due on the note, and any balance due on the flour would be coming to the plaintiff."

The objection urged to this instruction is, that it was not founded on any evidence. Instructions ought to be confined to the evidence in the case and the law applicable thereto, but this court has held in an early case that, if an

erroneous charge be given to the jury on an abstract proposition, or on a point entirely out of any case made by the evidence, and the verdict can be supported by the proof made, the judgment will not be reversed. *Meredith v. Kennard*, 1 Neb., 312. The case at bar is an apt one for the application of the law there laid down. Here the court told the jury that should they find that the proceeds of the flour were to be applied on the R. A. Hotchkiss note, etc., leaving no application of that instruction in the event of their finding otherwise. It is apparent from the verdict that the jury did not find that the proceeds of the flour were to be applied on the R. A. Hotchkiss note. But the writer does not think that there is an entire want of evidence as to whether the defendant became the owner and possessor of the R. A. Hotchkiss note before or after the same became due. The note itself, which was introduced as evidence by the defendant, shows on its face that it became due on the first day of May, 1877. The defendant in his deposition says: "In the year 1877 or 1878 I purchased two notes of John Dunbar, one of them for $368, dated July 3, 1876, and due May 1, 1877, signed by R. A. Hotchkiss," etc. Here defendant says that he bought this note in the year 1877 or 1878. If in 1878 or the later two-thirds of 1877, it was after the note became due. A statement made by a party, or an interested witness, should, if subject to construction, be construed against his interest. This statement of the defendant, though slight, is some evidence that the note was purchased by defendant after due, and sufficient, I think, for the purpose of the instruction under consideration.

The third point made by plaintiff in error is upon the admission of testimony in the deposition of R. A. Hotchkiss as to payments made on the said note while in the hands of John J. Dunbar. As we have seen, there was some evidence proper to be considered by the jury tending to prove that the note was not transferred to the defendant

until after due. So, the objection to the admission of the deposition on that account must be held not well taken.

The fourth point is upon the admission of the answers of R. A. Hotchkiss to interrogatories propounded to him in his deposition as to the authority of the plaintiff to pay or deliver flour, etc. As above stated, while examining the first point of error, the record does not point out with any degree of clearness what portions of the depositions were suppressed and what portion admitted in evidence to the jury; but, as we understand the record, all of that part of the depositions to which this objection would apply were suppressed, and not admitted in evidence to the jury.

The fifth and last point is that "the court erred in overruling the defendant's motion for a new trial, as the verdict of the jury was contrary to the law and the evidence, and not sustained by sufficient evidence."

There is a clear and sharply defined conflict of testimony, but having carefully examined it and given it such consideration as we are able to, we do not think that there is that clear preponderance which alone would justify the court in disturbing the verdict for that cause.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

JOSEPH LEACH, PLAINTIFF IN ERROR, V. THE MILBURN WAGON CO., DEFENDANT IN ERROR.

Judgment Against Partnership. Where a judgment has been recovered against a partnership in the firm name, and it is sought to subject the individual property of the members of the firm to the satisfaction of the same, it must be made to appear that the partnership property has been exhausted.

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

Gantt & Norris, for plaintiff in error, cited: *B. & M. R. R. v. Dick & Son*, 7 Neb., 242. *Haskins v. Alcott*, 13 Ohio State, 216. *Ruth v. Lowrey*, 10 Neb., 260.

A. G. Kingsbury, and *Fawcette & Pardoe*, for defendant in error.

MAXWELL, J.

This is an action to recover judgment against an individual partner on a judgment against the partners as a firm. A demurrer to the petition was overruled in the court below, and the plaintiff in error (defendant below) electing to stand on his demurrer, judgment was rendered in favor of the defendant in error.

It is alleged in the petition that prior to January, 1878, Joseph Leach and James A. Sawyers were a firm doing business under the name of Sawyers & Leach in Iowa and Nebraska; that said firm became indebted to the Milburn Wagon Company in a large amount, and at the January, 1878, term of the circuit court, in Woodbury county, Iowa, said company recovered a judgment against said firm for the sum of $——; that an execution was issued out of said court on said judgment, which was returned unsatisfied; "that at no time since the rendition of the judgment set out in the petition herein has there been any funds, assets, or property belonging to said firm out of which said judgment, or any part thereof, so far as plaintiff has knowledge or information, could have been made."

It is also alleged that there was due on the judgment in question the 3d day of March, 1881, the sum of $976.39 and $74.15 costs. The prayer is for judgment against the defendant below for the sum of $1058.84, and interest at ten per cent, and to subject his individual property to the payment of the same.

Sec. 24 of the code provides that: "Any company or

association of persons formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this state, and not incorporated, may sue and be sued by such usual name as such company, partnership, or association may have assumed to itself or be known by, and it shall not be necessary in such case to set forth in the process or pleading, or to prove it at the trial, the names of the persons composing such company."

Sec. 27 provides that: "If the plaintiff, in any judgment so rendered against any company or partnership, shall seek to charge the individual property of the persons composing such company or firm, it shall be lawful for him to file a bill in chancery against the several members thereof, setting forth the judgment and insufficiency of the partnership property to satisfy the same, and to have a decree for the debt, and an award of execution against all such persons, or any of them, as may appear to have been members of such company, association or firm."

The authority of a firm to sue and be sued in the firm name without specifying the individual names of the partners is given by statute, and has existed but a few years, the statute from which ours was copied substantially, being passed in 1846 (See 2 Curwen St., 1244). *Abernathy v. Latimore*, 19 Ohio, 286. The statute makes the firm a distinct entity and provides in what manner service may be had upon the firm. If a judgment is recovered against it which remains unsatisfied in whole or in part, the same proceedings may be had to subject the individual property of the partners as in an ordinary creditor's bill. This was the course pursued in the case of *Haskins v. Alcott*, 13 Ohio State.

In that case it was sought to subject the individual property of the partners to the satisfaction of a judgment against the firm. It was alleged in the petition in that case that the plaintiffs had recovered a judgment against "Haskins, Roller & Haskins" for the sum of $1675.27, which judgment was then in full force; that an execution had been is-

sued thereon, which was returned unsatisfied, and that said firm had no property out of which to collect said judgment or any part thereof. The petition also set out the names in full of the individual members of the firm, and contained a prayer for judgment against them individually.

This was what was attempted to be done in this case, but the petition fails to show that the partnership property had been exhausted. The return of an execution unsatisfied in Iowa would be sufficient to make a *prima facie* case if it was not alleged that the firm was organized for the purpose of doing business in this state. There is no allegation, claim, or pretense that the partnership property in this state had been exhausted. The allegation quoted above falls short of negativing the existence of such property. Allegations of this kind must be stated positively although they may be sworn to upon information and belief. The case therefore clearly falls within that of *Ruth v. Lowrey*, 10 Neb., 260.

It may be questioned whether an action can be brought against one member of a firm alone upon a joint obligation —that is, must not the action be in form against all the members of the firm although but a portion are served? See *Bazell v. Belden*, 31 O. S., 572–3. *Fox v. Abbott*, 12 Neb., 328. But this objection is not raised by the demurrer.

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

REVERSED AND REMANDED.

LUCIUS POST, PLAINTIFF IN ERROR, V. THE CHICAGO & NORTHWESTERN RAILROAD COMPANY, DEFENDANT IN ERROR.

1. **Railroads:** SELLING TICKETS AT REDUCED RATES. A regulation of a railroad company providing for the sale of tickets at a reduced rate upon condition that they be used only by the persons purchasing the same is reasonable and proper, and a third party cannot by purchasing such ticket acquire the right to travel on the same. A party holding such ticket who refused to pay his fare and was expelled from the cars cannot recover damages therefor.

2. ———: NON-TRANSFERABLE TICKETS. Where a non-transferable ticket contained a condition that "I, failing to comply with this agreement, either of the companies may refuse to accept this ticket," *Held*, That this did not give the conductor the right to take it up, but merely to refuse to receive it.

3. ———: ———: DAMAGES. The measure of damages in such case would not exceed the value of a ticket of the same class between the points named.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

John I. Redick and *W. J. Connell*, for plaintiff in error, cited: *Du Laurens v. St. Paul R. R.*, 15 Minn., 49. *Vankirk v. Railroad*, 76 Penn. State, 66. *Toledo & Wabash R. R. v. Wright*, 34 American Reports, 285.

E. Wakeley, for defendant in error, cited: *Bissell v. R. R. Co.*, 25 N. Y., 442. *Dietrich v. Penn. R. R. Co.*, 71 P. St., 432. *Goetz v. R. R. Co.*, 50 Mo., 472. *R. R. Co., v. Fitzgerald*, 47 Ind., 79. *Powell v. R R. Co.*, 25 Ohio St., 70.

MAXWELL, J.

On the 7th day of January, 1879, one John Tristas purchased in San Francisco a third-class ticket *via* the Central

Pacific, Union Pacific, Chicago and Northwestern, Michigan Central, Canada Southern, N. Y., L. E. and Western railroad to Boston, the price paid being the sum of $66. This ticket contained the following conditions:

"Checks to be detached by conductors only. No stop-over privileges will be given on this ticket. Baggage checked only to destination. In consideration of this ticket being sold at a reduced price from the regular, full, first-class rate, I, the undersigned, hereby agree that it not be good for passage after 'Twenty' (20) days from (and including) the date indicated by the agent's punch marks in the margin, and that I will go through to place of destination by the proper train and connecting trains; also that this ticket is not transferable and shall become 'void' if not presented for passage on the trip for which sold, and that I failing to comply with this agreement, either of the companies may refuse to accept this ticket or any coupons (checks) thereof, and demand the full regular fare, which I agree to pay. "Signature,

"JOHN TRISTAS.

"Witness,

"H. P. STANSWOOD.

"DAIGHMAN.

"F. H. GOODMAN,

"Gen'l Passr. and Ticket Ag't C. P. R. R."

The price of a first-class ticket at that time over the same route is shown to have been the sum of $140, but the proof fails to show the price of a second-class ticket, or whether unlimited transferable third-class tickets were issued or not, and if so the price of the same. Tristas seems to have gone no farther than Omaha and there transferred his ticket to one Hobbie. Within twenty days from the date of issue Hobbie sold the ticket to the plaintiff for the sum of $25, the price of a regular ticket of the same class being about $30. The plaintiff commenced his journey over the defendant road, but at Denison the conductor, in

pursuance of directions from Council Bluffs, examined the ticket and enquired of the plaintiff if his name was Tristas.

In answer to the inquiry he frankly stated his name, and that he was not the original party to whom the ticket was issued. The conductor then put the ticket in his pocket, and informed the plaintiff that he must pay fare or leave the train. The plaintiff demanded the return of his ticket, which being refused, and the conductor insisting that he should either pay fare or leave, he left the train at that point. He then returned to Omaha, and commenced this action. On the trial of the cause, the jury returned a verdict for $31.70, upon which judgment was rendered. The plaintiff brings the cause into this court by petition in error.

The errors relied upon are that the court erred in giving certain instructions, and in refusing those asked by the plaintiff.

The instructions are as follows:

1. If you find from the testimony that the ticket in question in this case was a third-class or "emigrant" ticket, which had been sold at a reduced rate to a person in San Francisco other than the plaintiff, and said ticket was by its terms not transferable, and the purchaser thereof in San Francisco, in part consideration of such sale at a reduced price, agreed that it should not be transferable, and you further find that the plaintiff purchased in Omaha from some person other than defendants or their authorized agent, and offered and attempted to use it as entitling him to passage from Omaha to Chicago on the defendant's road, and refused to pay his fare on the defendant's road and did not pay his fare, then the defendants were not under obligations to allow the plaintiff to ride upon such ticket, and upon such refusal to pay fare, had a right to require the plaintiff to leave the train, and he can recover no damages based on the fact that he was so required to leave.

2. The taking up of the plaintiff' sticket, however, wa

a wrongful act on the part of the defendants, for which they are liable to plaintiff.

3. The measure of damage to which the plaintiff is entitled for the taking of such ticket would be the value thereof, which would not exceed the price of a third-class or emigrant passage from Omaha to Boston with interest to the first day of this term.

Every railroad has a right to adopt rules and regulations for the management of its business, provided such rules are not unreasonable, are within the scope of the powers of the corporation, and are not in conflict with the laws of the state. *Elwood v. Bullock*, 6 Q. B., 383. *Navigation Co. v. Pilling*, 14 M. & W., 76. 1 Redfield on Railways, 95.

The question whether rules are reasonable or not is a mixed question of law and fact, and is to be determined by the jury under the instructions of the court. *Day v. Owens*, 5 Mich., 520. *Jencks v. Coleman*, 2 Sumn., 221. *Bass v. C. & N. W. R. R. Co.*, 36 Wis., 450. Thompson Carrier of Passengers, 335.

In *Day v. Owen* it is said the reasonableness of a rule or regulation is a mixed question of law and fact, to be found by the jury on the trial, under the instructions of the court. It may depend on a great variety of circumstances, and may not improperly be said to be in itself a fact to be adduced from other facts.

A regulation of a railroad company providing for cheaper rates of fare between certain points, provided the ticket is used alone by the person purchasing the same and within a certain number of days from the date of issue, is reasonable and proper. It gives the purchaser the benefit of lower rates, while the railroad companies being advised of what tickets have been sold and their character, are enabled without inconvenience to provide the necessary means of transportation. The contract being that the ticket was to be used alone by Tristas, no one else could acquire the right, by the assignment of the same, to be carried over

the defendant's road. The plaintiff, therefore, having no right to use the ticket in question for the purpose of being carried to Chicago, is not entitled to recover damages because he was required to leave the train.

There is no error therefore in the first instruction.

There is no error in the second instruction.

The terms of the contract are "the companies may refuse to accept this ticket," not that the company shall have the right to take it up. Although it gave no right to the plaintiff to travel on the defendant's road, still it was his, and if in his possession might be sufficient to enable him to recover the purchase money from the person selling him the ticket. But the measure of damages in such case in an action against the railroad company could not exceed the value of a third-class ticket from Omaha to Boston. The measure of damages was correctly stated in the third instruction.

The instructions asked on behalf of the plaintiff were not applicable to the testimony, and were properly refused.

The judgment must be affirmed.

JUDGMENT AFFIRMED.

MARGARET WARD, PLAINTIFF IN ERROR, V. S. DEWIT BEALS ET AL., DEFENDANTS IN ERROR.

1. **Finding:** EVIDENCE. Case examined, and the findings of the court held to be in accordance with the evidence.
2. **Attorney.** The ordinary rule governing the authority of attorneys in the collection of debts, where no special direction is given, *Held*, Inapplicable.
3. **Evidence:** LETTERS: LETTER-PRESS COPIES. Letter-press copies of letters are but secondary evidence, and are not admissible against objection without first showing the loss of the originals or giving notice to produce them.

ERROR to the district court for Lancaster county. The action was one to foreclose a mortgage given by S. D. Beals to plaintiff in 1871. The defense was in substance that Beals had paid the note, which the mortgage was given to secure, to Robinson, attorney for Joseph Ward, the husband of plaintiff, and on trial below before POUND, J., defendant had judgment.

Burr & Marshall, for plaintiff in error.

Charles O. Whedon, W. J. Lamb, and *J. H. Foxworthy,* for defendants in error.

LAKE, CH. J.

On a careful examination of this record, we are entirely satisfied with the result reached in the district court. It is perfectly clear to our minds that the mortgage debt was paid, the note canceled and returned to the maker, and the mortgage handed over by Robinson to the purchaser of the lots, with the promise that it should be released. And in making the arrangements which he did with Beals, to raise the money by taking to himself a conveyance of the lots and disposing of them as he did, there is not a particle of doubt that Robinson was fully authorized by Joseph Ward, the late husband and duly authorized agent of the plaintiff.

Although executed nominally to the plaintiff, the note and mortgage in question were given by Beals for a debt due to said Joseph Ward for building a house for him in Lincoln. The security doubtless belonged in reality to Joseph Ward, for it seems that he never handed it over to his wife, who testified that she had never seen either the note or mortgage, nor even knew "they existed," until so informed by one of her attorneys in this suit, nearly eight years after the note had been paid off and returned to Mr.

Beals, the maker. The evidence shows that Joseph Ward not only held and controlled this mortgage, but also that he placed it in the hands of Seth Robinson, then an attorney practicing at the Lincoln bar, for collection, or rather to realize the money due upon it.

That Joseph Ward was authorized to deal with the mortgage as he saw fit, is conceded. Mrs. Ward herself testified that her husband "was authorized to do any business" she had to do. If she "had any business in Lincoln, Mr. Ward would be the person to do it for me. If I had any money to receive in Lincoln, he would be the person to receive it for me. Anything he did, or promised to do, in my name, was quite right. * * * If my husband was paid the amount of this note and mortgage, it would be all right."

This mortgage was given in March, 1871, to secure a note for $464.69, due in one year, with twelve per cent interest. Very soon after the note matured, it is shown to have been in the hands of Mr. Robinson, Mr. Ward's attorney, for collection. It is shown too, by the letters of Ward to Robinson, that a speedy collection, or realization of the money by a sale of the security, was desired. Ward evidently was greatly in need of money, judging from the tone of his letters about this time. Referring to the claims in Robinson's hands, in a letter under date of July 18th, 1872, Ward says to his attorney: "Yours of the 12th on hand. I am very much in want of funds, and *you must sell.* I presume your meaning is to have interest to or near the time of sale; at all events, do for me to the best in your power." Referring particularly to the Beals mortgage, he says: "I think, however, that Mr. Beals is acting anything but as a gentleman. I did not expect this treatment from him; when I built his house it was quite contrary to my wish, and had to deprive my family of needful conveniences in order to meet payments for his house. Remit me the amount as early as possible."

Again, under date of August 1st, of the same year, in a letter to Robinson, Ward says: "It is two weeks since I wrote to you in reply to yours of July 12th. In my letter, I told you to sell the mortgage and judgment. I certainly expected the money ere this. From the contents of your letter, that the money was on hand, and would wait ten days, I took it for granted that there would be no more delay, and therefore made distinct arrangements for using the money. On Saturday evening I sent you a telegram asking *when you would send the money for the sale of mortgages?* This is the fifth day, and yet no reply either by telegram or letter. Now, friend Robinson, I want to *hear from you.* If you have sold, I want you to send me the money at your very earliest opportunity, if not already sent."

And again, under date of Sept. 11th, 1872, Ward writes to Robinson: "Your letter of August 8th states that in ten days the cash will be paid for the Butler and Beals sale, and that I may count on it in twenty days, and make my arrangements accordingly." * * * "I did expect the balance this morning. If not sent, please write me on receipt." * * * "I have made arrangements, as you instructed me, and hope I may not be disappointed."

From these letters, it is seen that Ward had been assured by Robinson that the Beals and Butler claims had been so disposed of that he could rely upon having the "money in twenty days" from the 8th of August, 1872. On the 14th of September, 1872, Ward again writes to Robinson, acknowledging the receipt of a draft from him for "$995.85, less exchange." In this letter, no allusion is made to the Beals matter, but only to "the McElheny mortgage," then in the hands of his attorney, and some notes which had, it seems, been taken on a sale of some of the claims, some of which he supposed were then "due, and the balance in November."

A very fortunate and valuable coincidence—Ward and

Robinson, the chief actors in this business, both being dead—is found between the letter of Robinson to Ward, written on the 8th of August, and the one to Beals of the same date. In the one to Ward he informs him of the sale of the mortgage, and that he could "count on" getting the money in twenty days, and in that to Beals, he says: "Pay Ward's note and mortgage to none but me, I am the holder in trust for other parties." Evidently the parties here referred to were the ones to whom he had negotiated the security, and from whom he was to obtain the money which he told Ward he could "count on" having "in twenty days."

Thus from Ward's letter above we gather abundant evidence that Robinson, in making the negotiations which resulted in the cancellation and surrender of the note to Beals, and his promise to Hartley that the mortgage should be released of record, did not go beyond the scope of his authority. Our minds are perfectly satisfied on this point, without reference to any of the copies of letters from Robinson to Ward, which is claimed were erroneously admitted in evidence. This disposes of the claim that "the findings and judgment of the court are not sustained by the evidence;" for it is not questioned that Robinson did cancel and surrender the note, and agreed that the mortgage should be released. The ordinary rule governing the authority of attorneys in the collection of debts, where no special direction is given as to the mode, evidently is inapplicable here.

Considerable time was devoted in argument to the question of whether Ward ever actually received the money from Robinson on this claim. As we view the case it is wholly immaterial whether he did or not. His attorney was authorized either to collect the amount from Beals, or to raise the money by a sale of the security. And that Robinson accounted for the proceeds is, to our minds, made clear by the fact that Ward, although writing to Robin-

son frequently, and being himself in Lincoln frequently, even as late as January, 1879, never after his letter to Robinson of September 11th, 1872, before referred to, made any allusion whatever to the Beals claim. In view of Ward's urgent appeals for money in this and his preceding letters, in which he referred particularly to the Beals mortgage, this silence respecting it can be accounted for upon no other reasonable hypothesis than that of his having realized upon it to his full satisfaction.

The letter-press copies purporting to be of letters written by Robinson to Ward ought to have been excluded. They were, as we held in *Delaney v. Erickson*, 10 Neb., 492, but secondary evidence, and could not be resorted to, against objection, without first showing the loss of the originals, or giving notice to produce them, neither of which steps was taken. However, we do not think the judgment should be reversed for this error. The only fact which the defendants relied on, not fully established without their aid, is that of the actual payment of the money realized from this claim to Ward. In the one of September 10th, inclosing the draft for the $995.85, before referred to, Robinson says to Ward: "This makes us square, the McElhinny mortgages still in my hands, but I think I shall sell soon to eastern friends, as I did the others." But, as we have said, this fact is not indispensable to the defense, which we think is fully made out by simply showing that Robinson was authorized to raise the money by a sale or negotiation of the security, and that he did so. On the whole, we discover no error calling for a reversal of the judgment, and it must be affirmed.

JUDGMENT AFFIRMED.

HIRAM P. RIDER, PLAINTIFF IN ERROR, v. THE B. & M. R. R. CO., DEFENDANT IN ERROR.

1. **Railroad grant:** RIGHT OF WAY. The grant of right of way to the Burlington & Missouri River Railroad Company over the lands of the United States, by Sec. 18 of the act of July 2d, 1864, was of a present interest, and notice from the passage of the act to all persons dealing with public lands, within the prescribed limits, of the company's interest therein.

2. ———: CHANGED LINE OF ROAD. And where after one location of its road, the railroad company changed its line pursuant to the act of congress, approved May 6, 1870, U. S. Stat. at Large, 118, *Held*, That a purchaser of land from the United States, after the passage of the act, took it subject to the right of way under the new location afterwards made.

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

J. R. Webster, for plaintiff in error.

1. The entry made by a pre-emptor, when once consummated by performance of the conditions and payment made, is equivalent to purchase at the date of such location. Therefore the title of Rider and his right to compensation is as though full payment had been made June 7th, 1870. Prior to this date defendant had made no location of its line on these lands. On the contrary it had made a location on a line passing some miles north of these lands, and on that location had obtained the defining of its grant and the withdrawal of the granted lands from market. Even as late as May 6th, 1870, congress had passed an act permitting change in the location of its line, but no actual change of its line had been made when the pre-emption entry was made, nor till after February 20th, 1871, and probably not till between the 17th and 20th of March, 1871, which is the nearest approximation to the date that

the chief engineer and superintendent Doane can give, and he is the sole witness. May 14th, 1870, the company had, besides its original fixed line, at least three new trial lines passing north and south of these lands.

2. This case is not dependent on the same principle as that of *St. Joseph & Denver R. R. v. Baldwin*, 103 U. S., p. 426. Although the U. S. supreme court in that case came to a different conclusion to that reached by this court in the same cause, 7 Neb., 247, yet the opinion and reasoning of this court have the assent of the greater portion of the bar. In that case, however, the words and terms of the grant were somewhat different. Compare 13 U. S. Stat. at Large, 364, sec. 18. 14 U. S. Stat. at Large, 211, sec. 6. Admit the identity of the terms and effect of the grant in each case, the circumstances were different. In the case decided at the time of the entry, the railway company had a floating grant of right of way between two fixed termini. It had accepted the grant, and this was some notice that it might demand a right of way over these lands on a definite location of its line. Of the same character was *Flint v. Gordon*, 41 Mich., 420. In the case at bar a definite location had been made after the acceptance of the grant. This should fairly be held to be a fixing of any floating right of location, a segregation and definition of its claims for right of way. It was in effect a release of any floating right of way location, and consent that entry or location by private parties could safely be made on this land. The act permitting change of location (May 6th, 1870) was a mere license and not obligatory on the company, nor yet conferring any right as against others purchasing from the United States till it had been by defendant accepted and acted upon. This did not occur until after the lands in question had been segregated from the mass of the public domain by Englebright's settlement and entry, when it was too late for defendant to appropriate them without compensation.

Marquett, Deweese & Hall, for defendant in error, cited: *Fitzpatrick v. Bubois*, 2 Sawyer, 434. *Frisbie v. Whitney*, 9 Wallace, 191. *The Yosemite Valley Case*, 15 Wallace, 86. *Grinter v. K. P. Ry. Co.*, 23 Kansas, 656. *Merritt v. Northern R. R. Co.*, 12 Barb., 606.

LAKE, CH. J.

The controlling principle in this case is not different from that applied by the supreme court of the United States in the case of the *St. Joseph & Denver City Railroad Co. v. Baldwin*, 103 U. S. Reports, 426. The statute giving the right of way there considered is not essentially different from the one granting the right of way here in controversy. In both statutes, words of present grant are employed to designate the right given. To the St. Joseph & Denver City company, the grant is in these words, viz.: "That the right of way through the public lands be, and the same is hereby granted to said St. Joseph & Denver City Railroad company," etc. Sec. 6, act of July 23d, 1866, 14 U. S. Statutes at Large, 211. The grant in this case is as follows: "And for the purpose of enabling said Burlington & Missouri River Railroad Company to construct that portion of their road herein authorized, the right of way through the public lands is hereby granted to said company for the construction of said road." Sec. 18, act of July 2d, 1864, 13 U. S. Statutes at Large, 364.

Being a grant of a present interest, this language is notice from the passage of the act to all persons dealing with public lands within the prescribed limits of the grantee's interest therein. In this respect the grant of the right of way differs from that donating land to aid in the construction of the road, which is expressly limited in its operation to the time when the route is definitely fixed. *Vance v. B. & M. R. R. Co.*, 12 Neb., 285.

Speaking upon this subject of right of way under the act of July 23d, 1866, in the case first above cited, Mr.

Justice Field said: "But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions, except those necessarily implied, such as that the road shall be constructed and used for the purpose designated." And again: "The uncertainty as to the ultimate location of the line of the road, is recognized throughout the act; and where any qualification is intended in the operation of the grant of lands from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists."

It is claimed, however, that the case wherein this lan guage was used differs from the one we are now considering in this, that the right of way there upheld was on the first and only line adopted by the railroad company, while here it appears that another and different location had been made as early as the 15th of June, 1865, and the right now contended for was selected in pursuance of a change therein, by which the road was made to cross the plaintiff's land. And it is urged that, although this change was authorized by act of Congress, yet it should not be held to confer any right upon the railroad company as against a purchase from the United States, prior to the definite location of the new route; that the first location should "be held to be a fixing of any floating right of location, a segregation and definition of its claims for right of way."

We cannot assent to the application of this proposition to this case. If the plaintiff had acquired the government title to the land after the first location of the road, and before the passage of the act authorizing a change, there would be great strength in the position here taken. But as we view the effect of this act, it was, from the date of its passage, to bring section eighteen of the act of July 2, 1864, above referred to, into full operation as to public lands, not

otherwise disposed of, which the new location might cross. The act authorizing this change is, "Be it enacted," etc., "that the Burlington and Missouri River Railroad Company, or its assigns in the state of Nebraska, may so far change the location of that portion of its line that lies west of the city of Lincoln, in said state, as shown by the map thereof, now on file in the general land office of the United States, so as to secure a better and more practicable route, and to connect with the Union Pacific railroad at or near the Fort Kearney reservation, said new line to be located on the land grant made by the United States to aid in its construction. *Provided, however,* that said line shall not be located farther south than the southern boundary line of township number seven, in said state, and said change shall not impair the rights to, nor change the location of said land grant, and the said company, or its assigns, shall receive no different or other or greater quantity of land than if this act had not been passed and no change had been made in the located line of said railroad."

It will be observed that there is nothing in this language evincing any intent or disposition on the part of congress to withdraw any right given by the act of July 2, 1864, which might be applicable to this new line, except that the location and extent of the land grant as already determined should not be changed.

We are of opinion that when the plaintiff's grantor, Englebright, pre-empted this land on the 7th day of June, 1870, he took it subject to the right of the defendant to locate its new line across it. And the judgment of the district court, being in conformity with this view, is affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., dissenting.

I am unable to give my assent to the opinion of the majority of the court for the following reasons:

The plaintiff is the owner of the north-east quarter of section 20, township 8, range 1 east, and the defendant's railroad runs across the same in a diagonal manner, taking a strip about 200 feet in width by more than half a mile in length, the whole amount of land taken being in excess of 12 acres. Rider acquired title as follows:

On the 14th of June, 1870, one John Englebright filed a declaratory pre-emption statement alleging settlement on the 7th of that month. He made final proof and payment for the land June 14, 1871, and received his patent March 20, 1872. On the 24th of June, 1871, Englebright conveyed the west half of the land in question by warranty deed to the plaintiff and one Clark. In September of that year Clark and wife conveyed to the plaintiff. It appears, too, that Englebright on the 24th of June, 1871, conveyed the east half of this land to one Gary, and that in August of that year Gary and wife conveyed to the plaintiff.

On the 15th of June, 1865, the defendant filed a plat locating its line of railway from Plattsmouth to Kearney, on the Union Pacific railroad, and in August, 1870, Congress passed an act authorizing a change of the line within certain limits, west of the Blue river. In pursuance of this statute the company in 1871 filed a plat of the new line which passed through the lands in question, the settlement of Englebright thereon being made before the second plat was filed.

This action is brought by the owner of the land to recover damages for the land taken and other damages to the remainder of the tract. Two questions are presented: *First.* Did the defendant, by the location of its line on the 15th of June, 1865, exhaust the power given it to locate its line on the public lands of the United States? *Second.* If it did not, can it claim the right of way over lands that had been settled and filed upon under the pre-emption law before the second location of its line, and final proof and payment thereafter made?

In the case of *Moorhead v. Little Miami R. R. Co.*, 17 Ohio, 340-353, the company had located and constructed its road under a special charter, and the question presented was its right to relocate and reconstruct its road on other and distinct grounds. The tenth section of the charter required the company to select the route as soon as practicable. The twelfth section gave authority to vary the route and change the location after the first selection had been made. *First.* Whenever a better and cheaper route could be had. *Second.* Whenever any obstacle to continue said location was found, either by difficulty of construction or procuring right of way at reasonable cost. Under these latter provisions the company claimed the right to condemn the complainant's property. The court say, page 350–1. "These grants of power are in derogation of private right, and would be totally void, but for the provisions of the constitution, which make private rights subservient to the public welfare. Admitting that the interests of the public were such as to warrant this extensive delegation of the right of sovereignty, or right of eminent domain, and it is quite certain that the power should be clearly expressed, or necessarily and clearly implied from what is clearly expressed in the grant.

"In such case the rule of construction should be strict. No state can ever be presumed to have parted with a portion of its sovereignty even to her own citizens, without a grant affirmatively made. And no statute derogatory of private right should gain anything by forced construction. The general rule requiring grants of this nature to be strictly construed is in our opinion the only safe one, and it should be adhered to with unyielding tenacity." * * * * * "That statutes of this nature should be strictly construed, is a position abundantly sustained by the cases cited by complainant's counsel.

"This case stands thus: The corporators had the power to locate and construct a railroad. They could exercise this

right but once without a further grant. To accomplish this object a most important attribute of sovereignty was bestowed upon them by the legislature—the extraordinary reserved power of subjecting the property of private individuals to a public use. If it was intended that this should be a continuing power, one that might be exercised, and re-exercised again and again, as often as might suit the convenience of the company, the legislature should have so declared in express terms."

In the case of *Little Miami R. R. Co. v. Naylor* 2 Ohio State, 236, this decision was affirmed. See also *Pakemore v. Glamorganshire Canal Co.*, 1 My. & K., 154. *Canal Co. v. Blakemore*, 1 Cl. & Fin., 262. *State v. Turnpike Co.*, 10 Conn., 157. *Turnpike Co. v. Hosmer*, 12 Id., 364. *L. & N. Turnpike Co. v. N. R. Turnpike Co.*, 2 Swan, 282. 1 Redfield on Railways, 410.

If these cases state the law correctly, of which there is no doubt, then the defendant by the location of its line over the public lands exhausted its power in that regard, unless there is some provision in the act of 1870 continuing the grant of the right of way on the new line, and an examination of that act will show that while the land grant is preserved there is nothing said about the right of way. The right of way over the new line was not therefore granted to the defendant. But suppose it was, still the plaintiff is entitled to recover. Suppose Congress should pass an act granting the right of way to a railway company across the public lands—a grant *in presenti*, but there is no provision in the act for withdrawing such lands from market or selling them subject to the grant, is not a purchaser from the United States, without notice, entitled to protection? It will be said that the statute is notice of the grant, and that is sufficient; but that the statute is not notice is evident, because until the line is located it is a mere possibility. But before this grant was made Congress had passed general laws, granting to persons possessing certain qualifications portions of the public

lands not exceeding 160 acres to each person, the grant being made upon certain conditions, such as settlement, residence, etc. Here is a continuing offer to settlers on the part of the United States to settle on the public domain, and the proposition when accepted becomes a contract between the individual and the government, that if he comply with the terms of the statute he shall in due time receive a patent for the land claimed. A grant of right of way rests upon the same ground, and is a mere proposition in the first instance to give the right of way if the company will build its road thereon. If the company should fail the grant would lapse. It seems to me therefore that until the company located its second line it could not claim the right of way across lands which prior to that time had been entered as a homestead or settled upon under the pre-emption law. The language of sec. 2257 of the Revised Statutes of the United States is, that "all lands belonging to the United States to which the Indian title has been, or may hereafter be extinguished, *shall be subject to the right of pre-emption* under the conditions, restrictions, and stipulations provided by law." The lands excepted are: *First.* Those included in a reservation. *Second.* Lands within the limits of a town or selected as a town site. *Third.* Lands actually settled upon and occupied for purposes of trade and not for agriculture. *Fourth.* Lands on which are any known saline or mines.

This land was not within the exceptions, and being claimed as a pre-emption, was not government land. By the term "government land," I understand is meant land which is subject to disposition by the government. Suppose a grant of land is made to a railroad company to be conveyed to it in certain quantities upon the completion and acceptance of certain sections of the road, and that after the acceptance of the grant and the company's rights had vested, but before the acceptance of any portion of the road, Congress should pass another act granting the land

to another company, will it be contended that Congress in such case possessed such power? The rights of the company would have attached and the courts would see that they were enforced. Wherein does the case of a pre-emptor, who has settled on public land in good faith and filed his declaratory statement, differ from that of the railroad company? The case is well illustrated in that of *Koenig v. The O. & N. W. R. R. Co.*, 3 Neb., 373, where it was held that when the right to property is vested by grant for a particular purpose by legislative authority, the legislature cannot vest it for another. See also *McGee v. Matthias*, 4 Wall., 155. Are not the rights granted to a pre-emptor entitled to the same protection? Besides, the right of pre-emption can be exercised but once by an individual. He settles upon and enters 160 acres of land, intending to make his home thereon. In entering the land he pays the full price per acre for the entire tract, and receives a patent therefor. Afterwards a railroad is located across the land under an act of Congress granting the right of way, which act was passed before he entered the land, and under which the right of way is claimed across his land without compensation. If the right of way can be taken in this manner it is not the government that is granting it, but it is taken from the individual who is the owner of the entire tract.

In the case at bar the entire tract was entered and paid for, and if the defendant is not required to pay the damages the *citizen* and not the *government* must bear the loss. To me this seems like rank injustice, and I cannot give my assent to such a construction of the law. From the necessity of the case a railroad company is permitted to choose the most available route for its line of road, and the rights of individuals are so far subservient to the public welfare that any real estate necessary for right of way may be appropriated to its use, compensation being made therefor, but the courts by no strained construction of the language of a statute should deprive the owner of that which is justly his due.

THE REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR, V. HIRAM BOYSE ET AL., DEFENDANTS IN ERROR.

1. **Verdict:** EVIDENCE. Evidence examined and found sufficient to support the verdict.
2. **Error:** EXCEPTION. In order to lay the foundation for reviewing a ruling of the trial court on the admission of evidence, an exception is necessary.
3. **Affidavits.** It is only where affidavits are not otherwise a part of the record that their incorporation in a bill of exceptions is required.
4. **Juror:** PREJUDICE. When the conduct or appearance of a juror during the trial is relied on to show prejudice, its effect must necessarily be left almost exclusively to the judgment of the presiding judge.

ERROR to the district court for Harlan county, where the cause had been brought on appeal from award of commissioners of damage occasioned by the taking of right of way for plaintiff's railroad over defendant's premises. Tried below before GASLIN, J.

Marquett & Deweese, for plaintiff in error.

Lamb, Billingsley & Lambertson, for defendant in error.

LAKE, CH. J.

The errors complained of may all be considered under three heads:

First. That the verdict is not sustained by the evidence.

Second. Rulings of the judge on admission of evidence.

Third. Prejudice of one of the jurors.

On the first point, but little need be said. The testimony took a very wide range on the question of damages, and some of it, doubtless, might have been excluded if it had been objected to at the proper time. But, having been

given to the jury without objection, the question of its admissibility will not be considered on proceedings in error. On the question of damages, the testimony of the different witnesses, singularly enough, ranged from nothing at all to ten thousand dollars. The verdict returned by the jury was eighteen hundred and twenty-nine dollars, which, taking the interest into the estimate, was really less than the damages found by the commissioners appointed at the instance of the railroad company, their estimate being just eighteen hundred dollars. We are of opinion that even if the finding of the jury had been for a considerably larger amount, or even a much smaller, the evidence would have supported it. In considering this question of damages, the fact should not be overlooked that the lower estimates, those made by witnesses called by the railroad company, were based upon, and necessitated a removal of the mill from the place where it stood on the river bank across the railroad track, some two hundred feet distant, and a connection with the water power by means of shafting or an iron cable, while those of the other side were made in view of letting the mill remain where it then stood. We suppose the latter estimate was made upon the true basis; for it was the right of the defendants to operate their mill where they had placed it before the road was located, and the damages might have been estimated with the view of it remaining there.

Under the second head of errors, we find it claimed that the court erred in not excluding the testimony of Dennis Dean. This witness, who showed himself an expert in the matter of mills and the milling business, was permitted to testify in chief, at considerable length, without a solitary objection being interposed. He was then thoroughly cross-examined, after which it was moved "to strike out" his testimony, "for the reason that the same is incompetent, in that the damages estimated by the witness are consequential and remote." In view of the course of the examina-

tion of this witness and what he had said, this motion came too late, and included too much. Although portions of his testimony were objectionable, some of it at least was not. Besides, to the ruling of the court on the motion no exception was taken, from which we must now consider that it was satisfactory.

The only remaining ground upon which a reversal is asked is the alleged prejudice of a juror. This it is claimed is shown by certain affidavits presented to the trial judge. For the defendants in error, it is contended that these affidavits cannot now be considered, because they were not made a part of the record by a bill of exceptions. These affidavits, however, needed no bill of exceptions to make them a part of the record. They were made such by having been attached to and made part of the motion for a new trial. It is only where they are not otherwise properly a part of the record that a bill of exceptions is requisite to make them so. *Aultman v. Howe*, 10 Neb., 8.

These affidavits show simply that, after the jury had been charged and were about to retire to consider of their verdict, one of their number, Jabez Cobledick, addressing the judge, said: "I want to ask a question—Are we assured that the railroad company will allow this power to be transmitted across their track?" In view of the theory of the case, as taken by the railroad company, which required a removal of the mill from its present site, although not within the right of way, and the transmission of power across the track by means of a shaft or cable, this was a pertinent inquiry, and should have received a civil and intelligible answer. Thus far during the trial, it seems to have been taken for granted that no impediment would or could be interposed by the railroad company to this mode of conveying power from the stream to the mill, at the place where it was suggested it might be moved, and it was not at all remarkable or unreasonable that the question put by this juror was suggested to his mind, or that he desired

light upon it. Instead of light, however, he received for answer, simply, "I have given you your instructions." Upon which, as the affidavits show, "Cobledick, speaking excitedly and with apparent anger: 'Well, I want to know? When I was in Illinois, the railroad cut across my land, and cut me off from my warehouse, and I never could get across to it. I never got a cent for it.'" This rejoinder was but the statement of a fact, occurring between himself and another railroad company, as an illustration, merely, of the possible predicament in which the defendants in error might be left in case of the removal of their mill to the site suggested across the track. It was his reason for asking the question—a view of the case which might incline him to give damages commensurate with the loss occasioned by the mill remaining where it then stood.

But it is said that the juror spoke "with apparent anger." Toward whom did he so speak? Certainly not the plaintiff in error. His words were addressed to the judge, and indicate anger toward his honor, for the rebuff he had given, rather than any one else. Besides, there is nothing in the verdict, considered in the light of the evidence, to indicate that it was at all influenced by hostility or prejudice against the railroad company. When the conduct or appearance of jurors, during a trial, is relied on to show prejudice, its effect must necessarily be left almost exclusively to the judgment of the presiding judge. He is in a far better situation to know what it indicated than we are. On the whole, we discover no ground for a new trial.

JUDGMENT AFFIRMED.

PETER WILCH, PLAINTIFF IN ERROR, V. G. W. PHELPS ET AL., DEFENDANTS IN ERROR.

Patent rights: SALE OF. The act of February 18th, 1873, entitled, "An act to regulate the sale of patent rights in the State of Nebraska, and prevent frauds connected therewith," is in conflict with the constitution of the United States, and void.

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

J. W. Brown and *N. H. Bell*, for plaintiff in error, cited: *Cranson v. Smith*, 37 Mich., 309. *Helm v. First National Bank*, 43 Ind., 167. *Crittenden v. White*, 23 Minn., 24. *Hollida v. Hunt*, 70 Ill., 109. Note to last case, 22 Am. Reports, 67. *Grover & Baker Sew. Mach. Co. v. Butler*, 53 Ind., 454. *Walter A. Wood Mowing Machine Co. v. Caldwell*, 54 Ind., 270. *Gilman v. Philadelphia*, 3 Wall., 713. *Ex parte Robinson*, 2 Bissell, 309. *McCulloch v. State of Md.*, 4 Wheat., 426. *Gibbons v. Ogden*, 9 Id., 1. *Brown v. Maryland*, 12 Id., 419. *Sinnot v. Davenport*, 22 How., 227. *Ward v. Maryland*, 12 Wall., 418. *Woodruff v. Parham*, 8 Id., 130.

C. J. Phelps, for defendant in error.

The right to use the thing patented in defiance of a state law for police regulation is not secured. *Jordan v. Overseer*, 4 Ohio, 295. *Vanire v. Paine*, 1 Har., 65. *Patterson v. Kentucky*, 7 Otto, 501. See Cooley Const. Lim., 713–716, as to "police regulation." The right to "make," "use," "vend" being one thing, inseparable, and the fact that the Supreme Court of the U. S. has recognized and sustained the right of a state to even prohibit the "use" within its limits, it must by fair implication follow that a right to regulate the manufacture, use, or sale exists in the

state. *Gibbons v. Ogden*, 9 Wheat., 210. *Haskell v. Jones*, 86 Penn. State, 173.

LAKE, CH. J.

The action in the court below was brought to foreclose a mortgage executed to secure the payment of a promissory note given in the purchase of a patent right, "that is to say an exclusive right to use in said Colfax county a brick machine of a certain make, known as 'Kennedy's patent' brick machine, claimed by the plaintiff to be patented."

The petition is in the common form, and states a good cause of action. The question to be decided was raised by the demurrer to the first count of the answer. This count, after stating the consideration of the note as above given, avers, substantially, "that prior to the time of said transaction and the execution of said note," the plaintiff had not in any particular complied with the requisites of sec. 2, Ch. 66, Comp. Stat., 371. This section provides particularly what steps must be taken by the vendor of a patent right, in order to make a valid sale. It requires that every person "desiring or intending to sell or barter any patent right, or any right which such person shall claim to be a patent right," * * "before offering to sell or barter the same in any county within this state," to submit "the letters patent or a duly authenticated copy thereof, and his authority to sell or barter the right so patented," to the county judge of such county, for his examination. Also to make "affidavit before such judge, stating the name, age, place of residence, and former occupation of the applicant," etc.; "and if such judge be satisfied that the right so entitled to be sold, or bartered, has been duly patented, and that the letters patent have not expired, or been revoked or annulled," etc., then the judge shall record "such affidavit, the date of such letters patent, to whom the same were issued, and the designation or name of such

patent right given therein, with the number thereof, in a book to be kept in his office," etc.

Sec. 1 of this chapter makes it "unlawful for any person to sell or barter, or offer to sell or barter, in any county within this state, any patent right, or any right claimed by such person to be a patent right," without having first complied with the requirements of section two.

Sec. 4 provides that: "Any person who may take any note, or other obligation in writing, for which any patent right shall form the whole, or any part of the consideration, shall, at the time of the writing thereof, insert therein, in the body of the instrument, and above the signature thereof, in prominent and legible writing, or print, the words, given for a patent right, and all such obligations or promises, if transferred, shall be subject to all defense, as if owned by the original promisee."

And sec. 5 declares, that: "Any person who shall sell or barter within this state, or who shall take any note, or other obligation, or promise in writing, for which any patent right shall form the whole or any part of the consideration, without complying with the requirements of this act," * * "shall be deemed guilty of a criminal offense, and on conviction," * * "shall pay a fine of not more than five hundred dollars, or be imprisoned in the jail of the proper county not more than six months, or both, at the discretion of the court," etc.

On the part of the plaintiff it is claimed in support of his demurrer, that the statute in question is in conflict with the constitution and laws of the United States, and therefore his non-compliance with its requirements is of no consequence, and cannot bar the recovery on the contract of purchase. Numerous authorities are cited in support of this position, and we think it is well taken.

The eighth clause of sec. 8, Art. 1, of the constitution of the United States, gives to congress sole authority, "to promote the progress of science and useful arts, by securing,

for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

From an examination of the authorities, it seems to have been quite uniformly held, not only by the courts of the United States, but by those of the several states as well, that this provision has the effect of prohibiting the enactment of state statutes, affecting injuriously the assignment or transfer of rights secured by letters patent, or the sale of patented articles.

That the interest or privilege given and secured to a patentee by letters patent is a property right admits of no doubt. Being a property right, the patentee is protected in its enjoyment by the paramount law. *McClurg v. Kingsland*, 1 How., 206. And this right, as is said by Chief Justice Taney, in *Gayler v. Wilder*, 10 How., 494, is that of "making, using, and vending to others to be used, the improvement he has invented, and for which the patent is granted."

And Mr. Justice Davis, in *Ex parte Robinson*, 2 Biss., 309, in speaking of this right in connection with a statute of Indiana similar to the one we are now considering, used this terse and emphatic language: "The property in inventions exists by virtue of the law of congress, and no state has the right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of congress on the subject, he has the right to go into the open market anywhere within the United States, and sell his property. If this were not so, it is easy to see that a state could interpose terms which would result in a prohibition of the sales of this species of property within its borders, and in this way nullify the laws of congress which regulate its transfer, and destroy the power conferred upon congress by the constitution." Substantially the same views are taken of this right in numerous other cases, of which we cite: *Cranson v. Smith*, 37 Mich., 309. *Helm v. First National Bank*, 43 Ind., 167. *Hallida v.*

Hunt, 70 Ill., 109. 22 Am. Reports, 63. *Hascall v. Whitman*, 19 Me., 102.

It will be noticed that the question of the power of a state to regulate sales of manufactured patented articles, which is found in some of the cases, is not raised here, but only that of the right of property in the patent itself. As to the manufacture and sale of patented articles, state regulation has frequently been upheld as a proper exercise of police power.

Thus in *Livingston v. Van Ingen*, 9 Johns., 582, Chancellor Kent said: "The power granted to congress goes no further than to secure to the author or inventor a right of property, which, like every other species of property, must be used and enjoyed within each state according to the laws of such state." * * * "If the author's book or print contains matter injurious to public morals or peace, or if the inventor's machine or other production will have a pernicious effect upon the public health or safety, no doubt a competent authority remains with the state to restrain the use of the patent right."

And in *Patterson v. The Commonwealth*, 11 Bush., 311, (21 Am. Repts., 220), Pryor, J., in speaking upon this subject, used this language: "There is a manifest distinction between the right of property in the patent, which carries with it the power on the part of the patentee to assign it, and the right to sell the property resulting from the invention or patent. A state has no power to say through its legislature that the patentee shall not sell his patent, or that its use shall be common to all of its citizens, for this would be in direct conflict with the law of congress. * * * The discovery or invention is made property by reason of the patent, and this right of property the patentee can dispose of under the law of congress, and no state legislature can deprive him of this right; but when the fruits of the invention, or the article made by reason of the application of the principle discovered is at-

tempted to be sold or used within the jurisdiction of the state, it is subject to its laws like other property; and such has been the uniform decision of all the courts, state and federal, upon this question."

Tested by the rule of these decisions, we must hold the statute in question is unconstitutional, and that the demurrer should have been sustained. The judgment will therefore be reversed, the demurrer sustained, and the cause remanded to the district court for a new trial.

REVERSED AND REMANDED.

DAVID T. PHILIPS, PLAINTIFF IN ERROR, V. JOSEPH SPOTTS AND OTHERS, DEFENDANTS IN ERROR.

Jurisdiction. Writs and processes of the courts may be divided into two classes: 1. Those which point out specifically the property or thing to be seized. 2. Those which command the officer to make or levy certain sums of money out of property named. In the first class the officer has no discretion, but must do precisely what he is commanded. Therefore, if the court had jurisdiction to issue the writ, it is a protection to the officer in all courts. *Buck v. Colbath*, 3 Wallace R., 334.

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

Hurd & Matters and *John D. Hayes*, for plaintiff in error, cited: *State v. Jennings*, 4 Ohio State, 418. *Chapman v. Weimer*, Id., 481. *People v. Schuyler*, 4 Conn., 173. *Archer v. Noble*, 3 Greenleaf, 418. 1 Parsons Contracts, 520. 2 Id., 773. *Tootle v. Dunn*, 6 Neb., 99. 2 Hilliard on Torts, 143.

Bagley & Bemis, for defendants in error.

COBB, J.

One Hargreaves sued out a writ of replevin from before a justice of the peace in an action against one Frank Philips. The writ was in the usual form, and commanded the sheriff or any constable of the county to immediately seize and take the property, by description, to-wit: 50 bbls. apples, 35 lbs. cheese, 1 box cream crackers, 1 bbl. ginger snaps, 1 bbl. soda crackers, and 2 boxes butter crackers, "wherever they may be found in said county," etc.

This writ was placed in the hands of Joseph Spotts, the principal defendant in error herein, who was a constable of said county, for service. Spotts thereupon seized the goods therein described and delivered them to the plaintiff in said writ of replevin, taking the usual replevin bond therefor. D. T. Philips, claiming to have purchased the said goods from Frank Philips, brought this action in the court below, against the constable and the other defendants, who were his securities on his official bond, for the value of the goods. The jury found for the defendants. There is no question raised either upon the pleadings, admission or rejection of testimony, or upon the instructions, but only upon the denial by the court of a new trial on the ground that the verdict was not sustained by the evidence.

The question presented by the pleadings and evidence is, whether an action will lie against a constable and his sureties on his official bond for the taking of goods on a writ of replevin, regular and fair on its face, by one not a party to the replevin suit, who claims to be the owner of the goods replevied.

Our statute, sec. 1035 of the civil code, provides for the issuing of a writ of replevin by a justice of the peace upon the filing of an affidavit setting up certain facts therein prescribed, that such summons shall be as in other cases, "but in addition commanding the officer immediately to seize and take into custody, wherever found in the county, the goods and chattels mentioned in the affidavit," etc.

Sec. 1036 provides that: "The constable or sheriff shall execute the writ by taking the property therein mentioned; he shall also deliver a copy of the summons to the person charged with the unlawful detention of the property," etc.

We think that it may be laid down as a rule of almost universal application that legal process issued by a court of competent jurisdiction will protect an officer while acting within the letter and spirit of its command. Lord C. J. Kenyon in *Belk v. Broadbent*, 3 Term R., 183, used the following language: "But it is incomprehensible to say that a person shall be considered as a trespasser who acts under the process of the court."

In levying an execution or fi fa or an attachment, where the command is to levy the same of the property of A. B., defendant, if the sheriff levy the same of the property of C. D., a stranger, it is a breach of official duty as well as an invasion of private right, and the sheriff and his sureties will be liable on his official bond at the suit of C. D., because the taking of the property of C. D. was not within the command of the writ. Such cannot be the case in the service of a writ of replevin. In the latter case the command is, to seize and take certain property therein specifically described. The name of the owner is never mentioned, unless as a matter of description, and if the sheriff by virtue of such writ seize the identical property intended and described by the writ, and make such disposition of it as the law requires, the writ will protect him, although it may turn out that a stranger is the real owner of the property.

Mr. Crocker, in his work on sheriffs, etc., states the rule as follows: "Sec. 285. If the process is issued by a court or officer of competent jurisdiction, and is not void for any reason, it will be the duty of the sheriff to execute it according to the command thereof, although such process may have defects upon its face which render it voidable. * * * He is answerable alone, in such case, for the manner in which he executes it."

The case of *Watson v. Watson*, 9 Conn., 14, is quite in point. We quote from the opinion of the court by C. J. HOSMER: "It was said in the argument of this case, that no difference exists as to the proceedings of an officer, if the plaintiff has no property in the goods to be replevied, between the taking of property on a replevin and the taking of the goods of A upon a process commanding him to take the goods of B; that the caption in both cases is equally a trespass. No remark can be more unfounded, for the difference is immense and distinctly marked. *In case of the replevin the officer does what by legal authority he is commanded to do; and in the other case he does what he was not commanded to do.* In replevin the property is identified and described, and the command is, *take this specific property.* In the case of a process commanding the taking of the goods of A., without any identification or description, the command is, *take the goods of A, if any such there are, but not the goods of any other person.* From the nature of the case last put the officer must act on his own enquiry, and is bound to all the responsibility of his action. * * * "

In the case of *Buck v. Colbath*, 3 Wallace, 334, it became necessary for the supreme court of the United States to pass upon the question here involved. We quote somewhat at length from the opinion by Mr. Justice Miller, as well for its high authority as for its clear statement and satisfactory reasoning:

"How far the courts are bound to interfere for the protection of their own officers, is a question not discussed in the case of *Freeman v. Howe*, but which demands a passing notice here. In its consideration, however, we are reminded at the outset that property may be seized by an officer of the court under a variety of writs, orders, or processes of the court. For our present purpose, these may be divided into two classes:

"1. Those in which the process or order of the court

describes the property to be seized, and which contain a direct command to the officer to take possession of that particular property. Of this class are the writ of replevin at common law, orders of sequestration in chancery, and nearly all the processes of the admiralty courts, by which the *res* is brought before it for its action.

"2. Those in which the officer is directed to levy the process upon property of one of the parties to the litigation sufficient to satisfy the demand against him, without describing any specific property to be thus taken. Of this class are the writ of attachment or other mesne process by which property is seized before judgment to answer to such judgment when rendered, and the final process of execution elegit, or other writ by which an ordinary judgment is carried into effect.

"It is obvious, on a moment's consideration, that the claim of the officer executing these writs to the protection of the courts from which they issue stands upon very different grounds in the two classes of process just described. In the first class he has no discretion to use, no judgment to exercise, no duty to perform but to seize the property described. It follows from this, as a rule of law of universal application, that if the court issuing the process had jurisdiction in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and that, in the execution of such process, he kept himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts."

Counsel for plaintiff in error cites *State v. Jennings*, 4 Ohio State, 418, which is an authority directly in point on his side. This court has almost always followed the supreme court of Ohio (that being the state whose laws and system of jurisprudence have been more closely followed by us than any other) when cited to a case in point. But notwithstanding our high respect for that court, and particu-

larly for the distinguished judge who delivered the opinion in the case referred to, we cannot follow it to the conclusion therein reached. The case fails to draw any distinction between the variety of writs, orders, or processes of the courts as classified and clearly defined by Mr. Justice Miller as above quoted. The cases cited by Chief Justice Thurman, in *State v. Jennings*, as well as those cited by counsel, without an exception come within Mr. Justice Miller's second class, and are as we think inapplicable to a case growing out of the service of a writ of replevin, such as that court was then considering, and such as the case at bar.

The judgment of the district court being in accord with the views herein expressed is affirmed.

JUDGMENT AFFIRMED.

THE BOARD OF COUNTY COMMISSIONERS OF SEWARD COUNTY, PLAINTIFF IN ERROR, V. JOHN CATTLE, SR., AND CHARLES W. BARCLAY, PARTNERS, ETC., AS THE STATE BANK OF NEBRASKA, DEFENDANTS IN ERROR.

Taxes: UNINCORPORATED BANKS. The bank made the following report to the assessor for assessment for the year 1881:

Assessor for G. Precinct, Seward county, Nebraska.

NAME AND LOCATION OF BANK OR FIRM.

Name, State Bank of Nebraska. Location, Seward, Neb.

	VALUE.
1. The amount of property on hand or in transit.....	$ 8,356 12
2. The amount of funds in the hands of other banks, bankers, brokers, or others, subject to draft.....	15,962 46
3. The amount of checks or other cash items, the amount thereof not being included in either of the preceding items.....	267 32
4. The amount of bills receivable, discounted, or purchased, and other credits due or to become due.	

including accounts receivable, and interest accrued but not due, and interest due and unpaid... 4,486 32

5. The amount of bonds and stocks of every kind, State and county warrants, and other municipal securities, and shares of capital stock of joint stock of other companies or corporations, held as an investment, or any way representing assets.... 000 00

6. All other property appertaining to said business other than real estate (which real estate shall be listed and assessed as other real estate is listed and assessed under this chapter)..... 000 00

7. The amount of deposits made with them by other parties..... 29,022 22

8. The amount of all accounts payable, other than current deposit funds..... 000 00

9. The amount of bonds and other securities exempt by law from taxation, specifying the amount and kind of each, the same being included in the preceding fifth item..... 000 00

The board of equalization thereupon fixed the amount, for which said unincorporated bank was assessable and taxable for said year, at $24,585.90. *Held*, Correct, and the action of said board sustained.

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

D. C. McKillip, for plaintiff in error, cited: *State v. Keim*, 8 Neb., 67. *Bank v. Gandy*, 11 Neb., 434. *Ellis v. Link*, 3 Ohio State, 72. *Jones v. Seward Co.*, 10 Neb., 161.

George W. Lowley, for defendant in error.

COBB, J.

Pursuant to the requirement of law and the notice of the precinct assessor, the State Bank of Nebraska, an unincorporated private bank, located at Seward, in Seward county, and of which the defendants in error are the owners, made out and furnished to the assessor a sworn statement, of which the following is a copy:

Assessor for G. Precinct, Seward county, Nebraska.

NAME AND LOCATION OF BANK OR FIRM.

Name, State Bank of Nebraska. Location, Seward, Neb.

	VALUE.
1. The amount of property on hand or in transit	$ 8,356 12
2. The amount of funds in the hands of other banks, bankers, brokers, or others, subject to draft	15,962 46
3. The amount of checks or other cash items, the amount thereof not being included in either of the preceding items	267 32
4. The amount of bills receivable, discounted, or purchased, and other credits due or to become due, including accounts receivable, and interest accrued but not due, and interest due and unpaid	4,436 32
5. The amount of bonds and stock of every kind, State and county warrants, and other municipal securities, and shares of capital stock of joint stock of other companies or corporations, held as an investment, or any way representing assets	000 00
6. All other property appertaining to said business other than real estate (which real estate shall be listed and assessed as other real estate is listed and assessed under this chapter)	000 00
7. The amount of deposits made with them by other parties	29,022 22
8. The amount of all accounts payable, other than current deposit funds	000 00
9. The amount of bonds and other securities exempt by law from taxation, specifying the amount and kind of each, the same being included in the preceding fifth item	000 00

SUMMARY.

Amount of first item	$ 8,356 12	
Amount of second item	15,962 46	
Amount of third	267 32	
Aggregate carried to last column as "moneys"		$24,585 90
Amount of sixth item carried to last column		000 00
Amount of fourth item	4,436 32	
Deduct amount of seventh item $29,022 22		
Deduct amount of eighth item 000 00		
Remainder carried to last column as "credits"		000 00
Amount of fifth item	000 00	
Deduct amount of ninth item	000 00	
Remainder carried to last column as "bonds or stocks"		000 00
Total assessed valuation		$ 000 00

I, C. W. Barkley, cashier, do solemnly swear or affirm that I have listed above or within all the personal property, money, and credits, subject by law to taxation and required by law to be listed by me for Bank (not incorporated), Banker, Broker, or Stock-Jobber, according to the best of my knowledge.

Subscribed in my presence and sworn to before me this 28th day of May, 1881.

WM. IMLAY,

Assessor for G, Seward county, Nebraska.

The same was received by the assessor, and the sum of $29,022.22 was put down to and assessed as the valuation of said bank, for the purpose of taxation for said year 1881. Afterwards, and while the county commissioners of said county were in session as a board of equalization,

there was presented to said board a petition, as follows, to-wit: "To the board of equalization of Seward county, Nebraska: Petition, John Cattle, Sr. and Chas. W. Barkley now come and petition the board of equalization to correct the assessment of the State Bank of Nebraska. Seward, of which he is the sole owner except that Chas. W. Barkley is the owner of the undivided one-sixth part of said bank; on the 25th day of May, 1881, for the following reasons, to-wit: That the first three items of said list is the money of depositors, as well as the fourth item, bills receivable, in which their money was invested, said bank having no capital, moneys, or other property, except what was invested in the bank building. That the assessment list of said bank shows the first three items of said list as it were the money and property of the bank, when in truth and in fact it was the money and property of depositors—a copy of said assessment list is made a part of the affidavit of John Cattle, Sr., which, together with the affidavits of Chas. W. Barkley, the cashier, and Carl A. Bemis, the bookkeeper of said State Bank of Nebraska, is made part of this petition, and marked A B & C. Petitioner avers that said list as made out—the money of depositors is counted twice, and the said list was made in the manner it was through a mistaken belief as to the requirements of the blank list requiring him to show where the depositors' money was, and how invested, wherefore he asks that the first three lines of said list be stricken out, and the first three lines of the summary be stricken out and then said assessment list will be correct," etc.

A time was set for a hearing in said matter, and upon a full hearing the board of equalization made the following order as a final decision thereof. After reciting the proceedings and evidence, "And on a review of the proceedings as appears to be just, it is ordered that the petition of the State Bank of Nebraska be and the same is hereby overruled, and it is further ordered that the said assess-

ment be, and the same is hereby corrected, so that the amount included in the 7th and 8th items in said return be deducted from the amount of the 4th item, and that the amount of said return of said Bank in the 1st, 2d, and 3rd items be returned as the assessed valuation of said State Bank of Nebraska, to-wit, the sum of $24.585.90."

The cause was then taken to the district court on error by the said John Cattle, Sr., and Charles W. Barkley, where, upon the final hearing thereof, the said district court entered its judgment therein, whereby the said order, decision, and proceedings of the board of equalization herein were reversed, whereupon the said cause was by the said board of county commissioners brought to this court on error.

It does not seem to me that section 30, of article 1, of chapter 77, Compiled Statutes, providing for the listing of the property of bankers, etc., is open to the charge of being vague or of doubtful meaning. The defendants in error understood it, for they made their return in strict accordance with its provisions. Nor is it at all inconsistent with the provisions of law applicable to individuals not bankers. Nor is it inconsistent with the provisions in relation to taxation of national and state banks.

When the owner of money makes a general deposit of it in a bank, it ceases to be his money, and instantly becomes the money of the bank, and he becomes the creditor of the bank to that amount. He is not required to give this in to the assessor as money, but as a credit, and if he is also indebted, he may deduct the amount of such debt therefrom. But if he keeps the money on hand, he must give it in to the assessor as money and cannot deduct anything therefrom on account of what he may be owing to others. In framing the provisions of law for the taxation of unincorporated banks, bankers, brokers, and stock jobbers, it was for manifest reasons deemed necessary to treat their funds, placed in the hands of their correspondents for the

purpose of making exchange, as still their money, and not as a deposit, and this is the only distinction made in the law between such banks and private tax-payers. They are allowed to deduct the amount of their *bona fide* debts for money deposited, as well as the amount of all accounts payable, other than current deposit funds, from the amount of bills receivable, etc., but not from the amount of money either on hand, in transit, or in the hands of correspondents.

The shares of stock of state and national banks represent their capital, as well as the deposits, bills receivable, and other property of the bank, with certain exceptions, and are taxed at their market value.

With due respect to the evidence in the case, to the effect that the defendants in error reported the three first items of their return by mistake, we think that they made exactly the report which the law required, and in a proper case would compel them to make, and which is plainly indicated by both the letter and the spirit of the statute.

The judgment of the district court is reversed and the proceedings and order of the board of county commissioners sitting as a board of equalization, are reinstated and affirmed.

JUDGMENT ACCORDINGLY.

JOHN B. HUFF, PLAINTIFF IN ERROR, V. WILLIAM M. BABBOTT, DEFENDANT IN ERROR.

Trial before Justice. In an action by attachment before a justice of the peace the trial was commenced on the 28th of Sept., 1881, at one o'clock P.M., a jury being waived. Upon the conclusion of the trial the justice took the case under advisement until the following morning at 8:30 o'clock. *Held*, That the judgment was rendered "immediately" within the meaning of the statute.

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

Watson & Wodehouse, for plaintiff in error.

C. W. Seymour, for defendant in error.

MAXWELL, J.

This action was commenced before a justice of the peace by attachment. The trial commenced on the 28th day of September, 1881, at one o'clock P.M., a jury being waived. The case was tried before the justice. It does not appear at what time the trial was concluded, but it is stated in the transcript that "after the argument and before the case was decided the defendant asked to withdraw his said counterclaim, permission granted, and defendant withdrew his counterclaim. The court took the case under advisement to the 29th day of September, 1881, at 8:30 o'clock sharp."

At the time to which the adjournment was had judgment was rendered in favor of the plaintiff in the justice court (plaintiff in error) for the sum of $64.83 and costs. The case was taken on error to the district court by Babbott, where the judgment was reversed.

The only objection in this court is that the court erred in reversing the judgment of the justice.

Sec. 1002 of the code provides that: "Upon a verdict, the justice must immediately render judgment accordingly. When the trial is by justice, judgment must be entered immediately after the close of the trial, if the defendant has been arrested, or his property attached; in other cases it must be entered either at the close of the trial, or if the justice then desire further time to consider, on or by the fourth day thereafter, both days inclusive."

Webster defines "immediately" as follows: "In an immediate manner, without intervention of anything; proxi-

mately; directly." "Without interval of time; without delay; instantly."

The statute, if construed literally, would require the justice to render a judgment instantly on the conclusion of the trial. It will not be contended that the legislature intended such a narrow construction to be given to the statute. It is to be construed in a reasonable manner—that the justice is to render judgment in a short time and before taking up new business.

The object of the statute doubtless is to enable a party who has been unlawfully restrained of his liberty to be discharged at the earliest practicable moment, in case no cause of action is proved against him. So if his property is taken from him on an order of attachment and the proof fails to show a cause of action the property shall be discharged. But the justice may require time to consider the evidence before rendering a judgment, and it may be necessary for him to do so before he is prepared to decide. If a decision is rendered before the justice has time to consider the evidence there is great danger of his committing an error which more mature reflection would have enabled him to avoid. We therefore are not disposed to place so narrow a construction on the word "immediately" as to hold that a delay of a few hours in rendering judgment is not in compliance with the statute. Had the evidence been introduced on the 28th and the case continued until the next morning for the purpose of hearing the argument of the parties or their attorneys in the case, no one would contend that a decision must be made before the conclusion of the argument, yet the argument is merely for the purpose of aiding the court in reaching a correct conclusion.

It is well to require justices to perform their duties in the mode and within the time required by the statute; but their proceedings must be construed in a reasonable manner, and in such a way as will enable them to administer justice. It is pretty clear that a correct decision was made

by the justice in this case, and this court will not reverse it for an alleged error which at most is but technical. The judgment of the district court is reversed and that of the justice reinstated.

JUDGMENT ACCORDINGLY.

PETER NELSON, APPELLEE, V. ANDREW BEVINS AND ALICE BEVINS, APPELLANTS.

1. **Husband and wife.** The agreement by a husband that his wife will execute a mortgage upon real estate held in her name and to which she claims title, will not be enforced against her where there is no proof that she authorized the contract.

2. ——: MORTGAGE BY WIFE. Where satisfaction of a mortgage due in three years, executed by a wife upon her real estate, was entered of record by the mortgagee upon the promise of the husband that his wife would execute a mortgage due in one year, upon the failure to execute the mortgage, *Held*, That the satisfaction would be set aside.

APPEAL from the district court of Douglas county. Tried below before SAVAGE, J.

E. Wakeley, for appellants.

1. Alleged agreement to give the mortgage was not in writing, nor was any memorandum of it signed or made by either Andrew or Alice Bevins. It was therefore void by the statute of frauds, without reference to where the title was. Nor was there any fact or circumstance to take the agreement out of the statute. Payment of the money alone is not sufficient to authorize a court to decree specific performance of an agreement to convey or mortgage land. The statute and the authorities leave this in no doubt whatever. Sec. 3, ch. 25, p. 372, Rev. St. Sec.

25, Id., p. 395, Rev. St. Pp. 286-288, Comp. St. Frey on Spec. Perf., p. 154, *et seq.* Id., sec. 430, *et seq.* Browne on St. Frauds, sec. 461, *et seq.*, and very numerous cases cited in both works.

2. The land was homestead of appellants and could not be mortgaged except by wife's consent and joining in the mortgage. Comp. Stat., sec. 4, p. 296.

3. Suit cannot be maintained as one to reform a written agreement, or written instrument. 1 Story Eq. Jur., sec. 152, 157.

4. Cancellation cannot be set aside and canceled mortgage restored. *Leggenwell v. Fryer*, 21 Wis., 392. *Brete v. Vreeland*, 2 McCarter, 103.

John D. Howe, for appellee.

Husband is shown by the evidence to have had abundant power to bind the property for the improvements, and to get credit on basis thereof, and expenditures being for wife's benefit are chargeable on the realty. Schouler Domestic Relations, 237. *Rogers v. Ward*, 8 Allen, 387. *McMurtry v. Brown*, 6 Neb., 377. *Fowler v. Seaman*, 40 N. Y., 572.

MAXWELL, J.

This is an action for the specific execution of an agreement to execute a mortgage upon certain real estate, and for a decree foreclosing the same, and for general relief.

It is alleged in the petition in substance that on or about the 22d of September, 1879, Andrew Bevins purchased the premises in controversy, taking the title thereto in the name of Alice Bevins, his wife; that about the same time the defendants applied to the plaintiff for a loan of six hundred dollars for the purpose of erecting a house on the lot in question; that it was agreed that the defendants should have the sum required, out of a note which Bevins, as an attorney, held for collection, the defendants to secure the

same by executing a mortgage on said premises, due in one year from November 10, 1879; that about the 10th of November, 1879, Bevins gave the plaintiff his note for the sum of $600, and agreed that the mortgage should be executed in a short time; that about the 24th of that month, the defendants did execute a mortgage for the sum of $350, reciting therein the payment of $250, and providing that it should not be foreclosed until two years from the maturity of the note, which mortgage was placed on record without being presented to the plaintiff; that on or about the 10th of January, 1880, the plaintiff discovered the character of the mortgage and refused to accept the same, and thereupon Bevins agreed to execute a new mortgage, due on the 10th day of November, 1880, and relying upon this agreement of Bevins, the plaintiff canceled the mortgage given by the defendant; and that the defendants thereafter refused to give a new mortgage.

The answer alleges in substance that Alice Bevins purchased and paid for said premises; that plaintiff loaned Andrew Bevins the sum named, and agreed to take his (Bevins') note therefor, due in one year, and credit him with fees due for legal services; that afterwards the parties settled, and it was agreed that $250 was a reasonable sum for the aforesaid services; that about November 10th, 1879, the plaintiff requested Bevins to give him a mortgage, due in one year, which he refused, but promised to give him one due in three years if his wife would consent; that such mortgage was executed November 24th, 1879, and recorded in the plaintiff's absence; that in January, 1880, the plaintiff refused to accept said mortgage and canceled the same, taking Bevins' note for $350, due in one year.

The answer denies specifically that Alice Bevins ever agreed or authorized any person to agree to execute a mortgage upon said premises except as above stated, and alleges that she never knew of any proposal for a mortgage due in one year, until January, 1880.

A large amount of testimony was taken, which is set forth in the record, and to which it is unnecessary to refer at length. The court below rendered a decree that the plaintiff was entitled to have a mortgage from the defendants upon the premises in question for the sum of $350, said mortgage to be due in one year from November 10th, 1879, and to draw interest at the rate of 10 per cent; that said mortgage was a lien upon said real estate, and that the plaintiff was entitled to a decree of foreclosure and sale. The defendants appeal to this court.

It is not seriously contended that more than $350 was due from Bevins to the plaintiff on the 10th day of Nov., 1879, so that the only question necessary to be determined is, does the proof warrant a decree against the wife for the execution of a mortgage due in one year from November 10th, 1879.

It is a well settled rule of equity that a parol contract for the sale and conveyance of real estate will, if the party seeking relief has performed, or so far performed the contract as to entitle him to the relief, be specifically enforced. And if there has been a full performance on one side, the other cannot insist upon the statute as an objection to the enforcement of the contract. These principles undoubtedly apply to mortgages.

If it was clearly established that Bevins was the owner of the lot upon which the house was erected, and that the wife merely held the legal title to the same, and that the husband had borrowed the money from the plaintiff under an agreement to execute a mortgage upon said premises to secure the sum borrowed, the court would have no hesitation, after a full performance on the part of the plaintiff, to compel the execution of a mortgage in pursuance of the contract. But there is a defect in the proof on these points.

There is no pretense that the title to the real estate in question was placed in the wife's name for the purpose of defrauding creditors, nor that any of the money borrowed

was used in paying for the lot, nor does it appear that the plaintiff was not aware that the title to the real estate was in the wife. Indeed the circumstances surrounding the transaction lead us to believe that the plaintiff trusted largely to the solvency of Bevins, who at that time held for collection notes belonging to the plaintiff for a considerable amount, and was transacting considerable business for him, and so far as appears their relations were of the most amicable character. There is no pretense or claim that the wife ever agreed with the plaintiff or authorized any one to agree to execute a mortgage due on the 10th of November, 1880. How then can such an agreement be enforced against her?

The case is similar in that regard to that of *Morgan v. Bergen*, 3 Neb., 209.

The decree for a mortgage due November 10, 1880, and foreclosing the same, is therefore reversed. It is very clear, however, that the satisfaction of the mortgage executed by the wife was made under a promise from Bevins that his wife would execute a mortgage due in November, 1880.

As these facts clearly appear in the pleadings and proof, the satisfaction will be set aside under the prayer for general relief, and that mortgage be reinstated in full force.

In the case of *Leggenwell v. Fryer*, 21 Wis., 392, upon facts somewhat similar to the case at bar, such relief was denied; but justice, the aim and object of all law, requires such cancellation. A decree will be entered in this court in conformity to this opinion.

DECREE ACCORDINGLY.

TOOTLE & MAULE, PLAINTIFFS IN ERROR, V. MORRIS ELGUTTER, DEFENDANT IN ERROR.

Guaranty. A guaranty in these words, "Please let Mr. John Newman have credit for goods to the amount of one hundred dollars, and for the payment of which I hold myself responsible," *Held*, To be a continuing guaranty, and the limitation therein is as to the amount for which the guarantor will hold himself liable, and not as to the credit to be given.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

W. J. Connell, for plaintiff in error, cited: *Sickle v. Marsh*, 44 How. Pr., 91. *Ringe v. Judson*, 24 N. Y., 64. *Boehne v. Murphy*, 46 Mo., 57. De Colyar on Guarantees, 214, also 240 to 248.

Simeon Bloom, for defendant in error, cited: *Reed v. Fish*, 59 Maine, 358. *Lawton v. Mauer*, 10 Rich. Law (So. Car.), 323. *Wilde v. Haycraft*, 2 Duvall (Ky.), 309. *Bussier v. Chew*, 5 Phila. (Pa.), 70. *Boston & Sandwich Glass Co. v. Moore*, 119 Mass., 435. *Kay v. Groves*, 6 Bing., 276. *Kay v. Groves*, 3 Moore & Payne, 634. *Cremer v. Higginson*, 1 Mason, 323. *White v. Reed*, 15 Ct., 457. *Congdon v. Read*, 7 Rhode Is., 570. *Aldricks v. Higgins*, 16 Serg. & Rawle, 212. *Hall v. Rand*, 8 Ct., 560. *Sallee v. Mengy*, 1 Bailey Law (So. Car.), 620.

MAXWELL, J.

This is an action upon the following guaranty:

"OMAHA, NEBRASKA, March 11th, 1878.

"DEAR SIR: Please let Mr. John Newman have credit for goods to the amount of one hundred dollars, and for the payment of which I hold myself responsible.

"(Signed) M. ELGUTTER."

It is alleged in the petition that the instrument was delivered to the plaintiff and was intended as a continuing guaranty. The defendant in his answer, denies that the guaranty was intended to be continuing. On the trial of the cause, the court directed a verdict for the defendant, and judgment was rendered thereon dismissing the action.

The testimony tends to show that Newman was insolvent, and that the defendant was anxious to aid him to start in business; that the plaintiff sold to Newman from time to time, goods to quite a large amount, and received payments of $25, $50, or $75, when convenient for Newman to pay, and that these transactions continued up to the time of his death, which occurred in 1880; and that he was owing them an amount greatly in excess of $100. There is also testimony tending to show that the defendants had stated to the plaintiffs during the period at which the goods were being furnished, that he considered himself responsible on the guaranty.

The rule is well settled that where a contract has been reduced to writing, without any uncertainty as to the object and extent of the obligation, the presumption is that the entire contract was reduced to writing, and oral testimony as to declarations at the time it was made are not permitted, except in a direct proceeding for that purpose to change the written instrument. In other words, parol contemporaneous evidence is not admissible to change the terms of a valid written contract. 1 Greenleaf Ev., § 275. But this restriction applies only to the language of the contract. It may be read by the light of surrounding circumstances—by the construction given to it by the parties themselves, in order more perfectly to understand the intention of the parties. In such cases the court is not to inquire what the parties may have secretly intended, but what is the meaning of the words they have used. 1 Greenleaf Ev., § 277.

As is said by a late writer, the general rule that unam-

biguous language in a contract must control, does not exclude extrinsic evidence of the subject matter and other surrounding circumstances to enable the court to consider what the parties saw and knew in order to ascertain their meaning. Abbott's Trial Ev., 508.

In *Hargrave v. Smee*, 6 Bing., 244, Chief Justice Tindal said: "The question is, what is the fair import to be collected from the language used in this guaranty? The words employed are the words of the defendant, and there is no reason for putting on a guaranty a construction different from that which the court puts upon any other instrument. With regard to other instruments the rule is, that if the party executing them leave anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself."

In *Mason v. Pritchard*, 12 East, 227, it is said: "The words were to be taken as strongly against the party giving the guaranty as the sense of them would admit."

In *Lawrence v. McCalmont*, 2 How., 426–449, it is said: "Some remarks have been made on the argument here, upon the point, in what manner letters of guaranty are to be construed; whether they are to receive a strict or liberal interpretation. We have no difficulty whatever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation, we do not mean that the words should be forced out of their natural meaning; but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments, generally drawn up by merchants, in brief language, sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care, would not only defeat the intention of the parties, but render them too unsafe a basis to rely on for extensive

credits." These cases and others to the same effect are cited with approval in the case of *Ringe v. Judson*, 24 N. Y., 64.

In that case the guaranty was as follows:

"MR. RINGE: SIR: I will be accountable to you that Mr. Butler will pay you for a credit on glass, paints, etc., which he may require in his business, to the extent of fifty dollars. "D. C. JUDSON.

"Dated, Nov. 29th, 1858."

This was held to be a continuing guaranty, and that the limitation was as to the extent of the guarantor's liability, and not of the credit to be given. That case is directly in point, and appears to be a correct construction of the instrument. In our opinion, the guaranty in this case was a continuing one, and the limitation therein was as to the extent of the defendant's liability, and not as to the credit to be given to Newman. It follows that the judgment must be reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

MOSES KAUFMAN AND G. W. EISER, PLAINTIFFS IN ERROR, v. LEWIS WESSEL ET AL., DEFENDANTS IN ERROR.

1. **Replevin:** ACTION ON UNDERTAKING. The penalty in an undertaking in replevin fixes the limit to which a recovery can be had for the value of the property taken in an action on the undertaking.

2. ———: ———. Where executions in favor of five different creditors were at the same time placed in the hands of a sheriff, and levied upon the same goods which were claimed by a third party, and taken by replevin upon his giving an undertaking, judgment in replevin being rendered in favor of the sheriff, he assigned the undertaking to the execution creditors, who brought a joint action thereon. *Held*, That the action could be maintained.

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

S. H. Calhoun and *Watson & Wodehouse*, for plaintiffs in error, cited: *Hicklin v. Nebraska City National Bank*, 8 Neb., 463.

Covell & Ransom, for defendants in error, cited: *Cyman v. Robinson*, 14 Reporter, 270. 1 Parson Contracts, 13, 14.

MAXWELL, J.

This is an action upon an undertaking in replevin. The defendants in error each recovered a judgment in the county court of Otoe county, against one Jacob Blum, and an execution was issued on each judgment and placed in the hands of the sheriff at 1:30 P.M., on the 12th day of Sept., 1879, and certain goods were levied upon under said execution as the property of said Blum, all the levies being upon the same goods. This property was claimed by George W. Boulware, who instituted an action of replevin and recovered possession of the same, and gave to the sheriff an undertaking in the sum of $536, signed by Boulware as principal, and George W. Eiser and Moses Kaufman as sureties. On the trial of the action of replevin judgment was rendered in favor of the defendant and for a return of the property, or in case a return thereof could not be had, for the value thereof.

The property was not returned nor was the judgment paid, and an execution issued on the judgment was returned unsatisfied. The sheriff then assigned the undertaking to the judgment creditors, who brought a joint action, thereon and on the trial recovered a judgment for the sum of $569.27.

The first objection to the judgment is that it is for a sum in excess of the penalty in the undertaking.

The penalty in an undertaking fixes a limit beyond which the parties are not liable in an action upon the instrument, and a judgment in excess of the penalty cannot be sustained. But where it is clear that there are no other errors in the record, the court will permit the judgment creditors to remit the excess. And the defendants have leave to enter such remittitur in this case.

Second. It is objected that the defendants in error could not join in the action, and we are referred to the case of *Hicklin v. Neb. City National Bank,* 8 Neb., 463, in support of that position.

An examination of that case will show that the construction contended for cannot be sustained, as in that case the undertaking had not been assigned to the party bringing the action, nor did it appear that he was the judgment creditor. In the case at bar there is no donbt that the sheriff being the obligee named in the undertaking could maintain an action thereon for the benefit of the creditors. The court found the value of the interest to be the sum of $569.27, the defendants in error therefore have an interest in the undertaking to the full extent of the penalty of the same.

In the case of *Rutledge v. Corbin,* 10 Ohio State, 478, where an action was brought upon an attachment undertaking by the payee and subsequent attaching creditors, some of whom had attached only a part of the property while constructively in the hands of the sheriff, it was held that all parties having an interest as attaching creditors in the proceeds of the goods attached might be joined as plaintiffs in an action on the undertaking, although not named as payees therein. The reason assigned is, that all the attaching creditors had an interest in the attached property, and they were permitted to join for the purpose of protecting this interest. See also *Tate v. O. & M. R. R. Co.,* 10 Ind., 174. *Goodnight v. Goar,* 30 Ind., 418. Bliss on Code Pl., § 75.

We have no doubt that the creditors could join in the action, the judgment being a common fund out of which the executions are to be paid *pro rata.* It is claimed that Boulware was garnished in a certain action, and that judgment was rendered against him in that case. Without reviewing the garnishment proceedings at length, we think the court below was justified in disregarding them.

Upon condition that the remittitur heretofore mentioned is entered, the judgment of the court below is affirmed.

JUDGMENT ACCORDINGLY.

GUY C. BARTON, PLAINTIFF IN ERROR, V. EMIL E. ERICKSON ET AL., DEFENDANT IN ERROR.

1. **Jurors:** COMPETENCY. A person who belongs to a religious denomination, as the Lutheran, is not thereby precluded from sitting as a juror in a case where a church organization of the same denomination, of which he is not a member, is a party.

2. **Ejectment:** TITLE. In ejectment, where both parties claim under the same third person, it is sufficient *prima facie* to prove the derivation of title from him, without proving his title.

ERROR to the district court for Lincoln county. Tried below before GASLIN, J.

Hinman & Neville, for plaintiff in error, cited: Tyler on Ejectment, 75. 2 Washburn, 194–6. 2 Story's Equity, 478. *Cleage v. Hydin,* 6 Heisk, 73. *Morton v. Green,* 2 Neb., 45.

George E. Pritchett, for defendant in error, cited: *Hightown v. Williams,* 38 Ga., 597. *Dae v. Johnson,* 3 Ill., 522.

Conger v. Converse, 9 Ia., 554. *Brooks v. Chaplin*, 2 Vt., 381.

MAXWELL, J.

This is an action of ejectment brought by the defendants in error as trustees against the plaintiff to recover the possession of lots 7 and 8 in block 115 in the town of North Platte. On the trial of the cause in the court below a verdict was returned in favor of the defendants, upon which judgment was rendered. The plaintiff brings the cause into this court by petition in error.

While the jury were being impaneled, Alfred Samuelson, August Johnson, and Theodore Lowe, called as jurors, while being examined on the *voir dire*, stated in substance that they were members of the Lutheran church, and were thereupon challenged by the attorneys for the plaintiff in error as not being unbiased persons. The court overruled the challenge, and this is assigned for error.

None of the persons thus challenged appear to have belonged to the organization at North Platte. But one of them was asked that question, and he answered that he lived at a considerable distance from the town, and had nothing to do with the organization there—in other words, the jurors challenged were members of the denomination known as Lutheran, but were not members of this particular organization. An elector of a county or city is competent to sit as a juror in any case brought against the county or city, his interest being considered too remote to affect his judgment. This being so, why should a juror, otherwise acceptable, be rejected simply because he is a member of the same denomination as one of the parties to the suit? No fair-minded person would permit such a consideration to affect his judgment in the slightest degree. The challenges were properly overruled.

The defendants in error claim title under the following deed:

"This indenture made this seventh day of December, A.D. 1868, between the Union Pacific Railroad Company, by its agent and trustee, of the first part, and H. W. Kuhns, pastor Lutheran Church of Omaha, of the county of Douglas and state of Nebraska, of the second part.

"Witnesseth: That in consideration of the sum of one dollar in hand paid by the said H. W. Kuhns, the receipt whereof is hereby acknowledged, the said party of the first part has quit-claimed, remised, and released, and does hereby quit-claim, remise, and release unto the said party of the second part all their right, title, and interest in and to the following described premises, situated in the county of Lincoln and state of Nebraska, and described as follows, to-wit: Lots No. seven and eight (7, 8,) in block No. one hundred and fifteen (115) town of North Platte. *Donated in trust for use of the Lutheran Church*, with all and singular the hereditaments and appurtenances thereunto belonging, to have and to hold the above described premises to the said party of the second part and to their heirs and assigns forever.

"In witness whereof the said party of the first part has, through its agent and trustee, as aforesaid, executed and delivered this instrument the day and year above written.

"GRENVILLE M. DODGE,
"*Agent and Trustee.*

"In presence of
"J. E. HOUSE.

"STATE OF NEBRASKA, }
"COUNTY OF DOUGLAS, }

"On this seventh day of December, A.D. 1868, before me, notary public within and for said county, personally appeared the above named Grenville M. Dodge, agent and trustee of the Union Pacific Railroad Company, to me known to be the identical person who executed the foregoing instrument, and acknowledged the same to be his vol-

untary act and deed and the voluntary act and deed of the Union Pacific Railroad Company.

"OSCAR F. DAVIS,
"*Notary Public.*"

They also introduced proof tending to show the organization of the society at North Platte, of which the defendants were trustees, and a deed from Kuhns to them as such trustees for the lots in question. There was other testimony in the case, to which it is unnecessary to refer.

The plaintiff in error claims to derive title to the lots in question from the Union Pacific Railroad as follows: In the year 1868, one Charles E. Buchanan was station agent at North Platte, and appears to have acted as land agent also. This man testifies that the lots in question were given to the school district upon condition that it would build thereon, which it did. That is, that the witness set apart those lots for school purposes. He also states that a deed for the same was made. In this he is evidently mistaken, as no such deed was offered in evidence. The powers of this agent are stated by J. E. House, his immediate superior, as follows:

Q. Any contracts that these station agents made had to be afterwards ratified by you or General Dodge?

A. Yes.

Q. Describe the manner in which a station agent would make a contract with a man, sell him a lot in North Platte or any other towns on the road?

A. They were furnished a price list, a map of the town showing the lots, and were furnished application slips upon which the numbers of the lots and prices were all in blank; they were also furnished contracts. The contracts were made in duplicate, and sent to the office with the first installment, whatever it was, for the contracts to be ratified and returned for signatures.

Q. Was the contract sent in before the application slips?

A. They all came together.

Q. Then if the proposed contract was satisfactory?

A. It was signed by the parties at Omaha, and returned back again to the purchaser; both of the contracts were signed by the purchaser, then the duplicate copy was sent to the purchaser and the original was kept in the office.

Q. Then these station agents had no authority to make any verbal agreements with reference to the sale of lands at all?

A. No.

A log school building was erected on the lots in question in 1868, and school seems to have been taught therein until 1874, when, the district having erected a new schoolhouse upon other lots, the school property on lots seven and eight was sold at public auction to J. H. McConnell for M. C. Keith, for the sum of $611. Keith, several years afterwards, conveyed to the plaintiff in error.

There is a conflict in the testimony as to what was offered for sale at the time the school property on lots seven and eight was sold, but the clear weight of the testimony shows that nothing was offered but the buildings, and that the lots without the buildings were worth about $1,000. After the completion of the sale two of the school trustees made a deed to McConnell—Street, the other member, refusing to join them.

The deed is as follows:

"Know all men by these presents: That Guy C. Barton, Joseph Mackle, and C. H. Street, school board of District No. 1 of the county of Lincoln and state of Nebraska, for the consideration of $611, hereby quit-claim to Joseph H. McConnell, of the county of Lincoln and state of Nebraska, to-wit: All of our right to lots seven and eight in block one hundred and fifteen (115), in the town of North Platte, as platted and recorded in the clerk's office of said county, with the erections thereon, possession of the

enclosure of the same to be given on or before the 1st day of May, 1874.

"In witness whereof we have set our hands this 9th day of February, 1874.

"JOSEPH MACKLE,
"*Director School Dist. No. one (1).*
"GUY C. BARTON,
"*Moderator School Dist. No. one.*"

"In presence of
"JAMES BELTON.

"STATE OF NEBRASKA, }
"LINCOLN COUNTY. }

"Before me, the undersigned, a clerk of the district court in and for said county, personally appeared Joseph Mackle and Guy C. Barton, who are personally known to me to be the identical persons whose names are affixed to the foregoing deed as grantors, and acknowledged the same to be their voluntary act and deed.

"Given under my hand and official seal this 9th day of February, 1874.

"JAMES BELTON,
"*Clerk.*"

The proof fails to show that the school district claimed the title to the lots in controversy, or that it held adversely, and as the plaintiff in error has not been in possession under the deed from the school district for ten years, the validity of his title must depend upon the alleged conveyance from Buchanan. This, in our opinion, wholly fails.

It is very strenuously insisted that the defendants in error must fail in the action because they did not introduce the patent from the government of the United States to the Union Pacific Railroad for the lots in question. The rule seems to be well settled that a party is estopped from denying a title under which he claims to derive his right to the premises. Where both parties claim title from the

same grantor, it is sufficient *prima facie* to prove derivation of title from him without proving his title. 2 Greenleaf Ev., sec. 307. *Hart's Lessee v. Johnson*, 6 Ohio, 89. *Conger v. Converse*, 9 Iowa, 554. It was unnecessary therefore to introduce the patent from the United States for the lots in question.

It is evident that justice has been done and that there is no error in the record. The judgment must be affirmed.

JUDGMENT AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR, V. JOSHUA P. BROWN, DEFENDANT IN ERROR.

Railroads: DAMAGES FROM OVERFLOW OF WATER. An instruction charging the jury "that notwithstanding the fact that the railroad company when it constructed its bridge did so in a prudent manner, according to the best information it could obtain at the time of its construction, yet, if it subsequently appeared that its construction was such that damages would result from the gorging of ice against the bridge, and that damages would result to the plaintiff and other property holders in the vicinity of the bridge, by reason of the overflow of ice and water in consequence of said gorge, and the defendant had the time and the opportunity and means, by a reasonable effort on its part in that behalf, to avoid or prevent such damage, it was its duty so to do; and it was required to use all reasonable effort to avert such damages, and if it failed so to do it is liable to plaintiff for the damages sustained by him as resulted directly from such failure," *Held*, Erroneous, and a new trial awarded.

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

A. J. Poppleton and *J. M. Thurston*, for plaintiff in error, cited: 1 Thompson on Negligence, 2, 55, 86. *Belinger v.*

Railroad, 23 New York, 42. *Ward v. Telegraph Co.*, 71 Id., 81. *Railroad v. Holborn*, 53 Texas, 46. *Railroad v. Gilleland*, 6 P. F. Smith, 445. *McFadden v. R. R. Co.*, 44 N. Y., 478. *Withers v. North Kent R. R. Co.*, 3 Hun., 969. *Tyrrell v. R. R. Co.*, 111 Mass., 546. *Mobile R. R. Co. v. Ashcroft*, 48 Ala., 15. *Campbell v. Tator Co.*, 35 Cal., 679. *Hoffman v. Water Co.*, 10 Cal., 413. *Wolf v. Water Co.*, 10 Cal., 541. *Everett v. Flume and Tunnel Co.*, 23 Cal., 225. *Shrewsbury v. Smith*, 12 Cush., 177.

W. J. Connell and *George W. Doane*, for defendant in error, cited: *Hay v. The Cohoes Co.*, 2 Conn., 159. *Tremain v. The Cohoes Co.*, Id., 163. Angell on Water-Courses, 336. *Mayor of New York v. Bailey*, 2 Denio, 433. *Brown v. The Cayuga and Susq. R. R.*, 2 Kernan, 486. *Hamden v. The N. H. and North R. R. Co.*, 27 Conn., 157. *Johnson v. Atlantic and St. L. R. R. Co.*, 35 N. H., 569. *Lawrence v. The Great Northern R. R. Co.*, 71 E. C. L., 643. *Boughton v. Carter*, 18 Johns., 405. *March v. The Ports. and C. R. R. Co.*, 19 N. H., 372. *Smith v. Milwaukee*, 18 Wis., 63. *Haynes v. Burlington*, 38 Vt., 350. *Lawrence v. Fairhaven*, 5 Gray, 110. *Perry v. Worcester*, 6 Gray, 544. *Hookset v. Amoskeag Mfg. Co.*, 44 N. H., 105. *Parker v. Lowell*, 11 Gray, 353. *Haskell v. New Bedford*, 108 Mass., 208. *Emery v. Lowell*, 104 Mass., 13. *Brayton v. Fall River*, 113 Mass., 218. *Rowe v. Addison*, 34 N. H., 306.

COBB, J.

This action was commenced in the district court by the defendant in error, Joshua P. Brown, against the Omaha and Republican Valley Railroad Company for damages alleged to have been sustained by him in the destruction of his mill and mill site by an overflow of water and ice caused by the faulty plan and construction of the railway

bridge of said company across the Platte river. The plaintiff below had a verdict and judgment in the district court, and the railway company bring the cause to this court on error.

There are six grounds of error assigned, but in presenting the views and conclusions to which the court has arrived, and which control its disposition of the case, it will probably be necessary to consider only those involved in one of the instructions given in charge by the court to the jury.

Upon the trial there was a large amount of testimony tending to prove that the plaintiff's property, described in his petition, was damaged, if not wholly destroyed, by reason of floating ice lodging against the piles of the bridge of defendant, and damming up the natural course of the water, and thus causing it to overflow the bank of the river, and run and carry ice down to and upon plaintiff's property. That the agent of defendant was notified of the formation of the gorge, and requested to move the bridge or a part of it, and thus open the channel for the flow of the ice and water by the natural course of the stream. That plaintiff also applied to the superintendent of the road to remove some of the piles of the bridge, and that it could have been done with gunpowder.

There was also testimony on the part of the defendant below tending to prove that, in the spring of 1881, the time of the ice gorge and damage, the thickness of the ice of the Platte river, the height of the water at the time of the breaking up of the ice in the river, and as to the manner of its breaking up—it having first broken up at the junction of the North and South Platte rivers, several hundred miles above the bridge under consideration—were quite unprecedented in the history of the country since its earliest settlement.

The second instruction given by the court to the jury at the request of the plaintiff below is as follows:

"As to the second ground of recovery referred to, the jury are instructed that notwithstanding the fact that the railroad company, when it constructed its bridge, did so in a prudent manner, according to the best information it could obtain at the time of its construction, yet, if it subsequently appeared that its construction was such that damages would result from the gorging of ice against the bridge, and that damages would result to the plaintiff and other property holders in the vicinity of the bridge by reason of the overflow of ice and water in consequence of said gorge, and the defendant had the time and the opportunity and means, by a reasonable effort on its part in that behalf, to avoid or prevent such damage, it was its duty so to do, and it was required to use all such reasonable effort to avert such damages, and if it failed so to do, it is liable to plaintiff for the damages sustained by him as resulted directly from such failure."

This instruction, in connection with the pleadings and evidence in the case, was erroneous. The manner of avoiding or preventing such damages, for failing in which the court tells the jury the company is liable, according to the petition and testimony, was to have taken out the bridge by means of gunpowder or otherwise.

It was the duty of the railway company, in planning and constructing its bridge, to bring to their execution the engineering knowledge and skill ordinarily practiced in such works, and to see to the practical application of such knowledge and skill to the work in hand, among other things, so as to allow of the passage of water and ice, such as is known to pass in the stream annually, or which may reasonably be expected to occur occasionally, without regard to such great or sudden overflows as are often designated as acts of God. But having once built its bridge and opened its line of railroad, the company had assumed duties to the public which were paramount to any duty which it owed to the plaintiff. Its bridge was either skill-

fully or negligently constructed; if negligently, then, within the qualifications above stated, the company was liable for the damages occasioned thereby; but its first and highest duty was to keep open its line for the transportation of persons, property, and the public mails, and if the bridge was planned and built, in the language of the said instruction, "in a prudent manner, according to the best information it" (the company) "could obtain at the time of its construction," it was not liable for any damages which the said bridge in connection with one of "those unexpected visitations, whose comings are not foreshadowed by the usual course of nature," may cause to the property of individuals, and to prevent such threatened damage it was not its duty to blow up with gunpowder, or otherwise destroy its bridge, and thus sever its line of railway.

As the above considerations render a new trial inevitable, the other errors assigned will not be considered.

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

REVERSED AND REMANDED.

SPRINGER GALLEY, PLAINTIFF IN ERROR, v. ALVIN GALLEY, DEFENDANT IN ERROR.

1. **Evidence.** Where there is a conflict of evidence, if it be sufficient to support the finding, the judgment will not be disturbed.
2. **Statute of Frauds.** The statute of frauds relative to the sale of land will not enable one who has accepted a conveyance of real estate to escape paying for it simply because the contract of purchase was not in writing.
3. **Deed:** PROOF OF EXECUTION. The certificate of acknowledgment of a notary public, with his official seal attached, is sufficient proof of the due execution in another state of a deed of real estate lying in this state.

ERROR to the district court for Nuckolls county. Heard below before WEAVER, J.

James B. Winters and *W. A. Bergstresser*, for plaintiff in error.

D. W. Barker, for defendant in error.

LAKE, CH. J.

A simple but complete statement of the case in the court below is the following: Alvin Galley, who was plaintiff, alleged in his petition that he and Springer Galley entered into a verbal contract, by which, in consideration of the conveyance by Alvin of forty acres of land to Byron D. Brown, and the giving of his promissory note for one hundred dollars, payable in one year to Springer, the latter would give to the former a span of mares and harness, the note being the difference in value between the land, and mares and harness. That, in pursuance of said contract, Alvin executed a deed of the land to Brown, which Springer accepted, on or about the 12th of September, 1877, and also tendered to him his promissory note, as agreed, and demanded the team and harness, which were refused. The value of the land conveyed to Brown was two hundred dollars.

Springer Galley's answer is, *first*, a general denial; *second*, that the difference between the price of the land and the team and harness was one hundred dollars; *third*, that the agreement was that he should convey the team and harness to Alvin upon the payment of one hundred and thirty-five dollars, which had not been made; *fourth*, that Springer purchased the land, so conveyed to Brown, from one Morrill; *fifth*, that on the 16th of December, 1878, the parties made a full settlement, and mutual discharge of all demands between them; and, *sixth*, the statute of frauds. The reply to this answer was a general denial.

The evidence given upon the trial, which was to the court, without a jury, is quite voluminous, and although in some particulars very conflicting, fully supports the finding of the judge. As a review of the evidence in this opinion would be of no special service, we shall refer to it only so far as may be necessary in deciding questions other than that of its sufficiency to support the finding of the district judge.

In the first place it may be well to state what the transaction resulting in the conveyance of this land to Brown really was. In brief, it seems that Brown desired to purchase a tract of land for a farm. Springer Galley had eighty acres that suited him, if he could also obtain forty acres adjoining, the title to which was in Alvin Galley. An arrangement was finally concluded between Brown and Springer Galley for the sale and purchase of the land, including, by Alvin's consent, his forty acres, and the payment of the entire consideration, composed in part of the team and harness, to Springer. Thus far there is no serious difficulty with the case, the chief matters in dispute being the interest of Alvin in the land which he conveyed, and the terms on which he was to have the team.

Brown, who seems to have been a fair witness, and, as a party to the arrangement, in a situation to know of what he swore, in his testimony said: "I bought forty acres of land of Alvin Galley, and eighty acres of Springer Galley. I gave Springer $800 for his eighty, and this gentleman, Alvin Galley, $200 for his forty. This gentleman wished to sell his forty for the team, but I valued the team and harness at $300. They took the team at three hundred dollars, and he gave a warranty deed for his forty for two hundred, and the other hundred dollars was to apply as part payment on the other eighty I bought of his brother." He says Springer Galley took the team; and there is other testimony which sustains the claim of Alvin that he was to have the team turned over to him upon the

delivery of his note to his brother for one hundred dollars, payable in one year, although the evidence respecting this point is very conflicting.

Several errors are assigned upon the rulings of the court in the admission of evidence. The first of these is, the overruling of the objection made by the following question put to Alvin Galley, viz.: "State what interest you had in the lands described in this deed." This was objected to on the ground "that the contract relating to the sale of real estate was not reduced to writing." With the understanding that the contract here alluded to was the one between the two Galleys mentioned in the petition, this objection was properly overruled. This exception, as well as several others taken during the trial, was based upon the third section of the statute of frauds, which counsel for the plaintiff in error contends is applicable. But we think otherwise. It is true that the contract was oral, and in part related to a conveyance of land. The action, however, was not brought to enforce either the conveyance, or an acceptance of the conveyance, agreed upon. According to the petition, the deed had been made by Alvin, and accepted by Springer for delivery to Brown, by whom the consideration was handed over to Springer. This action was merely to recover from Springer Galley damages for refusing to pay for that which he had received. He had agreed to make payment by a delivery of the team and harness, but refusing to do so, he became liable to an action for damages. The statute of frauds will not enable one who has accepted a conveyance of land to escape paying for it simply because the contract of purchase rested in parol.

Error is assigned also upon the admission of two deeds in evidence. As to one of these deeds, that from Alvin Galley and wife to Byron D. Brown, the record shows no objection to its introduction. As to the other, that of E. N. Morrill and wife to Alvin Galley, the objection was expressly waived by a written stipulation signed by coun-

sel for both parties. These deeds were a part of the testimony taken, and reduced to writing, at a former trial. On the trial in question, it was stipulated, "that all the evidence taken in this case at the previous trial in this court be attached hereto, and be made a part of this transcript, and be received without objection." But even waiving this stipulation, no error appears. It was objected that the deed was "not sufficiently proven." This objection was untenable. The deed was executed and acknowledged in Kansas, before a notary public, using an official seal. The certificate of the notary, with his seal attached, was sufficient evidence of the due execution of the instrument. *Green v. Gross*, 12 Neb., 117. Comp. Statutes, Ch. 73, § 13.

After a careful examination of the evidence and rulings of the court complained of, we are satisfied no sufficient cause is shown for a new trial.

JUDGMENT AFFIRMED.

SAMUEL LORMER, PLAINTIFF IN ERROR, V. EDWARD BAIN, DEFENDANT IN ERROR.

Negotiable Instruments. In this case, *Held*, That the holder of a collateral security for the payment of a promissory note, without special contract to that effect, need not convert and apply the said collateral before bringing suit on the note.

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

John D. Hayes, for plaintiff in error, cited: *Cole v. Sacket*, 1 Hill, 516. *Loby v. Barber*, 5 Johns., 66. *Dayton v. Trull*, 22 Wend., 345. *Alcock v. Hopkins*, 6 Cush., 484. *Mills v. Lumsdas*, 16 Ill., 161. *Harris v. Johnston*,

3 Cranch, 311. *Jones v. Savage*, 6 Wend., 658. *Raymond v. Merchant*, 3 Conn., 150. *Smith v. Lockwood*, 10 Johns., 367. 2d Dan'l Neg. Inst., 274. Edwards on Bills, 204. *Jennison v. Parker*, 7 Mich., 355. *Phœnix Ins. Co. v. Allen*, 11 Id., 501. *Booth v. Smith*, 3 Wend., 67. 2 Parsons Notes and Bills, 154–181. Edwards on Bills, 198, 201–445. Redfield & Bigelow's Leading Cases, 637–642. 2 Dan'l Neg. Inst., 275.

Bagley & Bemis, for defendant in error, cited: 2 Dan'l Neg. Inst., 276. *Larzier v. Nevin*, 3 West Va., 622. Story on Notes, 550. *Cornwall v. Gould*, 4 Pick., 448. *Ripley v. Green*, 2 Verm., 129. *Bishop v. Rowe*, 3 M. & S., 362. 2 Parsons Notes and Bills, 183.

COBB, J.

The action was commenced in the county court of Clay county by the defendant in error, against the plaintiff in error, on a promissory note, set out and described in the bill of particulars in said court. The plaintiff in error answered said bill of particulars, denying that he was indebted to plaintiff in the court below, and for a further answer alleged that, at the commencement of said action the said plaintiff was indebted to the defendant on two promissory notes, amounting to the sum of ninety dollars, which were given to secure the payment of the note sued on by plaintiff, which said notes the plaintiff has never accounted for to the defendant, and prayed that so much of said sum of ninety dollars and interest thereon might be set off against any claim the plaintiff might have against the defendant as equals the same, and that he might have a judgment against said plaintiff for the balance.

There was a trial and judgment for defendant in the county court. The cause was taken to the district court on error, when the judgment of the county court was reversed,

and the cause retained for trial, whereupon the defendant brings the cause to this court on error.

The question presented for the consideration of this court is, do the facts stated in the answer constitute a defense to the cause of action as set out in the bill of particulars? The said answer is not, strictly speaking, a defense, but rather a counter-claim, and do the facts there stated constitute a cause of action? These facts are that, at the time defendant executed the promissory note sued on, he also delivered to the plaintiff two other promissory notes as collateral security therefor. It is not stated whether these notes or either of them have become due, were endorsed by any one entitled to notice of the dishonor of said notes, have been paid in whole or in part, or indeed any fact which imposed any duty upon the plaintiff in respect to the said notes, or if so, that such duty had not been fully performed.

The naked statement of these facts seems to be all that need be said in answer to the above question. Doubtless there might be a contract between parties by which it would be the duty of the holder of a collateral security to convert and apply it before bringing suit for the debts, but no such contract is implied from the facts stated in the answer.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

GEORGE W. MINKLER, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, EX REL. PERCY SMITHERS, DEFENDANT IN ERROR.

Officers: COUNTY SURVEYOR: MAL-ADMINISTRATION. Repeated acts of removal of government section corner-stones by a county surveyor, under a claim of right so to do for the purpose of rectifying the original government survey, amount to willful mal-administration in office within the meaning of sec. 1, article II., chap 18, Compiled Statutes.

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

Brown & Ryan Brothers and *Bush & Rickards*, for plaintiff in error, cited: *State v. Preston*, 34 Wis., 675. *United States v. Railroad Cars*, 1 Abb., 196. *Kendall v. Stokes*, 3 Howard (U. S.), 87. *Ramsey v. Riley*, 13 Ohio, 157. *Stewart v. Southard*, 17 Ohio, 402.

Pemberton & Forbes and *A. H. Babcock*, for defendant in error, cited: *Heaton v. Hodges*, 30 Am. Dec., 737. *Diehl v. Zanger*, 39 Mich., 604. 2 Whart. Crim. Law, sec. 1245. *Wallace v. New York*, 18 How. Pr., 169.

COBB, J.

A complaint was made to the board of county commissioners against the plaintiff in error for willful mal-administration in his office of county surveyor. He was tried and found guilty of this charge, and removed from office. The cause was removed to the district court on error, when the finding and judgment of the board of county commissioners were affirmed, and is now before this court on error to the district court. The only substantial error assigned is, that the action of the board of county commissioners is not sustained by the evidence in the case.

Section 1 of article 2 of chapter 18, Compiled Statutes, provides that: "All county officers, including justices of the peace, may be charged, tried, and removed from office for official misdemeanors, in the manner and for the causes following: *First.* For habitual or willful neglect of duty. *Second.* For gross partiality. *Third.* For oppression. *Fourth.* For extortion. *Fifth.* For corruption. *Sixth.* For willful mal-administration in office. *Seventh.* For conviction of a felony. *Eighth.* For habitual drunkenness."

The charge in this case was made under the sixth clause of the above section, and the mal-administration in office charged was that of having, "in his capacity of county surveyor, and while acting as such," taken up, "removed, and carried away all the government land marks and the stones set up to mark the section, half-section, and quarter-section corners," of certain sections of land therein described, in his county.

There is no material conflict in the testimony. Nearly or quite all of the witnesses, including the plaintiff in error himself, who was sworn as a witness on his own behalf, testified in substance that he had removed the government section and quarter-section corner-stones, knowing them to be such, of the sections described in the complaint; and that he did it under pretense of rectifying the government survey. It is admitted by counsel that this was done without authority, but they contend that as it was done "under claim of power to do so," that it was not willful mal-administration in office. Counsel also claim that the power on the part of the county surveyor to remove the government corner-stones was fortified by the written opinion of respectable attorneys, and that "on each occasion the change was made to place the corners where such corners should be under the plat and field notes." But neither such written opinion of attorneys, nor the plat or field notes of the government survey, were offered in evidence, according to the bill of exceptions. Counsel draw a distinction between

the legal meaning of the prefixes *mal* and *mis*, and in effect claims, that while the county surveyor was guilty of *mis*-administration, he was not guilty of *mal*-administration. But whatever there may be in the original meaning of the two words, we find them used in the law books almost or quite interchangeably, indicating a regard for euphony of sound rather than a distinction in meaning.

Thus, in Bouvier's Law Dictionary, under the word mal-practice, in Latin *mala-praxis*, we find the several definitions of *willful mal-practice, negligent mal-practice,* and *ignorant mal-practice.* Certainly, the prefix *mal* is not used in the two last cases to signify intentional wrong.

In the case of *Coite v. Lynes,* 33 Conn., 109, the court use the following language: "For a misfeasance strictly is a default in not doing a lawful act, in a proper manner, omitting to do it as it should be done—while a malfeasance is the doing of an act wholly wrongful and unlawful, and non-feasance is an omission to perform a required duty at all, or total neglect of duty."

The phrase mal-administration is not found in any of the law dictionaries, but we cannot be far wrong in giving it the signification of wrong administration, and we believe that to be the sense in which the legislature used it in framing the section under consideration. Certainly, the prefix *mal* could not have been therein used in the sense of corruption or oppression, as these are both expressly provided for by other clauses of the same section.

The word *willful* or *willfully* is variously construed. Abbott, in his law dictionary, says that it is a term used in averring or describing an act, particularly one charged as a crime, to show that it was done with free activity of the perpetrator's will. The author also quotes from the opinion in the case of *United States v. Three Railroad Cars,* 1 Abb. U. S., 196, a case cited by plaintiff in error, as follows: "To antagonize a conviction under a penal statute prescribing a punishment for willfully removing an official

seal from property, which has been sealed up by officers of the customs, it must appear that the defendant not only intended to remove the seal, but that he had at the time a knowledge of its character. One who removes such a seal in ignorance of its character, and in the honest execution of a supposed duty in the care and transportation of the property, is not liable to punishment under the statute, for the reason that he cannot be deemed to have acted willfully."

Test the conduct of the plaintiff in error by the rule laid down in the above case, and it appears to us that he acted willfully. It is admitted, as it must be, that the removal of established monuments and land marks was unlawful and forbidden even from the time of Moses, the great-law giver, and it is nowhere claimed or suggested that the plaintiff in error was ignorant, or without knowledge of the character of the government corner stones. But on the contrary, it is claimed that he not only knew the true character of the corner stones, but had a better knowledge of where they ought to have been set than the original government surveyors had.

Plaintiff in error also cites *State v. Preston*, 34 Wis., 675. That was an action against Preston for willfully obstructing a highway. C. J. Dixon, in the opinion of the court, says: "The principal question to be considered in the case is as to the meaning and effect of the word "willfully" above used, and arises upon an offer of proof made by the defendant on the trial which was rejected by the court. Having shown by the witness, one of the supervisors, that an application was made to the supervisors to take up the road in question, the defendant then offered to prove by him that the supervisors of the town of Koshkonong in the year 1871, and prior to the alleged act of the defendant in obstructing this road, upon proper application made to them to take up and discontinue the same upon due notice given, met to decide such application, viewed the premises in question, and determined that there was no highway

there, and so informed the defendant, and instructed him to place the fence where he did. The offer was objected to by the plaintiff, and rejected by the court, and exception was taken by the defendant." This offer the majority of the court held should have been accepted, and if made good would have been a defense. While we are not disposed to question the authority of this case, although by a divided court, we do not deem it applicable to the case at bar. What is this case in plain terms? Simply that Preston did not incur the penalty for obstructing the highway; because the town board, which had full control of all highways in the town, had publicly and officially informed him that it was not a highway, and assented to his doing the act for the doing of which it was now sought to subject him to a penalty. Let us suppose that this offer had been to prove that he had been advised by even the highest authority that he had a right to obstruct any and all highways, then that case would have been in point to the case at bar, but it is quite possible that the supreme court of Wisconsin would not have sustained such offer.

This court cannot take judicial notice of the fact which seems to be assumed by counsel, that the government survey of the Otoe reservation was done in an incorrect and faulty manner, although some members of the court, as individuals, may believe such to be the case. But if this be true, it is no part of the duty, nor is it permissible for the county surveyor to undertake to rectify such surveys.

C. J. Cooley, in *Diehl v. Zanger*, 39 Mich., 601, a case cited by counsel for defendant in error, says: "Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey, without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be

simply incalculable, and the visitations of the surveyor might well be set down as a great public calamity. But no law can sanction this course. * * * The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. No rule in real estate law is more inflexible than that monuments control course and distance—a rule that we have frequent occasion to apply in the case of public surveys, when its propriety, justice, and necessity are never questioned."

We see no error in the judgment of the district court sustaining the action of the board of county commissioners, and it is affirmed.

JUDGMENT AFFIRMED.

MARY A. BROTHERTON, APPELLEE, VS. NOAH BROTHERTON, APPELLANT.

1. **Referee.** A referee appointed simply to take testimony in a case, and report it to the court, has no right to decide upon the admissibility of the evidence offered.
2. **Alimony.** A decree for alimony making it a lien upon the defendant's real estate, *Held*, So far erroneous, and reversed.

REHEARING and further consideration of case reported 12 Neb., 75.

A. W. Agee, for appellant.

J. S. Miller, for appellee.

LAKE, CH. J.

This cause is before us now on the question of alimony, which was reserved in our decision affirming the decree of divorce, and a reference ordered to take further evidence upon it. *Brotherton v. Brotherton*, 12 Neb., 75.

A motion for a rehearing of the case upon the question of divorce has also been made. After a careful examination of the points urged upon our attention, we see no reason for changing our conclusion heretofore announced upon this branch of the case, and the motion is denied.

Exception is taken to the action of the referee who was appointed to take testimony upon certain questions relating to the allowance of alimony, in ruling upon the admissibility of testimony offered before him, and in receiving or rejecting it, as he thought proper. The position taken by appellant's counsel is doubtless correct. Under such an order of reference as this was, merely to take testimony and report it to the court, a referee has no authority to decide questions of this sort. His powers in this respect are unlike those of a referee under the statute, appointed to take testimony and hear and determine a case upon its merits. He is simply to take down faithfully all of the evidence offered, noting in the proper order such objections to its admissibility as are urged, leaving the decision of questions thus raised to the court, if finally insisted upon. The powers of such a referee as this one was are simply those of an officer taking depositions under a notice, and he cannot say whether any particular item of evidence shall be received or not.

But, notwithstanding these unwarrantable rulings of the referee, we find no serious error attending them, nor any reason for a further delay in order to obtain the excluded testimony, inasmuch as it could not aid us in the matter in hand. From the additional light thrown upon the question of alimony by the testimony now before us, we are fully confirmed in the belief which prompted the reference to obtain it, that the alimony allowed by the district judge is, "excessive, and greater than the defendant is able to pay." That portion of the decree too respecting alimony, which made it a lien upon the real estate of the defendant, is erroneous. *Swansen v. Swansen*, 12 Neb., 210.

Our conclusion is therefore, that the allowance of alimony must be reduced to the sum of seventy-five dollars per annum from the date of the decree, viz.: February 3d, 1881, payable as follows: One hundred dollars on the first day of June, 1883. One hundred dollars on the first day of October, 1883, and thirty-seven dollars and fifty cents on the first days of April and October annually thereafter, and costs. That portion of the decree of the district court relating to alimony is reversed, and the cause is remanded with directions to enter one conforming to this opinion.

JUDGMENT ACCORDINGLY.

JOHN FITZGERALD, PLAINTIFF IN ERROR, V. SAMUEL W. HOLLINGSWORTH, DEFENDANT IN ERROR.

Garnishment. The rights of an attachment creditor against a garnishee are not superior to those of the attachment debtor. Rule applied.

ERROR to the district court for Lancaster county. The case was one wherein Hollingsworth caused a garnishee process to be served upon the plaintiff Fitzgerald, on the 15th of September, 1880, in a suit wherein Ezra Lines was defendant and Hollingsworth plaintiff, claiming that Fitzgerald was indebted to Lines on a contract for grading. Judgment below before POUND, J., in favor of Hollingsworth.

Marquett, Deweese & Hall, for plaintiff in error, cited: *Taylor v. B. & M. R. R.*, 5 Iowa, 114. *Dwight v. Banks*, 10 Met., 58. *Grant v. Shaw*, 16 Mass., 341. *Squair v. Shea*, 26 Ohio State, 645.

A. W. Field, for defendant in error.

When a party would seek to avoid responsibility and disobey an order of court by pleading a contract, he should not object to a strict enforcement of that contract. By the contract in question he reserves the right to pay the laborers, and further contracts to charge such payment to himself, Fitzgerald, "The party of the second part." Having sought protection under this clause of his contract he cannot complain when courts require him to carry out all of the provisions of that particular clause. While the plaintiff in error has neither in his pleadings nor his brief claimed that there was an error or mistake in this contract, yet, as he assumed that position in the trial below, we would submit that as he did not plead a mistake, and ask for a reformation, nor offer any testimony to show that the contract in testimony was not the contract intended to have been made by the parties, it is too late to raise the question now. 2 Parsons Contracts, 493.

LAKE, CH. J.

It is very clear that the rights of an attachment creditor against a garnishee are not at all superior to those of the debtor himself. If the latter had a right of action against the person garnished, the former may have one also under sec. 225 of the code of civil procedure, but not otherwise. Garnishment changes the liability of the garnishee in but one particular, viz., the person to whom he must make payment of whatever is due; respecting all things else his obligations remain unchanged.

The money sought by this garnishment was earned by the attachment debtor, under a contract with the garnishee, for grading section eighteen of the Lincoln and Northwestern railroad. In his answer to the petition against him, the garnishee answered respecting the matter, that, by the terms of this contract, he had the right to pay out of this money whatever might be due to the employees of

Lines, the attachment debtor, on the work, and had done so. That in consequence of such payment nothing remained in his hands subject to the garnishment.

The evidence on this point fully sustains the answer in this particular, and establishes the fact, beyond any doubt whatever, that Lines himself could not have recovered from Fitzgerald the money which Hollingsworth sought to reach by the attachment proceeding. By taking the aggregate amount which Fitzgerald paid to these employes, together with the ninety-two dollars and fifty cents admitted to have been properly paid on the Ferguson judgment, the balance standing to Lines' credit, under the contract, when the garnishment was served, is fully exhausted. Fitzgerald having thus paid these laborers, as by the express terms of the contract he could do, he has the right, as a matter of course, to deduct the amount from the price Lines was to receive. The judgment is reversed, and a new trial awarded.

REVERSED AND REMANDED.

JOEL N. CONVERSE, PLAINTIFF IN ERROR, v. LOUIS MEYER, DEFENDANT IN ERROR.

1. **Evidence:** INSUFFICIENCY. To warrant the setting aside of a verdict for want of evidence to support it, it is not enough that the court would have found differently from the jury upon it, but there must be no reasonable doubt of its insufficiency.

2. **Depositions.** When in the taking of a deposition of a witness, the adverse party has appeared and cross-examined, he is entitled to the benefit of the deposition, and may read such portions of it as he chooses, without being compelled to read the whole.

3. ———. An objection to the reading of a deposition, on the ground that it has not been shown that the personal attendance of the witness could not be procured, to be availing must be made before the deposition is read.

4. **Instructions.** An error in an instruction to the jury, which could not have prejudiced the party complaining of it, is not a ground for a new trial.

This was an action brought in the district court for Lancaster county, by Meyer against Converse, Montcrief, and Houck, on an account for goods sold and delivered, the petition alleging that said defendants were partners doing business under the firm name of A. W. Houck & Co. On trial before POUND, J., and a jury, verdict and judgment in favor of Meyer against Converse and Houck and in favor of Montcrief. Converse brought the case up on a petition in error.

Mason & Whedon, for plaintiff in error, cited: *Southwark v. Knight*, 6 Wharton, 327.

Burr & Marshall and *J. R. Webster*, for defendant in error, cited: *Calhoun v. Hays*, 8 Watts & S., 127. *Stevenson v. Anderson*, 12 Neb., 83.

LAKE, CH. J.

It is possible that the amount of the recovery was slightly in excess of the amount really due upon the account; but we are unable to say that the jury were clearly mistaken in this particular. So, too, upon the question of the liability of the plaintiff at all. We might possibly differ with the jury as to the weight of the evidence, but there is no such preponderance against their finding as would justify us in setting the verdict aside. It is not enough that we would have found differently upon the evidence; there must be no reasonable doubt of its insufficiency to support the verdict to warrant the granting of a new trial. The testimony was very conflicting and of such a character that the jury, acquainted most likely with the witnesses, were much better qualified to understand and weigh it correctly than we are.

It is complained that the court permitted portions of the deposition of A. W. Houck to be read in evidence, on behalf of the defendant in error, without reading the whole of it. There was no error in this. The rule contended for is applicable only to the reading of a deposition by the party on whose behalf it was taken. He who takes a deposition is not permitted to read portions only of it, if objected to. Such was the rule held in *Southwark Insurance Co. v. Knight*, 6 Wharton (Penn.), 327. But where, as here, the adverse party has appeared and cross-examined the witness, he is entitled to the benefit of the deposition, and may read from it if he choose. *Calhoun v. Hays*, 8 Watts & Serg., 127. In this case it was held that: "If a deposition be taken by one party, it is competent for the other to read such parts of it as tend to prove his case, leaving to the other party the right to read the other parts if they be legal evidence for him."

The second instruction is also assigned for error. It is claimed that by it the judge erroneously assumed the existence of a firm named "A. W. Houck & Co.," when in fact there was no evidence to warrant it. This is true. There is no evidence whatever that the name of the firm to which the goods were furnished was "A. W. Houck & Co." The evidence on the part of the defendant in error tends to show the name to have been "Houck & Co.," simply, and that Converse was a silent partner; the evidence on behalf of the plaintiff in error, that it was simply "A. W. Houck," composed alone of A. W. Houck and Maggie Monterief, and Converse having no place whatever in it.

But this error was not material, nor could it have prejudiced the plaintiff in error. It was conceded by the evidence on this trial, that the goods in question were furnished to a firm engaged in keeping the European Hotel. The material question, therefore, was not what was the real name of that firm, but was Converse a member of it,

whatever its name may have been. This action was not brought against a firm as such, but against certain persons alleged to have been members of a firm, in their individual capacity; whether the name of the firm were the one charged or some other, was unimportant to its maintenance; it was enough if the individuals charged were found either to have been associated together in the business for which the goods were furnished, or to have held themselves out to be, to authorize a recovery against them. Inasmuch as the error complained of could not have prejudiced the plaintiff in error, it furnishes no ground for a new trial.

The objection that the deposition of Houck was admitted in evidence, without showing that his personal attendance could not be procured, cannot be sustained. The objection comes too late. To have been available, it should have been made when the deposition was offered; but not having been made then, the right to make it was waived.

JUDGMENT AFFIRMED.

S. H. SORNBERGER, PLAINTIFF IN ERROR, v. WILLIAM E. LEE ET AL., DEFENDANTS IN ERROR.

1. **Statute of Limitations:** PART PAYMENT. In this state, part payment of a promissory note will remove the bar of the statute of limitations.

2. ——: OF PAYMENT. The receipt and indorsement on a promissory note by the holder of money realized from a collateral left with him by the maker for that purpose, will remove the bar of the statute.

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

S. H. Sornberger, pro se.

George I. Wright, for defendants in error.

LAKE, CH. J.

Was the note in question barred by the statute of limitations when the action was brought upon it? This is the only question presented by the record. It fell due October 1st, 1876, and the action was commenced January 28th, 1882; so that the five years limitation had fully run, and the bar of the statute was complete, unless the indorsement of payment under date of January 30th, 1877, shall be held to prevent it.

It is contended on the part of the plaintiff in error that mere payment of a part of a debt is not sufficient to stop the running of the statute; and cases are cited sustaining that view, the principal one of which is *Parsons v. Carey*, 28 Ia., 431. An examination of these cases will show that they rest upon statutes widely different from our own, and are not therefore applicable here. Under the Iowa statute, for instance, the admission of an existing liability was in all cases required to be in writing in order to interrupt its running. Our statute, on the contrary, gives to part payment alone this effect, and the decisions of this court heretofore have recognized this rule. *Kyger v. Ryley*, 2 Neb., 20. *Mayberry v. Willoughby*, 5 Id., 368. In this respect our statute is in harmony with the common law. Chitty on Contracts, 729.

The indorsement in this case was of a sum of money which the defendants in error had collected upon another note delivered to them by the plaintiff in error as collateral security to the note sued on. The fact of indorsement is set out in the petition in these words: "That on the 30th day of January, 1877, plaintiffs collected $61.55 on a note which defendant had left with them as collateral security to the note above described, and on the same day made the indorsement as above set forth."

By demurring to the petition it is of course conceded that the indorsement was of money actually received as stated, and properly made. The money derived from the collateral was therefore properly applied as the parties had stipulated that it should be, and was a payment by the debtor just as truly as if he himself had, at the time of the indorsement, handed the money over to his creditor with the express direction to him to make the indorsement. The creditor did just what it was his duty to do when he accepted the security. *Wheeler v. Newbould*, 16 N. Y., 392. *Joliet Iron Co. v. Sciota F. B. Co.*, 82 Ills., 548. *Whipple v. Blackington*, 97 Mass., 476. *Haven v. Hathaway*, 20 Me., 345. The district court ruled correctly, and its judgment is affirmed.

JUDGMENT AFFIRMED.

WILLIAM D. HALLER, PLAINTIFF IN ERROR, V. RICHARD BLACO, DEFENDANT IN ERROR.

1. **Practice:** FINDINGS. The code, sec. 297, does not require the court to separate its findings of fact, but merely "the *conclusions* of fact found separately from the conclusions of law." MAXWELL, J., dissenting.

2. **Forcible Entry and Detainer.** A party who has never been in possession of land cannot maintain an action against the owner of the fee for an alleged forcible entry and detention.

ERROR to the district court for Washington county. Tried below before SAVAGE, J.

L. W. Osborn, for plaintiff in error.

E. Estabrook, for defendant in error.

LAKE, CH. J.

This is a petition in error from Washington county. The original action was brought by the plaintiff in error in the county court, for the forcible entry and detention of a quarter-section of land, where the defendant had judgment in his favor, which, on proceedings in error to the district court, was affirmed. This judgment of affirmance is now here for review.

The errors assigned are practically three. *First.* The refusal of the court "to make separate findings as required by law." *Second.* That the finding of the county judge was against the evidence. *Third.* The exclusion of certain tax receipts offered in evidence.

As to the first error complained of, the record only shows that "the plaintiff requested the court to make separate findings of fact, which the court refused to do." There was no error in this refusal. The statutory provision by which this demand upon the court is supposed to have been justified, does not entitle a party to "separate findings of fact," but simply to a statement in writing of "the conclusions of fact found separately from the conclusions of law." Sec. 297, civil code. The request therefore was not within the contemplation of the statute. Besides, there was but a single conclusion of fact to be passed upon, and that was simply whether the evidence showed the complaint to be true. The court did find expressly "that the complaint" was "not true," which gives ample opportunity for review upon the question of the findings being supported by the evidence.

The second assignment cannot be upheld. The evidence was clearly insufficient to sustain the complaint. The charge was that "Blaco did, on the first day of December 1876, unlawfully and forcibly enter upon the said premises, and has unlawfully and forcibly detained the same" from the plaintiff. The evidence offered by the plaintiff

was to the effect merely that he claimed the land under a tax deed, which by this court had been pronounced invalid (*Haller v. Blaco*, 10 Neb., 36); that Haller himself had never in person been upon the land, but had executed a lease of it to one Mortenson, who, at his instance, in the fall of 1876 had erected a small house and stable thereon, with the intention of living there; that even when Mortenson went on the land, under this lease, the defendant Blaco was in actual possession, engaged in plowing, and had during that year raised and harvested a crop of wheat thereon; that soon after Mortenson had completed the house, Blaco moved into and had held possession of it ever since; that the plaintiff leased the land to Mortenson, and had him erect the house, with full knowledge of Blaco's possession and cultivation, and with the view of thus getting to himself an adverse possession; that soon after Blaco went into the house, Mortenson surrendered his lease, and abandoned all claim to the land.

It is clear that, even upon the plaintiff's showing alone, of which we have given the substance, the action was not sustained; but on the contrary, if Mortenson had moved into the house, and remained there forcibly and against the will of Blaco, he would have been liable in an action at the suit of the latter. The attitude of the parties toward each other was simply this: Blaco is in peaceable possession of the land from early in the year 1876, and engaged in its cultivation. Haller is without title, and was never in possession, unless constructively for a short time in the fall of that year, while his lessee, Mortenson, was building the house and stable. His only interest in the land, if he had any at all, being that given by the statute to the holder of a tax title which has failed. Occupying this relation to each other, and to the land, it seems clear that a forcible entry by Blaco, as against Haller, was not only not shown, but was absolutely impossible. And the correctness of this conclusion is made doubly certain by the evidence on the

part of Blaco, that he was not only in the peaceable possession of the land, but was the absolute owner of the fee. A party who has never been in possession of land cannot maintain an action against the owner of the fee for an alleged forcible entry and detention. If he have any interest in the land, he must seek it in another form of action.

As to the third assignment, we have only to say that the record fails to show that the tax receipts were excluded; indeed, it shows just the reverse of this. But they ought to have been excluded for the reason that they were incompetent evidence in that action. Finding no error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., dissents.

JOHN FITZGERALD, PLAINTIFF IN ERROR, V. JOHN MORRISSEY, DEFENDANT IN ERROR.

Guaranty. Where the leading object of a party promising to pay the debt of another is to promote his own interests, and not to become guarantor, and the promise is made on sufficient consideration, it will be valid although not in writing. In such case the promissor assumes the payment of the debt.

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

T. Appelget & Son, for plaintiff in error, cited: *Osborn v. Farmers Bank*, 16 Wis., 36. *Bressler v. Pindell*, 12 Mich., 225. *Brown v. Hazen*, 11 Mich., 219. *Walker v. Richards*, 39 N. H., 259. *Jackson v. Raynor*, 12 Johns., 291. *Simpson v. Patten*, 4 John., 422. *Watson v. Randall*, 20 Wend., 201. *Stern v. Dinker*, 2 E. D. Smith, 401.

Pinero & Chapman, for defendant in error, cited: *Rose v. O'Linn*, 10 Neb., 367. *Clopper v. Poland*, 12 Neb., 70. *Dearborn v. Parks*, 5 Greenleaf, 81. *Serge v. Williams*, 1 Saund., 211, note 2. *Williams v. Leper*, 3 Burr, 1886. *Colt v. Root*, 17 Mass., 236.

MAXWELL, J.

Morrissey brought an action against Fitzgerald in the district court of Johnson county, and for cause of action alleged in his petition in substance that on or about the first day of August, 1881, Fitzgerald was engaged in grading the roadbed of a railroad in Johnson county, and requiring the services of a large number of hands to aid him in performing said labor, promised Morrissey and others that if they would not abandon said work, which they were about to do, but would enter into the employment of said Fitzgerald and labor for him in grading said roadbed, that he would pay Morrissey and others for certain work previously performed by them on said roadbed for one Garland, as soon as said work was measured; that relying upon said promise, Morrisey and others did not abandon said work as intended, but remained and continued to work on said roadbed as requested by Fitzgerald; that the work done by Garland has long since been measured, but the amount due to Morrissey thereon has not been paid. The prayer is for $45.71 and interest. The answer in effect denies the facts stated in the petition. On the trial of the cause, a verdict was returned in favor of Morrissey, upon which judgment was rendered.

The errors assigned are: *First.* That the court erred in giving paragraph one of the instructions. *Second.* That the court erred in refusing to give the instructions asked on behalf of Fitzgerald, from one to five inclusive.

The instruction given which is complained of is as follows: "1st. If you shall find from the evidence that Fitzgerald agreed with John Morrissey that if he, Morrissey,

would work for him he would pay certain indebtedness coming from one Garland to Morrissey, and if you further find that in consideration of said promise the plaintiff went to work for the defendant and performed his part of the contract, then you will find for the plaintiff for such amount as the evidence shows he ought to recover."

It is admitted that Fitzgerald has paid Morrissey in full for all labor performed for him, and this action is for the sole purpose of recovering for labor performed by Morrissey for one Garland, on said roadbed. It appears that Garland was a sub-contractor under Fitzgerald, and that he left the work, indebted to his employes for labor performed. There is some testimony tending to show that Morrissey, because of his promise set up in his petition, failed to file a laborer's lien on the roadbed of the railroad and thereby lost the benefit of the same; but there is no allegation of this kind in the petition, and that question cannot be considered.

The only question at issue is, did the plaintiff in error, in order to induce the defendant in error to remain on the roadbed and perform labor for him thereon, promise to pay him, in addition to compensation for such labor, the amount owing him from Garland, and in pursuance of said promise, did Morrissey perform the stipulated labor? The instructions complained of in effect state this to be the issue, and we fail to perceive wherein it is erroneous.

The court also gave the following instructions:

"But if Fitzgerald only undertook to pay plaintiff with others such an amount as was due Garland after an estimate, then you will find for the defendant, because nothing is shown to have been due Garland. Or if Fitzgerald only made the naked promise to pay Garland's debt without any consideration, then you will find for the defendant, as such a promise would be void, not being in writing."

These instructions present the law applicable to the testimony.

Where the leading purpose of a person who agrees to pay the debt of another is to gain some advantage, or promote some interest or purpose of his own, and not to become a mere guarantor or surety of another's debt, and the promise is made on a sufficient consideration, it will be valid although not in writing. *Clopper v. Poland*, 12 Neb., 69. *Nelson v. Boynton*, 3 Met., 396. In such case the promissor assumes the debt and makes it his own. The promise is a direct undertaking on the part of the person promising to pay the debt—not to pay *if* the debtor fails to pay. Such a contract rests upon the same grounds as a contract for property sold and delivered, and is not collateral.

The very large number of instructions asked on behalf of the defendant below were properly refused, as such portions of them as had not previously been given by the court on its own motion were not applicable to the testimony. The judgment must be affirmed.

JUDGMENT AFFIRMED.

THE STATE, EX REL. A. B. TUTTON, PLAINTIFF, V. A. C. EBERHARDT ET AL., DEFENDANTS.

Mandamus: DEMAND. Where a proceeding by mandamus is instituted by a private individual, as a tax-payer, against a county clerk and treasurer to require them to keep the books pertaining to their respective offices in a particular manner, it must appear that a demand for that purpose was made upon such officers before the action was commenced.

ORIGINAL application for mandamus.

T. M. Marquett, for relator.

Harwood & Ames, McKillip & Page, France & Sedgwick, and *John C. Cowin*, for respondents.

MAXWELL, J.

The respondents, Eberhardt, Wulbrandt, and Love, were county commissioners of York county at the time this action was instituted. Gandy was county treasurer, and Eatherly clerk, and the relator deputy clerk of the same county. The relator made application for a writ of mandamus against the respondents, alleging their failure to perform certain duties required by law, and asking that they be required to perform the same. An alternative writ was granted, wherein the cause of action against the clerk is stated in substance to be his neglect to charge the treasurer with $1994.32, interest, added to the taxes after they became due. The treasurer is alleged to have been continuously in that office since 1873, and it is alleged that his books have not been and are not kept to show "the amounts received and paid out on account of each separate and distinct fund or appropriation, in separate or distinct columns or accounts, and for each year, and for the present term of his said office separate and distinct from other years and other terms of the office of county treasurer," etc. There are many other allegations of a like vague and indefinite character, but nowhere a charge of fraud, or that the books do not show the amount of money received and paid out. As to the county commissioners, while there are many indefinite allegations as to their neglect of duty, there is no such specific statement of facts showing neglect as would justify the intervention of this court to compel action.

The respondents have answered the writ, but as the answers contain no admissions tending to aid the writ, it is unnecessary to notice them. The respondents now move to quash the writ because it fails to state facts entitling the relator to the relief sought.

The county clerk is required to keep an accurate account with the county treasurer of all matters in relation to taxes

collected and paid out, and the county treasurer is required to keep a cash book, "in which he shall enter an account of all money by him received, specifying in proper columns provided for that purpose the date of payment, the number of the receipt issued therefor, by whom paid, and on account of what fund or funds the same was paid, whether state, county, school, road, sinking fund, or otherwise, and the amounts paid in warrants, orders, receipts, each in a separate column, and the total amount for which the receipt was given in another column; and the treasurer shall keep his account of money received for and on account of taxes separate and distinct from moneys received on any other account; and shall also keep his account of money received for and on account of taxes levied and assessed for any one year separate and distinct from those levied and assessed for any other year; and all entries in said cash book of money received for taxes shall be in the numerical order of the receipts issued therefor." Comp. Stat., 419.

In Moses on Mandamus, 204, it is said: "The petition for a mandamus should present to the court a *prima facie* case of duty on the part of the defendant to perform the act demanded, and an obligation to perform it; otherwise the alternative writ will not be granted. It should also appear from the petition that a demand has been made on the defendant to do the thing he is sought to be compelled to do, and that he has refused and neglected to do it. *Stephens Nisi Prius*, 2318–19. 9 Mich. 328."

In Redfield on Railways (5th Ed.), 659, note 6, it is said: "It is first indispensable to demand of the party against whom the application is to be made to perform the duty. See also *State v. The Governor*, 1 Dutch., 331. *State v. Parker*, 7 Rich., 234. *State v. Davis*, 17 Minn., 429.

Mandamaus will only be granted where the party applying for the writ has no other specific or adequate remedy. County commissioners have a general supervision of the books and accounts of the clerk and treasurer, and the pre-

sumption is that such commissioners will perform their duty and require the books to be kept in the mode pointed out by the statute. But if they fail to do so a private individual cannot in the first instance bring mandamus against such clerk and treasurer without making a demand upon them to perform their duties in the manner pointed out. One of the reasons for such demand is that there is frequently a difference of opinion as to the proper construction of a particular statute, and the party against whom it is proposed to proceed should have an opportunity to act upon his adversary's construction before being involved in litigation.

This action is prosecuted for the benefit of the relator as a tax-payer—in other words is a private action. It would seem but justice, therefore, that he should have stated to the respondents his construction of the law and asked them to comply therewith, and having failed to do so he cannot maintain the action. The action against the commissioners is in effect to require them to settle with the treasurer according to the corrected books of the clerk hereafter to be made. It will be time enough to grant a mandamus when such books have been changed and are shown to be correct and the commissioners refuse to act upon them.

As the alternative writ fails to state a cause of action it must be quashed and the action dismissed.

JUDGMENT ACCORDINGLY.

CHARLES P. COMSTOCK, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Continuance:** AFFIDAVIT FOR. Where an affidavit for a continuance of a case is based upon information derived from others, it should give their names and whereabouts, and also sufficient reason for not procuring their own affidavits to the facts communicated, which should be done if possible.
2. **Evidence:** WITNESS—COMPETENCY OF. A child may be a competent witness to testify to the fact of his parentage.
3. **Rape:** EMISSION. To establish the crime of rape evidence of emission is not necessary; emission is presumed from the fact of penetration.
4. **Instructions.** Where the instructions given to the jury are as favorable for the prisoner as those requested, a refusal is not error.
5. ——: RAPE. On the trial of an indictment for rape, the refusal to instruct the jury that the failure of the prosecution to call expert testimony to the fact of penetration weakens other competent evidence on that point—there being nothing to show that such testimony was available, and in fairness ought to have been produced—is not error.
6. **Prisoner as Witness.** The fact that a prisoner does not testify in his own behalf will not operate to his disadvantage; but if he testify, and fail to controvert in any way what has been said by witnesses against him, concerning a fact within his own personal knowledge, it will be taken as an admission that their testimony is true.

THIS was an indictment for rape committed upon one Coral Comstock, daughter of the defendant. The trial below before POST, J., in the district court for York county, resulted in a verdict of guilty, and sentence of prisoner to imprisonment in penitentiary for life, to reverse which he prosecuted this writ of error.

O. P. Mason, George B. France, and *Sedgwick & Powers,* for plaintiff in error.

Affidavits for continuance were sufficient. *Jameson v. Butler,* 1 Neb., 118. *Johnson v. Dinsmore,* 11 Neb., 393.

Williams v. The State, 6 Neb., 337. The evidence as to parentage was inadmissible. 1 Greenleaf, sec. 103. There must be both penetration and emission. Russell on Crimes, 685, note. *Rex v. Russell*, 1 M. & R., 122. *Williams v. The State*, 14 Ohio, 226. *Blackburn v. The State*, 22 Ohio State, 110. Warren's Ohio Criminal Code, 250. Prosecutrix must appear to have resisted to the full extent of her ability. *Oleson v. The State*, 11 Neb., 276.

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

LAKE, CH. J.

A large number of errors are assigned, but we shall consider only those which are referred to by counsel for the prisoner in their brief.

The first of these is a refusal of the court to grant a continuance on account of absent witnesses. There was no error in the ruling of the court on this question. The affidavit on which the motion to continue was based was clearly insufficient, according to the most approved rule of criminal practice in such cases.

The affidavit was that of the prisoner himself. All but two of the witnesses desired were non-residents of the state, and their whereabouts unknown to affiant, except that he had been recently "informed," but by whom he does not say, that they were somewhere in the states of Illinois and Michigan. The two witnesses in this state resided, as affiant "learned," about a week before, in Harlan county, but from whom he learned this, or whether the information was credible, does not appear.

When an affidavit for continuance is based upon information derived from others, it should give their names and whereabouts, and also sufficient reason for not procuring their own affidavits to the facts communicated, which should be done if possible. Being at least but hearsay testimony, the greatest particularity is due to the court, and

must be observed. The motion for a continuance was properly overruled. *Williams v. State*, 6 Neb., 334.

The next objection is to the ruling of the court on the admission of evidence. The prosecuting witness was asked what relation she bore to the prisoner, and answered that she was his daughter. It is claimed that this was incompetent testimony, for the reason that the fact of her parentage was one of which necessarily she could know nothing except as hearsay.

We do not regard this objection as sound. It is certainly competent for one who, from his earliest recollection, has been a member of one's family, given his name, and reared in the belief, and in all ways given to understand that he is a son in the household, to testify of his parentage. His testimony may not be satisfactory or conclusive of the fact, but it is at least admissible for what it is worth in the minds of the jury, and clearly sufficient to make a *prima facie* case, thus throwing the burden of overcoming it upon him who controverts it. To so rear a child, is in the nature of an admission of parentage, and should be so regarded.

The next question was raised by an exception to an instruction given to the jury, by which they were told that the prosecution was not "required to prove emission" to make out the crime of rape.

By our statute rape consists of the "*carnal knowledge*" of a woman, "*forcibly and against her will.*" Of the proof of "carnal knowledge," Greenleaf in his work on Evidence, vol. 3, § 210, says: "It was formerly held, though with considerable conflict of opinion, that there must be evidence both of penetration and injection. But the doubts on this subject were put at rest in England by the statute of Geo. IV., c. 31, which enacted that the former of the two acts was sufficient to constitute the offense. Statutes to the same effect have been passed in some of the United States. But as the essence of the crime consists in the violence done to the person of the sufferer, and to her sense of honor and

virtue, these statutes are to be regarded merely as declaratory of the common law, as it has been held by the most eminent judges and jurists both in England and in this country." And this we take to be the more safe and reasonable rule, and the one supported by the greater weight of authorities. Emission is presumed from the fact of actual penetration.

Error is also assigned upon the refusal of the court to give several instructions requested on behalf of the prisoner. In the action of the court in this particular, we see nothing to complain of. The first of these requests was that: "In order to make a case against defendant, all material matters must be proved beyond a reasonable doubt." This was followed by the designation of two matters only which were material to guilt, viz., penetration, and that the prosecuting witness was the daughter of the prisoner.

To simply say to a jury that "all material matters must be proved beyond a reasonable doubt," without also advising them what the "material matters" of the case are, can aid them but little if any in reaching a safe conclusion, and is no better than saying to them that, before they can convict, they must be satisfied of the prisoner's guilt beyond a reasonable doubt. Looking to the instructions which were given, we find that upon all of the matters referred to in those refused as material, the jury were expressly told they must be satisfied from the evidence, beyond a reasonable doubt, or they must acquit. This is true of the essential facts of penetration and relationship between the prosecuting witness and the prisoner, in addition to which it was, in general terms, more than once impressed upon the attention of the jury that "The state must establish his guilt beyond a reasonable doubt," before they could convict. The instructions actually given were certainly as favorable to the prisoner as those refused, and where this is the case the refusal to give those requested is not error.

Another instruction refused was as follows: "The fact that the prosecution have not called a physician, or expert,

to the fact of penetration of the person of the prosecuting witness, Coral Comstock, weakens the evidence of the prosecution in regard to the fact of penetration."

This was rightfully refused. The testimony to the fact of penetration offered by the prosecution was ample, and left no room for doubting that it took place. This testimony was confined to that of the prosecuting witness herself, very fully corroborated by that of her older sister, to whom she exhibited herself soon after the occurrence, with her clothing stained with blood from her private parts. This testimony we will not repeat, but it seems straightforward, and bears ample evidence of being entirely truthful. Besides, although the prisoner availed himself of the privilege of being a witness in his own behalf, and testified, he did not offer in a single particular to controvert what his daughters had sworn to respecting the fact of carnal connection. [Had he not gone upon the witness stand, the fact of his not testifying against them would not have operated to his disadvantage, but having done so, his failure to deny what they said respecting a matter which must have been within his own personal knowledge, will be taken as an admission that it was true.] Under these circumstances the testimony of the prosecuting witness needed no support from physicians or experts.

If it had been shown that a physician was called to attend upon the prosecuting witness at the time of this occurrence, who had made an examination of her private parts, and the fact of penetration were at all doubtful, the failure to produce such professional testimony might be an important circumstance for the jury to consider in favor of the prisoner. The instruction, however, was entirely inapplicable here, and there was no error in refusing it.

This disposes of all questions urged by counsel upon our attention, and finding no error respecting them we must affirm the judgment.

JUDGMENT AFFIRMED.

THOMAS JONES, PLAINTIFF IN ERROR, V. THE STATE, EX REL. CLARA M. GIBSON, DEFENDANT IN ERROR.

Bastardy: COSTS. One J. was tried under the bastardy act, and the jury returned a verdict of not guilty. The court therefore rendered judgment against him for the costs incurred by him. *Held*, That as the proceeding was in the nature of a civil action to enforce the performance of a civil and moral obligation, the support by a father of his child, the court had authority, under sec. 623 of the code, to apportion the costs.

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

Laird & Smith and *John D. Hayes*, for plaintiff in error.

C. J. Dilworth, Attorney General, for defendant in error.

BY THE COURT.

In the year 1877, the plaintiff was arrested under the bastardy act, and was bound over to appear at the next term of the district court. The case was continued for some time at his request, but in November, 1878, a trial was held, which resulted in a verdict of not guilty. A motion for a new trial was filed on behalf of the state, which was taken under advisement until the next term of the court. At the next term the motion was overruled, and judgment entered on the verdict, and that the plaintiff pay the costs.

The error assigned is, that the court erred in rendering judgment against the plaintiff in error for costs. Proceedings under the bastardy act are in the nature of a civil action to enforce the performance of a civil and moral obligation—the support by a father of his child. *Cottrell v. The State*, 9 Neb., 125. It is not necessary to bring the action in the name of the state, but it may be instituted in the name of the prosecuting witness.

Sec. 620 of the code provides that a party shall be allowed his costs of course in actions for recovery of money only, or for specific real or personal property.

Sec. 621 provides in what cases a plaintiff shall not recover costs, if the damages sustained be under five dollars.

Sec. 622 provides that costs shall be allowed a defendant of course on any judgment in his favor in any of the cases mentioned in sections 620 and 621.

Sec. 623 provides that in other actions "the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as it in its discretion may think right and equitable." This proceeding being in the nature of a civil action, and the court having authority to apportion the costs, the judgment is affirmed.

JUDGMENT AFFIRMED.

IRA A. PEARSON, PLAINTIFF IN ERROR, v. THE KANSAS MANUFACTURING CO., DEFENDANT IN ERROR.

1. **Practice:** JURISDICTION IN PERSONAL ACTIONS: SERVICE OF SUMMONS. An action against the maker and several endorsers of a promissory note may be brought in any county where any one of the parties defendant resides, or may be summoned. And when so brought, the court is authorized to issue its summons to any other county in this state, for service upon any of the parties found there, and by such service acquires jurisdiction of the persons so served, although it may be afterwards ascertained that the defendant summoned in the county where the action is pending, is not liable as indorser, but only as guarantor.

2. **Jurisdiction given by appeal.** An appeal from a judgment in a personal action gives the appellate court jurisdiction of the appellant regardless of whether the lower court had acquired jurisdiction over him or not.

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

Brown & Ryan Brothers, for plaintiff in error.

W. J. Lamb, for defendant in error.

LAKE, CH. J.

This is a proceeding in error to reverse a judgment of the district court for Lancaster county. The action originated in the county court of said county, and was brought by the defendant in error against W. F. Sherman, as maker, and three other persons, including the plaintiff in error, as endorsers of several promissory notes. Of these defendants, one only, C. C. Pace, was found and summoned in Lancaster county. The plaintiff in error was found and served in Jefferson county in this state, whither a summons was sent for that purpose. In obedience to the command of the writ, Pearson appeared, and a trial was had resulting in a judgment against him, from which he duly appealed to the district court, where a like result was reached.

The only ground of alleged error, and on which it is now sought to have the judgment of the district court reversed, is, that the county court, by the service of its summons in Jefferson county, acquired no jurisdiction over the person of the plaintiff in error. And this ground is taken upon the assumption, simply, that the defendant Pace, who alone was served with the summons in Lancaster county, although sued as endorser, was in reality liable only as guarantor, and therefore improperly joined as a defendant in that action. The argument of the counsel for the plaintiff in error amounts simply to this, that inasmuch as Pace, although nominally an endorser on the notes, was really liable only in the capacity of a guarantor, and therefore, under the rule announced in the case of *Mowery v. Mast*, 9 Neb., 445, not liable to be proceeded against jointly with

the maker and endorsers, if he objected, the action was not properly brought in Lancaster county, and therefore there was no authority for sending the summons to Jefferson county. To all this we answer, that the jurisdiction of a court to take cognizance of a plaintiff's claim, or its authority to issue process, and bring parties before it to answer, does not depend upon the contingency of their finally being adjudged liable as charged. Pace was a resident of Lancaster county; he appeared to be an endorser on the notes, and was charged as such; the action was therefore properly brought against him and the maker and other endorsers jointly, and the plaintiff in error properly served with summons in Jefferson county, without regard to what the liability of the several defendants might on the final trial be found to be. The authority for sending the summons to Jefferson county is found in section 65 of the civil code, which provides that: "When the action is rightly brought in any county, according to the provisions of title four, a summons shall be issued to any other county against any one or more of the defendants, at the plaintiff's request." The action was "rightly brought" in Lancaster county, according to section 60, title four of the code, which declares in express terms that actions like this one "must be brought in the county in which the defendant or some of the defendants reside or may be summoned."

But it is wholly unnecessary to trouble ourselves with what occurred in the county court prior to the entry of judgment there; for regardless of it all, it is very clear that the district court, whose judgment alone we are now dealing with, had jurisdiction over Pearson, and was given it by his own voluntary act—that of appeal. By his appeal he vacated the judgment of the county court, and brought the case within the jurisdiction of the district court, thereby subjecting himself to such judgment, under the law, as the facts of the case warranted; that the facts warranted the judgment which the district court gave, is

doubtless true, for the reason that no complaint is made on that score. There is no error in the matter complained of, and the judgment will be affirmed.

JUDGMENT AFFIRMED.

SILAS H. BURNHAM, PLAINTIFF IN ERROR, V. DOOLITTLE & GORDON, DEFENDANTS IN ERROR.

Attachment: GARNISHMENT: EQUITY OF REDEMPTION LIABLE TO. The equity of redemption in mortgaged or pledged personal property, even after condition broken, is such an interest as, in this state, may be reached by attachment or garnishment before judgment, and by garnishment after judgment in aid of execution.

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

Wales Frank Severance, for plaintiff in error.

1. Summons should have been quashed. *Humphrey v. Candee*, 2 Cow., 509. *Burgess v. Stilt*, 12 How. Pr., 401.

2. The equity of redemption cannot be reached by garnishment. Drake on Attachment, secs. 560, 561. *Williams v. Railroad*, 36 Maine, 201. *Hassie v. God With Us*, 35 Cal., 378.

Samuel J. Tuttle, for defendant in error, cited: *Finnell v. Burt*, 2 Handy, 207. *Casly v. Fenstemaker*, 14 Ohio State, 457. *Faulkner v. Meyers*, 6 Neb., 418. *Wheeler v. Newbold*, 16 N. Y., 392.

LAKE, CH. J.

This petition in error presents two questions. *First.* Was the motion to quash the summons in garnishment properly overruled? *Second.* Was the plaintiff in error rightly held as garnishee?

The first of these questions might well be disposed of by applying a rule of practice that a voluntary appearance is a waiver of all defects in the original process. *Crowell v. Galloway*, 3 Neb., 215. *Kane v. The People*, 4 Id., 509. Or it might be disposed of under the rule of the statute, that: "No proceedings against such garnishee or garnishees shall be quashed, or such garnishee or garnishees discharged, by reason of any informality or irregularity merely of the affidavit, or summons provided for in this article." Sec. 247 Comp. Statutes, 563. But we prefer to place our decision upon the ground that the summons was regularly issued, and sufficient to give the court jurisdiction of the person of the garnishee, even under the most technical rule of procedure.

The objection to the summons was simply that the "affidavit on which the procedure is based is insufficient in not establishing that the garnishee has property of, or is indebted to defendant; and that" * * * "it is not entitled in any court, proceeding, or cause."

This objection is based in part upon the supposition that, to properly institute a proceeding of this kind, the affidavit must necessarily show that the person to be summoned has property of the judgment debtor in his possession or under his control, or is indebted to him, and that a statement of *mere belief*, without more, will not answer. Referring to the statute, however, we find that nothing further is required to be stated than that the judgment creditor "has good reason to and does believe that any person or corporation (naming them) have property of and are indebted to the judgment debtor." Upon the filing of an affidavit, stating such belief, it is provided that the proper officer "shall issue a summons as in other cases, requiring such person or corporation to appear in court and answer such interrogatories as shall be propounded to him, it, or them, touching the goods, chattels, rights, and credits of the said judgment debtor in his, its, or their possession, or

control." Sec. 244, Comp. Statutes, 562. Mere belief, therefore, is all that the statute contemplates, and consequently all that courts have the right to exact in affidavits of this kind. If it had been intended that the facts and circumstances inducing such belief should be given, and their sufficiency determined by the court, it is but reasonable to suppose that language altogether different from this would have been employed.

The other point of this objection, viz., that the body of the affidavit was without a title, is merely technical. In the affidavit it is clearly averred that it was a transcript of the record of the writ of Doolittle & Gordon v. W. Sanford Gee, that had been filed in the district court, and it was against "the property of the said W. Sanford Gee" that the garnishment proceeding was directed. Besides, the affidavit was endorsed, "Doolittle & Gordon against W. Sanford Gee," and this is also the endorsement of the summons served upon the person garnished. There could not have been, therefore, any possible doubt as to the case in which it was intended to use the affidavit, nor as to the persons sought to have affected by it. There was neither uncertainty nor ambiguity in any particular, and we are aware of no purpose that would have been better served by prefixing the title of the cause to the body of the affidavit.

The only remaining question is whether the judgment debtor's equity of redemption, or interest in the two promissory notes, could be reached and held by the process of garnishment? It must be conceded that according to most of the cases bearing upon this question, it could not. 1 Wait's Actions and Defences, 422, 423. Following this general current of authorities, we held in *Peckinbaugh v. Quillin*, 12 Neb., 586, that it is only when a mortgagor of goods has the right of possession for a definite period that he has an attachable interest in them. This rule did not influence the result of that case, however, for the reason that the property was insufficient to satisfy the mort-

gage debt. But in view of our attachment law, and the ruling of the supreme court of Ohio on a statute from which ours was copied, and upon more mature reflection, we are now satisfied that whatever interest a mortgagor of chattels may have in them, in this state, may be reached by seizure under a writ of attachment at any time while in his possession, and by means of the process of garnishment if they have passed into the hands of the mortgagee. And to this extent our opinion in the case of *Peckinbaugh v. Quillin* must be modified. In the case of *Carty v. Fenstemaker*, 14 Ohio State, 457, which arose under a statute just like our own respecting this matter, it was distinctly held that the interest of a mortagor of chattel property in possession of the mortagor, after condition broken, was attachable. The seizure of the property under the order of attachment, it was said, "creates a lien in favor of the attaching creditor upon the interest of such mortgagor." Now the interest of a mortgagor in property thus circumstanced, as to the mortgagee, is but the equity of redemption, or what may remain after the mortgage debt is paid. And if this interest be liable to attachment, as there held, it seems to follow necessarily, that where property covered by a mortgage has passed into the hands of the mortgagee, the equity of redemption may be reached by garnishment, which is nothing but a species of attachment whereby property rights, which the officer holding the order "cannot come at" and take into his possession, may be brought within the jurisdiction of the court, and by its judgment subjected to the payment of the owner's debts.

On this point the supreme court of Ohio, in deciding the case before referred to, said: "The order of attachment designates the classes of property it is designed to subject; but where the possession and claims of other parties are such as to obstruct or prevent its execution by the officer directly upon the property, another mode of execution is provided, which is to charge such parties as gar-

nishees, and thus as effectually appropriate, indirectly, the interest of the defendant to the judgment the plaintiff may recover, as if the condition of the property had admitted of the officer doing so directly."

Having arrived at the conclusion that an equity of redemption is such an interest as may be reached by means of the process of attachment or garnishment before judgment, it only remains for us to determine whether the remedy afforded by the statute giving the right of garnishment after judgment, in aid of execution, was intended to be any less effective or complete in this respect. Referring to the statute, secs. 244 and 245 of the code of civil procedure, we find that persons so garnished are required to appear "and answer such interrogatories as shall be propounded" * * * "touching the goods, chattels, rights, and credits of the said judgment debtor," etc. Also, that "said garnishees shall be held liable in all respects as in cases of garnishees before judgment."

It would seem that the words here used—particularly "*rights and credits*," concerning which such garnishees must make disclosure, are sufficiently comprehensive to include the right of redemption in mortgaged or pledged personal property, even without the supplementary declaration that the liability shall be the same as that of "garnishees before judgment." With that declaration, the matter is made to our minds perfectly clear, and we must therefore hold that whatever interest the judgment debtor had at the date of the service of the summons in garnishment in the two notes held as collateral security, which seems to be merely the equity of redemption, or whatever may remain of the proceeds thereof after paying the secured debt, the garnishee is answerable for.

The rulings of the district court having been in conformity to these views, its judgment will be affirmed.

JUDGMENT AFFIRMED.

LOUIS HELMER, PLAINTIFF IN ERROR, V. WM. KARL REHM ET AL., DEFENDANTS IN ERROR.

1. **Attachment**: SALE OF LAND. The sale of land taken in attachment under an order of court is governed by the same restrictions and regulations as are provided for sales of lands under execution.
2. ———. An error in the description of the land, *Held*, Sufficient to justify the vacation of the sale.
3. ———. The fact that an order of sale is simply erroneous, is not a sufficient ground for setting a sale aside.
4. ———: NOTICE: WAIVER. An appearance in court, and filing objections to the confirmation of a sale of attached property, is a waiver of defects in the published notice to the defendants.

ERROR to the district court for Lancaster county. Tried below before POUND, J. The action was one of attachment, and the error complained of was in the overruling of a motion by plaintiff to confirm the sale of real property attached.

Burr & Marshall, for plaintiff in error.

M. H. Sessions, for defendants in error.

LAKE, CH. J.

I can discover in this record but a single ground on which the refusal of the court to confirm the sale can be sustained, and that is the error in the description of the land found in the published notice given by the sheriff; and this is not one of the grounds of objection urged by counsel against the sale.

The land attached and ordered sold by the judgment was the north half of the south-east quarter of section thirty, in township twelve north, range five east; and this is the tract which the sheriff returned as sold under a no-

tice given on the 9th of April, of a sale to take place on the 10th of May, 1881. Referring to the notice, it is found that the description of the land to be sold was the north half (N. ½) of the south-west quarter (S. E. ¼) of said section.

The sale of attached lands under an order of court is governed by "the same restrictions and regulations as if the same had been levied on by execution." Civil Code, § 228. One of these regulations is, that notice shall be given of the time and place of sale, as provided in § 497; and another, that the court shall carefully examine "the proceedings of the officer" in making the sale, and if satisfied that it has "in all respects been made in conformity to the provisions" of the statute on that subject, an order of confirmation may be entered.

This notice was clearly defective. It is true that the abreviated number, in parenthesis, is correct, and possibly, might have upheld the sale if the court had seen fit to confirm it. But, however this might be, I do not think that this court would be warranted in saying that, with such a notice, there was an unlawful exercise of the supervisory control given to the district judge over sales, in setting this one aside. The fact that this objection was not brought to the attention of the judge by counsel did not prohibit him from taking cognizance of the defect and acting upon it. It was his duty to examine the proceedings of the sheriff, and if not "satisfied" in reason of the legality of the sale, it was his duty to set it aside. I am not prepared to lay it down as a rule that a notice like this one should be upheld as against the judgment of the court to which it was first presented for approval.

The first three objections urged against the sale go to the jurisdiction of the court to render the judgment. The judgment may have been erroneous for the reasons stated in these objections; but it was not void, and was ample to uphold a sale of the attached property. Even if there

were defects in the published notice to the defendants of the commencement of the action, they were cured by their voluntary appearance in contesting the sale.

So, too, of the fourth objection. This was that the land was not attachable. Even if this were so, a motion to set the sale aside simply was not the way to correct the wrong. With the sale vacated the judgment directing a sale still stands, by which another can be made which may be effectual to pass the title to the purchaser. The proper step to reach the root of the matter in such case would be to move to set the judgment aside and be let in to defend, or to obtain a reversal of it by proceedings in error. The mere setting aside of the sale affords no permanent advantage.

The fifth, sixth, seventh, and eighth objections are already practically and sufficiently answered by what has been said of the other. They were not well taken. The defendants have made a voluntary appearance, and the sale of the attached land could be properly made only in the manner provided for sales of real estate under an ordinary execution.

JUDGMENT AFFIRMED.

CATHARINE TOWLE ET AL., PLAINTIFFS IN ERROR, v. CHARLES B. HOLT ET AL., DEFENDANTS IN ERROR.

1. **Taxes**: REDEMPTION FROM TAX SALE: IMPROVEMENTS. The provisions of sec. 104 of the revenue law of 1869, requiring the land-owner, before a decree is rendered against a person holding under a tax deed, to pay such person "the full value of any and all improvements put upon said land by the purchaser at tax sale, or his heirs or assigns," are in addition to the remedy provided by the act for the relief of occupying claimants, and must be complied with before the land-owner is entitled to possession of the premises.

2. ———: ASSESSMENT: PLEADING: BURDEN OF PROOF. Where a plaintiff admits in his reply that certain real estate was assessed, but alleges that such assessment was illegal, the burden of proof is upon him to show such illegality.

3. **Tax deed:** DESCRIPTION. Two separate and distinct tracts of land may be included in the same tax deed, and such joinder in the deed will not necessarily raise a presumption that such tracts were sold in gross.

4. ———: LIMITATION. A tax deed must be valid on its face to entitle the party claiming under it to the benefit of the special limitation of the revenue law.

5. ———: REDEMPTION. Under the revenue law of 1869, the landowner must pay all taxes paid by the purchaser at tax sale, having a tax deed, with interest thereon, before he is entitled to judgment for the possession of the land.

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

A. H. Babcock and *J. H. Broady*, for plaintiffs in error.

Including two separate and distinct tracts in deed creates no presumption that they were assessed and sold as one tract. Laws of 1869, § 62, p. 203. *Nelson v. Rountree*, 23 Wis., 371. *Silliman v. Frye*, Gilm., 664. The deed was admissible. As to seal, see *Huey v. Van Wie*, 23 Wis., 613. *Putney v. Cutler*, 11 N. W. R., 437. Greenleaf on Evidence, § 503. Gen. Stat., § 32, p. 237. On limitation of actions, cited Cooley on Taxation, 376. Blackwell on Tax Titles, § 564. Angell on Limitations, § 22. *Scott v. Hickox*, 7 Ohio State, 93. *Bradstreet v. Huntington*, 5 Peters, 402. *Jackson v. Diffendorf*, 3 Johns., 267. *Griffins v. Totinham*, 1 Watts & Serg., 488. Burroughs on Taxation, 343. *Pillow v. Roberts*, 13 How., 472. On admission of evidence of rents and profits, cited: Sedgwick & Wait on Trial of Title to Land, § 678. *Nixon v. Porter*, 38 Miss., 401. *Davis v. Lark*, 30 Wis., 308. *Jackson v. Loomis*, 4 Cow., 168. As to improvements, cited: *Howard v. Lamaster*, 11 Neb., 582.

R. W. Sabin and *J. A. Smith* (*Walter J. Lamb* with them), for defendants in error.

Deed was properly excluded. Blackwell on Tax Titles, 401. *Carlisle v. Longworth*, 5 Ohio, 369. *Jones v. Devore*, 8 Ohio State, 430. *Haller v. Blaco*, 10 Neb., 36. *Miller v. Hurford*, 11 Neb., 383. *Grimm v. O'Connell*, 54 Cal., 523. Cooley on Taxation, 324. *Atkins v. Kinnan*, 10 Wend., 240. *Lain v. Cook*, 15 Wis., 446. *Maxey v. Clabaugh*, 1 Gilm., 26. *Smith v. Hileman*, 1 Scam., 323. *Harrington v. City of Worchester*, 6 Allen, 578. *Ferris v. Coover*, 10 Cal., 632. *Mayo v. Haynie*, 50 Cal., 73. As to description of two tracts in one deed, see *Hall v. Dodge*, 18 Kan., 279. *Walker v. Moore*, 2 Dillon, 256. Statute of limitations does not run. *Sutton v. Stone*, 4 Neb., 319. *Waterson v. Devoe*, 18 Kan., 223. *McGavock v. Pollock*, 13 Neb., 536. *Howard v. Lamaster*, 11 Neb., 582. *Cogel v. Raph*, 24 Minn., 197. *Wofford v. McKinnie*, 23 Texas, 36. Rents and profits. *Dungal v. Van Phul*, 8 Iowa, 269. *Wolcott v. Townsend*, 49 Iowa. 456. Improvements. *Buchanan v. Dorsey*, 11 Neb., 376,

MAXWELL, J.

This is an action to recover possession of the S. E. ¼ of section 27, T. 4, R. 6 E., in Gage county, and for the rents and profits of the same. The defendants below made a number of defenses, among which, after a denial of the plaintiff's title, they claim to be owners of said land under a tax deed to one Towle, dated November 28, 1873; that said Towle took possession of said land under said deed, and cultivated and improved the same, and had open, exclusive, notorious, adverse possession thereof for more than three years under said deed, and thereby acquired a complete and perfect title to the same. There is also an allegation that he paid taxes thereon amounting, with interest, to the sum of $600. The plaintiffs, in their reply,

deny in substance the new matter contained in the answer, but say: "That a pretended assessor of the pretended precinct in which said land was situated, on or about the first day of April, A.D. 1870, made a pretended assessment of said lands for the year 1870, by copying a pretended assessment roll of said Gage county, for the year 1869, and in no other way; that said pretended assessor, who made said pretended assessment of said premises, did not take and subscribe an oath to perform the duties of assessor in and for said precinct for said year, as required by law, or in any manner, nor did he list or have listed said property or any property for taxation of said precinct for the year 1870." This will be adverted to hereafter. There is no denial, except in a general way, that the defendants paid the taxes as stated in the answer. On the trial of the cause, a verdict was returned in favor of Holt and Sabin, for the possession of the land and for the sum of $515.60 rents and profits, and the defendants were allowed nothing for their improvements, nor for taxes paid.

It appears from the record that Albert Towle purchased the land in controversy at public sale in 1871, for the taxes due thereon in the year 1870; that in November, 1873, and after the time for redemption had expired, he obtained a tax deed for said land; that the entire tract at that time was unbroken prairie, and that he broke up and cultivated about 125 acres of the same. All the testimony tends to show that the entire value of the rents and profits was derived from that portion of the land broken up by Towle. Charles L. Schell, a brother-in-law of Sabin, called for the plaintiff below, testified: "I would put such tillable land at $2 to $2.50 per acre, cash rent. I don't know whether it was all under cultivation." R. W. Sabin, one of the plaintiffs below, testified: "The east half of the south-west quarter is mostly broken, probably all of it; there may be a little over 120 acres broken." These witnesses were the only ones produced by the plaintiff.

The condition of the case therefore is this: Towle purchased the land at tax sale and obtained a deed for the same. He thereupon broke up about 125 acres, and cultivated the same up to the time of his death, which occurred in 1879, and paid the taxes due thereon; that since the death of Towle, his heirs, who were the defendants below, have received the rents and profits for which the judgment for $515.60 was rendered against them, while they were not permitted to recover for taxes paid, nor for the costs of the breaking, which produced the rents and profits. Can such a judgment be sustained?

The case must be governed mainly by the provisions of the revenue law of 1869. Section 104 of that act reads as follows: "Deeds hereafter executed by the county treasurer for real estate sold for taxes shall be *prima facie* evidence, in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts:

First. That the land conveyed was subject to taxation, and had been assessed at the time and in the manner required by law.

Second. That the taxes were not paid at any time before the sale.

Third. That the lands conveyed had not been redeemed from the sale at the date of the deed.

Fourth. That the land was advertised for sale in the manner required by law.

Fifth. That the land was sold for taxes as stated in the deed.

Sixth. That the grantee in the deed was the purchaser, or his or her assignee.

Seventh. That the sale was conducted in the manner required by law, and this shall apply as well to private as to public sales made by the treasurer for taxes; and in all suits involving the title to land claimed and held under and by virtue of a deed executed by the treasurer as afore-

said, the party claiming adverse title shall be required to prove, in order to defeat the said title, either that the land was not subject to taxation at the date of the sale, that the taxes had been paid, that the land had never been assessed for taxation, that the land had not been advertized for sale as required by law, or that the same had been redeemed according to the laws of the state, and that such redemption was made for the use and benefit of persons having the right of redemption under the laws of this state; and in no event shall a decree or judgment be rendered against the purchaser until the claimant shall have paid to said purchaser, his heirs or assigns, the full value of any and all improvements he has put upon said real estate, which shall be determined by arbitration according to the laws of this state, or by trial by jury in any court of competent jurisdiction, and shall also have paid over to the county treasurer for the use of the purchaser, in case judgment be rendered against him, the amount necessary to redeem the land at that date, at the same rates as provided by law in cases where the land is redeemed within two years from the date of sale; provided, that no person shall be compelled to pay for any improvements made prior to the date of the treasurer's deed."

These provisions are applicable to all cases where improvements have been made under tax deeds, and are in addition to the remedy given by the occupying claimant's act. To entitle the party to recover it is not necessary that his tax deed should be valid, because if that was the case he would need the aid of no statute to enable him to recover for his improvements, as he would have the entire title.

The tax deed was objected to: *First*, Because it does not appear that the land was subject to taxation, or had been assessed at the time and in the manner required by law. These objections were sustained and the deed excluded. It does appear from the evidence of the plaintiff below, that

the land was entered by Charles B. Holt, prior to 1869, and that a patent for the same was issued in that year, so that it is clear that the lands were taxable.

The second objection is untenable, because the plaintiffs below admit in their reply that the land was assessed. It is true, it is called a pretended assessment, but having admitted the assessment, the burden of proving its invalidity is upon them. *Miller v. Hurford*, 13 Neb., 13. The court therefore erred in sustaining these objections.

It was also objected that the deed did not recite the place of the sale of the land. This we find on examination to be true.

In *Haller v. Blaco*, 10 Neb., 36, it was held by a majority of the court that the failure to recite in a tax deed the place of sale of land sold at public tax sale was a fatal defect. The writer filed a dissenting opinion in that case, and while he sees no reason to change his views therein expressed, still the decision has to some extent become a rule of property, and if changed at all, it should be done by the legislature. This objection therefore was properly sustained.

Objection was made to the deed because two separate and distinct tracts of land not contiguous were taxed and sold together for a sum in gross. It is a sufficient answer to say that it is not sustained by the record. While two separate and distinct tracts were included in the deed, as the statute provides they may be, yet it does not appear that they were sold together. The court therefore erred in sustaining this objection.

The 4th, 5th, 6th, and 7th objections were too general to be considered.

For the sole reason, therefore, that the deed failed to show that the lands were sold at the door of the court house, it was properly excluded as evidence of title. It was proper to be considered, however, for the purpose of

showing color of title, and that the improvements were made under it.

The defendants below claim that possession under this deed for three years entitles them to the benefit of the special statute of limitations provided in the revenue law. This question was before the court in *Sutton v. Stone*, 4 Neb., 319, and it was held that to entitle a party to the benefit of the special limitation, the deed must conform to the statutory requirements. In other words, the deed on its face must be valid. Where a party is in actual possession under such a deed for the requisite length of time, the court will not inquire into mere irregularities in the proceedings leading up to the tax deed. But if the deed is not in the form required by the statute, the invalidity appearing on the face of the deed, it is mere color of title under which a party must retain adverse possession for ten years to acquire an absolute title.

The last question presented is the right of the defendants below to recover the taxes paid with the interest thereon. It will be observed that sec. 104 above quoted, required the party claiming the land to pay to the county treasurer for the use of the purchaser, in case judgment should be rendered against him, the amount necessary to redeem the land at that date, with interest. This is an equitable provision. Under our constitution and laws, all property not belonging to the state, or the United States, or used for charitable or benevolent purposes, is taxable. That is, the burdens of taxation are intended to be evenly distributed upon all taxable property in the state, and taxes are made a lien upon real estate, from the first day of March of each year. At the time of the passage of the act in question, there was no mode of enforcing this lien, consequently if a party purchased a tract of land at tax sale and obtained a deed therefor, and the title thereafter failed, he would have been entirely without remedy but for the above provision. The law therefore says in effect to

the land owner, "you failed to pay your taxes upon your land, and because of your default it was sold for said taxes and purchased by the person holding the tax deed, who has a lien thereon for the same, which is a defense *pro tanto.*"

In 1875, the section above referred to was amended, but the amendment did not affect rights acquired under the act, and Mr. Towle having acquired an interest in the land by his purchase at tax sale, and tax deed, had a right to protect the same by the payment of all taxes thereafter lawfully assessed against the land. Holt and Sabin, therefore, in any event must, in addition to the improvements, pay the defendants below the taxes paid with interest thereon. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

A. F. CLARK, PLAINTIFF IN ERROR, v. JOHN P. STRONG, DEFENDANT IN ERROR.

1. **Election contest:** APPEAL: BOND. In a contested election case, an appeal was taken to the district court, the bond being signed by sureties, but not by the appellant. On motion to dismiss, because the bond was not filed by the appellant, the motion was sustained. *Held,* To be error.

2. **Appeal:** COSTS: STIPULATION. Where a party enters into a stipulation to pay all costs in case no appeal is taken, and fails to pay the costs, he cannot insist upon the stipulation to prevent an appeal.

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

J. A. Grimison, for plaintiff in error.

Appeal bond. *O'Dea v. Washington County*, 3 Neb., 118. Right of appeal. McCrary's Law of Election, §§ 316, 360, 382. *Kellar v. Chapman*, 34 Cal., 635. *Mann v. Cassidy*, 1 Brewster, 43. *People v. Holden*, 28 Cal., 139.

Phelps & Thomas, for defendant in error, cited: Wells' Law and Fact, § 633. *Lydick v. Korner*, 13 Neb., 10.

MAXWELL, J.

At the general election in November, 1881, the plaintiff and defendant were candidates for the office of superintendent of public instruction of Colfax county, the plaintiff receiving the certificate of election. The defendant thereupon contested his election in the county court, and on the trial the court found that 581 legal votes were cast for the defendant, and 580 for the plaintiff. Judgment was thereupon rendered in favor of the defendant. The parties then entered into a stipulation, in writing, that the defendant would pay all costs, which amounted to a very large sum, and the plaintiff would not appeal the cause. Whether this stipulation was valid or not is unnecessary to determine, as the defendant has wholly failed to comply with its terms, and therefore can claim nothing under it. It is a mere accord without satisfaction.

Within ten days from the rendition of the judgment, a bond, not signed by the plaintiff, but by sufficient sureties, was duly filed in the county court and approved, and an appeal taken. In the district court the defendant moved to dismiss the appeal. 1st. Because no proper bond for an appeal had been filed. 2d. Because the plaintiff had waived the right to appeal. The motion was overruled with leave to the defendant to file a supplemental motion. The defendant thereupon filed a supplemental motion to dismiss the appeal upon the ground that the appeal bond was filed

without the plaintiff's knowledge or consent. Several affidavits were filed to support the motion, which was sustained and the appeal dismissed. The question to be determined is, did the court err in dismissing the appeal for the cause stated?

Sec. 98 of the election law provides that a party against whom judgment is rendered may appeal to the district court, and shall "give a bond with security to be approved by the court." Sec. 100 is to the same effect, but different conditions being made. There is no time designated in the statute within which an appeal is to be taken, nor is the question of *time* raised by the motion. The statute does not require the appellant to sign the bond, the language being similar in meaning to sec. 1007 of the code. The bond therefore for the purposes of the motion was in proper form, and duly filed and approved. Whether it was filed by the direction of the plaintiff or not, he claims the benefit of the same, and was endeavoring to prosecute his appeal to effect when the cause was dismissed. The act in that regard may be compared to ratification by a principal of the acts of his agent. Proceedings in regard to appeals are construed very liberally in order to preserve the rights of parties, and prevent a failure of justice, and a party will not be deprived of this right, unless through his negligence he has failed to take the appeal within the time limited, or has failed in some other material matter to comply with the law.

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

REVERSED AND REMANDED.

JOHN CLARY, PLAINTIFF IN ERROR, v. THE B. & M. R. R. CO., DEFENDANT IN ERROR.

Railroads: GUARDS AROUND CUTS. A railroad company is not required within the limits of a city, to place guards around a cut, away from a public thoroughfare, to prevent animals, grazing near the cut in violation of law, from falling down the bank.

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

C. W. Seymour, for plaintiff in error, cited: 1 Thompson on Negligence, 300. *Young v. Harvey*, 16 Indiana, 314. *Bush v. Brainard*, 1 Cowen, 78. *Hess v. Lupton*, 7 Ohio, 216. Maxwell's Justice, 361. *Fernow v. Dubuque R. R.*, 22 Iowa, 528. *Barnes v. District*, 1 Otto, 540.

Marquett & Deweese, cited: *Haden v. Rust*, 39 Ill., 186. *Railroad Co. v. Linder et al.*, 39 Ill., 433. *Railroad Co. v. Munger*, 5 Denio, 256. 2 E. D. Smith (N. Y.), 257. *Mentges v. N. Y. & Harlem. R. R.*, 1 Hilton, 426. *Railroad Co. v. McKinney*, 24 Ind., 283. *C., B. & Q. R. R. Co. v. Carter*, 20 Ills., 391. *Elliott v. Railroad Co.*, 66 Mo., 683. *Davis v. B. & M. R. R.*, 26 Iowa, 550. *Rogers v. R. R. Co.*, 26 Iowa, 558. *K. P. Ry. Co. v. Landis*, 24 Kan., 406. *C. B. R. R. Co v. Lea*, 20 Kan., 353. *Railroad Co. v. Lawrence*, 13 O. S., 66.

MAXWELL, J.

This is an action by the plaintiff against the defendant, to recover for the value of a horse killed by falling down the side of a cut, alleged to have been made by grading the defendant's road. A demurrer to the petition was sustained in the court below and the action dismissed. The only error assigned in this court is, that the court erred in

sustaining the demurrer. The following is a copy of the petition: "The said John Clary, plaintiff, complains of the said Burlington & Missouri River Railroad in Nebraska, for that the defendant before and at the time of the committing of the grievances hereinafter mentioned, to-wit: on the 28th day of July, A.D. 1880, was the owner and occupier of a certain railroad running through Nebraska City, Otoe county, state of Nebraska, and the said plaintiff further saith that said defendant in constructing the track of said railroad running south-easterly of the eastern terminus of Ferry street in Kearney City, now a part of Nebraska City, Otoe county, state of Nebraska, excavated the ground along the line of said railroad track, leaving a high, steep, and dangerous embankment on the south-western side of said railroad track at the place described as aforesaid, unprotected, unfenced, and without any safeguards whatever as required by the law of the land. And the said plaintiff says that in consequence of the negligence and carelessness of said defendant, in permitting said high, steep, and dangerous embankment, described as aforesaid, to remain and maintain in said unfenced and unguarded condition, and without safeguards of any kind, plaintiff's horse of the value of seventy-five dollars, casually and without fault of the said plaintiff, strayed on the night of the day and year aforesaid, in and upon the ground occupied by the railroad of the said defendant as aforesaid, and slipped and fell from the top of said high and steep and dangerous embankment, described and set forth as aforesaid, down to the railroad track, as aforesaid, and was then and there killed by said fall, to the damage of said plaintiff in the sum of seventy-five dollars. The said plaintiff therefore prays judgment against said defendant," etc.

We are not aware of any statute in this state requiring a railroad company to fence its road within the limit of a city or village. Indeed the statute (Comp. St., 381) ex-

pressly excepts the crossings of public roads, and highways, and towns, cities, and villages, from the operation of the act.

The action therefore must be governed by the principles of the common law.

If an excavation was made so near a public road that persons or animals passing along the road might accidentally fall into the same, it would be the duty of the party making the excavation to erect suitable guards to prevent such accidents, and upon failure to do so, the party injured could recover whatever damages he may have sustained from the neglect. Cooley on Torts, 660. *Beck v. Carter*, 68 N. Y., 283. *B. & O. R. R. Co. v. Boteler*, 38 Md., 568. *Davis v. Hill*, 41 N. H., 329. *Vale v. Bliss*, 50 Barb., 358. *Hardcastle v. Railroad Co.*, 4 H. N., 67. *Barnes v. Ward*, 2. C. & K., 661. But where a party makes an excavation on his own land away from a public thoroughfare, we are not aware of any case in which it is held that a party making the excavation must erect guards around the same for the protection of persons or stock trespassing on such land. There is no obligation in such case.

It is claimed that the case of *Young v. Harvey*, 16 Indiana, 34, supports the plaintiff's claim. In that case, one Harvey commenced digging a well near the line of a street upon an uninclosed lot owned by him, and dug the same to the depth of six feet, and then abandoned it in an unfinished condition, and it was uncovered or only partially covered. Horses, cows, and hogs were permitted by law to run at large in the street. A horse belonging to the plaintiff, fell into the unfinished well and was killed. The court held that the plaintiff was entitled to recover the value of the horse. The court below had held that the action could not be maintained. The court say: "Whether it can be or not depends upon the degree of probability there was that such an accident might happen from thus leaving

exposed the partially dug well; considered perhaps in connection with the usefulness of the act or thing causing the danger. *Dunham v. Musselman*, 2 Black., 96. If the probability was so strong as to make it the duty of the owner of the lot, as a member of the community from the danger to which the pit exposed its members, in person and property, he is liable to an action for loss occurring through his neglect to perform that duty."

We think that is a correct statement of the law as applied to the facts of that case. But the case is not applicable to the facts stated in the petition.

In *Dunham v. Musselman*, 2 Black., 96, the action was for the loss of a horse running at large, which was killed by a falling tree which had been set on fire by the defendant. It was held that unless it was shown that there was some degree of probability that the burning down of the tree would have done the plaintiff an injury, there was no liability.

In the case under consideration, the horse was running at large in the night time, in violation of the statute, and so far as appears was trespassing upon the lands of another. The place at which the accident occurred is not alleged to have been on or near any thoroughfare, nor does it appear that the defendant was under any obligation to erect barriers at the place designated to prevent an accident to the plaintiff's stock. The petition therefore fails to state a cause of action, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

RAYMOND BROTHERS & CO., PLAINTIFFS IN ERROR, V. WILLIAM R. STRINE, DEFENDANT IN ERROR.

Practice in justices' court: VACATION OF JUDGMENT. A defendant having entered an appearance to the action by filing a motion for security for costs, but not appearing on the day of trial, is not entitled as of right, under sec. 1001 of the code, to have the judgment against him set aside.

Error: WAIVER OF. Taking an order for leave to plead in the district court after an erroneous reversal of the judgment of a justice of the peace, the order being afterwards vacated, is not a waiver of the error, nor does it estop a party from prosecuting error to this court on the judgment of reversal.

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

Watson & Wodehouse, for plaintiffs in error.

C. W. Seymour, for defendant in error.

LAKE, CH. J.

The facts of this case bring it clearly within the principle held in *Strine v. Kaufman*, 12 Neb., 423. The motion for security for costs was an appearance to the action and following the decision in that case, that where there is such appearance by the defendant, he is not entitled, as of right, under sec. 1001 of the code, to have the judgment against him set aside, the judgment of the district court must be reversed, and that of the justice of the peace reinstated and affirmed.

It is urged on behalf of the defendant in error, that because the plaintiffs, after the reversal of the justice's judgment in the district court, took leave to file a petition (which, however, was afterwards vacated by order of the court), they thereby waived the error committed against them, and are

estopped from proceeding in this court to question the correctness of the judgment of reversal. Such possibility might have been the effect of taking the order for leave to plead, if it had not been afterwards vacated. This, however, we do not decide. But, whatever the effect would have been had the order remained, we must hold that, being set aside, the plaintiffs had the same right to prosecute error to this court, as if it had not been made. It was not a waiver of the error in the judgment of reversal.

JUDGMENT ACCORDINGLY.

C. W. MARSH ET AL., PLAINTIFFS IN ERROR, V. CARL SYNDER, DEFENDANT IN ERROR.

1. **Irrelevant testimony.** On the trial of an action for the price of a Marsh wind mill, sold with warranty as to its capacity for pumping water, the defense being that the mill failed to come up to the requirements of the warranty, testimony showing the worthless character of another mill of the same name, and purchased by the witness from the same parties from whom the mill in controversy was obtained, is irrelevant and inadmissible.

2. **Evidence:** BILL OF EXCEPTIONS. When the judge, in a bill of exceptions, certifies that the plaintiffs "introduced evidence tending to prove the allegations of the bill of particulars," this will be taken as showing, sufficiently for a proceeding in error, that there was evidence enough to submit to the jury, and to have warranted a finding in their favor upon the issue joined.

3. ———: EXCEPTION TO ILLEGAL TESTIMONY: WAIVER. Where an exception is duly taken to the admission of illegal testimony, it is not waived by cross examining the witness respecting it.

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

McKillip & Page, for plaintiff in error, cited: Greenleaf on Evidence, sec. 51. 1 Wharton's Evidence, sec. 29, and note 3. *Mailler v. Propeller Co.*, 61 N. Y., 312. *Maginn v. Railroad*, 115 Mass., 240. *Gov. v. Campbell*, 17 Ala., 566. *McCartney v. The Territory*, 1 Neb., 121. *Bank v. Whinfield*, 24 Wend., 419. *Jackson v. Tuttle*, 7 Cowen, 364.

Norval Brothers, for defendant in error.

Plaintiffs did not establish a fulfillment of warranty. *Schultz v. Lepage*, 21 Ill., 159. *Berdell v. Berdell*, 80 Ill., 607. *Christ v. Wray*, 76 Ill., 205. *R., R. I. & St. L. R. R. Co. v. Rafferty*, 73 Ill., 62. Richey's testimony was competent. *Brooks v. McDonnell et al.*, 41 Wis., 139. *Taylor v. Boggs*, 20 O. S., 516. If irrelevant and incompetent, yet by plaintiffs' cross-examining Richey upon all his testimony, and by calling Gerrans to disprove the same matter, is a waiver of the error. *Cropsey v. Averill*, 8 Neb., 158. 1 Greenleaf Ev., sec. 421. *Flagg v. Mann*, 2 Sumn., 487. *Donalson v. Taylor*, 8 Pick., 390. *Burden v. People*, 26 Mich., 165.

LAKE, CH. J.

This is a proceeding in error from Seward county to reverse the judgment of the district court, affirming that of the county court, rendered in an action brought by the plaintiffs in error for the price of a Marsh wind-mill, purchased by the defendant in error.

The sale of the mill was by a written contract, with warranty as to its working capacity in pumping water. The defense relied on was the failure of the mill to come up to this requirement of the warranty. The error complained of in the ruling of the county court was in the admission of the testimony of the witness Richey, called by the defendant, to the effect that a certain other wind-mill, of the same name, which he had purchased from the same parties

as the defendant purchased his, was a failure, and not equal in capacity to another mill, of a different pattern, which he had afterwards obtained for use on his farm.

This testimony was clearly objectionable, and ought to have been excluded. The fact that the mill bought by the witness was defective, did not tend to prove that the defendant's was a poor one. The only effect of this testimony was to mislead the jury, and to cause them to infer that if Richey's mill was a failure, that of the defendant was probably a failure also. In order to have made this testimony pertinent to the issue, some material defect, as in the design or construction of the mills, which was common to both, must have been shown. This, however, was not attempted.

In 1 Phillips on Evidence, 748, it is said "that no reasonable presumption can be formed as to the making or executing of a contract by a party with one person, in consequence of the mode in which he has made or executed similar contracts with other persons." Transactions which fall within this class "are termed in law *res inter alios acta*, and evidence of this description is uniformly rejected." And as an example of the application of the rule a case is cited where the question was as to the quality of beer to be furnished by the plaintiff to the defendant, and it was held that evidence could not be admitted of the quality of beer supplied by the plaintiff to other persons.

But counsel for the defendant contend that, even if this testimony were inadmissible, the judgment should not be disturbed, because, as they say, the plaintiff was not entitled to recover without it, there being no evidence of the mill in question coming up to the requirements of the warranty. If the record justified this assumption, it would probably be fatal to this proceeding, for the plaintiffs must recover, if at all, on the strength of their own case, and not on the weakness of the defendant's, nor because of the admission of erroneous evidence against them. There is no

warrant, however, for the assumption that the plaintiffs could not, in any event, have recovered. The evidence was not all preserved. And the county judge, in the bill of exceptions, certifies that the plaintiffs "introduced evidence tending to prove the allegations of the bill of particulars," which must, for the purposes of this proceeding, be taken as showing that there was evidence sufficient to submit to the jury, and to have warranted a finding in their favor upon the issue joined.

Another point made on behalf of the defendant is, that although the testimony was inadmissible, the error of admitting it was cured by the cross-examination of the witness respecting it, and authorities are cited to support this view. These cases, however, do not so hold. That of *Cropsey v. Averill*, 8 Neb., 151, was where, after an exception to an erroneous cross-examination, the party excepting not only went more fully into the matter on a re-examination, but actually gave in evidence the identical bond which the cross-examination related to. The case of *Donalson v. Taylor*, 3 Pick., 390, was where the objection to a witness, incompetent by reason of his interest, was not made until after he had been sworn and examined; and it was held that the objection came too late. Where an exception is duly taken to the admission of illegal testimony, it is not waived by a mere cross-examination of the witness respecting it.

The objection to a reversal of the judgment of the district court, on the ground that the judgment of the county court was not final, cannot be sustained. If the judgment was not final then the district court had no jurisdiction, and the judgment of affirmance was erroneous, for it is only final judgments that can be reviewed.

The judgments of the district and county courts are reversed, and the cause remanded to the district court to be proceeded with in conformity to law.

REVERSED AND REMANDED.

TIMOTHY CLARK, PLAINTIFF IN ERROR, V. JEFFERSON H. FOXWORTHY, DEFENDANT IN ERROR.

1. **Garnishment in Aid of Execution.** In cases of garnishment in aid of execution, no personal *judgment*, based upon the testimony of the garnishee, is allowed, but simply an *order* for him to pay the amount admitted to be due and payable from him to the defendant in execution. Such an order may be enforced by means of an ordinary execution.
2. ———: PERSONAL JUDGMENT: If a personal judgment is required against the garnishee, resort must be had to a personal action, as is provided in sec. 225 of the code, in cases of garnishment before judgment.
3. ———: SUMMONS. Upon a summons in garnishment, no indorsement of an amount for which judgment will be taken is required.

CLARK recovered judgment against Yearnshaw in the county court of Lancaster county. Execution issued and returned *nulla bona*. Affidavit for garnishment and summons issued to Foxworthy, garnishee. Finding by the court that Foxworthy had $227 belonging to Yearnshaw, etc., and an order that same be paid into court, and judgment that Clark have and recover of and from Foxworthy the said sum and costs. The district court, POUND, J., presiding, reversed this judgment, and Clark brought the case here upon a petition in error.

A. J. Sawyer, for plaintiff in error.

John H. Ames and *Jefferson H. Foxworthy*, for defendant in error.

LAKE, CH. J.

It appears from the transcript of the proceedings before the county judge that, upon the close of the examination of the garnishee, a formal judgment was entered against him, in favor of the plaintiff in execution, for the sum of two hun-

dred and twenty-seven dollars, together with the costs of the proceeding. This was clearly erroneous. There was no authority at this stage of the proceeding for doing more than simply to order the garnishee to pay over the amount found to be due and payable from him to the defendant in execution, upon his own admission, not exceeding, of course, the amount due upon the execution and costs of the proceeding in garnishment. Sec. 249, code of civil procedure. And this section seems to authorize the enforcement of such order, or rather the payment of the money, by means of an ordinary execution; in this respect differing from garnishment before judgment, wherein no execution can be [illegible] to against the garnishee, except upon a personal judgment against him in a new and independent action brought by the attachment creditor under sec. 225 of the code.

It is evident that, as before stated, an order for the payment of money under sec. 249, can be rightly made and enforced by execution only upon an unqualified admission by the garnishee of a present indebtedness, which the execution debtor would be entitled to but for the garnishment. If the garnishee make any legal or equitable claim to the amount in his hands, or if he insists upon his right to retain it for any lawful purpose, the order cannot be made, for in such case the controversy must be determined by action, as in garnishment before judgment, so that the constitutional right of a jury trial, secured by sec. 6 of the Bill of Rights, may be availed of.

With this understanding of the law governing the case, we need but glance at the testimony of the garnishee to see that even an unqualified order for him to pay any definite amount at once, would not have been proper. Without delaying to particularize, but taking his entire story on the witness stand, we must say that to our minds it is evident he did not, even conceding he could have done so, fix upon any sum as being then due and payable. As he claimed, and seemed to understand the matter, there was a large

balance of indebtedness in his favor, which he and the execution debtor, prior to the garnishment, had arranged should be satisfied out of the money in his hands. He conceded that there might be a small surplus after this was done, but the nearest he came to fixing its amount definitely was that it might be from fifty to one hundred and fifty dollars. As to the items of the amount due him from Yearnshaw, the execution debtor, which were to be paid out of this money, but a single one had been definitely determined, and this was the sum of three hundred and seventy-five dollars, agreed to be taken in satisfaction of a note calling for seven hundred and fifty dollars. The rest, substantially, were open, unsettled accounts, awaiting future adjustment.

Under this sort of showing the garnishee could have been ordered to retain and pay over for the use of the execution creditor any surplus found to remain after satisfying his own just claims upon the fund. If he failed to do this within a reasonable time, or if his disclosures were deemed evasive or in any material part unsatisfactory, redress was open by means of a personal action given by sec. 245 of the code, which provides that in garnishment in aid of execution, after the service of the summons, "like proceedings shall be had therein, and said garnishees shall be held liable, in all respects, as in cases of garnishees before judgment."

Quite a large number of points were made and discussed by counsel, but all of them we think, including that of the indorsement upon the summons of the amount for which judgment would be taken, are practically disposed of by our holding that a personal judgment in such cases is improper. As to the indorsement, however, we will merely add that upon this sort of summons it is not required; it is entirely inapplicable. It is only in actions for the recovery of a money judgment that such an indorsement is requisite.

JUDGMENT AFFIRMED.

JOSEPH A. BLANCHARD, ADMINISTRATOR, APPELLEE, V. WEALTHY ANN JAMISON, ET. AL., APPELLANTS.

1. **Practice:** SUBMITTING CAUSE ON PLEADING. Where a cause is submitted to the court on the petition, answer, and reply without evidence, only such matters of defense in the answer as are admitted by the reply, either by a failure to deny or by admission, are to be considered as established.

2. ———: REPLY: ADMISSIONS. An admission in a reply that the title to certain lands mortgaged was at the time of the execution of the mortgage in the United States, is not a valid defense, provided the mortgagor afterwards acquired title to the same.

APPEAL from Cass county. Tried below before POUND, J.

Sam. M. Chapman, for appellants.

W. F. Chapin, for appellee.

MAXWELL, J.

This is an action to foreclose a mortgage upon real estate. It is alleged in the petition that on the 12th day of June, 1873, one Andrew J. Robertson executed three promissory notes for the sum of $900 in the aggregate, with interest, and delivered the same to Calvin H. Blanchard, and to secure the payment of said notes executed a mortgage upon the south-west quarter of section twelve, in township ten north, range ten east, of the 6th P.M.; that said mortgage was duly recorded in the office of the county clerk of Cass county, on the 7th day of August of that year; that on the 15th day of April, 1876, Robertson conveyed all his right, title, and interest in said premises to Sarah F. Frisbie, who in January, 1877, conveyed it to the defendant. It is also alleged that no part of the debt has been paid, and that no action at law has been instituted to recover the amount due. The prayer is for an ordinary decree of foreclosure.

To this petition the defendants, Wealthy Ann Jamison, Andrew J. Robertson, and Sarah F. Frisbie filed a joint answer, in which they admit the execution and delivery of the promissory notes and mortgage mentioned, but allege that the mortgage was executed prior to the entry and purchase of said land from the United States, and that the debt was contracted prior to the entry of said land by said Robertson. It is also alleged that said notes and mortgage were executed and delivered to said Blanchard in consideration of a homestead filing or entry upon said real estate, when in fact Blanchard did not have a homestead filing or filing of any kind upon said real estate or any part thereof.

The plaintiff demurred to the answer upon the ground that the facts stated therein were not a defense to the action. The demurrer was overruled, whereupon the plaintiff filed a reply, in which he admits that at the time of the execution of the mortgage in question the title to the land was in the United States, but alleges that said Robertson afterwards obtained title to the same by making an additional homestead entry, upon which a patent was issued from the United States. He denies that said notes were given for a homestead entry or filing which Calvin H. Blanchard had or represented he had on said land, but avers that they were given for the improvements on said land, consisting of a dwelling house, an orchard, and a large amount of breaking, which improvements were owned by said Blanchard, and sold by him to Robertson, and were of the full value of $1,000. The cause was submitted to the court upon the pleadings, and a decree of foreclosure rendered in favor of the plaintiff for the sum of $1,741.65 and costs. The defendants appeal to this court.

The questions presented by the answer are not available as a defense separately, either to Mrs. Frisbie or Wealthy Ann Jamison, if, as it appears from the record, they derived title from Robertson. But the answer being joint, any defense stated therein which is admitted in favor of

any of the defendants, will be considered. The case being submitted upon the pleadings, it is necessary first to determine what the issue is.

Sec. 134 of the code provides that: "Every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer, not controverted by the reply, shall, for the purpose of the action, be taken as true; but the allegation of new matter in the reply shall be deemed controverted by the adverse party, as upon a direct denial or avoidance. Allegation of value, or of amount of damage, shall not be considered as true by failure to controvert them."

There being no proof in support of the answer, and the material facts therein stated, except as to the title of the land at the date of the mortgage, being denied in the reply, the notes and mortgage are admitted, and the only defense established is that Robertson executed the same while the title was in the United States.

In *Jones v. Yoakum*, 5 Neb., 265, it was held that the homestead act does not prohibit the owner of a homestead from pledging it voluntarily to secure a pre-existing debt, and that the only effect of the statute was to protect the debtor against a compulsory payment of such demand out of the land. This statement of the law is evidently correct, because, although the statute declares that the land shall not be liable for debts incurred prior to the patent being issued, yet it will not be contended that a conveyance of the land in payment of an antecedent debt would be void.

But it is said that it is against public policy to enforce a contract of this kind, being in contravention of the homestead law.

This question was before this court in the case of *Robinson v. Bateman*, 12 Neb., 508, and it was held, after a full examination of the authorities bearing upon the question, that where an act is merely prohibited by statute, and

the parties are not in *pari delicto*, the party upon whom no penalty is imposed may, upon the non-performance of the contract, maintain an action thereon against his co-contractor. The same rule was applied in *Simmons v. Yurann*, 11 Id., 516. In the case last cited it is said a case must fall clearly within the prohibition before its enforcement will be denied. "As a rule public policy is best subserved by requiring a party receiving the labor or property of another under contract to pay the price agreed upon for the same."

There is no penalty imposed by the statute upon the person who merely purchases the lands entered by another as a homestead under the laws of the United States, all the penalties being imposed upon the person selling the same. And the same rule, doubtless, will apply to mortgagees.

The purchaser, therefore, or mortgagee is not in *pari delicto* with the person who enters the land, who cannot be permitted to plead his own illegal act as a shield against the payment of property obtained by such contract. Improvements upon the public lands are, by statute in this state, a sufficient consideration for a promissory note, and an action thereon may be maintained. For aught that appears in the record, therefore, there was a sufficient consideration for the notes and mortgage, and the admitted facts are not sufficient to defeat the action. If, as is alleged in the reply, the defendant Robertson obtained a house, orchard, and large amount of breaking upon this land, justice requires that he should pay for the same.

We have discussed this case as falling within the homestead laws, but the only evidence that the land was entered as a homestead is in the reply, and that being new matter is denied by the statute and requires proof. It is very clear that justice has been done, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

SYLVESTER ANDREWS, PLAINTIFF IN ERROR, V. EUGENE MULLIN, DEFENDANT IN ERROR.

Appeal from Justice of the Peace. On the facts stated in the record, *Held*, That an appeal would lie from the judgment of a justice of the peace to the district court.

ERROR to the district court for Saline county. Heard below before WEAVER, J.

E. S. Abbott, for plaintiff in error, cited authorities referred to in the opinion.

T. B. Parker, for defendant in error.

MAXWELL, J.

On the 6th day of February, 1882, Mullin brought an action against Andrews before a justice of the peace of Saline county. At the time set for the hearing Andrews appeared by an attorney and filed a motion to dismiss the action for certain reasons therein stated. The motion was overruled, whereupon Mullin demanded a jury, which was selected, and summons issued requiring the jurors to appear February 10th at one o'clock P.M.

The transcript shows that at one o'clock P.M. of the 10th day of February, 1882, Mullin appeared, but Andrews failed to appear, whereupon the jury were impaneled and a verdict rendered in favor of Mullin for the sum of $159, upon which judgment was given. Andrews thereupon appealed to the district court, where, on motion of Mullin, the appeal was dismissed upon the ground that Andrews had failed to make his defense before the justice. It is claimed that the district court erred in dismissing the appeal.

The defendant in the justice court was entitled to one hour in which to appear. The justice, therefore, could not

lawfully impanel a jury and proceed with the trial before 2 o'clock P.M. of the day to which the cause was adjourned. The only question presented by the record is, did the court err in dismissing the appeal?

In *Crawford v. Clendenning*, 7 Neb., 474, it was held that as the statute specially provides that a judgment rendered in the absence of a party in a justice's court may be set aside and a trial had on the merits, no appeal will lie to the district court until after a motion has been made to set aside the judgment, and a new trial is had. In that case it is said: "It seems clearly to be the legislative intent that actions in justice's court must be tried upon the merits of both the claim of one party and the defense of the other, before an appeal shall be taken to the district court; and this rule seems to be reasonable and just, for where the law establishes the court in which a party shall bring his action, the adverse party should not be allowed to disregard the process of such court, and then select the forum of his own choice in which the cause shall be first tried upon the merits of the cause. If such a practice were permitted, it would defeat the main object for which the justices' courts were established, namely, the trial and disposal of causes or controversies with the least possible expense to the parties, where the amount involved does not exceed one hundred dollars. In the following cases it has been held that if a party is duly summoned and fails to appear and set up his defense, an appeal will not lie to the district court. *Brayton v. County of Delaware*, 16 Iowa, 441. *Trullenger v. Todd*, 5 Oregon, 36. *Long v. Sharp*, 5 Id., 448. See *Garnet v. Rodgers*, 52 Mo., 145. *Sample v. Gilbert*, 46 Ind., 444."

This case was approved in *Strine v. Kingsbaker*, 12 Neb., 52.

Section 951 of the code requires the defendant, if required by the plaintiff, his agent, or attorney, to file a bill of particulars of his claim of set-off. This may be re-

quired in all cases, and the evidence of set-off will be confined to the matters set forth in the defendant's bill of particulars. If the defendant fail to file a bill of particulars of his set-off when required to do so, no proof of the same can be received either in the justice's court or on appeal.

Section 1100 *a* of the code provides: "That in all civil actions before justices of the peace, in which the defendant has been served with summons in this state, it shall not be necessary to prove the execution of any bond, promissory note, bill of exchange, or other written instrument, or any indorsement thereon, upon which the action is brought, or set-off or counter claim is based, unless the party sought to be charged as the maker, acceptor, or indorser of such bond, promissory note, or bill of exchange, or other written instrument, shall make and file with the justice of the peace, before whom the suit is pending, an affidavit that such instrument was not made, given, subscribed, accepted, or indorsed by him." Comp. Stat., 658.

This would seem to apply to all actions upon any of the instruments named.

In *Strine v. Kaufman*, 12 Neb., 423, *Crawford v. Clendenning* and *Strine v. Kingsbaker* were approved; but it was held that where the defendant has entered an appearance to the action, and absents himself on the day of trial, he is not entitled to have the judgment against him set aside. It is said: "If after appearance and issue joined, a defendant has the power by absenting himself on the day of trial to have the judgment set aside once, what is there to prevent him from doing so again, or indeed any number of times that he may choose?"

The decision amounts to this, that after a defendant has appeared in an action and joined issue, he cannot, by failing to appear at the trial and prove his defense, have the judgment set aside and a new trial awarded. In other words, he cannot take advantage of his own neglect. In the case at bar the record clearly shows that the trial was com-

menced, and for aught that appears concluded, before the time in which the defendant was required to appear and prove his defense.

A party cannot be deprived of his rights in this manner. The defendant therefore is entitled to an appeal.

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

REVERSED AND REMANDED.

JAMES CHARLES, PLAINTIFF IN ERROR, V. WILLIAM H. ASHBY, DEFENDANT IN ERROR.

Error: JUDGMENT AGAINST EVIDENCE. Where the only questions presented to a reviewing court for determination are questions of fact, the judgment will be affirmed, unless it is clear that it is against the weight of evidence.

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

O. P. Mason, for plaintiff in error.

William H. Ashby, pro se.

MAXWELL, J.

This action is brought by the plaintiff against the defendant, who is an attorney at law, to recover from him the sum of $1,528, alleged to have been obtained by fraud and misrepresentation. The court below found in favor of the defendant, and dismissed the action. The plaintiff brings the cause into this court by petition in error.

It appears from the record that in April, 1879, the plaintiff was in possession of a farm in Gage county, but the manner in which he derived title, and the length of time he had resided on the premises, do not appear, except from inference. It is to be inferred that he purchased the

land from one Loomis, giving him a mortgage on the premises which was not recorded, and that Loomis was indebted in a considerable amount, and judgments had been rendered against him which were liens upon the premises; that in a sale on execution on one of the judgments, on which there was due about the sum of $400, the premises had been sold to L. W. Colby, and the sale thereafter confirmed and a deed made. The proof shows that in April, 1879, Colby commenced an action of ejectment against the plaintiff to recover possession of the premises; that the plaintiff thereupon employed the defendant to look the matter up and make a defense, giving him a retainer fee of $10; that defendant discovered a judgment for the sum of $1100, which was a lien on said premises prior to the lien of the judgment under which Colby derived title. This judgment the plaintiff, under the defendant's advice, purchased for the sum of $400, and an execution was issued thereon, and the premises sold thereunder, and were purchased by the defendant. Before this sale the plaintiff and his wife had conveyed to the defendant for the purpose of enabling him to perfect the title to the premises, and it was agreed the defendant should perfect the title, and have one-half of the premises as compensation; that is, he should convey one-half of the land by a good and sufficient deed to the plaintiff, and retain the remainder.

Sometime after the agreement was made the defendant proposed to the plaintiff to convey the entire premises to him by a good and sufficient deed, provided he would pay him the sum of $750. This he agreed to do. The proof shows the land was worth from $2,000 to $2,400. The defendant obtained a quit claim deed from Colby for the premises in question, and in January, 1880, conveyed the land to the plaintiff, who then completed the payment of the $750, consideration. In March, 1880, Colby commenced certain actions against the plaintiff to recover $500, the consideration for the deed made to Ashby. This suit

the plaintiff settled by paying Colby the amount claimed. He thereupon brought an action against Ashby to recover the $500 paid to Colby, the $400 paid for the judgment heretofore mentioned, and for costs, taxes, and expenses, amounting in the aggregate to the sum claimed. There is no question of law involved in the case, the matter for determination relating solely to the facts. It is sought on the part of the plaintiff to ignore the contract made by him with the defendant for the services rendered, which are placed at the sum of $150. The contract is clearly proved, and we see no reason for disturbing it. In regard to the Colby claim the defendant testifies that Colby was to receive nothing, while Colby testifies that he was to be paid $500. Whatever the facts may be as between Colby and Ashby, the record fails to show a liability on the part of the plaintiff to Colby. In other words, the payment, so far as appears, was purely voluntary. Had he been compelled to pay this sum to protect his property, or did the proof show a legal liability on his part to pay the debt, there would be no doubt of his right to recover.

But the burden of proof is on the plaintiff, and he has failed in both of these particulars. The testimony fails to show that the defendant was to pay the $400 for the judgment for $1100 which was purchased, and the fact that the plaintiff in January, 1880, and long after the purchase of the judgment, paid to the defendant the remainder of the $750, without making any claim for this $400 or the costs, shows that at that time he did not regard the defendant as liable. The plaintiff, whether knowingly or not, seems to have purchased encumbered real estate, and in his anxiety to free the title from the encumbrance seems to have made bargains in relation to the same without any great degree of care or certainty. Upon the whole case, as it does not appear that the court erred in dismissing it, the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE BOARD OF COUNTY COMMISSIONERS OF CEDAR COUNTY, PLAINTIFFS IN ERROR, V. PETER JENAL ET AL., DEFENDANTS IN ERROR.

1. **County Treasurer:** PAYMENT OF MONEY TO HIS SUCCESSOR. The payment of money in the hands of a county treasurer, at the termination of his office, to his successor, can be effectuated only by the delivery of that which by the law of the land is recognized as money.
2. ———: ———. The mere delivery of certificates of deposit of a banker—no money having been realized from them—even if assented to by the successor, is not a payment; nor will it relieve the outgoing treasurer and his sureties from liability on his official bond, for failing to pay over money found to be due from him to the county on final settlement.

ERROR to the district court for Dixon county, where the cause had been removed on change of venue, and tried before SAVAGE, J.

Gamble Brothers, W. E. Gantt, W. F. Bryant and *C. C. McNish*, for plaintiff in error, cited: *State v. Keim*, 8 Neb., 67. *First National Bank v. Gandy*, 11 Neb., 431. *Welton v. Adams & Co.*, 4 Cal., 37. *Dale v. Burleigh*, 1 Dak., 227. *Hartwell v. Page*, 8 Wis., 53. *Burmagim v. Tallant*, 29 Cal., 503. *Poorman v. Mills*, 35 Cal., 118. *Bank of Orleans v. Merrill*, 2 Hill, 295. *Miller v. Austin*, 13 How., 218. *Naglee v. Palmer*, 7 Cal., 543. *Payne v. Gardner*, 29 N. Y., 169. *Downs v. Phœnix Bank*, 6 Hill, 299. *Robinson v. Gardiner*, 18 Grat., 95. *Downs v. Phœnix Bank*, 6 Hill, 297, 299. *Perley v. County of Muskegon*, 32 Mich., 144. *Young v. Hibbs*, 5 Neb., 433. *Elliott v. Miller*, 8 Mich., 132. *Ward v. School District*, 10 Neb., 294. *State v. Sheldon*, 10 Neb., 455.

B. B. Boyd and *W. H. Munger*, for defendants in error, cited: *The State v. Prather*, 44 Ind., 287. *State v. Grammer*, 29 Ind., 530.

LAKE, CH. J.

The action in the court below was brought on behalf of Cedar county, to recover from Peter Jenal, late treasurer of said county, and the other defendants as sureties on his official bond, a sum of money which it was claimed he had failed and refused to pay over to L. M. Howard, his successor, at the expiration of his term of office. Although the record is exceedingly voluminous, including as it does, unnecessarily, all of the testimony taken in the case, the real gist of the controversy is embraced within very narrow limits.

The defendants, by their answer, admitted that at the expiration of Jenal's term, the amount of money demanded was in his hands, belonging to the county; but they alleged, in defense, full payment "in the manner required by law." Payment being the only defense claimed, if this failed the plaintiff was entitled to judgment as prayed.

The matter relied on for payment is stated in the answer thus: "That on the 14th day of January, 1879, the said Peter Jenal, under the express direction of one Louis M. Howard, who at that time was acting as treasurer of Cedar county, Nebraska, and recognized by the plaintiff as the successor in office of the said Peter Jenal, did pay of said funds to one M. M. Parmer," (who was a banker at Yankton, in Dakota territory,) "the sum of three thousand five hundred dollars, and received certificates from said M. M. Parmer, of said payment, which said Peter Jenal duly delivered to said Louis M. Howard; and said Howard received as payment of the said sum, on the amount to be accounted for to the said plaintiff, by reason of the amount found chargeable to the said Peter Jenal on the settlement with said plaintiff, as set forth in said plaintiff's petition; which, with the amounts admitted in said petition to have been paid, fully satisfies the amount found due at said settlement."

From this it appears that the payment relied on, more briefly stated, was by certificate of deposit purchased from Parmer, with the funds in Jenal's hands, by direction of the succeeding treasurer. If in the opinion of the court this, as to the county, were no payment, the defense fails, and the judgment must be reversed. A very large number of errors are assigned, but all or nearly all of them depend upon whether this plea of payment is any defense or not. If it be a defense, then the testimony objected to by the plaintiff was rightly received, and the instructions to the jury properly given; if it be not, then the testimony ought to have been excluded, and instructions, substantially as requested by the plaintiff, which were refused, given.

Is the matter pleaded as payment a defense? We think not. The bond given by the defendant, on which the action was brought, required Jenal to "promptly pay over to the person or officer entitled thereto, all money which" might "come into his hands by virtue of his said office," and to "faithfully account for all balances of money remaining in his hands at the termination of his office."

Sec. 94 of the revenue act, Gen. Statutes, 930, provides that the "treasurer, on going out of office, shall deliver to his successor in office all public moneys," etc., "in his possession." And the next section declares that if he "shall fail" * * * "to pay over all moneys with which he may stand charged at the time, and in the manner prescribed by law, it shall be the duty of the county clerk, on receiving instructions," * * * "to cause suit to be instituted against such treasurer and his sureties, or any of them, in the district court of his county."

Thus we see that, it being *money* that was in Jenal's hands, belonging to the county, both the law and his official bond united in requiring him to hand that over to his successor. The delivery of Parmer's certificates was not payment, for they were mere promises of a stranger to the county to pay money. The payment of money can be ef-

fectuated only by the delivery of that which by the law of the land is recognized as money. Even if Howard, the successor in office, did agree to accept these certificates in payment, which, however, he denies, no money having been realized from them, it could avail the defendants nothing as against the county. In the collection, care, and disbursement of the revenues in this state, such certificates are not recognized at all by the law, and no officer has any right whatever to deal in them on behalf of the public. If a treasurer invest the public funds in them, he is guilty of a highly penal offense. Criminal Code, sec. 124. It would indeed be a strange system of laws that would permit an act, denounced as a felony, to be pleaded in bar of an action brought to recover money lost by that act. But such is not the law. The only way in which it was possible for Jenal to have satisfied the law and his bond, and relieved himself and his sureties from responsibility as to this money, was to have handed it over to his successor in office. It being *money* which he held on the public account, it was *money* that the law and his bond required him to produce and hand over. Nothing else could suffice.

Such being our view of the law governing this case, it is unnecessary to notice the particular errors committed during the trial, in ruling upon the admissibility of evidence and in giving instructions to the jury.

The several rulings complained of were in harmony with the view of the law entertained by the judge, and clearly expressed in one of the instructions excepted to, which was in these words: "Mr. Jenal testifies that he had the amount due from him to the county on deposit in a bank at Yankton. That he requested Mr. Howard," his successor, "to go with him to that place and receive the money; that Mr. Howard refused so to do, but instructed Mr. Jenal to bring him a small portion thereof, and deposit the rest to his credit in the same bank. Now if you find that these instructions were given, and in pursuance thereof Mr. Jenal

did bring so much of the money as directed, and left the rest on deposit in the bank to the credit of Mr. Howard, changing the deposit from his name to that of Mr. Howard, and that this was agreed upon by both Howard and Jenal as a payment, and if you further find that the bank at that time had sufficient funds, and was able to pay the amount of such deposit, then such transaction would be a payment of such amount of $3500.00 to Mr. Howard, and you would be obliged to find for the defendant."

This instruction, it will be observed, is in direct conflict with our views, as above expressed, concerning the duties and responsibilities of a county treasurer respecting the public funds intrusted to his care. Surely, the learned judge presiding at the trial must have overlooked the fact that Jenal himself, and not the Yankton banker, was the lawful custodian of the money, and the only one to whom the county could look for it until handed over to his successor. And that Jenal, the moment he deposited the money in the bank, violated the law, and was guilty of an act of embezzlement, for which he was not only civilly but criminally liable.

Very clearly to our minds the transaction referred to in this instruction was not a payment of the public money by Jenal to his successor, nor did it relieve the defendants from liability on their bond. The judgment must be reversed, and the cause remanded to the court below, to be proceeded with in conformity to this opinion.

REVERSED AND REMANDED.

JOHN H. GRIFFITH, PLAINTIFF IN ERROR, V. HENRY W. SHORT, ADMINISTRATOR, AND OTHERS, DEFENDANTS IN ERROR.

1 **Attachment:** LEVY: IRREGULARITIES. The sheriff levied an order of attachment on certain lands as property of the defendant. After schedule, appraisement, and return of writ, he applied to the court on his own motion for leave to amend his return. Without any showing the court granted such leave. Whereupon the sheriff canceled his schedule, appraisement, and return, and returned said attachment—no property found to attach, etc. *Held*, Not good practice, and that in a proper case this court would set aside such cancellation of the original return and restore the levy. But *held, further*, That such error did not affect the subsequent proceedings in the case, there being an appearance by the defendant.

2. **Promissory Note:** SIGNATURE BY MARKS. Action on promissory note for $1500.00 purporting to be signed by defendant, decedent, by mark. Proof, that decedent was very old, infirm, and nearly blind; that he owed plaintiff thirty dollars, borrowed money, for which he was willing to give his note; that plaintiff presented the note in suit, representing it to be for said sum of thirty dollars, whereupon decedent authorized plaintiff to write his name to the note, and then made his mark to said signature, without reading the note. After verdict for defendant, plaintiff assigned for error that he was entitled to judgment for the thirty dollars, borrowed money, but did not offer to amend his petition. Judgment for defendant affirmed.

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

Royce Wyant, for plaintiff in error.

W. A. Bergstresser and *D. W. Barker*, for defendants in error.

COBB, J.

There was an order of attachment issued in this case, by virtue of which the sheriff attached certain lands as the

property of the then defendant, Samuel Griffith, and returned the same accordingly. He afterwards applied to the court for, and obtained, leave to amend his return, and thereupon made a return in effect that his original return was an error; and that at the date thereof, as appeared by an affidavit, deed, and abstract referred to, and made a part of said second return, the property attached was not the property of the defendant, but of one Anna Mary Schmin; he therefore returned said order; that after diligent search he was unable to find goods or chattels, lands or tenements, etc., of the said defendant in his county, whereof to levy, etc.

The plaintiff filed a motion to set aside said amended return, which was by the court refused. While we think there is a broad discretion vested in all courts of general jurisdiction, in the control of all writs and process issued under their authority, yet it was certainly irregular practice on the part of the district court to allow the sheriff, on his own motion and without a showing, to amend the return of the writ of attachment so as to release the property attached, and in a case where it would be conducive to the ends of justice to do so, this court would not hesitate to reverse the order allowing such amendment, and treat the amendment or second return as a nullity. But this action of the court had no effect upon the jury in giving their verdict, nor is there any connection between it and the judgment rendered in the case.

The action was brought on a promissory note for fifteen hundred and forty dollars purporting to have been executed by Samuel Griffith by mark, and witnessed by David F. Schnavely. Samuel Griffith died soon after the commencement of the suit, and the defense is made by Abner J. Griffith, his executor in the state of Pennsylvania, and H. W. Short his administrator in this state.

The defense is, that the said promissory note was obtained by the said plaintiff from the deceased in his life-time by

fraud and misrepresentation, in this, that at the time said Samuel Griffith signed said promissory note he was indebted to said plaintiff in the sum of thirty dollars and no more, and was at said time prostrated with sickness, and had been so prostrated and confined to his bed with sickness for a long time prior thereto, and that as a result of such sickness and the advanced age of said Samuel Griffith, he being about eighty years of age, he was so weakened and impaired in mind and body, that he was utterly incapacitated to transact any business, and his eye-sight was so affected at that time that he was unable to see to read or write—that the plaintiff, who is a son of the said Samuel Griffith, presented the said promissory note to him and represented to him that it was for thirty dollars, money previously borrowed by said deceased from plaintiff, and relying upon said statement, and without reading said note, said Samuel Griffith made his mark thereto, etc. The jury found a verdict for the defendant.

Upon a careful examination of the evidence we are satisfied that the defense was fully proved. There are no briefs by either party. But the plaintiff by his petition in error impliedly admits that he could not recover on the note, but claims that he should have had a verdict for thirty dollars on the pleadings. If he had declared for money loaned or money had and received, or even offered to amend his petition to that effect, after the testimony was in, he might have been entitled to judgment for that amount, but he did not. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

ALVIN GALLEY AND OTHERS, PLAINTIFFS IN ERROR, v. M. L. KNAPP AND F. H. PARKER, DEFENDANTS IN ERROR.

1. **Practice in Supreme Court.** Every case submitted to this court for review should contain a transcript of the pleadings constituting the issue tried in the district court, otherwise the judgment of the court below will be affirmed.

2. **Trial:** ANSWER OF WITNESSES: OBJECTION. When upon a trial a question is put to a witness and answered, although the question or answer, or both, may be afterwards objected to by the opposite party, and the objection sustained by the court, unless such answer be suppressed or withdrawn from the jury by the court, by order or instruction, such answer may be considered by the jury, and, after verdict, will be presumed to have been properly considered by them.

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

H. W. Short, for plaintiff in error.

D. W. Barker, for defendant in error.

COBB, J.

This case was submitted to the court without either printed briefs or oral arguments. Upon examination of the record we find no pleadings.

The errors assigned, other than those which are merely formal, are,

1st. The court erred in ruling out the evidence of F. A. Long, and

2d. The court erred in ruling out the evidence of William C. Overton.

The record containing no pleadings, this court is entirely without knowledge or information as to the issue, to prove which those witnesses were called, therefore can only pre-

sume that the action of the trial court in the matter complained of was correct; but upon turning to the bill of exceptions it appears that the objection to the questions asked by the defendants in error of these witnesses was in each case made after they had fully answered. Although the objections seem to have been sustained by the court, yet no motion was made to suppress or exclude the answers from the jury, and as the record contains no instructions by the court to the jury, it must be presumed that the evidence, being before the jury, was fairly considered by them.

So far as can be ascertained from an examination of the bill of exceptions, the question before the jury was whether the date of the note was altered from the 28th to the 30th, after or before its signing by the defendants in the court below. On that point there was a sharp conflict of testimony, so that it cannot be said that the verdict is unsustained by the evidence.

For the above reasons the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

HERMAN SPELLMAN, PLAINTIFF IN ERROR, V. MARY A. DAVIS, DEFENDANT IN ERROR.

Married Women. Since the act of 1875 [Laws, p. 88] there is no law of this state subjecting the separate property of a married woman to execution or sale for any debt of her husband whatever.

ERROR to the district court for Lancaster county.

C. O. Whedon, for plaintiff in error.

Brown & Marshall, for defendant in error.

BY THE COURT.

This is an action of replevin by Mrs. Davis, against Herman Spellman, now plaintiff in error, and Henry W. Gable for the detention of a certain house, the property of said plaintiff below.

The defendant, Spellman, answered in the court below, denying the facts alleged in the plaintiff's petition, and for a second defense alleging the recovery of a judgment by him against Joshua P. Davis, the husband of the plaintiff, for the sum of $26.85 and $3.00 costs of suit, in an action for a bill of groceries, family goods, and provisions, furnished to the said Joshua P. Davis and his family while the plaintiff was living with him as a member of his family, and which articles were used and consumed by the said family. That after the rendition of said judgment, and the same remained in full force and effect, an execution was issued thereon and placed in the hands of one O. Evans, a constable of said county, who levied the same upon the house in question, and defendant claims to hold said house by virtue of said levy, etc.

The plaintiff demurred to the second defense in the said answer, which demurrer was sustained by the court. A trial was had on the first defense to a jury, who found for the plaintiff. A motion for a new trial being overruled and judgment for the plaintiff, defendant Spellman brings the cause to this court on error.

There is no bill of exceptions in the record, nor brief by either party, and as there was no oral argument in the case, we can only guess at the question sought to be presented by the plaintiff in error.

The legislature of the late territory of Nebraska, at its first session, passed an act exempting the property of married women from execution for the debts of their husbands, with certain exceptions, which exceptions, had the said act been in force at the date of the detention of the house in

question, would probably have embraced this case. Said law was carried into all of the codes and revisions of the statutes up to and including the general statutes of 1873, but was repealed by section two of an act, approved Feburary 25, 1875, on page 88 of the laws of 1875. So that at the date of these transactions there was no law subjecting the property of a married woman to execution for any debt of her husband whatever.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE STATE, EX REL. SAMUEL BEATTY, V. THE MAYOR AND COUNCIL OF OMAHA ET AL.

1. **Mandamus.** To warrant a court in granting a mandamus, it must be made to appear that the relator has a clear legal right to the performance by the respondents of the particular duty sought to be enforced, and that he has no adequate remedy at law.
2. **Cities:** NUISANCE. Temporary obstructions in a street, which are reasonable and necessary for the erection of a building upon an adjoining lot, do not constitute a nuisance, provided they are not unreasonably prolonged.

ORIGINAL application for mandamus.

Redick & Redick, for relator.

John D. Howe, for respondents.

MAXWELL, J.

This is an application for a mandamus to compel the mayor and council, the marshal, and street commissioner of the city of Omaha, to remove a certain frame building from 12th street in said city. The relator states in his

application that he is a saloon keeper in said city; "that on or about the 1st of February, 1880, he procured a lease of the building then and now standing on the west side of 12th street, between said Farnham and Douglas streets, and on the corner of the alley, for — years from that date; that he took out his license as required by law, and at a great expense fitted up said building, placed therein a large stock of goods, and engaged in the retail liquor and cigar business, and soon built up a large and lucrative trade, which was constantly increasing until the date of the grievances hereinafter stated. * * * That on or about the 1st day of March, 1882, the Nebraska National Bank, a corporation organized under the national banking act of the congress of the United States, purchased a large building, 132 feet in length and twenty-two feet in width, then standing on the north-west corner of Farnham and 12th streets, and on lot 8, in block 121, and unlawfully moved the same out over the sidewalk into said 12th street, so that the same occupied about twenty-four feet of said street for a distance of about 136 feet, the rear of said building standing within twenty feet of the front doors of your petitioner's place of business, and in so doing tore up and mutilated the sidewalk running from Farnham street to the alley on the west side of said 12th street; that the only way wagon or carriage travel on said 12th street between Farnham and Douglas streets can be accommodated is by a narrow passage way between said building and the sidewalk on the east side of said 12th street; that said building obstructs and hinders traffic of every kind upon said street, and is a great inconvenience to the traveling public in general, and those who do business on that street in particular, and by reason whereof your petitioner is greatly and especially damaged; that by reason of said obstruction your petitioner's place is out of sight of said Farnham street and persons who pass that way, and has been rendered almost inaccessible; that in plaintiff's busi-

ness the most important element of success is the procurement of a well known and popular locality; that there is no other place in said city as desirable and advantageous to your petitioner for his said business as was his present one before the removal of said building into said street; that since said removal his trade has been constantly falling off, owing to the impassable condition of said street and the obscurity of his location, and the fact that pedestrians are driven to the east side of said 12th street, all caused by the removal of said building into and the consequent obstruction of said street." etc.

There are other allegations as to the obstruction of the street as to the public at large, to which it is unnecessary to refer. A number of the ordinances of the city are also set out in the application, which do not require notice.

To warrant the court in granting a mandamus, it must appear that the relator has a clear legal right to the performance by the respondents of the particular duty sought to be enforced. *Anderson v. Cobson*, 1 Neb., 172. *State v. School Dist.*, 8 Id., 94. High on Ex. Legal Rem., § 10. And it must also appear that he has no adequate remedy at law.

The application is defective in both of these particulars, and fails to state facts sufficient to entitle the relator to the writ.

Whether this court would control the action of the mayor and council of a city of the first class, in regard to the temporary removal of buildings into the street, is not now before the court, and we express no opinion thereon. It is very clear, however, that the application fails to state all the facts as to the removal of the building, and it was conceded in the argument of the case that the removal was temporary and for the purpose of enabling the bank to erect a new building on the site formerly occupied by the wooden building. And it has erected and nearly completed such building.

Is a reasonable temporary obstruction of the street and side-walk for the purpose of erecting a new building a nuisance? The right of the public to the use of a street is the right of every person who desires to do so to pass and repass along the same. But this right is subject to temporary or partial obstructions necessarily placed therein.

In *Com. v. Passmore*, 1 Serg. & Rawle, 217, the supreme court of Pennsylvania says: "Necessity justifies actions which would otherwise be nuisances; this necessity need not be absolute—it is enough to be reasonable. No man has a right to throw wood or stones into the street at pleasure. But inasmuch as fuel is necessary a man may throw wood into the street for the purpose of having it carried into the house, and it may lie there a reasonable time. So because building is necessary, stone, brick, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner."

In *Rex v. Ward*, 4 Ad. & El. 405, Lord Denman, speaking in reference to a board erected for repairing a house, said: "The board is placed for the safety of those possessing the right of way; it protects them from inevitable danger; if it leaves them a free passage, and leads them another way, the whole street is necessarily obstructed. Every way to which houses adjoin must be considered as set out, subject to those occasional interruptions which resemble the temporary acts of loading coal in Keels, alluded to in *Rex v. Russell*, 6 B. & C., 566."

In *Clark v. Fry*, 8 O. S., 373–4, the supreme court of Ohio says: "Even the use of a highway for mere transit by one part of the public may, at the time of a multitude upon it, oppose a temporary obstruction to the passage of another part of the public. A company of persons stopping and standing on the pavement of a street with their wagons or carriages, for mere temporary purposes of business, interpose impediments to the free and uninterrupted transit upon a public highway. The delivery of freight, and

every variety of goods, fuel, etc., at business and other houses, on a street, is a necessary incident to the use of the public highway, and the repair and improvement of streets and the deposit of the materials for the same, often create obstructions to the uninterrupted transit by the public. So, also, the improvement or building or repair of houses, and the construction of sewers and cellar drains, on adjacent lots, often create necessary temporary impediments upon public highways. These are not invasions of, but simply incidents to, or rather qualification of, the right of transit, and the limitation upon them is, that they must not be unnecessarily and unreasonably interposed or prolonged."

Temporary obstructions in a street which are reasonable and necessary, for the erection of a building upon an adjacent lot, do not constitute a nuisance, provided they are not unreasonably prolonged. Such obstructions are not invasions of the rights of the public to the use of the street, but merely incident to or a limitation on such right; but are justified only so long as they are reasonably necessary. The party placing the obstructions therein, however, will not be justified in leaving the street in an unsafe condition. One of the principal grounds of complaint in this case is the obstruction of the sidewalk, thereby causing people to pass on the east side of the street, and away from the relator's place of business, but there are no facts stated showing such obstruction to be unnecessary. As to the removal of the building into the street, it is evident that it was placed there temporarily, and there is no allegation that it was not so removed with the consent of the proper public authorities. The facts stated in the application do not show the obstructions to be a nuisance. The writ must be denied.

WRIT DENIED.

LEANDER GERRARD AND MICHAEL WHITMOYER, PLAINTIFFS IN ERROR, v. THE OMAHA, NIOBRARA & BLACK HILLS RAILROAD, DEFENDANT IN ERROR.

1. **Railroads:** RIGHT OF WAY: TITLE. Where a railroad company institutes proceedings and condemns a right of way across real estate, it cannot, on appeal to the district court, disprove the title of the person to whom the damages were awarded without pleading his want of title.

2. ———: ———: ———. The word "owner" as used in the statute applies to any person having an interest in the estate.

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

Gerrard & Whitmoyer, and *E. Wakeley*, for plaintiff in error cited: Mills on Eminent Domain, 161, and cases cited. *R. R. Co. v. Moffatt*, 7 Cal., 579. *Water Works v. San Francisco*, 22 Cal., 434. *Turnpike Co. v. Burhit*, 26 Ind., 53. *President, etc., v. Givens*, 17 Ill., 255. *P. & R. I. R. Co. v. Bryant*, 57 Ill., 473. *P. P. & I. R. Co. v. Lowrie*, 63 Ill., 264. *St. L., etc., R. Co. v. Peters*, 68 Ill., 143. *L. & Mil. R. Co. v. Geeger*, 4 Wis., 268. *Ex parte Heirs of Van Vorst*, 2 N. J. Eq. (1 Green), 292. *Severin v. R. R. Co.*, 38 Iowa, 463. *R. R. Co. v. Alley*, 34 Mich., 16.

A. J. Poppleton and *J. M. Thurston*, for defendants in error, cited: Mills on Eminent Domain, sec. 160. *Miller v. Mayor*, 35 N. J. L., 460. *Thurston v. Portland*, 63 Maine, 149. *Minot v. Commissioners*, 28 Maine, 121. *Horrecks v. R. R.*, 4 B. & S., 315. *Regina v. R. R. Co.*, 3 El. & Bl., 443. *Carli v. Stillwater*, 16 Minn., 260. *R. R. v. Mahoney*, 49 Cal., 112. *Bersbine v. R. R.*, 23 Minn., 114.

MAXWELL, J.

In April, 1881, the defendant instituted proceedings in the county court of Platte county for the appointment of

commissioners to appraise the damages sustained by the owners of certain tracts of lands, by reason of the location of the defendant's railroad across the same. Among the lands thus described was the north-east quarter of the south-east quarter of sec. 24 T. 17 R. 1 west, and notice of condemnation was served on the plaintiffs in error, and Thomas C. Durant, trustee. The plaintiff's damages were appraised at $1,050. The defendant then appealed to the district court, and upon the trial the court excluded a tax deed under which the plaintiffs claimed title, and directed a verdict for the defendant. No pleadings were filed in the district court, nor was any issue of want of title made.

In the case of the *Republican Valley R. Co. v. Hayes*, 13 Neb., 489, it was held by this court that 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 in issue to that effect—disprove such ownership. The reason of the rule is plain. The appeal properly brings up only the question of damages. If that is the only one to be determined no pleadings are necessary, because the sole question for consideration is, what is the amount which the land-owner ought to recover? *Neb. Ry. Co. v. Van Dusen*, 6 Neb., 160. But when other matters are involved in the case, they must be put in issue. The R. R. Co. acquires merely the right of way possessed by the parties to the proceedings. It is therefore its duty to bring in all parties having an interest in the estate in order that the condemnation money may be properly applied. The word "owner" as used in the statute applies to all persons who have an interest in the estate.

Where it is necessary the court possesses ample power to require such parties to interplead, and to apportion the money according to their rights. The court therefore erred in directing a verdict for the defendant.

The question of the validity of the tax deed has not been very fully considered in the brief of either counsel, and

therefore will not be determined. It was admissible in evidence, however, for the purpose of showing the lien of the plaintiffs for taxes paid, and perhaps as evidence of title.

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

REVERSED AND REMANDED.

ROSWELL A. INGALLS, PLAINTIFF IN ERROR, V. LYMAN T. NOBLE, DEFENDANT IN ERROR.

1. **Continuance.** Ordinarily the decision of motions to continue causes is left to the discretion of the particular court to which they are addressed. It is only where such discretion has evidently been exercised unwisely or abused, to the prejudice of a party, that a reviewing court will interfere.

2. ——: AFFIDAVIT FOR. The statement of facts in an affidavit for a continuance should be specific of acts done, or of excuses for not doing them, and given with such particularity that an indictment for perjury would lie in case of its being false.

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

A. J. Rittenhouse, for plaintiff in error.

J. H. Smith, for defendant in error.

LAKE, CH. J.

But two errors are complained of: *first*, that the motion for a continuance was improperly denied; and, *second*, that the verdict was not supported by the evidence.

Ordinarily the decision of motions of this sort is left to the discretion of the particular court to which they are

addressed. It is only where such discretion has evidently been exercised unwisely or abused, to the prejudice of a party, that a reviewing court will interfere. *Billings v. McCoy Brothers*, 5 Neb., 187. *Johnson v. Dinsmore*, 11 Id., 391. In this case we not only see no abuse of discretion but the motion was decided rightly.

The action was commenced in June, 1881. The answer was filed on the 14th of July, by which issue was joined. The motion for a continuance was not made until December 20th, just as the case was called for trial. The continuance was sought to obtain the testimony of Samuel Tull, who had but recently been a partner of the plaintiff in error. The substance of the affidavit in support of the motion is, that when the action, which was an ordinary one for the price of labor, was commenced, Tull resided in Kansas, but before issue was joined had removed to some place in Colorado, unknown to the affiant. In regard to the efforts put forth to ascertain Tull's whereabouts and get his testimony, all that is shown is this, that "affiant has made diligent inquiry to ascertain the place to which he has removed, by asking persons who were supposed to know, and by writing to witness at points where it was supposed he had gone." As evidence of diligence, this statement of what had been done to obtain the desired testimony is sadly deficient. He says he "made diligent inquiry," but when and of whom did he inquire? He "wrote to witness at points where it was supposed he had gone." To what "points" or places did he address his letters? Who "supposed he had gone" there? And were the letters returned to him? The question of diligence is for the court to determine from the sworn statement of what has been done. And this statement should be specific of acts done, or of excuses for not doing them, and given with such particularity that an indictment for perjury would lie in case of its being false.

This affiant says he "made diligent inquiry." That,

however, is merely his own opinion of what he did, with no fact given to support it. If just what he bases this opinion upon were given, possibly the court might differ with him. The court could not act upon his belief of the effect of what he did. The motion was properly overruled.

Of the verdict there is but a word to say. In the evidence there was but little conflict. It not only strongly supports the finding of the jury, but impresses us with the conviction that we should have found substantially as the jury did if it had been submitted to us to pass upon.

JUDGMENT AFFIRMED.

BELLE WALKER, PLAINTIFF IN ERROR, V. OSCAR C. LUTZ, DEFENDANT IN ERROR.

1. **Practice:** AFFIDAVITS: HOW MADE PART OF RECORD. Affidavits used in the district court will not be considered in this court in error proceedings, unless made part of the record, which can ordinarily be done only by means of a bill of exceptions.

2. **Sheriff's Return to Summons.** A sheriff's return to a summons, that he served it by leaving a copy at the defendant's usual place of residence, is not conclusive as to the fact of residence, but the defendant may show that the place where the copy was left was not at the time his residence, on a motion to quash the service.

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

Hale & Conner, for plaintiffs in error, cited: *Diller v. Roberts*, 13 Sergeant & Rawle, 60. *Stevens v. Brown*, 3 Vermont, 420. *Blythe v. Richards*, 10 Sergeant & Rawle, 261. *Denny v. Willard*, 11 Pickering, 519. *Whitaker v. Sumner*, 7 Pickering, 551. *Granger v. Clark*, 22 Maine,

128. *Cook v. Darling*, 18 Pickering, 393. *Brown v. Turner*, 12 Alabama, 752. *Lightsey v. Harris*, 20 Alabama, 411. *Cooper v. Sunderland*, 3 Clark, 114. *Phillips v. Ewell*, 14 Ohio State, 133.

George B. France, for defendant in error, cited: *Bond v. Wilson*, 8 Kan., 228. *Porter v. C. & N. W. R. R.*, 1 Neb., 14. *Watson v. Watson*, 6 Conn., 334. *Ports v. Table Mountain*, 10 Cal., 441. *Carr v. Commercial Bank*, 16 Wis., 50.

LAKE, CH. J.

There is but a single question here presented for our decision, and that is, whether in setting aside the service of summons the district judge ruled correctly.

The record brought here is in a very incomplete state, and not in a condition to enable us to know, with any reasonable certainty, just what evidence the judge had before him and acted upon in making the order complained of. We know that he had the motion of the defendant suggesting the want of jurisdiction, together with certain affidavits attached to and made a part of it. These affidavits being so attached as exhibits, may perhaps be properly regarded as a part of the record without the aid of a formal bill of exceptions. But not so of a large number of affidavits filed on behalf of the plaintiff in support of the sheriff's service. They fall clearly within the rule frequently announced by this court, that affidavits used in the district court will not be considered by this court, in error proceedings, unless made a part of the record. And this can ordinarily be done only by means of a bill of exceptions. *Ray v. Mason*, 6 Neb., 101. *Credit Foncier of America v. Rogers*, 8 Id., 34. *Aultman v. Howe*, 10 Id., 8. *Oliver v. Sheeley*, 11 Id., 521. The record does show that, upon the entry of the order quashing the service, forty days were given within which to prepare and file a bill of exceptions, which,

however, does not appear to have been done. It follows from this condition of the record, that we must presume the district judge ruled correctly upon the facts before him; and all that is left to us to decide is simply whether the sheriff's return to the summons, *as to the fact of the defendant's residence,* must be taken as conclusive or not.

The rule of the common law, by which such returns were held to be conclusive as between the parties to the action, has been much modified by many of the courts of this country, especially as to those jurisdictional facts not supposed to be within the officer's own knowledge, but which he must act upon—facts which not unfrequently he must ascertain upon inquiry from other persons, and about which he is quite liable to be misinformed entirely. To this class of facts belongs that of the "usual place of residence" of a defendant, the only place where, by leaving a copy, not with the defendant in person, the service of a summons can be effectuated.

Now is the first time that this court has been called upon to decide the precise question here presented, although one substantially like it in principle was considered in the case of *Porter v. The Chicago and Northwestern Railway Company,* 1 Neb., 14. The question in that case arose in the district court for Douglas county, and concerned the service of a summons on the railway company. It was first decided by the writer of this opinion, who was then presiding in that court, and, although the service was sustained, yet the principle was applied that, as to the matter there in dispute, the sheriff's return was not conclusive, but, on a motion to quash, might be shown to be untrue.

In that case the return of the sheriff, conforming to the requirements of the statute, showed service by leaving a certified copy of the summons with "W. B. Strong, the general managing agent of the defendant, at their usual place of doing business in the county of Douglas, state of Nebraska." A motion was made and entertained to quash

the service on the ground that Strong was not such managing agent as the sheriff had taken him to be, and in his return had certified that he was. And this court, in reviewing and affirming the ruling of the district court upon the showing made, did not question the right of the company to have the service set aside if the evidence had but shown that Strong was not in truth its managing agent in this state—in other words, that the return in that particular was false.

This precise question was considered by the supreme court of Kansas in the case of *Bond v. Wilson*, 8 Kansas, 228, under a statute respecting the service of summons similar to ours, and the conclusion reached that, "when the return of the sheriff is that a copy of the summons was left at the residence of the defendant, the court may hear and determine whether the place where the copy was left was at the time the residence of the defendant." And this principle is sustained by the courts of several other of our sister states. While we are of opinion that the return was not conclusive upon the question of the defendant's residence, for the reason that the record does not show that the court below ruled erroneously upon the facts before it, the judgment must be affirmed.

JUDGMENT AFFIRMED.

WILLIAM M. KAEISER, PLAINTIFF IN ERROR, v. THE BOARD OF COUNTY COMMISSIONERS OF NUCKOLLS COUNTY, DEFENDANT IN ERROR.

1. **Sale of land for taxes:** LIABILITY OF COUNTY TO PURCHASER. In order to show a liability on the part of a county to a purchaser of land at tax sale, under sec. 71 of the revenue act of 1869, Gen. Stat., 924, it must appear that the sale has failed through some "mistake, or wrongful act of the county treasurer or other officer" of the revenue.

2. ———: PLEADING: PETITION. In such case, to state a cause of action, the petition must set out the particular act done or omitted, and the officer doing or omitting it.

3. ———: COUNTY COMMISSIONERS. It is not within the jurisdiction of the board of county commissioners to determine whether the "mistake or wrongful act," contemplated by this section, has been committed or not.

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

D. W. Barker, for plaintiff in error, cited: *Kittle v. Shervin*, 9 Neb., 324.

W. A. Bergstresser, for defendant in error, cited: *People v. Auditor General*, 30 Mich., 12. *Otoe County v. Gray*, 10 Neb., 568. *Pettit v. Black*, 8 Neb., 52. *Peet v. O'Brien*, 5 Neb., 360.

LAKE, CH. J.

The action below was brought by the plaintiff in error to recover from the county of Nuckolls a sum of money, claimed to be due him from the county, under sec. 71 of the revenue act of 1869, Gen. Stat., 924, which provides that: "When by mistake or wrongful act of the treasurer, or other officer, land has been sold contrary to the provisions of this act, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold," etc.

To the petition the county interposed a general demurrer, which was sustained and the action dismissed. The only question now presented is, whether the petition states a good cause of action.

It appears from the petition that the plaintiff purchased the land in question in October and November, 1875, at private tax sale, paying therefor, in the aggregate, the

sum of sixty dollars and thirty-five cents; that he subsequently paid taxes duly levied upon the land, to the amount of one hundred and forty-two dollars and fifty-eight cents. These sums, together with interest, at the rate of forty per cent per annum, he prays judgment for.

There is no direct allegation in the petition to the effect that the sale in question was contrary to the revenue act in any particular. All that there is upon this point is simply the fact that one "Maggie C. Blakely, claiming to be the owner of said lands," brought her action against the said board of county commissioners and the treasurer of said county and this plaintiff for the purpose of having the said tax sale set aside and the treasurer enjoined from making a deed. Although the plaintiff herein was made a defendant in that action, the petition in this case shows conclusively that the court acquired no jurisdiction over him. He was not lawfully served with process, nor did he voluntarily appear, so that as to him the judgment enjoining the treasurer from executing the tax deed was a mere nullity. It really settled nothing. The fact that the county commissioners assented to or stipulated with Blakely for the judgment as charged is of no consequence. Without the concurrence of the purchaser they could make no arrangement with the land-owner respecting the sale which would bind him. It is not within the jurisdiction of county commissioners to determine whether the "mistake or wrongful act" contemplated by this statute was in fact committed or not; and if they assume to do so, it will bind no one, neither the purchaser who has sustained the loss nor the officer who occasioned it, and who is by the law rendered liable on his bond to make it good, either to the purchaser, or to the county.

Therefore, in order to show a liability on the part of the county, it must appear, independently of the former suit, and of the action of the commissioners therein, that the sale in question failed through some "mistake or wrongful

act" of the county treasurer or other officer of the revenue. The particular act done or omitted, and the particular officer doing or omitting it, should be set out in the petition, so as to enable the court to see and determine whether the case is one contemplated by the statute. This petition fails to do that, and therefore the demurrer was rightly sustained.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. DAKOTA COUNTY, v. S. J. ALEXANDER ET AL.

1. **Bonds:** REGISTRATION. In registering and certifying bonds issued under the act, "To authorize the issue of county bonds in certain cases," approved Feb. 19, 1877, the auditor and secretary of state have no right to review the action of their predecessors upon the original bonds.

2. ———: VOTE OF PEOPLE. In the issue of bonds under this act no vote of the people is required.

ORIGINAL application for mandamus to compel respondents, Alexander, the Secretary of State, and Wallichs, Auditor, to register certain bonds of Dakota county.

Isaac Powers, Jr., and *E. Wakeley* for relator.

C. J. Dilworth, Attorney-General, for respondents.

LAKE, CH. J.

In the answer of the respondents to the alternative writ, but two reasons are given for the refusal to comply with its command to register and certify the bonds in question. *First.* That the original issue, which these bonds are designed to replace, was in excess of the amount which the

county was authorized to vote. *Second.* That the proposed issue has not been submitted to the voters, and is largely in excess of ten per cent of the assessed valuation of the taxable property of said county.

The question now presented is whether these reasons are sufficient to justify the defendants in their refusal to perform the required acts, it being conceded that they accord with the facts of the case.

The act under which the new bonds were executed is as follows:

"Section 1. That any county, precinct, or city in the state of Nebraska, which has heretofore voted and issued bonds to aid in the construction of any railroad or other work of internal improvement, and which bonds, or any part thereof, still remain unpaid, and remain and are a legal liability against such county, and bearing interest at ten per cent per annum, is hereby authorized to issue coupon bonds at a rate of interest not exceeding eight per cent per annum, to be substituted in place of and exchanged for such bonds heretofore issued, whenever such county, precinct, or city, can effect such substitution and exchange, which substitution and exchange shall be dollar for dollar.

"Section 2. The new bond so issued shall have recited thereon the object of its issue, the whole of the act under which the issue is made, stating the issue to be in pursuance thereof, and shall also state the number, date, and amount of the bond or bonds for which it is substituted, and such new bond shall not be delivered until the surrender of the bond or bonds so designated.

"Section 3. The new bonds so issued shall not require a vote of the people to authorize such issue, and they shall be paid, and the levy be made, and the tax collected for their payment, in accordance with the laws now governing the said bonds heretofore issued." Session laws, 1877, page 224. Comp. Statutes, 325.

It will be noticed that by the first clause of the last sec-

tion of this act, a vote of the people upon the question of the issue of bonds under it is in express terms dispensed with. The propriety of replacing old bonds by new ones bearing a lower rate of interest is intrusted to the wisdom and discretion of the board of county commissioners, who it was doubtless presumed would so act as to subserve the best interests of the tax-payers.

The other question raised by the answer—that of the excess of each of these issues over the limit fixed by law—although rather more difficult, may, we think, be readily and satisfactorily answered.

The theory of the respondents is, that they are authorized and required to now pass upon the legality of the old bonds in performing their duties as to the new. If this were so, their action in the premises would be entirely justifiable. But, as we view the matter, their only duty respecting the former issue is to determine whether they are in fact internal improvement bonds, and bear evidence of having been lawfully issued. It is conceded that these bonds were issued to aid in the construction of a railroad —a work of internal improvement—and were registered and certified to as the law required. It is only by reviewing the action of former officers, by which the bonds are shown to have been properly issued, that they can now say they were unauthorized. This, we think, they have no right to do. As to them, the questions confided to the judgment of and decided by their predecessors are *res judicata*, and not to be opened. Finding the old bonds thus authenticated, which they concede they do, the only additional inquiry respecting them, which they may enter upon, is to satisfy themselves by proper evidence that the new bonds conform to the formal requirements of the act authorizing such re-issue. This done, all that remains for them is the ministerial duty of registration and indorsement, as directed by the alternative writ.

Inasmuch as the answer does not question the correct-

ness of the relation respecting the formal requisites of the new bonds, and thus concedes that they meet all of the statutory conditions, it was plainly the duty of the respondents to register and certify them, as directed by the alternative writ. There is no principle that we are aware of which will permit the respondents to overturn the action of their predecessors in registering and certifying to the legality of bonds, and a peremptory writ is awarded.

WRIT AWARDED.

MAXWELL, J., dissenting.

I do not dissent from the statement of the law in the syllabus of this case, but in my view the question at issue is entirely different from that stated therein. It appears from the pleadings that in the winter of 1875–6, and since our present constitution took effect, the county commissioners of Dakota county submitted to the electors of that county a proposition to issue county bonds to the Covington, Columbus & Black Hills railroad company, in the amount of $95,000, being fifteen per cent of the assessed valuation of the county. This proposition was submitted at one election, and received more than two-thirds of all the votes cast, and was declared carried, and the bonds were thereafter issued and placed in the hands of a trustee, and have been delivered to the railroad company or its assigns.

The election for these bonds was held under the provisions of section 2, article 12, of the constitution, which reads as follows: "No city, county, town, precinct, municipality, or other subdivision of the state, shall ever make donations to any railroad or other works of internal improvements, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law. *Provided*, 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 property. *Provided further*, that any city or county may, by a two-thirds vote, increase such indebtedness five per cent, in addition to such ten per cent, and no bonds or evidences of indebtedness so issued shall be valid unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of state, showing that the same is issued pursuant to law."

There is no statute in this state authorizing a county to issue its bonds in excess of ten per cent of the assessed valuation, and the constitutional provision above quoted does not confer the right to vote bonds, but merely places restrictions upon the power of the legislature, prohibiting it from ever authorizing the issue of such bonds in excess of fifteen per cent. The question here presented was before the court in the case of *Reineman v. C., C. & B. H. R. R. Co.*, 7 Neb., 312, the opinion being written by the present chief justice, who, after copying the section above quoted, said: "It will not be claimed that, in the absence of any law, either statutory or constitutional, the electors of a county or municipality could impose an indebtedness of this sort that would be binding upon the inhabitants thereof. Very clearly they could not. Neither will it be denied, we think, that in the absence of all constitutional restriction, the legislature could, by suitable enactment, authorize such aid in any amount which the people might see fit to vote. Indeed, until the adoption of our present constitution, this whole matter of municipal aid to works of internal improvement was within the sole control of the state legislature, and subject to no restraint other than such as that body in its wisdom saw fit to impose. This being so, the section of the constitution above quoted must be considered as restrictive only upon the exercise of legislative discretion in the authorization of county and municipal indebtedness, to aid in the construction of railroads and other works of internal improvement. It fixes the boun-

dary beyond which the legislature cannot go, but within which its authority is still supreme. The constitution does not, of its own force and independently of the legislature, assume to authorize the people to vote such aid, but, on the contrary, the necessity of legislative permission and direction is expressly recognized."

Again, on page 313, he said: "We conclude, therefore, that until the legislature shall by suitable act change the existing statutory law so as to authorize it, there is no warrant for creating a county indebtedness in aid of internal improvements exceeding in the aggregate ten per cent of the assessed value of the taxable property within the county furnishing such aid. And further, that by the amendment of February 17th, 1875, such aid must have been authorized by at least two-thirds of all the votes cast on the proposition to extend such aid." It was held that as the proposition was submitted as an entirety, and exceeded the statutory limit, the election was simply "a void act, conferring no authority whatever upon the board of county commissioners to issue the bonds of the county in any amount whatever."

The correctness of that decision has never, so far as I am aware, been questioned, nor can it be successfully. A county has no inherent right to issue commercial paper. It is a mere governing agency of the state, with certain powers distinctly specified in the statute. Now suppose such organization, without legislative authority, should issue its bonds to a railroad company to the amount of fifty per cent of its assessed valuation, would such bonds possess any validity? There would be a lack of power on the part of those executing the bonds that would render them invalid in whatever hands they might be found. The reason is, the county commissioners in issuing bonds act under a special power, and if they proceed without authority, their acts are simply void. Nor can it make any difference whether the bonds issued without authority of law

amount to fifteen or fifty per cent of the assessed valuation. In either case, being in excess of the powers conferred, they are nullities. In the case under consideration, the $95,000 issued by Dakota county in 1876, being five per cent in excess of the limit fixed by law, in the opinion of the writer are null and void. Yet it is proposed to issue funding bonds to the amount of $144,000 to replace such bonds, the rate of interest to be diminished to six per cent. And the mandamus applied for in this case is to compel the secretary of state and auditor to endorse on these bonds that they are issued pursuant to law. The object of the constitutional provision, so far as the writer is aware, was to prevent unprincipled persons from going into the unsettled counties of the state, and issuing fraudulent obligations in the names of such counties, and selling the same, and thus not only defraud the purchasers, but bring reproach upon the good name of the state. But the respondents are not judicial officers, nor is their certificate a guaranty on the part of such officers or of the state that the instruments are valid. Such officers may make a mistake as to the law, and so long as they act in good faith they are not personally liable for the same. Thus, the former auditor and secretary of state, evidently supposing that the constitution alone conferred authority to issue bonds to the extent of fifteen per cent of the assessed valuation, certified that the $95,000 bonds in question were issued pursuant to law. But this added nothing to their validity, and that question can be determined alone by the court. Where, however, these officers object to certifying certain bonds, upon the ground that they are illegal as in this case, the court, in order to compel them to act, must declare that the proposed bonds are legal. This court must in effect hold that the $95,000 of bonds issued in 1876 without authority of law, were and are legal obligations of Dakota county. Such a decision breaks down all the barriers erected for the protection of tax-payers, and is fraught with evils the full import of

which may not now be apparent. There are other questions in the case which cannot be considered without extending this opinion to too great length. The writ should be denied.

JOHN A. EATHERLY, COUNTY CLERK OF YORK COUNTY, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, EX REL. LEMUEL J. GANDY, TREASURER OF YORK COUNTY, DEFENDANT IN ERROR.

Tax lists: CORRECTION BY COUNTY CLERK. Under the revenue law of this state, it is only where the county commissioners have failed to settle with and allow the county treasurer credit for such property tax as he is unable to collect, or for errors in the assessment of real estate, or footings of tax books, that the county clerk has authority to examine such lists and correct the same.

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

George B. France (with whom were *Sedgwick & Power*), for plaintiff in error.

W. P. Conner, for defendant in error.

MAXWELL, J.

This action was commenced in the year 1881, in the district court of York county by the relator against the plaintiff in error, to compel him, as county clerk, to certify to the state auditor the valuation of property and the amount of taxes due thereon, for which the relator, as treasurer of York county, was entitled to credit, and to certify under the seal of his office the valuation of property and amount of taxes and special assessments due thereon, allowable to said treasurer in the settlement of his several accounts, and for other relief. On the hearing of the cause a peremptory writ of mandamus was allowed. Eatherly brings the cause into this court by petition in error.

It is alleged in substance in the alternative writ that the relator was county treasurer of said county, and Eatherly county clerk at the time stated; that on the 19th day of July, 1881, the relator filed with said clerk a statement in writing, setting forth in detail the name of each person charged with personal property tax, which the treasurer had been unable to collect by reason of the removal or insolvency of the person charged with such tax, the value of the property, the amount of such tax, the cause of the inability to collect the same, etc.

And at the same time said relator filed with said clerk a list of errors in the footings of tax books, giving in each case a description of the property, the valuation of the same, and the amount of taxes and special assessments due thereon, which list was duly verified by the oath of said relator; that on the 19th day of July, 1881, the board of county commissioners of said county being in legal session, examined said lists and approved the same, and entered an order to that effect; that Eatherly has failed and refused to certify to the state auditor the valuation of property and the amount of taxes due thereon for which the relator is entitled to credit, and has failed and refused to make and deliver to him the statements, certificates, and lists pertaining to the settlement of the accounts of the relator, to enable him to make a full and final settlement with the state auditor. To this writ Eatherly filed an answer, wherein he states in substance that the lists furnished are incorrect, and personal property taxes for the years 1874-5-6 and 7, to the amount of $271.71, are collectible, giving the names of the individuals owing the same. He admits that the county commissioners, on the 19th day of July, 1881, approved the list presented by the relator, but denies that said commissioners were in legal session at that time. He also alleges that said lists were so imperfect and inaccurate as to render it impossible to determine whether the relator was to be credited or debited with the amounts, etc.

Sec. 155 of the revenue law provides that: "On or before the first day of October, annually, and at such other times as the county board may direct, the county treasurer shall make out and file with the county clerk a statement in writing, setting forth in detail the name of each person charged with personal property tax, which he and other collectors have been unable to collect, by reason of the removal or insolvency of the person charged with such tax, the value of the property and the amount of tax, the cause of inability to collect such tax, in each separate case, in a column provided in the list for that purpose. Said treasurer shall, at the same time, make out and file with the county clerk a similar detailed list of errors in assessment of real estate, and errors in footing of tax books, giving in each case a description of the property, the valuation and amount of the several taxes and special assessments, and cause of error. The truth of the statement contained in such lists shall be verified by affidavit of the county treasurer."

Sec. 156 provides that: "If any lands or lots shall be delinquent for taxes or special assessments, the treasurer shall be entitled to a credit in his final settlement of the amount of the several taxes and special assessments thereon—the county to allow the amount of printers' fees thereon, and be entitled to said fees so allowed when collected: Provided, That the county treasurer shall not be entitled to credit for delinquent personal property until he has filed with the clerk an affidavit that he has been unable to collect the tax thereon by reason of a want of personal property of the owner thereof, and that to the best of his knowledge and belief no personal property of any such owner is in the county. If the county board be in session on the first of October, it shall settle with, and allow the county treasurer credit for such allowance as he may be legally entitled to."

Sec. 157 is as follows: "If there be no session of the board held at the proper time for settling and adjusting the accounts of the county treasurer, it shall be the duty of the

treasurer to file the lists with the county clerk, who shall examine said lists and correct the same, if necessary, in like manner as said board is required to do. Said county clerk shall make an accurate computation of the value of the property, and the amount of the delinquent tax and special assessments returned, for which the collector is entitled to credit."

Sec. 158 provides that: "The county clerk shall immediately, in either case, certify to the auditor of public accounts the valuation of property, and the amount of state taxes due thereon, for which the treasurer may be allowed credit."

It is only where the county commissioners fail to settle with the treasurer, and allow him credit for such allowance as he is entitled to, that the county clerk has authority to examine the lists and correct them. If an error is committed by the commissioners in making settlement, in the absence of fraud, it should be reviewed in a direct proceeding for that purpose. In any event, the clerk cannot ignore such settlement, and refuse to certify what the records of his office show is the condition of the accounts. The statute makes it his duty to certify to the auditor of public accounts the valuation of property and the amount of state taxes due thereon to which the treasurer is entitled to credit. This he admits he has failed to do, and he has neither pleaded nor proved any sufficient justification for such neglect. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

WILLIAM STADLEMAN, APPELLANT, V. JOHN FITZGERALD, APPELLEE.

Principal and agent: A letter from a principal to his agent directing a sale of his real estate is sufficient authority to the agent to sell such property according to the terms of the writing; but if the authority is denied, and the letter is lost, its contents must be clearly proved to sustain a contract made by the agent.

APPEAL from the district court for Cass county. Tried below before POUND, J.

S. P. Vanatta, for appellant.

Marquett, Deweese & Hall, for appellee.

MAXWELL, J.

This is an action to enforce the specific execution of an alleged contract of the defendant for the conveyance to the plaintiff of the west ½ of lot 2 and the east ½ of lot 3, in block No. 34 in the city of Plattsmouth. The memorandum of the alleged agreement is as follows:

"PLATTSMOUTH, NEB., Jan. 18, 1881.

"Received of William Stadelman twenty-five dollars in part payment for west ½ lot 2 and east ½ lot 3, block 34, Plattsmouth, Nebraska, for which and upon payment of balance due inside of thirty days from date, I agree to make him a warranty deed for said premises. Balance due $1,575."

This is signed in the name of Fitzgerald by an agent. The authority of the agent is denied. On the trial of the cause in the district court, judgment was rendered in favor of the defendant. The plaintiff appeals to this court.

Sec. 3 of chap. 32 of the Comp. Statutes provides that: "No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same."

Sec. 5 provides that: "Every contract for leasing, for a longer period than one year, or for the sale of 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."

Sec. 23 provides that: "The term 'conveyance' as used in this chapter, shall be construed to embrace every instrument in writing (except a last will and testament) whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, alienated, assigned, or surrendered."

Sec. 25 provides that: "Every instrument required by any of the provisions of this chapter to be subscribed by any party, may be subscribed by his agent, thereunto authorized by *writing*."

A contract, or at least a note or memorandum thereof for the sale of real estate, must be in writing. In 2d Kent's Comm., 613, it is said: "Though the statute of frauds of 29 Charles II. requires in certain cases a contract for the sale of goods to be in writing, and signed by the party to be charged, or by his authorized agent, the authority to the agent need not be in writing. It may be parol." Chitty on Commercial Law, vol. III., p. 104. Lord Eldon, 9 Ves., 250. *Stackpole v. Arnold*, 11 Mass., 27. *Long v. Colburn*, Ibid, 97. *Northampton Bank v. Pepoon*, Ibid, 288. *Ewing v. Tees*, 1 Binney, 450. *Shaw v. Nudd*, 8 Pick., 9. *Turnbull & Phyfe v. Trout*, 1 Hall (N. Y.), 336. *McComb v. Wright*, 4 Johns. Ch., 667.

And in *Riley v. Minor*, 29 Mo., 439, and *Rottman v. Wasson*, 5. Kas., 552, it seems to have been held that the authority of an agent to make a contract that his principal will convey certain land, need not be in writing. Under our statute, however, the authority of an agent to sell real estate must be in writing, unless there has been a subsequent ratification of his acts.

In the case under consideration the authority to the agent at Plattsmouth was said to have been given by letter or postal card; but the writing, whatever it was, had been mislaid and was not produced at the trial. Two witnesses who professed to have seen this writing, testified as to its contents, and stated in substance that it authorized the agent to

sell the real estate in question for $1,600. On the other hand, both Fitzgerald and his secretary, who conducted his correspondence, testify that no such letter or postal card was ever written or sent, and that the agent had no authority whatever to sell the lots in question. This being the condition of the testimony, this court cannot say that the district court erred in dismissing the action.

A letter by the principal to his agent directing a sale of his real estate is sufficient authority for the agent to make a sale according to the terms of such writing, and the principal will be bound thereby; but the writing itself must be produced or its contents clearly proved. The proof in this case fails in both of these particulars. The judgment is clearly right and must be affirmed.

JUDGMENT AFFIRMED.

ADAM E. SPURCK, APPELLEE, v. THE LINCOLN & NORTHWESTERN RAILROAD COMPANY, APPELLANT.

1. **Railroads:** DONATIONS IN AID OF. Under our law, public donations to aid in the building of railroads can be made only by the people themselves, by means of an election properly called and held.

2. ———. The people cannot delegate to the county commissioners the authority to determine which of two companies shall be the recipient of aid voted.

APPEAL from Butler county, where an injunction had been granted by GEORGE W. POST, J., enjoining the registration of $53,000 coupon bonds of Butler county, and Spurk precinct bonds to the amount of $8,500, and ordering the defendant railroad company to deliver up said bonds, and canceling and annulling the same.

Marquett & Deweese, for appellant.

The donation was good, and commissioners had power to determine which of the two companies should receive the aid. *Lews v. The County Com.,* 12 Kan., 206. *Land Grant Railway v. Commissioners,* 6 Kan., 256.

R. M. Sibbett and *D. G. Courtnay,* for appellee, cited: *Jones v. Hurlburt,* 13 Neb., 125. *People v. Tazewell Co.,* 22 Ill., 147. *People v. Smith,* 45 N. Y., 772. *Marsh v. Fulton Co.,* 10 Wall., 677. *Gulf R. R. v. Marshall Co.,* 12 Kan., 230. *Bamburg v. Commissioners,* 41 Ind., 502. *Monadnock R. R. v. Peterborough,* 49 N. H., 281.

LAKE, CH. J.

In one particular this case is clearly within the operation of the rule of our decision in *Jones v. Hurlburt,* 13 Neb., 125, under which the delivery of certain bonds was enjoined. In this case, as in that, the propositions submitted to a vote of the people and adopted, were in the alternative—to aid one railroad company or the other. In this case the propositions, both county and precinct, were: "Shall the county commissoiners of Butler county be authorized to issue and give to the Lincoln & Northwestern Railroad Company, or the Blue Valley & Northwestern Railroad Company," the proposed aid? "The whole amount of said bonds to be issued and given to one of the aforesaid railroad companies upon the following conditions, and none other: That one of said companies shall construct a railroad from a point on the south line of the county of Butler, in the valley of the Blue river, running thence north *via* the towns of Ulysses and David City, thence north-west to the north line of said Butler county," etc.

Under our law, public donations of the character here proposed can be made only by the people themselves, by

means of an election properly called and held. But it appears that in this case, the people have not said that the Lincoln & Northwestern Railroad Company should be the recipient of their aid. This was done by the county commissioners, who, according to our holding in *Jones v. Hurlburt*, could not lawfully do it, for the reason that the authority to name the donee was entrusted by the constitution to the people alone, and could not be delegated by them. Therefore, in issuing these bonds, the commissioners exceeded their powers, and it was a void act. It necessarily follows from this, that the plaintiff is entitled to the relief against the certification of these bonds, which he seeks. The defendant had notice of the want of authority on the part of the commissioners, and is therefore not in a situation to complain of this result.

Of the other points made by the plaintiff's counsel, we will only say that we see nothing in them which should be held to invalidate the bonds. The irregularities shown in the action of the commissioners, and attending the making up of the record, although perhaps justly censurable, are not sufficient in our estimation to invalidate bonds duly authorized by a vote of the people, and otherwise legally issued.

JUDGMENT AFFIRMED.

THE OMAHA & REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR, v. HENRY MARTIN, DEFENDANT IN ERROR.

1. **Railroad company**: RIGHT OF WAY: NEGLIGENCE. A railroad company is entitled to the exclusive use of its grounds, except at lawful crossings of public and private ways. Without a breach of legal duty, it is not guilty of actionable negligence.

2. ———. Facts of the case examined, and held not to warrant a recovery of damages.

ERROR to the district court for Lancaster county, where, upon a trial before POUND, J., the defendant in error had recovered a judgment for $3,500 on account of injuries received in the manner stated in the opinion.

A. J. Poppleton, and *J. M. Thurston*, for plaintiff in error, cited: 1 Thompson on Negligence, 361. *Blyth v. Topham*, Cro. Jac., 158. *Bush v. Brainard*, 1 Cowen, 78. *Howland v. Vincent*, 10 Metc., 373. *Houmel v. Smyth*, 7 C. B. (new series), 781. *Binks v. R. R. Co.*, Best & S., 244. *Hardcastle v. R. R.*, 4 Hurl. & N., 67. *Vale v. Bliss*, 50 Barb., 358. *Robbins v. Jones*, 15 C. B. (N. S.), 221. *Gramlich v. Wurst*, 86 Pa. St., 74.

Lamb, Billingsley & Lambertson, for defendant in error.

The road was a legal highway by force of sec. 2477 Rev. Stat. U. S. *Flint v. Gordon*, 41 Mich., 428. Railroads are liable for excavating into any traveled way or thoroughfare unless the same is protected and guarded. Gen. Stat., § 101, p. 193. A railroad company that cuts into a highway or thoroughfare, where people are constantly passing and have been accustomed to pass and repass for years, is bound to either warn the traveler, divert the road, or guard the excavation, whether said highway be legal or not. The maxim, *sic utere tuo ut alienum non lædas*, applies with full force. *Potter v. Bumell*, 20 Ohio State, 151. *Vesey v. Railway Company*, 49 Me., 119. Wharton on Negligence, § 819. Thompson on Negligence, §§ 343, 344. *Atlanta R. R. v. Wood*, 48 Ga., 568. *Judson v. R. R.*, 29 Conn., 438. *Com. v. R. R.*, 27 Penn. State, 339.

LAKE, CH. J.

A consideration of the character of the excavation into which the defendant in error fell and received his injury, and of the road along which he was traveling at the time,

will effectually dispose of the case; and to these matters we shall confine most that we have to say.

The petition charges in substance, as cause of complaint, that the railroad company had dug and left unguarded "a deep, wide, and dangerous ditch and excavation," across a "public road and highway," which was "usually traveled by the public," * * * between Raymond and Valparaiso, in Lancaster county, into which the defendant in error drove his heavily loaded wagon, which was thus upset, and the injury complained of caused. It appears that the ditch or excavation was made during the fall of 1879, and the injury occurred in March, 1880.

The evidence shows that this excavation was made within the right of way of the railroad company, in grading its track, which appears to have been done in all respects in the usual manner of such work. Indeed, there is an entire want of evidence tending to show anything unusual in the work, or distinguishable from the ordinary methods of railroad grades in similar localities. There was nothing, therefore, in the character of the excavation, or in the act of making it, which can render the company liable to the charge of wrong doing, or of which any one can rightly complain. Within its right of way a railroad company doubtless has the right to make such ditches and excavations as may be necessary or proper in constructing its road, due regard being had for the rights of others. And this leads us to the inquiry of whether there was any want of such regard in leaving the excavation "open, exposed, and unguarded."

It is shown conclusively that where Martin was traveling when he was injured, was not along a legal highway. It had neither been laid out, nor in any way recognized by the county authorities as such. It was merely a permissive way, consisting in some places of one, and in others of several tracks, adopted by travel, and used for several years before the construction of the railroad. For quite a dis-

tance these tracks ran almost parallel with the railroad, which, near where the accident occurred, actually cut into and across them, so that travel had been forced to go further westward upon the prairie, where there was ample room, until the public road was reached a short distance above. In the darkness of the night Martin had the misfortune to follow one of these abandoned tracks, which at this point had not been used for several months, and thus ran his wagon upon the railroad right of way, and into the excavation. It is conceded that the railroad company had erected no guard or barrier to prevent persons from driving upon its right of way, or from falling into these excavations, and that it had made no crossing for teams where the railroad cut through these old tracks. Do these omissions render the company guilty of negligence in its duty to the public, and liable to Martin for his loss? No case has been cited by counsel which would support us in so holding, and we are of opinion that they do not.

As before suggested, the company, in doing what it did, was in the lawful use of its own property. A railroad company is entitled to the exclusive use of its grounds, "except at lawful crossings of public and private ways." Pierce on Railroads, 402. Where the accident happened there was neither a public nor private way. It is true that after the grading for the railroad, in October and November, 1879, by which the course of travel was necessarily interrupted and changed, it had to some extent continued to follow alongside of, and near or upon the company's right of way, although a convenient public road had been laid out and opened to travel in the vicinity. But for this continuation of travel along and upon its right of way, the railroad company was nowise responsible. Not only had it done nothing to invite it to go there, but it had done all that the law required of it in the matter of providing suitable crossings at all public roadways passing over its track. Actionable neg-

ligence is said to involve the breach of a legal duty. Pierce on Railroads, 310. Here, as we have shown, there was no breach of legal duty, for the company was in the legitimate use of its own property, and was under no obligations to care for the safety of those who voluntarily or negligently went upon its right of way at the place where the accident to the defendant in error happened. 1 Thompson on Negligence, 361. *Bush v. Brainard*, 1 Cowen, 78. *Howland v. Vincent*, 10 Met., 371. *Clary v. The Burlington & Missouri R. R. Co.*, *ante* p. 232.

In *Pittsburg, etc., R. W. Co. v. Bingham Admrx.*, 29 Ohio St., 364, it is said of the principle governing this case, that it "recognizes the right of the owner of real property to the exclusive use and enjoyment of the same, without liability to others for injuries occasioned by its unsafe condition where the person receiving the injury was not in or near the place of danger by lawful right, and where such owner assumed no responsibility for his safety by inviting him there without giving him notice of the existence or imminence of the peril to be avoided. In such cases the maxim, *sic utere tuo ut alienum non lædas*, is in no sense infringed. Where no right has been invaded, although one may have injured another, no liability has been incurred." We think this rule, so clearly expressed, is entirely applicable to the facts of this case, and that under it none of the acts of the railroad company, either of commission or of omission, amounts to actionable negligence. In making the excavation, which was several feet within its right of way, no right of the public, or of Martin, was in the least degree trenched upon, for there that of the company was exclusive.

On a careful examination of the evidence, we are of the opinion that it makes no case for a recovery of damages. The judgment must be reversed and a new trial awarded.

REVERSED AND REMANDED.

HENRY B. KEPLEY, PLAINTIFF IN ERROR, V. SAMUEL IRWIN, DEFENDANT IN ERROR.

1. **Code of Civil Procedure:** RULE OF CONSTRUCTION. The code of civil service procedure, in all its provisions, must be liberally construed. Code, sec. 1. Especially should the construction be liberal as to the provisions respecting the appearance of parties, and the making up of issues, to the end that a full and fair hearing of cases on their merits may be had.
2. **Attorney at Law:** UNAUTHORIZED APPEARANCE BY. Although an authority will be presumed when an attorney appears for a defendant not served with process, yet, if the defendant prove that he had no authority, his rights cannot be affected by the attorney's acts.
3. **Opening Judgment:** FINDINGS OF FACT: COSTS. The findings of fact of the district court on the hearing of an application to open a judgment under sec. 82 of the civil code will not be disturbed unless clearly wrong. Whether in such case the defendant shall be required to pay costs as a prerequisite to opening the judgment is left to the wise discretion of the district court.

ERROR to the district court for Otoe county. The action was one of ejectment, brought by Henry B. Kepley against Nelson Tredo and Samuel Irwin. Tredo was in possession as tenant of the land, having rented the same of John Irwin, acting as the agent of Samuel Irwin. Service was had on Tredo personally, and on Samuel Irwin, by publication. S. J. Stevenson appeared as attorney for the latter, and filed an answer, verified by John Irwin, agent for Samuel Irwin. Afterwards, when the cause was called for trial, Stevenson obtained leave to withdraw his appearance and answer, and judgment was rendered April 18, 1878, for Kepley. September 19, 1879, affidavit and showing of Samuel Irwin to set aside judgment filed, and October 13, 1881, the original judgment set aside by POUND, J., and Irwin permitted to answer on payment of costs to that date. From the order setting aside said judgment Kepley brought the case here for review.

M. L. Hayward and *Henry B. Kepley*, for plaintiff in error, on question of appearance, cited: *Filkin v. Byrne*, 72 Ill., 101. *Dart v. Hercules*, 34 Id., 395. *Am. Ins. Co. v. Oakley*, 9 Paige, 498. *Abbott v. Dutton*, 44 Vt., 546. *Shrowdenbeck v. Ins. Co.*, 15 Wis., 700. *Martin v. Judd*, 60 Ill., 78.

E. F. Warren (*Watson & Wodehouse* with him), for defendant in error, cited: Weeks on Attorneys, sec. 198. *Denton v. Noyes*, 6 Johns., 298. *Critchfield v. Porter*, 3 Ohio, 518. *Frye v. Calhoun*, 14 Ill., 132. *Bryant v. Williams*, 21 Iowa, 329. *Shelton v. Tiffin*, 6 How., 163. Freeman on Judgments, § 499.

LAKE, CH. J.

The questions presented in this case arose under sec. 82 of the code of civil procedure. It is claimed that the court below erred in opening the judgment and letting the defendant in with his defense. The service on the defendant was by publication, or what by the code is termed constructive. On this point there is no dispute. The really vital question is simply whether the nominal appearance made by S. J. Stevenson as attorney of the defendant, and filing an answer in his name, was authorized. On the showing made the court below held that it was not, and we are now called upon to review that decision.

The section of the code referred to, like every other part of it, should receive a liberal construction, to the end that substantial justice may be done to litigants. And especially so should be the construction as to those provisions respecting the appearance of parties, and the making up of issues, to the end that a full and fair hearing of cases upon their merits may be had. This court, in reviewing the doings of inferior courts, has always been disposed to, and does now, regard liberal rulings in these particulars favor-

ably. In doing so we believe we represent the spirit of the code, which in its very first section declares that: "Its provisions and all proceedings under it shall be liberally construed, with a view to promote its object and assist parties in obtaining justice."

Sec. 82 provides that: "A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which by it or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title to any property sold before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or order, as provided in this section, shall be allowed to present counter affidavits, to show that during the pendency of the action the applicant had notice thereof in time to appear in court and make his defense."

It is practically conceded by the plaintiff that every requirement of this section to authorize the opening of the judgment existed, except that of the defendant's want of actual notice of the pendency of the action. On this point the defendant filed several affidavits, among them his own, by which it seems to us he made a showing bringing himself fairly within the section of the statute above quoted. In his own affidavit he says, expressly, that he was a resi-

dent of the state of Ohio during all of the time of the pendency of the action, and did not know of it "till about the 30th day of March, 1879." Of the appearance and answer made in his name by S. J. Stevenson, he says that he "had never employed an attorney to defend said suit, nor had affiant authorized any person or agent to employ attorneys for him, or to appear in any litigation in Otoe county, Nebraska." And as to this appearance, which seems to have been withdrawn by leave of the court, S. J. Stevenson, the attorney, says in his affidavit that what he did in the case was done "at the request of John Irwin." John Irwin swears that he "spoke to S. J. Stevenson, attorney, about the matter without knowing what should be done, and without having any authority to employ an attorney for Samuel Irwin, or either of said defendants," etc.

Opposed to this, on the question of the right of Stevenson to appear in the case, there was produced a power of attorney from Samuel Irwin to John Irwin, by which the latter was, in terms, authorized to "bargain, sell, and convey in fee simple, by deed of general warranty, for such price, upon such terms of credit, and to such person or persons as he shall think fit, the whole or any part of any and all real estate of every kind and description belonging to me, and lying and being in the county of Otoe in the state of Nebraska." Also empowering him "to lease and to farm, let by leases, duly executed for such term or number of years, to such person or persons, at such yearly or other rents, in money or kind as he may think fit, the whole or any part of" such lands.

It would seem that the mere reading of this power of attorney ought to be sufficient to satisfy any one that it gave no authority to John Irwin to appear, or to employ an attorney to appear, in the case at bar. The learned judge of the district court held that it did not, and in this we think he was clearly right. And this is decisive of the case. But an extensive brief has been filed on behalf

of the plaintiff, discussing at length many questions, which, although not of importance to this issue, ought not, perhaps, to be wholly overlooked by us at this time.

One of the points urged upon our attention is that "the withdrawal of an answer does not withdraw an appearance." Very true, but here the record shows that on the eve of the trial, "*by leave of the court first had and obtained*, Samuel J. Stevenson withdraws his appearance as attorney for defendants herein," so that the appearance as well as the answer was gone. This having been done by leave of the court, left the case, as we think, in the same situation as if no answer had been filed. If we are correct in this, then surely if Samuel Irwin had no actual notice of the pendency of the action, having been only constructively served, he was in a situation which entitled him to the benefit intended by section eighty-two of the code.

It is also contended that "the appearance of an attorney of a court for a party in a proceeding pending in a court binds the party for whom he appears and assumes to act, whether he is in fact authorized to act or not." On this point we cannot agree with counsel. The better rule seems to be, "that although an authority will be presumed, when an attorney appears for a defendant not served with process, yet if the defendant prove he had no authority, his rights cannot be affected by the attorney's acts." 1 Wait's Actions and Defenses, 458. *Denton v. Noyes*, 6 Johns., 298. *Frye v. Calhoun*, 14 Ill., 132. *Legere v. Richard*, 10 La. Ann., 669. *Handely v. Stateton*, 6 Litt. (Ky.), 186. *Hess v. Cole*, 23 N. J. L., 116. But, as we have before shown, this question was really eliminated from the case by the authorized withdrawal of the appearance made by the attorney.

A very large portion of the plaintiff's brief is devoted to a discussion of the relation of principal and agent, which although interesting, is really inapplicable to the real matter in issue.

As before stated, we are simply to review the action of the district court upon the question of the right of the defendant to have the judgment against him opened so as to enable him to make his defense. The statute giving this right to defendants constructively summoned, requires a certain showing to be made "to the satisfaction of the court." This the defendant did. Upon the showing made, the district court found "that no authorized person had appeared for" the defendant, and "that during the pendency of the action," * * he "had no actual notice thereof." This finding, based as it is upon evidence, like the findings of courts and juries generally upon questions of fact within their jurisdiction, has every presumption in its favor, and should not be disturbed by us unless clearly wrong. We cannot say it was wrong, therefore it must be sustained.

The point that the payment of costs by the defendant was "not made a prerequisite to opening the judgment," is of no consequence. The statute leaves the matter of whether the payment of costs shall be required at all or not entirely to the discretion of court to which the application is addressed. In that particular the decision must be left to rest on the sound discretion of that court.

ORDER AFFIRMED.

THE COUNTY OF DODGE, PLAINTIFF IN ERROR, V. ROBERT GREGG, DEFENDANT IN ERROR.

Counties: LIABILITY FOR COSTS. Under the provisions of section 536 of chap. 50 of the criminal code, the respective counties are legally liable for the costs earned by justices of the peace, sheriff, and constables, "on examinations before a magistrate on a" proper "complaint of a felony, whether the accused be held to answer in court or discharged." And in cases where the charge is for a felony, but ought to have been for a misdemeanor only, the county board may in their discretion allow or disallow the entire bill, or any part thereof.

THIS was an action commenced before the board of county commissioners of Dodge county, on the 23d day of May, A.D. 1882, by the defendant in error against said Dodge county for an allowance of two claims, one for fees for services rendered by himself as sheriff of said county, in a certain preliminary examination wherein the State of Nebraska was plaintiff and Frank M. Lane defendant, amounting to $76.30; and the other for fees of James Huff as justice of the peace, rendered in the same examination.

Huff's fees as justice on said examination were as follows:

Docketing case	$ 25
Swearing 87 witnesses, 10 cents each	8 70
Filing 17 papers, 10 cents each	1 70
Granting and entering nine adjournments, 50 cents each	4 50
Issuing ten subpœnas, 50 cents each	5 00
Nine days attendance on trial after first day, $1.00 per day	9 00
Taking affidavit for continuance	25
Total	$29 40

And Gregg's fees as sheriff were as follows:

Serving warrant and return	$ 1 00
Mileage on warrant, 12 miles, 5 cents per mile	60
Attendance on court ten days, $1.00 per day	10 00
Serving subpœnas on 95 witnesses at 25 cents each.	23 75
Making 95 copies of subpœnas for witnesses, 25 cents each	23 75
Mileage on subpœnas, 344 miles at 5 cents per mile	17 20
Total	$76 30

The said claim of Huff was, before the presentation thereof, assigned to defendant in error.

Upon the claim of said Gregg as sheriff, the board al-

lowed $42.55 on general fund, as appears from the endorsement on the back thereof. Upon the assigned claim for Huff's fees, the board allowed $15.90 to defendant in error, in all $58.45. They refused to allow the items of $10 attendance of sheriff on court and $23.75 for copies of subpœnas in sheriff's bill, and the items of $4.50 for nine adjournments and $9 for nine days attendance on court in Huff's bill. From this action of the board the defendant in error took an appeal to the district court of Dodge county, and that court, George W. Post, J., at the October term, 1882, thereof, rendered judgment in his favor for $105.70.

William Marshall, for plaintiff in error, cited: 3 Blackstone, 400. *U. S. v. Barker*, 2 Wheat., 395. *Miami County v. Blake*, 21 Ind., 32. 1 Dillon Mun. Corp., 254. *Rawley v. Vigo county*, 2 Blackf., 355. *Kitchell v. Madison Co.*, 4 Scam., 163. *Stanton Co. v. Madison Co.*, 10 Neb., 304. Comp. Stat., 195, sec. 3. *Hewerkle v. Gage County, ante* p. 18.

George L. Loomis and *E. F. Gray*, for defendant in error, cited the sections of the statutes bearing on the subject and referred to in the opinion.

Cobb, J.

Sec. 535, chap. L. of the criminal code provides that: "No costs shall be paid from the county treasury in any case of prosecution for a *misdemeanor*, or *for security to keep the peace*, except as provided in section five hundred and forty-one.

The following section (536) provides expressly for the payment of costs by the county, incurred upon examination before a magistrate on complaint of *a felony*, whether the accused be held to answer in court, or discharged. It

also makes it the duty of the county commissioners to disallow any item, in whole or in part, of any bill of costs in such cases that shall be found to be unlawfully or needlessly incurred. And also where it shall appear that the complaint upon which such examination was made was for a felony, when it ought to have been for a misdemeanor only, the county commissioners may, in their discretion, disallow the entire bill or any part thereof. This is the only matter arising under the provisions of these sections that is left to the discretion of the commissioners. The reason of this provision of the statute must be apparent to every person of experience, and is fully discussed in and illustrated by the case of *Boggs v. Washington County*, 10 Neb., 297. But the plain object and intent of the legislature in enacting the two sections in question was to fix and declare the liability of the county for costs lawfully and properly earned in the examination, before magistrates, of persons properly charged with felony, and to declare the non-liability of the county for costs incurred upon the trial or examination of persons charged with the commission of misdemeanors only, and in peace warrant cases.

Sec. 541 provides for the furnishing by magistrates and clerks of courts to the county clerk of their respective counties, of certified copies of uncollectible cost bills, in misdemeanor and peace warrant cases. And that, at the first meeting of the county commissioners in the months of April and October of each year, if it shall appear from the records and files of the county clerk's office that the receipts into the county treasury from the sources mentioned in the preceding section—that is to say, the costs and proceeds of jail labor, mentioned in section 540, and required to be credited to the county general fund—are in excess of the amount allowed to be paid from said treasury in the same time for costs in criminal cases, including the sums paid for keeping and transporting prisoners in criminal

cases, said commissioners shall make an order that a sum equal to such excess be appropriated from the county general fund for the payment of cost bills filed as aforesaid, in misdemeanor and peace warrant causes, or so much thereof as shall be necessary to pay all such bills or parts thereof as may be found lawful and just, etc.

The provisions of this section (541) are for the benefit of officers and witnesses earning fees in misdemeanor and peace warrant causes, and those only. It provides for paying to them any balance which may be in the general fund of the county treasury arising from a certain source, but it makes no provision for the payment of fees or costs in felony cases, for the probable reason that they had been provided for in section 536. Their full payment is assured, while the payment of the former class is contingent and uncertain.

While we agree with counsel in the propositions, that neither the state or federal governments ever pay costs, and that the liability of counties to pay costs in criminal cases cannot arise by implication, nor in the absence of an express statute, yet we think that the statute plainly provides that the county shall pay the costs legally earned by magistrates and sheriffs in cases of felony before justices of the peace, except in cases where the complaint ought to have been for a misdemeanor only, and it gives the county board the right to pay costs in their discretion, even then.

Counsel for plaintiff in error in the brief, says: "The greater part of the charges of these officers were for issuing and serving subpœnas on witnesses. The justice's transcript does not show who, or how many of these witnesses were for the state, or for the accused, nor whether any of them were for the state. Now at common law each party, except the sovereignty, was liable for his own costs; to what law can we be referred that makes the state or county liable for the costs in procuring the attendance of witnesses on behalf of the accused? We know

of no such law; but it must not be forgotten that this is an error case, and that it is with the action of the district court that we have to deal, and not with that of the county commissioners. Had the plaintiff in error made proper and timely application in the court below, the defendant in error would doubtless have been required to show that the costs claimed by him were incurred on the part of the prosecution, and not on the part of the defense. All presumptions are in favor of the correctness of the judgment, and to attack it for this cause it must be shown affirmatively that part or all of these services were rendered in procuring testimony for the defense.

The statute allows the sheriffs, as fees, twenty-five cents for serving a subpœna on a witness, and twenty-five cents (each) for all copies of certain enumerated writs and process, including subpœnas. Whether these copies were necessary is, we think, a question upon which the sheriff's return must be taken as conclusive. The law allows the justice fifty cents for each adjournment in a cause or examination before him. It draws no distinction between adjournments, and we know of no rule by which we can draw any.

As to the other items of cost complained of, we do not deem it necessary for the purposes of this case to examine them in detail, but content ourselves by saying that we do not think the objections to them well taken.

It cannot be denied that the items of costs for issuing, copying, and serving subpœnas in this examination amount to quite a sum, but it must be borne in mind that it was an extraordinary case in respect to the number of witnesses, exceeding in that regard any case within the somewhat extended experience and observation of the writer, and it has not been suggested in this case but that they were all subpœnaed and examined in good faith, or that their testimony

was not necessary to elicit the truth and meet the demands of justice.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE COUNTY OF RICHARDSON, PLAINTIFF IN ERROR, V. S. B. MILES, DEFENDANT IN ERROR.

1. **Construction of Statute.** When there are special provisions of a statute referring to a particular matter, and there are general provisions of the same or another statute in force, referring to a class or series of matters including the former, the provisions of the special statute will prevail so far as such particular matter is concerned, and there is a conflict between the two.
2. **Road:** DAMAGES: APPEAL. An appeal from the final decision of the county board by an applicant for damages claimed to be caused by the establishment of a road, should be taken under the provisions of section 39, chapter 78, Comp. Stat., and not under those of section 37, article I, chapter 18.

ERROR to the district court for Richardson county. A public road was located over land of Miles. He asked for $212 damages; was allowed $48; appealed, and in district court, WEAVER, J., recovered $60. The county brought the case here for review on a petition in error. The statutes bearing on the subject are as follows:

Compiled Statutes, chapter 78:

SEC. 39. Any applicant for damages claimed to be caused by the establishment of a road, may appeal from the final decision of the county board to the district court of the county in which the land lies; but notice of such appeal must be served on the county clerk within twenty days after the decision is made. If the road has been established on condition that the petitioners therefor pay the

damages, such notice shall be served on the four persons first named in the petition for the highway, if there are that many who reside in the county.

SEC. 40. An appeal may also be taken by the petitioner for the road as to the amount of damages, if the establishment of the road has been made conditional upon his paying the damages, by his serving notice of such appeal on the county clerk and applying for damages within twenty days after the decision of the board, and filing a bond in the office of such clerk, with sureties to be approved by him conditioned for the payment of all costs occasioned by such appeal, unless the appellant fails to recover a more favorable judgment in the district court than was allowed him by such board.

Compiled Statutes, article I, chapter 18:

SEC. 37. 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 claimed is due and unpaid after allowing all just credits. All claims against a 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 decision of the board to the district court of the same county, by causing a written notice to be served on the chairman, within twenty days after making such decision, and executing a bond to such county, with sufficient security, to be approved by the county clerk, conditioned for the faithful prosection of such appeal, and the payment of all costs that shall be adjudged against the appellant.

A. Schoenheit and W. S. Stretch, for plaintiff in error, cited: *Robinson v. Mathwick*, 5 Neb., 252. *Sims v. Otoe*

County, 6 Id., 133. *McCann v. McLennan*, 2 Id., 289. *Albertson v. The State*, 9 Id., 437. *Nosser v. Seeley*, 10 Id., 467.

C. Gillespie, for defendant in error, cited: Wade on Notice, sec. 3. 2 Bouvier's Law Dic., 36. Comp. Stat., 443, sec. 41. Id., 181, sec. 37. *Haas v. Lees*, 18 Kan., 449.

COBB, J.

It is an inflexible rule that when there are special provisions of a statute plainly referring to a particular matter, and there are general provisions of the same, or another statute in force at the same time, referring to a class or series of matters including the former, the provisions of the special statute will prevail so far as such particular matter is concerned, and the provisions of the two differ with each other. Under this rule the provisions of secs. 39 and 40 of chapter 78, Compiled Statutes, must be held to apply to and control appeals from the final decision of the county board, in cases of damages to land caused by the laying out and establishing of public roads, rather than those of section 37 of article 1, chapter 18. Indeed the above proposition concedes too much to the position of defendant in error. The latter section can scarcely be said to contain a general provision, which even in the absence of a special one would apply to a case like the one at bar. It is only in the most general sense that the owner of lands damaged by the establishment of a highway can be said to hold a claim against the county within the meaning of said section, if at all.

Upon reference to secs. 39 and 40 of chap. 78, it will be seen that in all cases of appeal from the final decision of the county board, by an applicant for damages claimed to be caused by the establishment of a road, or by the pe-

titioners for a road, as to the amount of damages, notice of appeal must be served on the county clerk, etc.

In the case at bar, no notice of appeal was served on anybody. No notice was ever made out. The chairman of the county board waived notice in writing on the face of the appeal bond. This being a statutory proceeding, neither the clerk nor the chairman of the board could waive the service of the notice; most certainly not the chairman, a service on whom would be a nullity.

The object of the notice is, that the county, as a body corporate, may know that an appeal has been taken, that it may, through its proper officers and attorney, prepare for trial. The county, as a body corporate, is charged with notice when notice is served according to law, not usually when one of its servants has gratuitously waived service. It is argued that the waiver of notice being endorsed on the bond, and the bond being approved and filed by the county clerk, is equivalent to a notice of appeal being served on the clerk. But the statute, which as we have seen especially applies to cases of this kind, requires no bond, hence the bond was a nullity with all of its indorsements and filings.

The notice of appeal, and its timely service on the county clerk, is the only foundation for jurisdiction in the district court in this class of cases. These being wanting in this case, the said court had no jurisdiction to render the judgment set out in the record.

The judgment of the district court is therefore reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

CHARLES A. SAVAGE, PLAINTIFF IN ERROR, V. JONAS B. AIKEN, DEFENDANT IN ERROR.

Practice: OPENING JUDGMENT. The relief provided for by sec. 82, title IV, part II. of the Compiled Statutes, is a right earned by the defendant, by claiming the same, and doing the things therein required of him within the time limited by statute, and is not a question of power on the part of the court.

ERROR to the district court for Gage county. Heard below before WEAVER, J.

E. Wakeley, for defendant in error, cited: *Larne v. Larne*, 3 J. J. Marsh, 156. *Butler v. Mitchell*, 17 Wis., 52.

Colby & Hazlett (*A. J. Poppleton* with them), for defendant in error, cited: *Smith v. Noe*, 30 Ind., 152. *Holmer v. Campbell*, 13 Minn., 66. *Knox v. Clifford*, 41 Wis., 458. *Whiting v. Korner*, 44 Wis., 563. *McKnight v. Livingston*, 46 Wis., 356.

COBB, J.

On the 20th day of December, 1876, Jonas B. Aiken, plaintiff, recovered a judgment against Charles A. Savage, defendant, in the district court of Gage county. There had been an order of attachment in the case, and the defendant's lands attached thereon, but no service in the case other than by publication in a newspaper, and no appearance in said cause by the defendant.

On the 15th day of October, 1881, the defendant filed a motion in said court to have said judgment opened, and to be let in to defend in said action. He also gave notice to the adverse party of his intention to make such application, and filed a full answer to the petition in said cause. On the 20th day of said month the following journal entry

was made in said cause, to-wit: "Now on this 20th day of October, 1881, it being the seventh day of the term, this cause came on to be heard, on the application of Charles A. Savage to open the judgment and be let in to defend, and the court, being fully advised in the premises, orders that the plaintiff, Jonas B. Aiken, have ninety days to file counter affidavits and the cause be continued."

The next term of the district court was held in April, 1882. On the first day of the term the plaintiff, Jonas B. Aiken, by attorneys (appearing specially for the purpose of objecting to the jurisdiction of the court, etc.), filed motions and objections supported by affidavit, and on application of defendant he had leave to file counter affidavits in thirty days. And on the 20th day of April, being the eighth day of said term, the court made its final order denying the application of the defendant to open up the said judgment, and the said defendant brings the cause to this court on error.

The provisions of the statute [civil code] under which this relief is sought are as follows:

Sec. 82. A party against whom a judgment or order has been rendered, without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such application, and shall file a full answer to the petition, pay all costs if the court requires them to be paid, and make it appear to the satisfaction of the court by affidavit that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense." * * *

The principal question presented by the record in this case is, whether a defendant brings himself within the provisions of the section above quoted by doing the things therein required of him within the five years, so as to en-

title him to the relief therein contemplated at the hands of the court after the expiration of the five years. In other words, do the words of the section express a question of right on the part of the applicant, or one of power on the part of the court. This question is now presented for the first time to this court, nor can I find that it has been presented to the court of any state having a statutory provision like ours. The corresponding provision of the statute of Wisconsin is in the following words:

"5. * * * If the summons shall not be personally served on a defendant, nor received by such defendant through the post-office in the cases provided for in this section, he or his representatives shall, on application and sufficient cause shown, at any time before judgment, be allowed to defend the action; and except in actions for divorce the defendant or his representative may in like manner, upon good cause shown, be allowed to defend after judgment at any time within one year after notice thereof, and within three years after its rendition, on such terms as shall be just, except in actions for divorce; * * (Chap. 124, p. 720, R. S., 1858.)

While this section has been twice before the supreme court of Wisconsin for construction, yet in neither case did the point now under consideration arise. Before the adoption of the code, and while the provisions of law of that state applicable to courts of law and to courts of chancery were different, the following provision applicable to courts of chancery was in force: * * * "In case any such absent defendant against whom a decree shall be made as aforesaid, his heirs, devisees, executors, administrators, or assigns, as the case may require, shall within six months after notice be given to him of such decree, or within three years after such decree shall have been made, if no notice as aforesaid shall have been given, petition the court touching the matter of such decree, and pay, or secure, or cause to be paid, such costs as the court may

think reasonable to order and direct, then and in such case the person aforesaid so petitioning may be permitted to appear and answer the complainant's bill, and thereupon such proceedings shall be had as if such absent defendant had appeared in due season and no decree had been made; or such absent defendant may, within the times aforesaid, file his bill of complaint in the said court for an account and settlement of the amount which was really due and owing to the complainant at the time of the decree, and to compel the said complainant to refund and repay what he may have wrongfully recovered and received, together with costs of suit, the former decree against such absent defendant notwithstanding." * * *

Under this statute, the case of *Berry v. Nelson* was twice before the supreme court. IV. Wis. R., *375, and V. Id., 605, and while the precise question now under consideration was not involved in said cause at either hearing, yet it is manifest that the court held the question of relief under the statute as one of right on the part of the applicant, and not one of power on the part of the court. In the former of the cases, the court by Mr. Justice Smith say: "But we think the positive provisions of the statute leave the court no room for doubt or discretion. It is only by a statutory provision that a non-resident can be made a party to a suit in equity, by publication of notice, and such *quasi* subjection of a party to the jurisdiction must of course be subject to all the modifications, restrictions, limitations, and conditions which the statute prescribes." After quoting the statute, he continues: "It appears from the record, that the defendant *Nelson* was in time, in filing his petition, and though he might have had other remedies of equitable relief at his command, he still had the one prescribed to him by statute, to the full extent which the statute provides, of which he could not be deprived without his own consent."

There is a line of Wisconsin and Minnesota cases cited

by counsel on either side, most, and the later of which, hold that proceedings under section 38, chapter 125, R. S. of 1858 of Wis., and a similar provision of the statute of Minnesota, must not only be commenced, but completed within the time therein limited, or the court loses the power to grant the relief.

The following is the provision referred to, copied from the Wisconsin Statutes:

"Sec. 38. The court may likewise in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this chapter, or by an order enlarge such time; and may also in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding against him through his mistake, inadvertence, or surprise, or excusable neglect." * * * Sec. 38, chap. 125 Revised Statues 1858. This chapter is entitled "Pleadings in civil actions." This provision is not the corresponding one either by reason of its position in the statute or its object to the provision of our statute under which this proceeding is brought, though it would seem to have been so considered by counsel. This section grants relief to the plaintiff as well as the defendant, and applies to a party who is actually in court. The granting of relief to a party from the effect of his own acts, in open court, and of record, by which he is estopped by the plainest principles of law, may well be regarded as a question of power on the part of the court which can only be exercised within the time limited by statute, while the right to relief by a party who has not been actually before the court, nor had actual notice of the proceeding against him, is earned by his appearing and claiming it, and doing the things required of him by the statute, within the time therein limited, and the power of the court to grant the relief continues until it is exercised.

The order of the district court is reversed, and the cause remanded, with instructions to open the judgment, and that the defendant be let in to defend.

JUDGMENT ACCORDINGLY.

BARCLAY WHITE, APPELLANT, V. W. R. BARTLETT ET AL., APPELLEES.

1. **Mortgage Foreclosure:** LIEN OF JUDGMENT CREDITOR. Where the party in whose favor a judgment was rendered was made defendant in an action to foreclose a mortgage, and a decree thereafter rendered, and the premises sold to a *bona fide* purchaser, an assignee of the judgment, on an assignment made before the proceedings in foreclosure, but who gave no notice, either actual or constructive, of the assignment, cannot as against the purchaser have the lien of the judgment declared paramount to his title.

2. ———: PARTIES. In an action to foreclose a mortgage, all incumbrancers, whether prior or subsequent, whose claims are due, are proper parties; but only subsequent incumbrances are necessary parties. If the petition state facts sufficient to require a proper party to answer and he fail to do so, he will be bound by the decree.

APPEAL from Douglas county. Heard below before SAVAGE, J.

George W. Doane, for appellant. Stebbins was not an innocent purchaser. *Savage v. Hazard*, 11 Neb., 323. The lien does not exist by virtue of the assignment but by virtue of the judgment, and notice of the judgment carries with it notice of the liens existing by virtue of it, in whosesoever favor they may exist, and defendant Stebbins cannot be heard to deny that he had notice of this lien when the judgment was of record unsatisfied and unreversed. On question of parties, cited: Jones on Mort., § 1437. *Forrer v. Kloke*, 10 Neb., 373.

John D. Howe, for appellee Stebbins, cited: Wade on Notice, § 149. *Terrell v. Andrew Co.*, 44 Mo., 309. *Barnard v. Campan*, 29 Mich., 162. *Pringle v. Dunn*, 37 Wis., 449. *Shellenbarger v. Biser*, 5 Neb., 195. *Metz v. State Bank*, 7 Neb., 172.

MAXWELL, J.

In October, 1874, the Omaha National Bank recovered a judgment in the district court of Douglas county against Joel T. Griffin and W. R. Bartlett for the sum of $2789.40, Bartlett being surety for Griffin. In January, 1875, Bartlett and wife executed a mortgage on lot 14 in Bartlett's addition, and lot 18 in Griffin and Isaacs' addition to Omaha, to secure the payment of the sum of $1,000. In May, 1878, an action was commenced in the district court of Douglas county to foreclose said mortgage, the defendants herein being defendants in that action, all except Bartlett and wife as lienholders. In that action, the Omaha National Bank filed an answer wherein it alleged that "on or about the 8th day of February, 1876, in an action therein pending in the district court for Douglas county, * * * the said Omaha National Bank recovered a judgment against said Bartlett & Smith for the sum of $2829.39, which judgment remains in force and unreversed." No mention was made of the judgment recovered in 1874. A decree of foreclosure and sale was rendered, and the property sold to George P. Stebbins, subject to certain liens, for the sum of $480.

The sale was confirmed, and a deed made to the purchaser.

In October, 1878, the plaintiff caused an execution to issue on the judgment in favor of the Omaha National bank, recovered in 1874 against Bartlett & Griffin, and caused the same to be levied upon the lots purchased by Stebbins, and thereupon instituted this action to have the

deed to Stebbins set aside, and he be declared to hold said lots subject to the plaintiff's lien, and that the title of the other lienholders may be declared to be subsequent to that of the plaintiff. Lot 3 in Bartlett's addition is withdrawn by agreement from the case. It is sought to establish the title to lot 14 in Wallace R. Bartlett, free from any equities of his wife. This question was before this court on substantially the same testimony in 1879, and is reported in 8 Neb., 319. We see no reason to change the decision made in that case, and therefore will not consider that question further. The plaintiff claims as assignee of the bank, the assignment being dated June 2, 1876.

On the trial of the cause below, the court found in favor of the defendants, and dismissed the action. The plaintiff appeals to this court.

The plaintiff claims that the assignment was entered on the execution docket, but there is no claim that it was entered on the judgment record, or in the index of judgments. Stebbins claims to have purchased the lots in question without any notice, actual or constructive, of the plaintiff's assignment. The only question necessary to be considered therefore is, did Stebbins have any notice of the plaintiff's judgment? The index of the judgment record showed that the judgment in question, at the time Stebbins purchased the property in controversy, stood in the name of the Omaha National bank; and as that bank had answered, making no claim under the judgment, Stebbins had good reason to believe that the same had been satisfied.

In *Metz v. The State Bank*, 7 Neb., 165, it was held that a purchaser need not search for judgment liens further than to examine the proper index. The object of an index is to render the contents of a book readily accessible. The legislature prescribed the form of the index, and intended it should be a part of the record. If a party, notwithstanding the index, must spend days or weeks in reading

the records of the court to test the accuracy of it, much valuable time would be lost, and an index would be of no value whatever. In fact, it would be worse than useless, because it would frequently prevent a thorough search, which otherwise would have been made. But such is not the law. It devolved on the plaintiff, therefore, in some way to bring to the notice of the purchaser the assignment of the judgment to him.

The rule of law is that if, after an assignment, and previous to such notice of it, the debtor pay the debt to the assignor, he will be discharged, because the law will not permit him to suffer by the negligence of the assignee. *Jones v. Witter*, 13 Mass., 304. 3 Parsons on Cont., 230. And the burden of proving such notice is on the assignee. *Heerans v. Ellsworth*, 64 N. Y., 161. *Thayer v. Daniels*, 113 Mass., 129.

But it is said that the assignee, being a prior incumbrancer, was not a necessary party to the suit, and that therefore the decree is not binding on him. The general rule in equity is, that all incumbrancers whose claims are due should be made parties. They are at least proper parties, whether the incumbrance is prior or subsequent. Story's Eq. Pl., 177. 2 Barb. Ch., 174. 2 Van Santvoord's Eq., 77.

Thus, the holder of a prior mortgage which is due is a proper but not a necessary party. If made a party, and the petition state facts sufficient to require him to answer to protect his interest, he will be bound by the decree. The case does not differ materially from that of *Grant v. Ludlow*, 8 O. S., 2-34, and in our opinion the bank was properly made a defendant.

Stebbins having purchased without notice of the assignment to the plaintiff, is not chargeable with notice of his judgment, and in this proceeding at least did not purchase subject to the judgment.

Whether the plaintiff, by seeking to redeem, and show-

ing that his judgment was deducted as a lien from the appraised value of the property, could sustain an action of that kind, is not before the court.

The judgment must be affirmed.

JUDGMENT AFFIRMED.

OLIVER TOWNSEND, APPELLANT, V. WILLIAM LAMB ET AL., APPELLEES.

Precinct Bonds. A proposition for precinct bonds to a railroad company provided that they should be issued "when said road shall be graded, tied, and ironed, and completed ready for the running of trains, and trains running thereon, etc., on or before the 1st day of January, 1880," *Held*, That the company, on compliance with these conditions within the time specified, was entitled to the bonds.

APPEAL from Gage county. Tried below before WEAVER, J.

O. P. Mason, for appellant, cited: *Jackson Co. v. Brush*, 77 Ill., 59. *Amherst Academy v. Cowles*, 6 Pick., 427. *Church in Hanson v. Stetson*, 5 Pick., 506. *Hill v. Buckminster*, 5 Pick., 591.

A. J. Poppleton, for appellees, cited: *R. R. Co. v. Nodaway county*, 48 Mo., 339. *Chamberlain v. R. R. Co.*, 15 Ohio State, 225.

MAXWELL, J.

This is an action brought by the plaintiff for himself and all other taxpayers of Beatrice precinct, in Gage county, to restrain the issuing of $20,000 of the bonds of said precinct to the Omaha & Republican Valley railroad com-

pany. On the trial of the cause in the court below, judgment was rendered in favor of the defendants, and the action dismissed. The plaintiff appeals to this court.

It appears from the record that in July, 1879, the county commissioners of Gage county submitted to the electors of Beatrice precinct the question of issuing precinct bonds to the amount of $20,000, to the Omaha & Republican Valley railroad company, "to aid in the construction of a railroad connecting with the St. Joseph & Western railroad, from the south line of said Gage county, in a northerly direction via the town of Blue Springs and Beatrice to the north line of said county of Gage, and through said Beatrice precinct. Said bonds to be issued in sums of one thousand dollars each, to be made payable to bearer, to be dated on the first day of January, A.D. 1880, and to become due twenty years from the date thereof, with annual interest at the rate of eight per cent per annum, payable annually on the first day of January of each year, upon interest coupons thereto attached; both interest and principal to be payable at the fiscal agency of the state of Nebraska in the city of New York; and shall the said county commissioners of the said county of Gage cause to be levied on the taxable property of the said precinct, in said county and state, a tax annually, sufficient for the payment of the interest on said coupon bonds as it becomes due, and after ten years from the date of said bond, shall said county commissioners of said Gage county cause to be levied, in addition to all other taxes on the taxable property of said precinct, an amount of taxes sufficient to create a sinking fund for the payment at maturity of the principal of said bonds; and shall the said taxes be continued from year to year, until the said bonds are fully paid; *Provided*, that said precinct shall only be liable to pay interest on said bonds from the time that said railroad company shall become entitled to receive the same, as hereinafter provided; *And provided further*, that the said bonds shall be issued

to said railroad company when said road shall be graded, tied, and ironed, and completed ready for the running of trains, and trains running thereon, from a point on the St. Joseph & Western railroad, south of the county of Gage, *via* the town of Blue Springs to the town of Beatrice, in said Beatrice precinct, on or before the first day of January, 1880. Said railroad when completed shall be of uniform gauge with the Union Pacific railroad, and shall be maintained and operated as a first-class railroad, with a passenger and freight depot at said town of Beatrice, which passenger and freight depot shall be located at some point where Fifth street crosses Court street in the city of Beatrice."

The proposition was adopted, and the road was built. and trains were running thereon before January 1st, 1880, The road, however, was not as well ballasted as are older roads, nor does it appear that it is practicable to so ballast a new road; but trains have been running thereon ever since, and so far as appears there has been no interruption in the carriage of either passengers or freight, and there is no claim that the road has not been maintained in as good condition as required in the proposition. There seems to have been a substantial compliance on the part of the railroad company with the terms of the proposition.

The principal objection made by the attorney for the plaintiff is that the terms of the proposition required the company to erect a passenger and freight depot in the town of Beatrice on or before the 1st day of January, 1880, and as they failed to erect such building within the time specified they are not entitled to the bonds in question. It will be observed that the proposition is that "said bonds shall be issued to said railroad company when said road shall be graded, tied, ironed, and completed ready for the running of trains, and trains running thereon, etc., on or before the 1st day of January, 1880." That is, the road was to be constructed ready for the running of trains, and

trains running thereon on or before the 1st day of January, 1880. If this was accomplished within the time specified the company was to receive the bonds. The provision as to the erection of the depot is in another sentence, and is in the nature of a covenant or agreement that the company will erect a depot within certain specified limits, and will maintain and operate the road as a first-class road, of uniform gauge with the Union Pacific railroad; but the erection of a depot prior to the 1st of January, 1880, was not required to entitle the company to the bonds in question. The judgment of the district court is clearly right, and is affirmed.

JUDGMENT AFFIRMED.

ISAAC TRAVER, PLAINTIFF IN ERROR, V. THE BOARD OF COUNTY COMMISSIONERS OF MERRICK COUNTY, DEFENDANT IN ERROR.

Internal Improvements. A water grist mill erected for public use, the rates of toll to be determined by the county commissioners, and being subject to regulation by the legislature, is a work of internal improvement within the meaning of the act of 1869, and bonds voted to aid its construction are valid. COBB J., dissenting.

ERROR to the district court for Merrick county. Tried below before GEORGE W. POST, J.

John Patterson, for plaintiff in error, cited: *Weismer v. Village of Douglas*, 64 N. Y., 99. *Allen v. Inhabitants of Jay*, 60 Me., 124. *Brick Company v. Inhabitants of Brewer*, 62 Me., 62. *National Bank of Cleveland v. City of Iola*, 9 Kas., 689. *Curtis v. Whipple*, 24 Wis., 350, 354, 355. *Weeks v. Milwaukee*, 10 Wis., 242, 263. *Lowell v. Boston*, 111 Mass., 454. *Jenkins v. Andrews*, 103

Mass., 94. *Memphis Freight Company v. Memphis*, 4 Caldw. (Tenn.), 419, 425. 20 Wall., 655. *Dawson County v. McNamar*, 10 Neb., 276. *Guernsey v. Township*, 4 Dill., 372.

A. J. Poppleton (*W. H. Webster* with him), for defendants in error, cited: *Leavenworth v. Miller*, 7 Kan., 527. Comp. Stat., 355. *U. P. R. R. v. Colfax Co.*, 4 Neb., 455. *Fremont Building Ass'n v. Sherwin*, 6 Neb., 48. *Burlington v. Beasley*, 94 U. S., 313.

MAXWELL, J.

This is an action to enjoin the defendant from levying taxes to pay certain bonds issued to J. G. Brewer to aid in the erection of a water grist mill in Merrick county. The defendants demurred to the petition, and the demurrer was sustained and the action dismissed.

It is alleged in the petition in substance that on or about the 1st day of February, 1872, the county commissioners of Merrick county submitted to the electors thereof the question of voting bonds to said Brewer in the amount of $6,000, to draw interest at 10 per cent, to aid in the erection and maintenance of a flouring and grist mill at or near Lone Tree, now Central City, in said county; that said proposition was adopted and the bonds issued and sold and the mill erected as provided; that said commissioners are about to levy $5,000 to pay the amount due on the principal of said bonds, and the further sum of $600 as interest thereon.

It is also alleged that the bonds on their face show that they were issued for an illegal purpose. The bonds are in the following form:

MILL BOND.

UNITED STATES OF AMERICA.

MERRICK CO. MILL BOND, STATE OF NEBRASKA.

Ten years after date, for value received, the county of

Merrick, in the State of Nebraska, promises to pay ..... or bearer,

ONE HUNDRED DOLLARS,

Lawful money of the United States, at the office of the County Treasurer of said county, with interest at the rate of ten per cent per annum from date until paid; said interest payable at the "National Park Bank" in the city of New York semi-annually, on the 1st day of August and 1st day of February in each year, on the presentation of the coupons hereto annexed. This bond is one of a series of sixty of like tenor, date, and amount, issued as a loan to the said James G. Brewer to aid him in building a public grist mill and water power in said county of Merrick, on section thirty-one (31), township thirteen (13) north, range six (6) west, authorized by the laws of the state of Nebraska, and issued pursuant to a vote of the legal voters of said county, at a special election regularly held on the 9th day of January, A.D. 1872, authorizing their issue, and providing for the payment of the principal and interest at maturity.

In testimony whereof, we, the county commissioners of said county, have hereunto subscribed our names, and have caused this to be attested by the county clerk of said county, with the seal thereof hereto affixed, and the annexed coupons signed by said county clerk.

Dated at Lone Tree, Nebraska, February 1st, 1872.

The question for determination is, is a water grist mill a work of internal improvement within the meaning of the statute?

The act of February 15th, 1869, provides as follows:

"Sec. 1. That any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or *other work of internal improvement*, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per centum of the assessed valuation of

all taxable property in said county or city; *Provided*, The county commissioners or city council shall first submit the question of issuing such bonds to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the Revised Statutes of the state of Nebraska, for submitting to the people of a county the question of borrowing money."

Section 2 provides that: "The proposition of the question must be accompanied by a provision to levy a tax annually for the payment of the interest on said bonds as it becomes due; *Provided*, That an additional amount shall be levied and collected to pay the principal of said bonds, when it shall become due; and *Provided further*, That no tax shall be levied or collected to pay any of the principal of said bonds until after the year 1880."

The act relating to mill dams, which took effect Feb. 26, 1873, provides as follows:

"Section 1. If any person desiring to erect a dam across any water-course for the purpose of building a water, grist, saw, carding, or fulling mill, or of erecting any machinery to be propelled by water, be the owner of the lands on which he desires to build such mill or erect such machinery, on one side of such water-course and not of the lands on the opposite side against or upon which he would abut his dam; or, if any person be the owner of the lands on which he desires to erect any such mill or machinery on both sides of such water-course; or, if any person shall have erected such mill and mill-dam on his own lands, he may file a petition for leave to build or continue such mill-dam and for a writ of *ad quod damnum* in the district court of the county where such lands lie, against the owners or proprietors of the lands above and below such dam, which are or probably will be overflowed or injured thereby, or against or upon which he may desire to abut a dam."

Section 2 provides that: "The plaintiff shall set forth in his petition, as near as may be, the place where such dam

is built, or proposed to be built, the height or proposed height of such dam, the kind of mill built or proposed to be built, his title to the lands whereon he has erected or proposes to erect such mill or machinery, whether legal or equitable, and shall describe with certainty the lands above and below the dam, the property of others which are or will probably be overflowed or injured as aforesaid, and shall give the name of the owner of each tract, or if the name of any such owner be unknown, the plaintiff shall so state in his petition."

Section 24 provides that: "When the water backed by any mill-dam belonging to any mill or machinery is about to break through or over the banks of the stream, or to wash a channel so as to turn the water of such stream, or any part thereof, out of its bed or ordinary channel, whereby such mill or machinery will be injured or affected, the owner or occupier of such mill or machinery, if he do not own such bank or banks, or the lands lying contiguous thereto, may, if necessary, enter thereon, and erect and keep in repair such embankments, fortifications, and other works, as shall be requisite to prevent such water from breaking through or over the banks of such stream, or washing a channel as aforesaid, such owner or occupier committing thereon no unnecessary waste or damage."

Section 25 provides that: "Nothing contained in the last preceding section shall be construed to bar the owner of such bank or banks, or lands lying contiguous thereto, from recovering the amount of any injury which he may have actually and in fact sustained by the erection or repair of such embankment, fortification, or other works."

Section 26 provides that: "If any person shall injure, destroy, or remove any such embankment, fortification, or other works, the owner or occupier of such mill or machinery may recover of such person all damages which he may sustain by reason of such injury, destruction, or removal."

Section 27 provides that: "All mills within this state now in operation, or which hereafter may be put in operation, for grinding wheat, rye, or corn, or other grain, and which shall grind for toll, shall be deemed public mills."

Section 28 provides that: "The owner or occupier of every public mill within this state shall grind the grain brought to his mill as well as the nature and condition of his mill will permit, and in due time as the same shall be brought."

Section 29 provides that: "The owner or occupier of every public mill shall cause a statement of the rates of toll by him charged for grinding and bolting the different species of grain to be posted in at least two conspicuous places within the mill; and such statement shall be either written or printed in a plain and legible manner, and the county commissioners of each county shall establish and regulate the amount of toll allowed to be charged."

In *Nosser v. Seeley*, 10 Neb., 460, it was held that a person who in good faith had commenced the erection of a grist mill on a stream could, after a considerable sum was expended in the erection of the mill, enjoin a party from erecting a dam across the stream on his own land, the effect of which would be to destroy the water power of the first occupant. This decision was adhered to in *Seeley v. Bridges*, 13 Neb., 547, and may be regarded as the settled law of this state.

The legislature has authority, without doubt, to provide that streams capable of being applied to mill purposes shall be so utilized for the benefit of the public, and for that purpose may provide that the person who first in good faith commences the erection of a mill and dam, if not subject to the restrictions named in the act, shall have the right to complete the same upon paying all damages assessed. This power has been exercised in some of the states from an early period in our history.

In 1713 an act was passed in Massachusetts authorizing

the erection of dams for propelling corn and saw mills, and providing compensation to persons sustaining injury by the erection of such dams. This statute was substantially renewed in 1796, and with some modifications was continued in the Revised Statutes of 1836. Like provisions have been adopted in a number of the other states, and seem to have been sustained.

This right, as is said in *French v. Braintree Manf'g Co.*, 23 Pick., 220, is "granted for the better use of the water power, upon considerations of public policy and the general good, with a view to keeping up and maintaining mills for use, which is deemed for the public good; and the right must be considered as incident and subservient to this purpose, as attached to mills for use and not as attached to the land merely."

It will be seen that under our statute, water grist mills are subject to regulation by the legislature, and the rates of tolls subject to its discretion—are in fact mills for the use of the public. But it is said that the words "to aid in the construction of any railroads, or other work of internal improvement," in the act of 1869, restrict the aid to be given to railroads, and works of like character, such as canals, turnpikes, and bridges.

The word "improvement" is defined as follows: "An amelioration in the condition of real or personal property effected by the expenditure of labor or money for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes." 1 Bouv. Law Dict., 589.

The phrase "internal improvements" is applied to improvements of highways, channels of travel and commerce, etc. *U. P. R. v. Commissioners*, 4 Neb., 456.

The test for determining the character of an improvement of this kind is the use for which it is designed. If it is for public use, subject to the control and regulation of the legislature, it would seem to come within the meaning of

the words "internal improvements." Besides, the language of the statute will not admit of the construction contended for without adding thereto the word "like" or a word of similar import. No court would be justified in thus importing a word into a statute when its meaning was plain and unambiguous, and we must hold that there is no such restriction in the act above referred to. The mill in this case is said to be propelled by water drawn from the Platte river, and is for the use of all who may desire to patronize it, at such rates of toll as may be prescribed by the county commissioners of Merrick county.

And in our opinion it is a work of internal improvement within the meaning of the act. See *Guernsey v. Burlington Tp.*, 4 Dillon, 375. *Township of Burlington v. Beasley*, 94 U. S., 313. In the case last cited, it is said: "It would require great nicety of reasoning to give a definition of the expression 'internal improvements,' which would include a grist mill run by water, and exclude one run by steam; or which would show that the means of transportation were more valuable to the people of Kansas than the means of obtaining bread." The Kansas statute of 1868 declares all water, steam, or other mills, whose owners or occupiers grind for toll or pay, public mills. In our view, there is a clear distinction between aiding the development of the water power of the state, a power which is continuing in its nature, and may be used without cost or expense, and must be used at certain points on a stream where a dam can be erected and power obtained, and a mill propelled by steam that must be attended with a continuous cost for fuel, and may at any time be removed to another locality.

It is very clear that justice has been done, and the judgment is affirmed.

JUDGMENT AFFIRMED.

COBB, J., dissented.

NEW ENGLAND MORTGAGE SECURITY CO., APPELLANT, v. PIERRE TELLER ET AL., APPELLEES.

A verdict or judgment will not be set aside as being against the weight of evidence unless it is clearly so.

APPEAL from Butler county. Heard below before GEORGE W. POST, J.

Hull & Stearns and *E. R. Dean*, for appellant.

Horace Garfield, for appellees.

MAXWELL, J.

This is an action to foreclose a mortgage given to secure a note for $300. The defense is usury.

On the trial of the cause, the court below found as follows: "That the contract is a Nebraska contract, and that one C. C. Cook of the Corbin Banking Company of New York, was and acted as the agent of the said plaintiffs; that the sum of two hundred and forty dollars was paid to the defendant, and no other thing of value as a consideration of said note and mortgage, and that the said contract was usurious. The court further finds that since the execution of said note and mortgage, that the sum of fifty-seven dollars and fifty cents has been paid thereon by said defendant, and that there is now due thereon the sum of one hundred and eighty dollars and fifty cents, and no more; and the said defendant, Pierre Teller et al., have and recover from the New England Mortgage Security Company, plaintiff herein, their costs herein expended taxed at."

A decree of foreclosure and sale was rendered in favor of the plaintiff for the sum of $182.50. The only question presented by the record is, whether or not the judg-

ment is sustained by the evidence. The established rule in this court is, that unless a verdict or judgment is clearly wrong it will not be set aside. It would subserve no good purpose to review the evidence at length, but in our opinion it fully sustains the judgment.

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

JUDGMENT AFFIRMED.

STATE HISTORICAL ASSOCIATION, PLAINTIFF IN ERROR, v. THE CITY OF LINCOLN, DEFENDANT IN ERROR.

1. **Evidence**: ORAL DECLARATIONS. The oral declarations of the commissioners of the state, who located, surveyed, and platted the city of Lincoln, are not competent evidence to prove the purpose for which the reservation of a block was made. This could be proved only by the plat and report of the commissioners, together with the act of the legislature confirming them.
2. ——: IMMATERIAL. Where evidence offered at a trial can have no legitimate bearing on any matter put in issue by the pleadings, it is immaterial, and its exclusion is proper.
3. **Dedication**: WITHDRAWAL OF: ACCEPTANCE. A dedication of property by the state to a private corporation in trust for a public use may be withdrawn at any time before its acceptance. The bringing of an action to recover the property from a subsequent donee is not an acceptance.

THIS was an action of ejectment, brought by plaintiff in the district court of Lancaster county, to recover possession of block 29 in the city of Lincoln. Plaintiff claimed title by virtue of its incorporation in August, 1867, and the reservation of said block for its use by the state, at the time Lincoln was located, for "State Historical and Library Association." Defendant claimed title under a special act of the legislature passed in 1875 (Laws 1875, p. 317), do-

nating said block to it for a "Market Place." Judgment below before POUND, J., for defendant.

Galey & Abbott and *Harwood & Ames*, for plaintiff in error, cited: *U. S. v. Ill. Cent. R. R. Co.*, 2 Bis., 174. *Warren v. Mayor of Lyons*, 22 Iowa, 174. *Huber v. Gazley*, 18 Ohio, 18. *Lebanon v. Warren county*, 9 Ohio, 80. *Le Clercq v. town of Gallipolis*, 7 Ohio, 218. *Williams v. Smith*, 22 Wis., 566. *Vick v. Vicksburg*, 1 How. (Miss.), 427. *City of Macon v. Franklin*, 12 Ga., 239. *Rutherford v. Taylor*, 38 Mo., 315. *Commonwealth v. Rush*, 14 Pa. St., 186. *Hoadley v. City of San Francisco*, 59 Cal., 265. *Godfrey v. City of Alton*, 12 Ill., 29. *Smith v. Town of Flora*, 64 Ill., 93.

Marquett, Deweese & Hall, for defendant in error, cited: 1 Dill. Mun. Corp., 494. *White v. Smith*, 37 Mich., 291. *Bridges v. Wyckoff*, 67 N. Y., 130. *Chicago v. Joliet*, 79 Ill., 25.

LAKE, CH. J.

Most of the errors assigned relate to the admissibility of certain evidence offered by the plaintiff, in respect to which there is really but a simple question. It was proposed to give in evidence, by several witnesses, certain declarations said to have been made by the agents of the state, at a public sale of city lots lying in the vicinity of the block in controversy, as to the purpose for which it had been reserved. The only object there could have been in introducing these declarations was, of course, to establish the fact of a dedication of the block to the use of the plaintiff. For such an object they were clearly incompetent. These agents of the state, or commissioners as they are called in the act of the legislature by which they were appointed, had no authority to speak for it respecting this matter. As to reservations in the city of Lincoln, their entire authority is found

in the act of June 24, 1867, "to provide for the location of the seat of government of the State of Nebraska," etc. Within certain specified limits they were required to select a suitable site for a capital city, and to survey and stake it out "into lots, blocks, streets and alleys, and public squares, or reservations for public buildings." They were also required to have the same accurately platted, and to make a report of their doings, in these and other particulars, "to the next legislature." This they did, and in their report they say that one block is reserved "for a state historical and library association," and on their plat, block 29 is designated "State Historical and Library Association." The legislature confirmed this report, which made it the evidence of its intent in setting this block apart as one of the reservations. It was the best evidence of the purpose for which the block was designed, and the court did not err in rejecting the oral statements made by the individual commissioners. The plat, report, and act of confirmation were in existence; there was no ambiguity respecting them, and no occasion for a resort to secondary evidence.

But while it is clear that the reservation was made for the use of a state historical and library association, it is not clear that it was designated for the use of the plaintiff, which seems to be essentially a private corporation, although very likely if the scheme of the originators had been fully carried out, it would to some extent have been of public interest. We think, however, that there is much better reason for believing that it was designed for the use of an organization purely public in its character, and, like the State University, for instance, placed under the control and patronage of the state.

It is also assigned for error, that the court refused to permit evidence to be introduced as to "who first suggested and advised the incorporation of" the plaintiff. Evidence of this sort would have been wholly immaterial. The fact of the incorporation of the plaintiff was permitted, which

was proper, for the reason that it was denied by the answer. But, as to "who advised it," this was of no consequence. So, too, of "why it was done." These facts could have been of no possible service in determining the issues between the parties. It was enough to know that the incorporation was effected, and the association thus made a legal entity, capable of taking and holding the property, if dedicated to its use. Where evidence offered at a trial can have no legitimate bearing upon any matter put in issue by the pleadings, it is immaterial, and its exclusion is not error.

But even if it be conceded that the evidence thus rejected was competent to show that the plaintiff was the intended beneficiary of this reservation, then our answer would be that its exclusion was without prejudice, for the reason that no acceptance of the grant by the association was shown. The plaintiff being a private corporation, an acceptance of the trust before the state withdrew the dedication was necessary to invest it with the title. *White v. Smith*, 37 Mich., 291. *Bridges v. Wyckoff et al.*, 67 N. Y., 130. *Incorporated Village of Lockland v. Smiley*, 26 Ohio St., 94. The only act on the part of the plaintiff evincing any interest in the block brought to the notice of the court, is the prosecution of this suit for its recovery. That, however, is no acceptance. *Cass County Supervisors v. Banks*, 44 Mich, 467. And even if it were, it came too late, for the legislature had already withdrawn the offer, which it could certainly do, and re-dedicated it to the defendant for another public use. The act of granting the block to the city was also a withdrawal of the former dedication.

Finally, it is assigned for error, that the finding and judgment are not sustained by sufficient evidence, and are contrary to law. In what we have already said upon the other points this one has been practically disposed of. For if, as we think was the case, the reservation were made with a view to a purely public use, of the character we have suggested, then, although it may have been the right of the

public to have the block preserved for that identical purpose, its diversion would give to the plaintiff no cause of action. The public do not complain. On the other hand, admitting that the reservation was made in the special interest of the plaintiff, then the total absence of evidence indicative of an acceptance by it was alone sufficient to prevent a recovery. On the whole, we are satisfied that justice has been done, and the judgment will be affirmed.

JUDGMENT AFFIRMED.

STEPHEN C. LANGWORTHY, PLAINTIFF IN ERROR, V. MARY CONNELLY, DEFENDANT IN ERROR.

Taking Instructions to Jury Room. Upon the trial in the district court, the plaintiff prayed a certain instruction to the jury, which the court took, and upon the left hand margin wrote the words, "Asked for by de endant, refused," and signed the same officially, which instruction the court then read to the jury, and handed the same to them, and permitted them to take the said instruction to their room and have it with them while deliberating upon their verdict, over the objection of the defendant. *Held*, Not reversible error, and the verdict for the plaintiff upheld.

ERROR to the district court for Seward county. Tried below before GEORGE W. POST, J.

D. C. McKillip, for plaintiff in error.

R. St. Clair, for defendant in error.

COBB, J.

This case was submitted to this court with neither brief nor oral argument on either side. Usually in such cases we would be disposed to affirm the judgment, confining our-

selves to so much of an opinion as would seem to comply with the requirements of the letter of the statute; but as one of the errors assigned is quite novel in its character we will give it some consideration, although it may lead us upon debatable ground.

The first error is assigned in the following words:

"The court erred in giving to the jury and permitting them to take with them to their room, and have with them while deliberating on their verdict, the following instruction requested by the defendant, to-wit: If the jury find from the evidence in the case that Mrs. Connelly, plaintiff, made a renewal of the $666.65 note by paying some money and giving other notes, and taking up the $666.65 note, such fact would be evidence tending to establish a settlement of all claims of a credit, including the one sued for of the $150. With said instructions marked thereon, refused by the court having written on the left hand margin of said instructions the words, 'Asked for by defendant. Refused. George W. Post, Judge.'"

The plaintiff in error, it will be observed, does not complain of the refusal on the part of the court to give the instruction in charge to the jury; but for, as it were, emphasizing its refusal, by allowing the instruction, with the court's mark of refusal thereon, to be carried by the jury to their room.

The law books furnish some curious reading as to what a jury may be allowed to take with them to their room upon retiring to consider of their verdict. It was at one time held generally that all *sealed instruments* which had been admitted as evidence in the case, as well as all records in the case, and all *matters of record* which had been admitted in evidence in the case, might be carried by the jury to their room, while sworn copies of papers and unsealed instruments admitted in evidence could not be carried to their room by the jury. At a later date, the rule was stated by a high authority in an English court, as follows: "The

jury, after going out of court, shall have no evidence with them but what was shown to the court as evidence, nor that without the direction of the court. The court may permit them to take with them letters patent and deeds under seal, and the exemplification of witnesses in chancery, if dead, but not a writing without seal unless by consent of parties." Buller, N. P., 308.

The practice of allowing documentary evidence to be carried to their room by the jury was severely condemned by Mr. Justice Cowen in *Farmers Bank v. Whitfield*, 24 Wend., 419. He says: "The evidence of the law, as it stands upon authority and practice, seems to be all one way, and that is against loading the jury with papers which they often will not understand, and sometimes perhaps cannot even read. As a general rule, it seems much safer that the contents should be communicated to them only by counsel in presence of the court."

On the other hand, the supreme court of Pennsylvania, in the case of *Alexander v. Jameson*, 5 Binn., 238, say, by Tilghman, C. J.: "It has been our custom to deliver to the jury all written papers except depositions taken under rule of court. These have been withheld, because it has been thought unequal, that while the jury were not permitted to call the witnesses before them who had been examined in court, they should take with them the depositions of other witnesses not examined in court. After the uniform practice which has prevailed in this state, I have witnessed the trial of many causes, particularly of the mercantile kind, in which the jury could not decide without the aid of unsealed papers—causes which required the minute and laborious investigation of a variety of books and papers, in which long calculations were necessary, founded on accounts and entries. To tell the jury that they must form their verdict on the recollections of what had passed at the bar, would be imposing on them a most unreasonable duty. Under such circumstances, they could do no more than make a vague

guess at the truth, and their verdict might be an *abuse*, rather than a satisfactory administration of justice."

While it is believed to be the law, in the absence of statutory directions on the subject, that the instructions given by the court to the jury in writing may be taken by them to their room where they deliberate, yet this doubtless is a matter of discretion with the court.

In the case of *Hurley v. The State*, 29 Ark., 17, which was a capital case, the deposition of one Bevans, a witness, taken down in writing, and subscribed by him before the committing magistrate, and returned to the clerk of the court, and which witness was absent from the state at the time of the trial, was read as evidence on the part of the state, and when the jury were about to retire, the court detached the deposition of Bevans from the other depositions, etc., returned by the committing magistrate, which had not been read in evidence, and they took it with them on retiring, against the objection of the appellant. Also, when the jury were about to retire to consider of their verdict, the court refused to permit them to take from the bar the written instructions given them by the court. The verdict of murder in the first degree was upheld.

In the case of *The State v. Tompkins*, 71 Mo., 613, the court say: "And there was no error in permitting the jury to take the instructions with them to the jury-room, since this was a matter within the discretion of the court, and it is the constant practice of many of the circuits of this state for this to be done, and there has been no ruling of this court that we are aware of to the contrary. Nor do we see that any error was committed in permitting the jury to take with them the documentary evidence in the cause. The law constitutes them the triers of the facts; for those facts, so far as testified by witnesses, they will obviously have to depend upon memory. But why should the jurors be deprived, when they retire to make up their verdict, of the very papers and documents upon which their verdict must

to a great extent depend? We are unable to discover any substantial reason."

The code of Iowa provides (§ 1783) that: Upon retiring for deliberation the jury may take with them all papers except depositions which have been received as evidence in the case.

In *Shields v. Guffey*, 9 Iowa, 322, it was assigned for error, that the jury took a deposition with them to their room, and had it there while deliberating on their verdict. The court, in the opinion by C. J. Wright, say: * * * "But in the second place, suppose he (the plaintiff, who was also plaintiff in error) did not know it, or knowing it made no objection, and that he was not bound to; then it should appear that he was prejudiced by the proceedings." The judgment was affirmed. This case is approved and followed in *State v. Delang*, 12 Iowa, 453.

In the case of *Langworthy v. Myers*, 4 Iowa, 18, it was assigned for error that the instructions (of defendants), twenty in number, were not read to the jury, but handed to them by the court, with the remark that they were given as asked, and allowed to be taken by the jury to their room. The court say: "Either party is, without doubt, entitled to have the instructions read to the jury before they retire, and such is no doubt the better practice. But if the defendants, as in the present case, did not insist upon the instructions being read by the court, and suffered them to be handed to the jury, supposing that they would be read by them, it is too late to assign the same for error, or make the failure to read the instructions to the jury ground of motion to set aside the verdict and grant a new trial."

In the state of Indiana it had never been the practice to allow the jury to take anything with them to their room upon retiring to consider of their verdict, not even the written instructions; yet in the case of *Wilds v. Bogan*, 57 Ind., 453, "one of the jurors took with him from the judge's desk a paper containing one page of the notes of

the instructions given by the judge to the jury in the cause; that he took the paper to the jury room with him; that he looked at it but did not read it; that he laid it down, and that the paper ramained in the jury room during the deliberations of the jury, but that no juror read or examined it at any time; that it was returned by him with the verdict and interrogatories into court, he being the foreman of the jury; that the paper was taken by the juror to the jury room without the knowledge or consent of the court, or of either of the parties or their attorneys." The court in the opinion say: "We are unable to see any misconduct whatever on the part of the jury, or any one of them, or anything in the circumstances that affords the slightest grounds for a new trial."

We quote the following from the opinion of the court in the case of *Goode v. Linecum & Nash*, 1 Howard (Miss.) R., 281: "The third exception which we shall notice is taken to the decision of the court overruling the motion for a new trial. This motion was predicated upon the fact that the jury took with them to the chamber, whither they retired to consult upon their verdict, a paper containing instructions which were asked by plaintiff's counsel, but which were refused by the court. But it does not appear from the record that this paper was read by the jury, and consequently, then, it could have no influence upon their verdict." The judgment was affirmed.

A consideration of these cases and many others to the same effect, but which it is deemed unnecessary to refer to at length, leads us to the conclusion that in the absence of statutory direction it is, in a great measure, left to the sound discretion of the court as to what papers, books, or other matters of evidence, or instructions, the jury will be permitted to carry with them to their room upon retiring to consider of their verdict. And that when by mistake or inadvertence on the part of a juryman or the court, or even through error of judgment on the part of the court, a paper

has been taken to their room by the jury which ought not to have been, then, before a verdict will be set aside and a new trial granted for that cause, it must appear, either from an examination of the objectionable paper itself, or from facts properly presented by the bill of exceptions, that such paper must have been, in the nature of the case, or in point of fact was, considered by the jury in arriving at the conclusion reached by their verdict.

In the case at bar the district judge certifies in the bill of exceptions that "said instruction was read and given to the jury, and by them taken to their room, and had with them while deliberating upon their verdict, with said aforesaid endorsement in pencil thereon, to all of which the defendant at the proper time duly objected and excepted."

The bill of exceptions leaves us in the dark as to whether it was the intention of the district court to give the instruction to the jury, and that he endorsed it as refused through mistake, or that he intended to refuse it, and read and gave it to the jury, and allowed them to take it to their room through mistake. As above stated, the refusal to give the instruction is not complained of, so it is unnecessary to pass any opinion upon it as applicable to the pleadings and testimony in the case. It does not appear from the bill of exceptions that either the instruction itself, or the lead pencil endorsement thereon, was considered, or even read by the jury, or any member thereof; nor do we think there is anything in the paper itself that leads to the conclusion that it must have been considered by the jury. The jury no doubt heard the instruction requested, and if it was the intention of the court to refuse it, they no doubt heard such refusal announced; and from the record this court must regard the instruction as refused; and such refusal might have been assigned for error, had the defendant so chosen.

The plaintiff in error also assigns for error the giving, by the court to the jury, of the instruction prayed by the

plaintiff below, which instruction is in the following words: "If you are satisfied from the testimony, that the plaintiff gave to the defendant a check for $150, as charged in her petition, and that the defendant received the same, and retained it to his own use, and promised to endorse the amount thereof on plaintiff's note, then held by defendant; and if you further find that the defendant did not give the plaintiff credit for the amount of said check, and that plaintiff, in the honest belief that the same had been endorsed as a credit on her said note, paid up the full amount of her said note, then your verdict will be for the plaintiff for the full amount of said check, with interest from the date of the delivery of the same by her to the defendant, at seven per cent per annum, unless you find that defendant, in some way, afterwards paid her back the amount of said check."

This being an action for money paid by plaintiff to defendant through a mistake of fact, in view of the evidence contained in the bill of exceptions, we fail to see wherein this instruction is open to objection.

Seeing no error in the record, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

DAVID GUDTNER, PLAINTIFF IN ERROR, v. S. D. KILPATRICK AND BYRON BRADT, DEFENDANTS IN ERROR.

Appeal: UNDERTAKING: ACTION. Suit brought on an undertaking entered into for the purpose of appealing from the judgment of a justice of the peace. *Held*, That the defendants were estopped to deny that an appeal had been taken in the case, in contradiction of their undertaking, executed in conformity to the statute, for the purpose of perfecting an appeal, although no appeal lay from the judgment of the justice.

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

Bush & Rickards, for plaintiff in error, cited: *McConnell v. Swales*, 2 Scam., 571. *Southerland v. Swales*, 22 Ill., 91. *Bensley v. Mountain*, 13 Cal., 306. *Rockfelter v. Donally*, 8 Cow., 664. 1 Abbott's National Digest, 118. *Clendenning v. Crawford*, 7 Neb., 474.

A. Hardy, for defendants in error, cited: *Loomis v. McKenzie*, 8 N. W. R., 779. *Secrest v. Barbee*, 17 Ohio State, 426. 7 Wait's Actions and Defenses, 126. Bishop on Contracts, § 458.

COBB, J.

This action was brought in the county court of Gage county, and from thence by appeal to the district court for said county, on an appeal bond, of which the following is a copy:

"Know all men by these presents, That we, S. D. Kilpatrick and Byron Bradt, of the county of Gage, Nebraska, are held and firmly bound unto David Gudtner, in the penal sum of $360.00, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally and firmly by these presents. Witness our hands and seals this 30th day of June, 1881. The consideration of the above obligation is such that, whereas, the said Daniel Gudtner did on the 20th day of June, 1881, before J. E. Cobbey, county judge in and for Gage county, recover a judgment against the above bounden S. D. Kilpatrick, for the sum of $134.53, and $25.45 costs of suit, from which said judgment the said S. D. Kilpatrick has taken an appeal to the district court of the county of Gage aforesaid, and the state of Nebraska.

Now if the said S. D. Kilpatrick shall prosecute his appeal with effect and without unnecessary delay, and shall pay whatever judgment may be rendered by the court, upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in force and effect." Signed and approved.

The plaintiff, after setting out the recovery of the judgment recited in the said bond, the taking of an appeal from said judgment by the said S. D. Kilpatrick, and the execution and delivery of such bond by him with the said Byron Bradt as surety thereon, alleged that on the — day of October, 1881, the said appeal was dismissed by the district court on motion of the said plaintiff, and that upon the dismissal of said appeal, the aforesaid judgment became and was in full force and effect in the said county court. Plaintiff further alleged in and by his said petition, that he, the said plaintiff, having caused a transcript of said judgment to be filed in the office of the clerk of the district court, and execution to be issued upon said judgment against the goods and chattels, lands and tenements of the said defendant, S. D. Kilpatrick, which execution had been returned wholly unsatisfied; and that said S. D. Kilpatrick has no goods, lands, or tenements from which said judgment or any part thereof can be made, etc.

The said defendants made answer to said petition, and alledged that the judgment described therein, rendered in the county court, was a judgment taken and rendered by default of the defendant S. D. Kilpatrick, and in his absence, and was a judgment against him solely; that no appeal was ever taken from said judgment, nor could be, for that the same is prohibited by law, and that all proceedings had for that purpose, including the giving of the bond, now in suit, were null and void, etc.; also that the attempted appeal was by the district court dismissed upon motion of the plaintiff, for the reason that the judgment was taken and rendered upon default of and in the absence of the ap-

pellant, etc.; and that a dismissal upon said motion was the only judgment therein rendered by said district court, etc.

A trial was had in the district court without the intervention of a jury, upon the record and agreed statement of facts, and there being a judgment for the defendant, the plaintiff brings the cause to this court on error. The agreed statement of facts, signed by the district judge, constitutes the bill of exceptions. From this statement of facts, I extract the following paragraph:

"June 10, no answer being on file, comes plaintiff and claims default of defendant, and the same is allowed, and *by consent of parties* this action is set for June 20, at 9 o'clock A.M., for trial."

The said statement does not show whether the summons in the said action was personally served on the defendant, nor whether he ever applied to the court to set aside the judgment under the provisions of section 1001 of the civil code.

I think under a fair construction of the syllabus as well as the body of the opinion in the case of *Clendenning v. Crawford*, 7 Neb., 474, a defendant against whom a judgment rendered "by default and in his absence," has the right to appeal after he has applied to have the judgment set aside, under the provisions of section 1001 of the civil code, and been denied; and that the principal defendant, to make his defense available, even upon his own theory, must have negatived such facts by allegation and proof. It appears by the statement of facts, as above quoted, that the said action was set down for trial June 20th, at 9 o'clock, by *consent of parties*. This statement, made in a stipulation of facts, on which a cause is to be heard and decided by a court, in the absence of sworn testimony, must be understood as meaning that the defendant, as well as the plaintiff, was present in court, either in person or by attorney, and gave his consent as therein stated. In the case of *Strine v. Kaufman*, 12 Neb., 423, this court say in

effect, that in a case where a defendant appears in response to a summons, he cannot, by voluntarily absenting himself from the court room, where judgment is about to be rendered against him, bring himself within the provisions of the section in question. And I think that it makes no difference in such case whether he actually makes an answer or defense in the case or not. If he was present, he could have availed himself of whatever answer or defense he could make.

The case of *McConnel v. Swales*, 2 Scam., 571, came before the supreme court of Illinois in 1840. It was an action on an appeal bond, taken in a case before a justice of the peace to the circuit court, where the appeal was dismissed, and action brought on the bond against the defendant and his bondsmen. The court in the opinion say: "This court does not entertain a doubt, but that the dismissal of an appeal or *certiorari* is equivalent to a regular technical affirmance of the judgment, so as to entitle a party to claim a forfeiture of the bond, and have his action therefor. The bond given in such case is conditioned to pay the debt and costs in case the judgment shall be affirmed on the trial of the appeal. What is the object of this requirement, and what its meaning and intention? Manifestly to secure the opposite party in his debt and costs, in case the judgment shall not be reversed; in case he shall be, in the circuit court, the successful party. By a dismissal of the appeal, either by the court, or by the act of the appellant himself, the appellee is the successful party. He has not lost what he gained before the magistrate. He is placed in the same situation he occupied before the appeal was taken; and we see no propriety in attributing to such a judgment of dismissal less efficacy than to a more formal and technical one of affirmance."

The above case was followed and approved in the same court by that of *Sutherland v. Phelps*, 22 Ill., 91.

The statute of the state of Wisconsin provided that a

party desiring to appeal from a judgment of a justice of the peace should make an oath that the appeal was taken in good faith, and not for the purpose of delay, and also give a bond, etc.

In the case of *Clark v. Miles*, 2 Pinney, 432, Clark had recovered a judgment against Miles before a justice of the peace. Miles desiring to appeal, presented a bond with security, but took no oath. The justice, however, allowed the appeal. The circuit court, upon motion of the appellee, dismissed the appeal for the want of the statutory oath. Clark then brought an action on the appeal bond against Miles and his surety. The circuit court gave judgment for the defendant, on the ground that the dismissal of the appeal carried with it and invalidated the appeal bond. The plaintiff took a writ of error to the supreme court, where the judgment of the circuit court was reversed. In the opinion the majority of the court say: "The appeal was properly dismissed in the first instance, as the affidavit was absolutely required by the statute; but the question now presented is, whether that dismissal rendered the recognizance void. We think not. One of the conditions of the recognizance (of which a form is given in the statute) is that the appellant shall pay the amount of the judgment rendered against him before the justice, including costs of appeal, with interest, in case his appeal shall be dismissed or discontinued."

"It was not the fault of the appellee that no affidavit was filed, nor can he be made to suffer for either the neglect of the appellant, or of the justice. It was not for him to enquire into the reason for the dismissal of the appeal; he was satisfied that it was dismissed. He had been subjected to delay and expense because of the voluntary action of his antagonist, and it would be harsh indeed to drive him back to his execution upon the justice's judgment, and thus deprive him of all indemnity for the delay and costs of the appeal. We regard his right to sue upon the recognizance

as perfect from the time of the judgment of the circuit court. It was a voluntary security for the payment of the judgment, and once given could not be withdrawn by the party, nor invalidated by the judgment of the circuit court." There were two dissenting opinions, the court being then composed of five circuit judges holding the supreme court on the *nisi prius* system. But after the organization of the separate supreme court the question came before it in a case precisely like the case at bar. *Love v. Rockwell*, 1 Wis., 382. The statute of Wisconsin allowed an appeal from justices of the peace only in cases where judgment had been rendered upon the trial of an issue of fact or issue of law, and for an amount exceeding fifteen dollars. Baker & Love obtained a judgment in a proceeding in garnishment before a justice of the peace against one Abbott. Abbott appealed to the county court, giving the statutory recognizance, with Rockwell as his surety therein. This appeal was dismissed by the county court on motion of the appellants, on the ground that the cause was non-appealable for the reason that there was no issue joined before the justice of the peace. Baker & Love brought suit in a justice's court on the recognizance against Abbott, and Rockwell, his surety. Abbott having made default, Rockwell pleaded in bar, taking the identical ground taken in the answer in the case at bar. To this plea the plaintiffs demurred. The justice sustained the demurrer. The defendant appealed to the county court. Pending the appeal Baker died. The suit proceeded in the name of Love, survivor. The county court reversed the justice, overruled the demurrer, and gave judgment for the defendant for his costs. The plaintiff took the case to the supreme court on error, where the judgment of the county court was reversed. I quote from the opinion of the court by C. J. Whiton: "We do not think that the defendant is entitled to set up the matters stated in his plea as a defense to this action. The recognizance

on which the suit was brought was entered into by the defendant, and the defense sought to be interposed to the action is that the recognizance is void, because the justice before whom it was taken had no authority to take it, as no appeal lay from his decision. The plea admits that the recognizance was entered into for the purpose of perfecting an appeal of the case to the county court; but the defendant insists that no appeal lay from the decision, and that the proceedings before the justice subsequent to the rendition of the judgment are consequently void. We suppose there can be no doubt of the correctness of the propositions of the defendant. The statute did not authorize an appeal of the case to the county court, and when by law no appeal can be had, we do not see how any legal consequence can follow from proceedings taken to perfect it. But this does not meet the difficulty. The recognizance was entered into by the defendant, together with *Abbott*, and recites the fact of the recovery of the judgment, and that an appeal had been taken to the county court. To allow the defendant to set up and prove these facts to contradict his own recognizance, would be to allow him to obtain a delay in the issuing of the execution upon the judgment rendered by the justice, and then, when the delay has been obtained, insist that the recognizance which procured it created no legal obligation. While we think this a case where it would be gross injustice to allow the defendant to avail himself of the defense set up in his plea, we are equally well satisfied that it is a case where the doctrine of estoppel applies, as laid down in the authorities."

The reason of these cases is entirely applicable to the case at bar, and is we think unanswerable.

The judgment of the district court is therefore reversed, and the cause remanded to the district court for further proceedings according to law.

REVERSED AND REMANDED.

WILLIAM DIETRICHS, PLAINTIFF IN ERROR, V. THE LINCOLN AND NORTHWESTERN RAILROAD COMPANY, DEFENDANT IN ERROR.

Railroad: APPEAL FROM AWARD: TITLE. Where a railroad company has condemned certain real estate as the property of A, it cannot on appeal from the award of damages prove that he is not the owner without pleading such want of title.

ERROR to the district court for Platte county. Tried below before GASLIN, J., in the absence of POST, J.

McAllister Brothers, for plaintiff in error.

Marquett & Deweese and *Whitmoyer, Gerrard & Post*, for defendant in error.

MAXWELL, J.

This case was before this court in 1881, and is reported in 12 Neb., 225. On the second trial in the district court, a verdict was returned in favor of the plaintiff for the sum of $10, and judgment rendered thereon. The plaintiff brings the cause into this court by petition in error.

It appears from the record that in March, 1880, lots 1 and 2 in block 75, in the city of Columbus, with the buildings thereon, were condemned by the defendant as the property of the plaintiff, the award of damages being the sum of $600. The money was deposited with the county judge by the company, with notice "not to pay said property owners any of the money this day deposited with you." The validity of such notice, where possession is taken of the property condemned, is very doubtful; but the question is not before the court. The company then took possession of the lots, and has retained the possession ever since.

The company filed no pleadings in the district court, nor indeed tendered any issue of want of title to the plaintiff,

but on the trial objected to the evidence of title offered by him, and succeeded in having the same excluded. In this the court erred. *Republican Valley Railroad Co., v. Hayes*, 13 Neb., 489. *Gerrard v. O. & B. H. R. Co., ante* p. 270.

The plaintiff derived title as follows: In 1861, one Francis Smith obtained a patent from the United States for the E. half of the S.W. quarter of sec. 20, town 17 N., R. 1 E. of the 6th P.M. The same year Smith and wife conveyed to John P. Becker, as trustee for the Columbus Town Company, certain portions of said land, including the lots in controversy. Becker afterwards conveyed these lots with others to the Columbus company. The Columbus company afterwards conveyed said lots with others to Deborah and Henrietta Malcom. In 1869, Deborah Malcom conveyed to Alexander B. Malcom. This deed purports to convey the entire title, but the manner in which she acquired title from Henrietta does not appear. All of this testimony was admitted without objection.

In 1875, Alexander B. Malcom died, and one Ansel Briggs was appointed administrator of his estate, and it being necessary to sell the real estate in question, said administrator filed a petition for that purpose in the district court of Platte county, obtained an order of sale, and sold said lots to the plaintiff. The sale was thereafter confirmed, and a deed made to the purchaser.

The record of the deed was offered by the plaintiff on the trial of the cause in the court below to prove his title.

Various objections were made, not to the record but the deed, the principal one being that the license was granted in Polk county.

In *Stewart v. Daggy*, 13 Neb., 290, it was held that a judge at Chambers has authority to grant a license to a guardian to sell real estate. And in our opinion the fact that license was not granted in the county where the land lies, provided it was issued in the proper judicial district, is immaterial.

The plaintiff was called as a witness, and testified as follows:

Q. Are you acquainted with lots 1 and 2 in block 75 in this city?

A. Yes, sir.

Q. State who was in possession of those lots about the first of April, 1880, if you know?

The appellant objects for the reason that it is incompetent, irrelevant, and immaterial for the purpose except to show nominal damages.

The court: you may answer.

A. Myself.

Q. About how long prior to that time had you been in possession of this property?

A. About three years.

Q. Prior to the first of April, 1880?

A. About three years.

Q. How did you get out of the possession of that land?

The appellant objects as incompetent, irrelevant, and immaterial, and not the best evidence.

The appellee offers to show by this witness that the railroad company took possession of the land and put him out, and still holds the adverse possession of this property.

The appellant admits that the appellant company took possession of this property in the exercise of the right of eminent domain, and has ever since held possession of it, and still holds possession of it; that it is the identical property in controversy, and that the railroad company took possession of it about April 15, 1880.

Q. When and how was this action commenced with reference to this property?

The appellant objects as incompetent, irrelevant, and immaterial, and not the best evidence. Sustained.

Q. Mr. Dietrichs, did you put any improvements on these lots after the time that you got your title and before the railroad company took them from you?

A. I did.

The appellant objects to the testimony until the appellee has shown title, as incompetent, irrelevant, and immaterial.

So far as appears, the railroad company has only the title possessed by the plaintiff.

He was in possession, claiming to be the owner, and he was the only person made defendant in the proceeding.

Whatever interest he may have in the premises he is entitled to compensation for. This is but justice, and it is the condition upon which the right to condemn property depends.

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

REVERSED AND REMANDED.

WILLIAM H. MORRIS, PLAINTIFF IN ERROR, V. JAMES MORTON, DEFENDANT IN ERROR.

1. **Negotiable instruments:** DELIVERY. One M., as accommodation maker, signed with one Meads a negotiable promissory note, payable to W. W. did not accept the note for the purpose for which it was intended, but endorsed the same, and delivered it to Meads to enable him to negotiate it. *Held*, That there had been sufficient delivery of the note to the payee.

2. ———: ———: PAYMENT NOT PRESUMED. An accommodation note endorsed by the payee and delivered to one of the makers before due to be negotiated, is not presumed to have been paid, and a person purchasing the same in good faith, may recover thereon.

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

William H. Morris, pro se, on delivery, cited: *Burson v. Huntington*, 21 Mich., 416. *Mahon v. Sawyer*, 18 Ind.,

73. *Thomas v. Watkins*, 16 Wis., 550. *Woodford v. Darwin*, 3 Vermont, 82. *Walker v. Evert*, 29 Wis., 194. Presumption of Payment. *Long v. Bank*, 1 Litt., 200. *Beebe v. Bank*, 4 Ark., 546. *Callahan v. Bank*, 78 Ky., 604.

Dawes & Foss, for defendant in error, cited: 1 Daniels Neg. Inst., 710. Parsons' Notes and Bills, 109. *Bank v. Strong*, 72 Ill., 559. *Winters v. Home Ins. Co.*, 30 Iowa, 172.

MAXWELL, J.

This action is brought on a promissory note, of which the following is a copy:

"$300. WILBER, NEB., January 9th, 1879.

"Six months after date, we promise to pay to the order of J. W. Wehn, Jr., three hundred dollars at W. C. Henry's bank, Wilber, Nebraska, for value received, with interest at 10 per cent per annum, payable annually, and in any action that may be brought for any sum due under the provisions of this note by the holder thereof, he shall be entitled to recover of the makers thereof a reasonable sum as attorney's fee, to be fixed by the court

"M. WEHN.
"W. T. MEADS.
"A. V. HERMAN.
"E. S. ABBOTT.
"WM. H. MORRIS.

"Note endorsed,
"J. W. WEHN, JR.
"Without recourse."

Morris answered the petition, admitting the execution of the note, but alleging in substance that upon the representations of one W. T. Meads, that he was about to rent the newspaper known as the *Opposition* and the appurtenances then located at Wilber, and owned by J. W. Wehn, Jr.,

and it being necessary that said Meads should give security for the rent of said newspaper office and appurtenances for six months at $50 per month, he, Morris, with the other sureties, was induced to sign said note and deliver the same to Meads for delivery to said Wehn; that Meads never delivered the same to Wehn, but fraudulently and without authority used said note as collateral security for a loan for himself. On the trial of the cause in the court below, judgment was rendered in favor of Morton for the sum of $100.40. Morris brings the cause into this court by petition in error.

It appears from the testimony that Wehn did not require any security except the conditions of the lease for the rent of the newspaper office, and that he refused to receive the note in question for some cause which does not appear; that Meads stated to him, Wehn, that if he would endorse the note in question and return it, he, Meads, could obtain the money thereon and pay a portion of the rent then due, and that Wehn thereupon took the note and endorsed it without recourse and delivered it to Meads, who transferred the same to the defendant in error before it was due, as collateral security for a loan of $200.

The plaintiff in error contends that there has been no delivery of the note to the payee, and it being purchased from one of the makers of the same, therefore the defendant in error is not an innocent purchaser, and cannot recover.

It is essential to the validity of a promissory note that it be delivered to the payee or his authorized agent, and unless it is so delivered, it is of no validity. Daniel on Neg. Inst., 51, and cases cited in note 1. But there was a delivery to the payee in this case. It is true the note was not used in the exact manner contemplated by the plaintiff in error, still he signed the same as accommodation maker for the purpose of aiding Meads; therefore, when Meads delivered the note to Wehn for his endorsement in order that he might negotiate the same and raise

money thereon, a portion of which was to be applied in payment of the rent, it was a sufficient delivery. The mere fact that a note was intended to be discounted at a particular bank will not prevent the party for whose benefit it was given from making other use of it. 2 Parsons N. & B., 28. *Bank of Rutland v. Buck*, 5 Wend., 66. *Mohawk Bank v. Cory*, 1 Hill, 513. *Grandin v. LeRoy*, 2 Paige, 509.

Second. The endorsement by the payee and delivery to Meads for the purpose of negotiating the note, it not being due, did not raise a presumption of payment so as to defeat a recovery. The rule may be and probably is the other way in regard to past due paper, but not as to that not due.

It is very clear that justice has been done, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

MATTHEW MCKEIGHAN, PLAINTIFF IN ERROR, V. PITT H. HOPKINS, DEFENDANT IN ERROR.

1. **Real property:** COLOR OF TITLE. A tax certificate is not sufficient to constitute color of title to real estate.

2. **Judicial sale:** CONFIRMATION. An order confirming a sale of real estate, where there is no fraud or collusion, cannot be attacked collaterally.

3. **Mortgage foreclosure:** SALE TO APPRAISER: FRAUD: REDEMPTION. Where a defendant acquired title to certain real estate by the foreclosure of a mortgage, and it appeared that the premises had been appraised at a sum greatly below their value, and were sold to one of the appraisers, who conveyed to the holder of the mortgage, *Held*, That as the legal title had passed to the purchaser, ejectment would not lie against him; but as there was testimony tending to show collusion amounting to fraud between the appraiser and actual purchaser, the

plaintiff, upon payment of all costs, would have leave to amend his petition to redeem the premises, upon the payment to the defendant of all moneys and taxes paid by him on said land, together with interest thereon.

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

T. Appelget & Son, for plaintiff in error.

Appraisement illegal. *Sessions v. Irwin*, 8 Neb., 7. *Rosenfield v. Chada*, 10 Id., 422. Sale was void. Comp. Stat., 594. *Maple v. Nelson*, 31 Iowa, 322. *Banks v. Bales*, 16 Ind., 423. Adverse possession. 3 Wash. on Real Prop., 119. Tyler Ejectment, 861, 875, 890. Purchaser chargeable with notice. *Hubbell v. Broadwell*, 8 Ohio, 128. Ejectment lies. *Harrison v. Ropp*, 2 Blackf., 1. *Smith v. Cocknell*, 6 Wall., 758. *Maguire v. Smith*, 4 Blackf., 228.

Davidson & Easterday, for defendant in error.

Adverse possession. Tyler Ejectment, 921. *Jackson v. Norton*, 18 Johns., 355. *Jackson v. Leek*, 12 Wend., 165. Confirmation cannot be attacked. *Phillips v. Dawley*, 1 Neb., 322. *Day v. Thompson*, 11 Id., 128. Rorer on Judicial Sales, 58. No appraisement was necessary. Comp. Stat., 627.

MAXWELL, J.

This is an action of ejectment brought by the plaintiff in the district court of Johnson county against the defendant to recover the possession of the south-west fractional quarter of section 6, town 4, range 12, in Johnson county. The answer is a denial of the plaintiff's title. On the trial of the cause judgment was rendered in favor of the defendant, and the action dismissed.

The questions to be determined are: *First*, Had the defendant title by adverse possession, and if so, to what portion of said land? *Second*, Did he acquire title under proceedings for the foreclosure of a mortgage executed upon said real estate by the plaintiff and assigned to the defendant?

It appears from the testimony that in April, 1870, the defendant took possession of the land in question under a tax certificate dated March 1, 1869. The character of the possession is stated by the defendant as follows:

Q. After the purchase of the tax certificate and mortgage did you take possession of the land in controversy?

A. I did, as I did of all lands I bought in any way; I did not move upon the land at the time, but took possession as I did of all other lands I owned in the county that I was not occupying. I managed the grass and other things, paid the taxes, etc.

Q. When did you thus go into possession of the land?

A. It was in the fore part of April, 1870. This assignment was made when I was in Iowa. I came out soon after. The assignment was made about the first of April.

On the 30th day of May, 1871, the defendant obtained a treasurer's deed. The deed was excluded for defects in its execution. This action was commenced on the 6th day of April, 1881. The defendant, therefore, was not in possession under color of title for ten years before the commencement of the action, unless the tax certificates constituted such color.

Washburn in defining the phrase says: "The term 'color of title' means a deed or survey of the land placed upon the record of land titles, whereby notice is given to the true owner and all the world that the occupant claims the title." 3 Wash., R. P. (4th Ed.), 154. If the title under which a party relying upon possession claims, and originally entered, be so defective as to convey no title, yet the adverse possession will not be affected by the defects in

such title. *Jackson v. Todd*, 2 Caines, 183. *Jackson v. Sharp*, 9 Johns., 162. *Jackson v. Waters*, 12 Id., 365. *LaFrombois v. Jackson*, 8 Cow., 589. That is, a grantee who occupies real estate as owner, under a deed which fails to convey the title for such length of time that the bar of the statute is complete, will have a perfect title by adverse possession. *Snell v. Iowa Homestead Co.*, 13 N. W. R., 848. But the instrument, whatever its name, must purport to convey the title.

But a tax certificate does not purport to convey title. It is merely evidence of the purchase of the land, and two years from the date of the sale are given by the statute to the land-owner to redeem, and until that time the purchaser has no interest in the land itself except his lien for taxes. But after the expiration of the time for redemption, and upon notice to the owner, the purchaser is entitled to a deed. This deed may be sufficient for color, even if too defective to convey title. But in the case at bar the testimony fails to show that the defendant was in possession of the premises in controversy for ten years prior to the commencement of the action under color of title. There is testimony tending to show that he has been in actual possession of a portion of the premises for more than ten years, but what particular portion does not appear. The defense of adverse possession therefore is not established.

Second. It appears from the testimony that in April, 1866, the plaintiff executed a mortgage upon the lands in question to one Perry Lawson to secure the sum of $150. Payments were made upon the debt thus secured at various times, reducing it below $100. In November, 1869, Lawson sold and assigned the mortgage to the defendant. In March, 1877, the defendant commenced an action in the district court of Johnson county to foreclose the mortgage, service being had upon McKeighan by publication.

In April, 1877, a decree of foreclosure for the sum of $96.14 was rendered in said court. An order of sale was

issued on this decree and delivered to the sheriff, who called George A. Phillips and J. W. Buffum to appraise the property. The following is a copy of the appraisement, omitting the formal part: "Do upon actual view thereof appraise the property hereinafter described at its real money value as the property of Matthew McKeighan, taken by virtue of an order of sale issued out of the district court of the First Judicial district of Nebraska, in and for the county of Johnson, wherein Pitt Hopkins is plaintiff, and the said Matthew McKeighan was defendant; the southwest fractional quarter of section No. 6, in township No. 4 north, of range 12 east, in Johnson county, Nebraska, valued at the sum of eight hundred and seventy-two and fifteen-one-hundredths dollars. Taxes as per county treasurer's certificate, $22.15. Tax title of Pitt Hopkins. The interest of Matthew McKeighan, defendant, we value at ten dollars."

The land was sold to Joseph W. Buffum for the sum of $156. The sale was reported to the court and confirmed, and a deed ordered and made to the purchaser. Buffum and wife thereupon conveyed to the defendant. The attorney for the defendant contends that even if the appraisement was illegal—in fact no appraisement at all—that the order of confirmation cured that defect, and that such order cannot be attacked collaterally. He also contends that no appraisement was necessary in sales under a decree of foreclosure.

Sec. 491*a* (Comp. St., page 593,) of the Code, provides that: "Whenever, hereafter, execution shall be levied upon any lands and tenements, the officer levying the same shall call an inquest of two disinterested freeholders, who shall be residents of the county where the lands taken on execution are situated, and administer to them an oath impartially to appraise the interest of the person, or persons, or corporation against whom the execution is levied, in the property so levied upon, and such officer, together with

said freeholders, shall appraise said interest at its real value in money; and such appraisement shall be signed by such officer and said freeholders, respectively."

Sec. 491*b* provides: "That for the purpose of the appraisement mentioned in the last preceding section, the officer and the freeholders therein named shall deduct from the real value of the lands and tenements levied upon, the amount of all liens and incumbrances for taxes or otherwise, prior to the lien of the judgment under which execution is levied, and to be determined as hereinafter provided, and which liens and incumbrances shall be specifically enumerated, and the sum thereafter remaining shall be the real value of the interest therein of the person, or persons, or corporation against whom or which the execution was issued."

Sec. 491*c* provides that: "It shall be the duty of the county clerk, the clerk of the district court, and the county treasurer of the county wherein such levy is made, for the purpose of ascertaining the amount of liens and incumbrances upon the lands and tenements so levied upon, on application of the sheriff, in writing, holding such execution, to certify to said sheriff under their respective hands and seals the amount and character of all liens existing against the lands and tenements levied upon, and which are prior to the lien of such levy, as the said liens appear of record in their respective offices. For which certificate and the necessary search therefor said officer shall receive a fee of two dollars ($2) each, to be paid by the plaintiff in the execution, and taxed as increased costs in the action in which the judgment on which execution was issued was rendered."

Sec. 491*d* provides that: "The officer holding such appraisement shall forthwith deposit a copy thereof, including his application to the officers enumerated in section 3 of this act, and their official certificates as in said section provided, in the office of the clerk of the court from which

such execution issued, and shall immediately advertise and sell said real estate, lands, and tenements, agreeable to the provisions of this act; but in no case shall he sell any such real estate, lands or tenements for less than two-thirds the appraised value of the interest of the person, persons, or corporation, against whom the execution was issued, unless it appear from the appraisement under this act that the liens and incumbrances thereon equal or exceed its real value in money."

Sec. 495 provides that: "In all cases where real estate may hereafter be levied upon, by virtue of an execution or order of sale, and shall have been appraised, and twice advertised and offered for sale, and shall remain unsold for want of bidders, it shall be the duty of the officer to cause a new appraisement of such real estate to be made, and successive executions or orders of sale may issue at any time in vacation, after the return of the officer 'not sold for want of bidders,' at the request of the plaintiff or his attorney."

Sec. 451 provides that: "Real property may be conveyed by master commissioners as hereinafter provided *First*, When by an order or judgment in an action or proceeding, a party is ordered to convey such property to another, and he shall neglect or refuse to comply with such order or judgment. *Second*, When specific real property is required to be sold under an order or judgment of the court."

Sec. 452 provides that: "A sheriff may act as a master commissioner under the second subdivision of the preceding section. Sales made under the same shall conform in all respects to the law regulating sales of land upon execution."

These provisions apply to all sales of real estate under the process of the court, whether upon execution or order of sale.

If the question of the validity of a sale in a case of this

kind was before this court for the first time, the writer would have no hesitation in holding the sale invalid. But from the earliest reported cases in this court to the present time it has been held that an order confirming a sale cannot be collaterally attacked. *Phillips v. Dawley*, 1 Neb., 320. *Crowell v. Johnson*, 2 Id., 146. *State Bank v. Green*, 8 Id., 297. *Berkley v. Lamb*, 8 Id., 392. *Day v. Thompson*, 11 Id., 123. This being the construction adopted by this court, it has become a rule under which rights and titles have been acquired, and if changed it should be done by the legislature and not by the court. This objection therefore must be overruled.

It is objected that Buffum, one of the appraisers, purchased the land at the sale. From an inspection of the record, this appears to be true, as the name, J. W. Buffum, is the same in each case. The land was sold to him as Joseph W. Buffum, but was conveyed to the defendant as "J. W. Buffum." As the legal title to the premises passed by the proceedings in foreclosure to the defendant, the plaintiff cannot maintain an action of ejectment, and to that extent the judgment of the court below will be affirmed. But as the appraisement was for a sum greatly below the value of the premises, and as there is testimony from which collusion amounting to fraud may be inferred between one of the appraisers at least and the defendant, the plaintiff will have leave, upon the payment of all costs, to amend his petition by filing a bill to redeem, and tendering to the defendant all moneys and taxes paid by him with interest thereon.

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

REVERSED AND REMANDED.

GEORGE W. BRIDGES AND JOHN R. JOHNSON, PLAINTIFFS IN ERROR, V. JOHN LANHAM, DEFENDANT IN ERROR.

Mills: CONTRACT: BREACH: DAMAGES. L. contracted with B. & J. to construct a stone flume, to be completed by a day certain, on the site of a mill which had been destroyed by fire. It was the intention of B. & J., when the contract was made, upon the completion of the flume, to erect thereon a corn feed mill for temporary use, which intention was known to L. The flume was not completed until several months after the time provided in the contract. No corn feed mill was ever built. In an action by L. for the contract price of the flume, B. & J. recouped their damages for the loss of the use of the corn feed mill, which they were prevented from building by reason of plaintiff's failure to complete the flume as contracted. *Held*, That such damages were too remote and uncertain, and an instruction to that effect by the trial court to the jury upheld.

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

Dawes & Foss, for plaintiff in error, cited: *Hadley v. Baxendale*, 9 Exch., 341. *Paine v. Sherwood*, 9 Minn., 315. *Booth v. Spuyten Duyvil Co.*, 60 N. Y., 487. *Gilbert v. Kennedy*, 22 Mich., 117. 2 Wait's Actions and Defenses, 454. *Griffin v. Colver*, 16 N. Y., 489.

Hastings & McGintie, for defendant in error, cited: *French v. Ramge*, 2 Neb., 254. *Howe v. Bryson*, 44 Iowa, 159. *McEwen v. McKinnon*, 11 N. W. R., 828.

COBB, J.

This action was commenced in the court below by the defendant in error against the plaintiffs in error for the agreed price of a stone flume furnished and built by him for them under a contract.

The defendants answered and set up as a defense and counter-claim that it was a part of the said contract for the

building of the said flume, that the same should be erected and built in a good and workmanlike manner, and to the satisfaction of the said plaintiffs in error, and fully completed on or before the first day of December, 1880. That said plaintiff (defendant in error) did not perform the work and labor on said flume in a good and workmanlike manner, nor did he complete the flume on or before the first day of December, 1880, by reason of which non-completion of said flume, the defendants (plaintiffs in error) were damaged in the sum of $4,160.

2. That by reason of the said plaintiff's non-completion of said flume on or before the first day of December, 1880, as agreed, the said defendants were on the fifteenth day of December, 1880, compelled to do a great deal of work and labor in and about digging frozen ground, to protect the unfinished wall of said flume, to their damage in the sum of $75.00.

3. That by reason of the non-completion of said flume at said specified time, defendants were, on the 8th day of May, 1881, compelled to use and throw 10,000 bricks into the water above the flume to protect the flume, and to prevent the water from washing it away, to their damage in the sum of $80.00.

4. That during the erection of the said flume, stones were thrown down the embankment by the said defendant against the green and unfinished wall so being built, whereby said wall became crooked and out of shape, and in such a condition that it would not hold water, to the damage of defendants in the sum of $500.

5. That said flume was not built in a good and workmanlike manner, but on the contrary the same was very poor work, to the damage of defendants $400.

6. That by reason of the said flume not being completed at the time agreed, the said defendants were damaged in the sum of $500 by water running through the wall and washing away the embankment.

7. That defendants have laid out and expended large sums of money, to-wit: forty dollars for labor and cement in and about protecting the unfinished wall of said flume, which became necessary on account of the incompletion of said flume on or before the first day of December, 1880.

8. That by reason of the incompletion of said flume on or before the first day of December, 1880, the head gates of said defendants, near which said flume was being built, were washed out in the spring of 1881, whereby defendants were compelled to expend large sums of money and labor in replacing said head gates, to their damage of $500.

With a prayer for judgment for $5,315.00.

To which the plaintiff replied by a general denial.

There was a verdict and judgment for the plaintiff. Defendants bring the cause to this court on error.

There are a great number of errors complained of in the petition in error. There is, however, but one important question involved, and to which our attention will be chiefly, if not exclusively, confined in this opinion.

Upon the trial the court on its own motion, among others, gave to the jury the following instruction:

"5. In the opinion of the court the claim for damages for the want of the use of the mill, and the building of which is claimed to have been delayed, is too remote, and you will allow nothing for this claim."

The same point also arises upon the refusal of the court to give in charge to the jury the third, fifth, sixth, seventh, eighth, and ninth prayers of the defendants, by which a contrary opinion was sought.

In their brief and by argument at the bar, plaintiffs in error claim that their case comes within the rule laid down in *Hadley v. Baxendale*, 9 Exch. R., 341. *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y., 487. *Griffin v. Culrer*, 16 N. Y., 489, and many other cases all following the case first named.

We had occasion to examine and cite the leading case of

Hadley v. Baxendale while writing the opinion in the case of *The Sycamore Marsh Harvester Co. v. Sturm*, 13 Neb., 210. The plaintiffs 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. A shaft being indispensable to the working of the mill, and the plaintiff 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 the want of the shaft for which the iron delivered to him was to serve as a model. In this case the decision turned upon the want of knowledge on the part of the defendant, or of notice to him that the mill was lying idle solely for the want of the shaft, the necessary model for which he was failing to deliver to the mechanic who was depended upon to furnish it; and the want of evidence from which the court and jury could find that it was within the contemplation of the parties, the defendant as well as the plaintiffs, at the time of the making of the contract, that the mill would necessarily be idle to the plaintiff's damage until a shaft should be manufactured and furnished from the model, the carrying and delivery of which was the subject of the contract. The distinction between the above case and the case at bar consists chiefly in this: There the mill had been completed, had been in operation, and was probably a well-known manufacturing establishment of the neighborhood. Capital was actually invested in it. Probably a number of persons were employed in and about the mill; it had established customers, as well those who furnished the raw

material as those who purchased and used the manufactured product. Thus it is obvious that a continued suspension of its operations would be substantial and far-reaching in its effects. But here, while there was evidence tending to prove that it was the intention of the defendants below to erect a corn mill for temporary use, to be propelled by water supplied by the flume which the plaintiff contracted to erect, and that such intention was known to him, yet it is an undisputed fact that this mill had not been built; that it only existed in the intention and potential ability of the defendants to build it.

The case of *Griffin v. Colver et al.*, 16 N. Y., 489, was where the plaintiff agreed to build a steam engine with boilers, etc., for defendants, and deliver it to them on a day certain. He failed to do so, and a delay of one week occurred, during which time defendants lost the use of certain machinery for the sawing and planing of lumber, which the steam engine was intended to drive, and which the plaintiff knew it was intended to drive. The plaintiff having brought his action for the price of the engine, the defendants recouped their damages from the failure to deliver it at the time fixed by the contract. The referee allowed the defendants $50 as a proper compensation upon their investment on the value of the property, which was partially unoccupied by reason of the plaintiff's default. The defendants excepted to the report on this ground, but their exception was overruled. On their appeal the judgment was affirmed by the general term, and by them appealed to the court of appeals. Here the judgment was also affirmed, and in the opinion, the court say: "The broad, general rule in such cases is, that the party is entitled to recover all of his damages, including gains prevented, as well as losses sustained, and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such

as might naturally be expected to follow the violation; and they must be certain both in their nature, and in respect to the cause from which they proceed." * * * The rent of a mill, or other similar property, the price of which would be paid for the charter of a steam-boat, or the use of machinery, etc., etc., are not only susceptible of more exact and definite proof, but in a majority of cases would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits; just as the ordinary rate of interest is upon the whole a more accurate measure of the damages sustained in consequence of the non-payment of a debt, than any speculative profit which the creditor might expect to realize from the use of the money. * * * The proper rule for estimating this portion of the damages in the present case was, to ascertain what would have been a fair price to pay for the use of the engine and machinery in view of all the hazards and chances of the business; and this is the rule which I understand the referee to have adopted."

I have been able to find no case, and certainly we have been cited to none, where it has been held that the price of the use of machinery not in existence, in a business yet to be established, can be estimated in any case. Such an estimate must necessarily lack the element of certainty, which we have seen is inflexibly required both in the nature of the damages, and in respect to the cause from which they proceed.

When we consider the changeable character of the human mind, as well as of all things in this life, who could say that a corn feed mill would certainly have been erected on the site in question had the flume been completed by December 1, 1880, or who could testify as to the capacity of such mill, or the value of its use per day, or

month? For aught that appears, or could properly appear, in this case, the funds for the building of said contemplated mill remained invested in more certain, if not more profitable security than were offered by the enterprise contemplated. It is obvious, therefore, that the rule of damages as laid down in *Griffin v. Colver* cannot be invoked in favor of the defendants in the case at bar. And the same may be said of that of *Hadley v. Baxendale.* Nor do I think that there is any case which furnishes an authority for giving damages as compensation for the loss of the use of the prospective mill which the plaintiffs contemplated but never built.

Plaintiffs in error make as points in their petition in error, the giving of the instructions prayed for by the plaintiff below, and the refusal to give the instructions prayed for by the defendants below; but as they do not designate the particular paragraph of the instructions objected to in the petition in error, nor point out the ground of objection in the brief, the same will not be examined.

They also make the point that the court erred in admitting the testimony of Thomas Lanham, a witness for the plaintiff, as to the time of making excavation, and conversation with Mr. Bridges at the brick yard.

This witness having testified that he was working on the flume for Bridges & Johnson in the fall of 1880; that they commenced some time in September; that he took six or seven men there to work—to excavate, is asked by the plaintiff's attorney:

Q. How long did you continue that excavation?

This question is objected to by defendants as immaterial and irrelevant. Being allowed to answer, witness answered:

A. I don't just remember on the first occasion.

Again he was asked:

Q. At the time did you hear any conversation between Bridges and Johnson and your brother (plaintiff) about coming back again and going to work?

A. After that?

Q. After that.

A. Some time in October Bridges came to the brick yard. Johnson was not there.

Objected to as immaterial. Overruled.

Witness continued. "He says, Where is Tom? I says, Gone away. He says, How is it you are not working at the flume? I says, He says you misrepresented the work, and he has stopped. He says, I am sorry such a thing happened. I says, That is what he told me. He says, Where is he? I says, Out west. He says, Can you telegraph him? I says, I don't know where to telegraph to him. He says, I am anxious to have the thing go along. I am anxious to get the work done. I told him I would not go down and commence again unless I saw brother. He said he was sorry I did not know where to telegraph to, because he was anxious to get along with the work. That is all there was at that time."

While I fail to see either relevancy or materiality to the issues in the case in this testimony, yet it is quite clear that it could not and did not prejudice the defendants, nor could it even tend to mislead a jury of ordinary intelligence.

Plaintiffs also make the point in their petition in error "That the court erred in admitting the testimony of John Lanham, plaintiff, offered in rebuttal."

Upon examination of the record I find that the testimony of the plaintiff was offered in rebuttal. It was received without objection on the part of the defendants. True, some questions put to him were objected to for cause, some of which objections were sustained and some overruled. But the assignment of error is too general to enable the court to apply it to any part of the testimony.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

JOHN E. MEGLEMERE, PLAINTIFF IN ERROR, V. JAMES BELL, DEFENDANT IN ERROR.

Final Judgment: In an action of ejectment the journal entry in the following form, to-wit: "Now upon this day this cause came on for hearing, the right of jury being waived, and trial had by the court. After listening to the evidence of sundry witnesses and hearing the argument of counsel, and the court being fully advised in the premises, it is considered by the court that said James Bell should have judgment entered, and stand as against the said defendant. And that the plaintiff recover of and from the defendant his costs herein taxed at $....." *Held*, Not a final judgment, and the case remanded for judgment.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

Hiatt & Hurd, for plaintiff in error.

John Dawson, for defendant in error.

BY THE COURT.

This action was commenced in the district court by James Bell against John E. Meglemere for the possession of a strip of land which was in dispute between them, in consequence of a disagreement as to the exact location of a government corner stone, and consequently of the division line between their respective tracts of land, which are co-terminous.

The action was such as was formerly known as an action of ejectment. A jury was waived, and the cause tried to the court. For a finding and judgment in the case we find in the record the following journal entry: "*James Bell vs. John E. Meglemere.* Now upon this day this cause came on for hearing, the right of jury being waived, and trial had by the court. After listening to the evidence of sundry witnesses and hearing the argument of counsel, and the

court being fully advised in the premises, it is considered by the court that said James Bell should have judgment entered, and stand as against the said defendant. And that the plaintiff recover of and from the defendant his costs herein taxed at $....."

"In ejectment," says Bouvier in his Law Dictionary, vol. 2, p. 17, "judgment for plaintiff is final in the first instance, that he recover the term, together with the damages assessed by the jury, and the costs of suit, with award of the writ of *habere facias possessionem*, directing the sheriff to put him in possession." The form for such judgment is given in the appendix to 3 Blackstone, p. 12.

There being no proper final judgment in the cause from which appeal or error will lie, the cause is remanded to the district court for the purpose of the rendition of judgment therein, and further proceedings according to law.

REVERSED AND REMANDED.

WILLIAM B. ORCHARD, PLAINTIFF IN ERROR, V. SCHOOL DISTRICT NO. 70, DEFENDANT IN ERROR.

1. **School District:** BONDS. In 1873, in pursuance of a request in writing of five persons purporting to be legal voters, a special meeting was called and held of the electors of school district No. 70, of Seward county, and bonds voted, which were sold, and of which the district had the avails. *Held*, That as the election was held by *bona fide* electors of the district, who did not object to the qualifications of the persons signing the request, the court would presume that they possessed the necessary qualifications.

2. ———: ———. The power to borrow money implies the power to issue bonds or other evidence of indebtedness for its payment.

3. ——: ———: SALE: USURY. The sale of a school bond for less than its face value, if it is not a device to evade the usury laws, is not usury.

ERROR to the district court for Seward county. Tried below before GEORGE W. POST, J.

D. C. McKillip and *Harwood & Ames*, for plaintiff in error.

Norval Brothers and *G. W. Lowley*, for defendant in error.

MAXWELL, J.

This is an action upon a bond for the sum of $500, alleged to have been issued by the defendant in the year 1878, for the purpose of erecting a school-house in said district. The defendant in its answer alleges that the request for the special meeting called for the purpose of voting bonds was not signed by five legal voters of the district, for the reason that one Robert Adams, whose name was signed to said request, never signed the same, nor authorized his name to be signed thereto, and that one T. Hackney, whose name was attached thereto, never resided in nor was a qualified voter in said district.

In the answer the "defendant admits that the officers of defendant without authority from defendant executed for defendant the pretended bond in suit. That the same was made on the 30th day of July, 1873, for $500, drawing 10 per cent from date, payable annually, principal payable July 30, 1878, in pursuance of a contract entered into between said Hamilton to the officers of said district, and that the only consideration which said officers received was the sum of $400, whereby said bond was usurious, of all of which the said plaintiff had notice."

On the trial of the cause the court found for the defendant and dismissed the action.

The questions for determination are: *First*, was the special meeting called on the request of five legal voters of the

district as required by the statute? *Second.* Did the authority to "borrow money" authorize the district to issue a negotiable bond for the amount of the loan? *Third.* Did the sale of the bond for less than its face value constitute usury?

The court below found that four of the persons signing the request were legal voters in the district, but that T. Hackney who signed said request was neither a voter nor resident of said district. It does appear, however, that one J. or James Hackney was a resident of the district, and that the special meeting was held at his residence. A very large amount of the testimony was taken to prove that no such person as T. or Thomas Hackney was a resident of the district, but we do not deem this testimony material. It is pretty evident that J. Hackney or James Hackney did sign the request. It is also clearly proven that in pursuance of the request a special meeting of the voters of the district was held, at which eight votes were cast—five being in favor of the proposition and three against.

The legal voters of the district being five in number, when assembled in pursuance of the call based upon the request signed by five persons purporting to be legal voters of the district, made no objections to the qualifications of such persons, and regarded them as legal voters. And when such is the case, and the meeting had apparently authority to act, the court will not inquire into the qualifications of the persons signing the request. The case differs from that of the *State v. School District No. 9, Nuckolls Co.*, 10 Neb., 544. In that case three citizens of an adjoining state procured the formation of a school district in this state, and held a special meeting and voted, and issued bonds of the district, and sold the same. At that time there were but three legal voters in the district, and no request for a special meeting was signed by five or any number of persons. These facts were clearly proved, and the court held that a special meeting could only be called by following

the steps pointed out by the statute, viz., on the written request of five legal voters. But the case has no application to the one under consideration. Here was a meeting called and held by the *bona fide* residents of the district, and they cannot be permitted to hold a special meeting, vote bonds, and sell the same, and after receiving the avails say that there was an irregularity in calling the meeting.

The second objection was before this court in the case of *The State v. School District No. 4*, 13 Neb., 82, where it was held that the power 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. The word "borrow" as used in the statute evidently means a contract for the use of money. See also *State v. School District 24*, 13 Neb., 78. Those decisions in our view state the law correctly, and we adhere to them.

The question raised by the third objection was before this court in the case of *Armstrong v. Freeman*, 9 Neb., 11, when it was held that the sale of a note and mortgage for less than their face value, where it was not a device to evade the usury laws, was not usury, and we see no reason to change our decision on that question. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ALLEN HAMRICK, PLAINTIFF IN ERROR, V. W. D. COMBS, DEFENDANT IN ERROR.

Attorney. The ordinary powers of an attorney do not authorize him to enter into an agreement to take about one-third of the face value of a valid judgment in favor of his client, and accept payment of the same in a debt owing by such attorney.

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

Brown & Ryan Brothers, for plaintiff in error, cited: *Tingley v. Parshall*, 11 Neb., 443. Comp. Stat., 65, § 7, subd. 3. *Critchfield v. Porter*, 3 Ohio, 519. *Dickson v. Wright*, 52 Miss., 585.

W. H. Snelling and *J. S. Gregory*, for defendant in error.

MAXWELL, J.

This is a proceeding to revive a dormant judgment. To the conditional order of revivor the defendant filed an answer as follows:

"STATE OF NEBRASKA, }
"LANCASTER COUNTY. }

"W. D. Combs, above named defendant, being duly sworn, on oath, says: That on the 14th day of November, 1874, he entered into an agreement with one Joseph W. Sharts, the attorney of record of Allen Hamrick, in the above entitled suit, whereby it was mutually agreed between them that in consideration of the payment by this affiant of one hundred dollars that the judgment against this affiant recorded in journal 'B,' page 541 of the records of this court, should be receipted and paid in full, and that the said sum of one hundred dollars should be paid in full satisfaction of said judgment (except the costs), that said proposition to take the sum of one hundred dollars in full of said judgment was made to affiant by the said Sharts, the authorized attorney of record of said Hamrick, and was accepted by this affiant, and that upon said agreement so made, affiant paid the sum of one hundred dollars and twenty-five dollars interest to James E. Philpott, by the advice and direction of the said Sharts, who stated to this affiant that he was going away and had turned the busi-

ness over to James E. Philpott, who is also the attorney of record of the said Hamrick, and that at the time he paid said money, he said Philpott, he took his receipt therefor, and now holds the same in full of said judgment (except costs), in pursuance of the agreement so made; that since he made such payment, the said Hamrick has never written to affiant, nor said or intimated that the agreement entered into and payment so made was not ratified by him, and since the date of said judgment, no person or persons have sought to exercise any control over or to collect said judgment except the said James E. Philpott, the attorney of Hamrick, until this motion to revive the same; that the judgment sought to be revived has long since become dormant and of no force; that the same has been fully paid by this affiant as per the terms of the agreement hereto attached, and the receipt of said money in full payment of same as per the terms of compromise; that said James E. Philpott after said agreement was made and before the payment agreed to be paid was made, caused two executions to be issued on said judgment, and signed himself attorney for Hamrick; that when affiant paid the money agreed upon in settlement of said judgment to said James E. Philpott, he did so at the instance of said Joseph E. Sharts the attorney of Hamrick, and by his direction and with the explicit understanding that James E. Philpott was the authorized and acting attorney of said Hamrick, and so represented himself to this affiant, and is such of record. Affiant further says that he paid the amount in good faith, believing the agreement so made with him would be carried out in good faith, and that the money so paid was in full of all claims against him except costs of said suit.

"W. D. COMBS."

"Subscribed in my presence, and sworn to before me, this Nov. 2nd, 1882.

"J. C. JOHNSTON.

"*Justice of the Peace.*"

The agreement referred to is as follows:

"ALLEN HAMRICK
vs.
"W. D. COMBS.

"Now whereas it is mutually agreed by and between said Allen Hamrick, by Joseph W. Sharts, his attorney, that whereas said Sharts is about to leave the state of Nebraska, and he has turned over the collection of said judgment to said James E. Philpott, that if said defendant would pay to said James E. Philpott the sum of one hundred dollars to apply on said judgment, then the said judgment should be receipted for in full and discharged of record; and, whereas said defendant accepted said proposition in the presence of said Philpott, now I, the said defendant, do on this second day of December, 1877, hereby offer and pay to said James E. Philpott, the said sum of one hundred dollars with twenty-five dollars interest thereon, making a total of $125.

"W. D. COMBS."

"I, James E. Philpott, acknowledge the receipt of one hundred and twenty-five dollars on the terms and conditions above set forth, and hereby authorize the clerk of said district court to enter a satisfaction of said judgment in pursuance of said agreement, and say that I was present and know of my own knowledge of the making of said agreement, and this receipt in pursuance thereof is in full of said judgment, except costs, and that I will not cause other execution to be issued thereon.

"JAMES E. PHILPOTT."

To this answer the plaintiff Hamrick filed an affidavit, wherein he states that: "I never employed, or in any way whatever, authorized James E. Philpott to act for me in this or any other transaction. I never knew or heard of such person till since this motion for a revivor has been pending in said court. Said Philpott never had any authority from me to act for me in any capacity whatever,

and I never authorized nor empowered Joseph W. Sharts, nor anyone else to turn over the said judgment to any person to collect or compromise for me, and I never knew that such transfer of authority was made or claimed to be made till since the motion for revivor was filed; to-wit, till late in October, 1882. I never authorized the compromise or satisfaction of said judgment at less than its face, and never consented or agreed that it should be compromised or settled, or satisfied for less than the full amount due thereon."

Philpott also filed an affidavit, wherein he states: "He was during the pendency of said suit and to its final determination one of the attorneys of said *defendant;* that after judgment was taken thereon, to-wit, on or about the — day of — A.D. 1875, the defendant in person and the plaintiff by Joseph W. Sharts, met in the presence of this affiant, and it was then agreed by and between the said defendant in person and said plaintiff by his said attorney, that on the payment one hundred dollars to the affiant, that this affiant should receive the same to be applied on said judgment, except costs, and that the said judgment should be receipted in full, except costs thereon. At the time said agreement was entered into, the said Joseph W. Sharts was about to leave the said state, and the said money was to be paid to this affiant on behalf of said Joseph W. Sharts."

The court below found that there had been paid on said judgment to plaintiff's attorney the sum of $100, and deducted that amount from the judgment, and entered a judgment of revivor for the remainder. Hamrick brings the cause into this court by petition in error, and Combs by a cross-petition in error, alleging that the entire judgment has been satisfied. The proof shows that no money whatever has been paid to the plaintiff or his attorney, and the only satisfaction of the judgment claimed is the arrangement between Sharts and Philpott, by which it is claimed that $100 which it is alleged Sharts owed Philpott has been

paid. Sharts is dead, hence there is no means of disproving the statement made in Philpott's affidavit. But it is unnecessary to do so. Even if this arrangement was made by Sharts, it was in excess of his powers as an attorney. The ordinary powers of an attorney do not authorize him to execute any discharge of a debtor, but upon the actual payment of the full amount of the debt, and that in money only. 2 Green. Ev., § 141. The extent to which an attorney would be justified in entering into a compromise of a doubtful claim it is unnecessary to consider; but it is very clear that he cannot, in the absence of authority to that effect, enter into an agreement to take about one-third of the face value of a valid judgment in favor of his client, and provide that that shall be paid in a debt owing by himself. Philpott was not at any time the plaintiff's attorney, and cannot bind him in any manner.

It follows that the court erred in deducting the $100 paid to Philpott from the judgment.

The judgment of the district court is reversed, and the cause remanded to that court to enter judgment in conformity to this opinion.

REVERSED AND REMANDED.

ARCHIBALD BOLAR, PLAINTIFF IN ERROR, V. FREDERICK WILLIAMS, DEFENDANT IN ERROR.

1. **Damage to Animals.** In an action for the value of a colt alleged to have been injured by the defendant, the only evidence to sustain the action was a threat of the defendant to shoot the plaintiff's stock if he did not keep it at home, and the fact that the injured animal was found on the defendant's premises. The jury having found for the defendant, *Held*, That as there was no testimony tending to show that the defendant committed the injury, the verdict would not be set aside.

2. **Trial:** STATEMENT OF ATTORNEY. On the trial of a cause in the district court, appealed from a justice of the peace, the attorneys in the case have no right to state to the jury what the verdict was before the justice.

3. **New Trial.** As a general rule newly discovered evidence which is merely cumulative is not cause for a new trial.

ERROR to the district court for Lancaster county.

L. C. Burr, for plaintiff in error.

Brown & Ryan Bros., for defendant in error.

MAXWELL, J.

This is an action to recover the value of a colt belonging to the plaintiff, which it is alleged in the petition was injured by the defendant so severely as to cause its death. The answer is a general denial. On the trial of the cause a verdict was returned in favor of the defendant, and the action dismissed.

The principal objection in this court is that the verdict is against the weight of evidence. The plaintiff and defendant are farmers residing about three-fourths of a mile from each other, near Crounse, in Lancaster county. In January, 1881, the colt in controversy was between nine and ten months old, and seems to have been permitted to run at large. The injury was alleged to have been committed on the forenoon of the 23d of January, 1881. At about 8 or 9 o'clock on the morning of that day Anthony Rump, who resides but a few rods from the defendant's residence, found the colt in question in his stable. In his testimony he states: "It was lying down; I had two colts in there. It was lying across the halter rope of one of my colts. I unloosed the halter, and it then ran out."

On the cross-examination he testified: "I went to the stable and found this colt there, not in the position a horse

ought to be." He also testifies that the colt went from his place to the defendant's. It also appears that he was the owner of a ferocious dog, and that when the colt was turned out of the witness's stable the dog pursued it to the residence of the defendant. Between 9 and 10 o'clock in the forenoon of the same day that Rump had turned the colt out of his stable the defendant went to the residence of the plaintiff and informed him that his colt had been badly injured. The injuries were found to be three or four deep gashes on the left shoulder, of which the colt died on or about the 25th of that month. The only ground of suspicion against the defendant is that he had threatened to shoot the plaintiff's stock if he did not keep it at home, and the fact that the injured animal was found on the defendant's premises. The defendant admits making the threats complained of, but states that they were made under great provocation, and without any intention of carrying the same into effect—that the plaintiff permitted about forty of his hogs to run in defendant's corn for a considerable time during November and December, 1880, and that he had threatened to shoot said hogs. Whatever the facts may be as to the threats, the plaintiff failed to produce any testimony tending to show that the defendant committed the injury, while he swears positively that he did not commit the same, and in this he is corroborated by one Johnson, a hired hand, and Johnson's wife. This being the condition of the testimony, it was properly submitted to the jury, and in our opinion the verdict is in accordance with the clear weight of evidence. It also appears from the affidavit of the plaintiff's attorney that while he was making a statement of facts to the jury he stated to them that "the case had been tried to a jury before a justice of the peace, and had brought in a verdict in favor of the plaintiff. Thereupon the court said to affiant in the presence and hearing of the jury in this case that when counsel for plaintiff makes such statement to the jury it

did, and the court would expect the same to prejudice the plaintiff's case."

This is assigned for error. No exception was taken, and therefore the alleged error cannot be considered. But it is evident that the attorney was guilty of a gross breach of propriety in making such statements to the jury. An appeal would be of but little value if the decision was to be controlled in the slightest degree by the action of the jury on a former trial. The cause is to be tried upon the evidence introduced on the trial and on that alone, and any attempt of a party or attorney to state facts outside of such evidence for the purpose of influencing the action of the jury should be promptly disapproved by the court. And we are not prepared to say that the reprimand in this case was too severe. Certain affidavits are filed also for the purpose of showing newly discovered evidence, but it appears that the evidence is merely cumulative, and is not ground for a new trial.

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

JUDGMENT AFFIRMED.

MARGARET GOTTSCHALK, APPELLANT, V. THE LINCOLN AND NORTHWESTERN RAILROAD COMPANY, APPELLEE.

Railroad: EMINENT DOMAIN: INJUNCTION. The fact that proceedings to condemn land to the use of a railroad were taken and prosecuted by direction of the lessee of the road, but in the name of the lessor, *Held*, Not a sufficient ground for enjoining them at the suit of the owner.

APPEAL from Platte county. Heard below before GEORGE W. POST, J., confirming report of W. H. Munger, referee.

W. S. Geer, for appellant, cited: *Paul v. Detroit*, 32 Mich., 108. *Mahoney v. Spring Valley*, 52 Cal., 159.

Marquett & Deweese and *Whitmoyer, Gerrard & Post*, for appellee.

LAKE, CH. J.

This action was commenced for the purpose of enjoining statutory proceedings taken to condemn a lot in the city of Columbus, belonging to the plaintiff, to railroad uses. The material facts on which the right to this relief is claimed are precisely similar to those presented in the case of *Dietrichs v. The Lincoln and Northwestern Railroad Company*, 13 Neb., 361, and, as we adhere to what is there decided, but little need be said here.

The point chiefly relied on and discussed by counsel for the appellant is that of the authority by which the condemnatory proceedings were resolved upon and commenced. It is said that the defendant never determined that the lot was required for railroad purposes, nor directed that the proceedings to condemn it be taken, but that these things were done, if at all, by its lessee, the Burlington and Missouri River Railroad Company, and that therefore, although apparently regular and valid, are in reality void. This position is not well taken, and cannot be sustained. Under the circumstances shown in evidence to the referee, the fact that the condemnation of this lot was first determined upon and directed by the management of the lessee company was eminently proper. That company, with its practically perpetual lease, and in view of its system of roads, was probably in a situation enabling it better to know the present, and correctly anticipate the future, needs of the road in the matter of depot grounds than the defendant possibly could. Besides, the lessee must have been quite as deeply interested in the matter as it was possible for the defendant company to have been.

Referring to the lease in question, we find that it puts the entire business and management of the defendant company practically in the hands of the lessee. About all that remains to it is its bare corporate existence, which seems to have been continued only *ex necessitate rei*, and for the purposes and benefit of the lessee. It transferred to the Burlington and Missouri River Railroad Company "all of the property and franchises" which the defendant company then owned or might acquire, and provided that the latter should "do and perform any and every corporate act which may be necessary, useful or appropriate" to secure to the lessee "the full enjoyment of every franchise, right, easement, power, and privilege" which it then possessed or might thereafter acquire, and that for this purpose it would "maintain its corporate existence."

That such an arrangement was warranted by our statute respecting the leasing of railroads does not seem to be questioned. It is provided that one railroad company "may lease or purchase any part or all of any railroad constructed by any other company * * * upon such terms and conditions as may be agreed on between said companies respectively."

The terms of this lease, fairly construed, certainly permit the lessee, within any reasonable limit, to dictate as to the necessities of the road in the matter of the condemnation of property to its use. Besides, it must be borne in mind that there is no disagreement between the two companies respecting this matter. They are in full accord, and the action said to have been taken at the instance of the lessee in the name of the lessor, is fully endorsed and defended by the latter.

On the whole we are of opinion that the finding of the referee, to the effect that the condemnation proceedings were properly undertaken and conducted, and that there is no equity in the plaintiff's case, is fully supported by the evidence and the law. Our views upon several other questions

presented in the record may be found in the case against this defendant above cited. The judgment of the district court dismissing the case for want of equity was right and will be affirmed.

JUDGMENT AFFIRMED.

HARVEY B. DENSMORE, PLAINTIFF IN ERROR, V. A. C. TOMER, DEFENDANT IN ERROR.

1. **Sale of Perscnal Property:** STATUTE OF FRAUDS: CREDITORS. By the 11th section of our statute of frauds, where in the sale of goods they are left in possession of the seller, in a controversy between his creditors and the purchaser the presumption is, *prima facie*, that the sale was fraudulent. And in such case the burden of showing the sale to have been honest is on the purchaser.

2. ———. The term "creditors," in the above mentioned section, includes all persons who are creditors of the vendor at any time whilst the goods remain in his possession or under his control.

3. **Res Adjudicata.** In the application of the rule of *res adjudicata*, it is essential that its operation be mutual. And a party is not concluded by a judgment in a prior suit, wherein he could not have availed himself of the same means of defense or of redress which are open to him in the second suit. 1 Greenleaf on Ev., sec. 524.

REHEARING of case reported 11 Neb., 118.

J. C. Crawford, for plaintiff in error, cited: *Ransom v. Schmela*, 13 Neb., 73. *Crowell v. Horacek*, 12 Neb., 625. Sackett Instructions, 168. Bump on Fraud, 165. On *res adjudicata* cited: *Wales v. Lyon*, 2 Mich., 276. *Kelly v. Donten*, 70 Ill., 385. 1 Green. Ev., 522. *Key v. Dent*, 14 Ind., 86. Bump on Bankruptcy, 260. *Russel v. Place*, 94 U. S., 606. Wells, § 17. *Duchess of Kingston's case*, 11 State Trials, 198.

E. P. Weatherby and *W. M. Robertson*, for defendant in error, on question of fraud, cited: *Cadbury v. Nolen*, 5 Penn., 320. *Dewart v. Clement*, 48 Penn., 413. *Burrows v. Stebbins*, 26 Vt., 650. *Shaw v. Thompson*, 43 N. H., 130. *Luke v. Morris*, 30 Conn., 201. *Dexter v. Perkins*, 22 Ill., 143. *Vance v. Boynton*, 8 Cal., 554. *Van Polt v. Lettler*, 10 Cal., 394. Bump's Fraudulent Conveyances, pp. 131–6. *Webster v. Peck*, 31 Conn., 495. *Kitchmer v. Watson*, 24 Ill., 591. *Monroe v. Hursey*, 1 Oregon, 188. *Res adjudicata:* Wells, §§ 14, 282, 440. *McReady v. Rogers*, 1 Neb., 127. *Benz v. Hines*, 3 Kan., 397.

LAKE, CH. J.

The points now urged upon our attention, and the argument to support them, are not materially different from those presented at the former hearing. What we then regarded, and still regard, the principal question in the record, was whether there was sufficient evidence to sustain the jury in finding that the sale of the goods to the plaintiff was fraudulent? As stated in our former opinion, *Densmore v. Tomer*, 11 Neb., 118, the burden of showing the sale to have been honest was on the plaintiff, no actual visible change of possession of the goods having attended it. This burden was a requirement of the statute, which made the sale, without delivery of possession, *prima facie* fraudulent and void as to the creditors of the seller, and conclusively so, unless it was made to appear satisfactorily that it was made in good faith, and without any intent to defraud them. This presumption, which the statute attaches in a controversy of this description, causes a seeming exception to the general rule that he who alleges fraud must clearly prove it in order to prevail. But really it is not an exception. The statute simply makes a single fact —the possession of things sold still in the vendor— evidence of certain value on the question of fraud, which,

however, may be overcome by proof of good faith and a want of fraudulent intent in making the sale.

The evidence on the question of good faith is almost entirely circumstantial, and somewhat conflicting; but if it be examined with a correct understanding of the relation and obligation of the parties to each other as suitors, no serious difficulty will be experienced in finding grounds sufficient to support the verdict, although a different result might reasonably have been predicated upon it.

Whatever title the plaintiff had to the goods he acquired by purchase, without having seen them, from Densmore & Hopper, a mercantile firm then engaged in business at Stanton, in this state. The purchase was made at the plaintiff's home, in the state of Illinois, through C. M. Densmore, his son, a member of and acting for the firm. It included the entire property of Densmore & Hopper, who were at the time financially distressed, and shortly afterwards instituted proceedings in voluntary bankruptcy. The plaintiff knew of this distress. Under these circumstances, the fact that the goods and management of the business were left in the hands of Densmore & Hopper, or of C. M. Densmore, without any apparent change of ownership, was really just what the statute makes it—a strong badge of fraud.

It is urged by counsel "that the failure of the defendant to show that he represented parties who were creditors at the time of the sale alone ought to be sufficient to reverse this case."

It is true, as claimed, that there was no evidence at all on this point. But does the want of it vitiate the verdict? We think not. In designating the classes of persons which the statute protects against such sales, "the creditors of the vendor" and "subsequent purchasers in good faith" are named. The designation "creditors of the vendor" is general, and nominally includes them all, whether they became such either before or after the time of making the

sale. See sec. 11 of our statute of frauds. But, as if to remove all doubt respecting this matter, the following section expressly defines the word "creditors," as here used. It declares that it "shall be construed to include all persons who shall be creditors of the vendor or assignor at any time whilst such goods and chattels shall remain in his possession, or under his control."

This construction of the statute, by itself, is of course conclusive, and settles the point against the claim of the plaintiff. But, even without it, we could not hold as requested to do, for, independently of it, the rule under statutes similar to our own, and under the common law as well, seems to be firmly settled the other way. In Benjamin on Sales, § 483, it is said that "Sales made by debtors, in fraud of creditors, are usually considered as being governed by the statute (13 Eliz., c. 5) and the decisions made under it; but other statutes had been previously passed on the same subject, and in *Cadogan v. Kennett*, Lord Mansfield said that: 'the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes. 13 Eliz., c. 5, and 27 Eliz., c. 4.'" Of the former of these statutes, which gives protection to creditors only, it is said: "And it seems that it protects, against fraudulent sales, subsequent creditors, as well as those having claims at the date of the fraudulent conveyance." And so it is held in numerous cases in this country, under similar statutes, and such seems to be the established rule. 1 Story's Eq. Jurisprudence, § 356. *Carter v. Grimshaw*, 49 N. H., 100.

This matter of the alleged prior adjudication is again pressed upon our attention, with much earnestness. It is true that it was but barely referred to in our former opinion, but the conclusion therein reached we still regard as correct. The controversy respecting the property in the

United States district court relied on as bringing the case within the principle of *res adjudicata*, and which seems to have been determined in favor of C. M. Densmore and J. J. Hopper, who constituted the firm of Densmore & Hopper, was between them and certain of their creditors, by whom their discharge as bankrupts was resisted on the alleged ground, among others, that they had willfully and intentionally concealed "one certain stock of goods in store in the town of Stanton, and State of Nebraska, consisting of dry goods, groceries," etc. The bankrupts, Densmore & Hopper, denied the concealment, alleging that the property in question belonged to Harvey B. Densmore, the plaintiff here. It will be seen, therefore, that the real issue in that controversy, and the only one decided, was simply whether the members of the firm of Densmore & Hopper had willfully and intentionally concealed their property. And it appears that this issue arose after the assignee had seized and actually disposed of the goods, or at least a part of them, and was responsible to the real owner for their value. To this litigation, neither the assignee nor Harvey B. Densmore were parties, and we do not see upon what principle they could be held bound by it. We apprehend that counsel would hardly be willing to concede that, if the decision had been the other way, and the bankrupts' discharge refused on the ground of their concealment of these goods, it would have concluded Harvey B. Densmore upon the question of his right to them. "It is a general rule that a verdict shall not be used against a man where the opposite verdict would not have been evidence for him; in other words, the benefit to be derived from the verdict must be mutual." * * * * "Where the parties are not the same, one who would not have been prejudiced by the verdict cannot afterwards make use of it; for between him and a party to such verdict the matter is *res nova*, although his title turn upon the same point." 1 Starkie on Evidence, 331. In 2 Phillips on Evidence,

Cowen & Hill's and Edwards' notes, 6, it is remarked that: "It was resolved by Holt, C. J., and the other judges of the court, upon a trial at bar, that no record of a conviction or verdict can be given in evidence but such whereof the benefit may be mutual; that is, such as might have been given in evidence, either for the plaintiff or the defendant." And in 1 Greenleaf on Evidence, § 524, in speaking on this subject, this language is used: "But to prevent this rule from working injustice, it is held essential that its operation be *mutual.* Both the litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either." * * * "Another qualification of the rule is, that a party is not to be concluded by a judgment in a prior suit or prosecution, where, from the nature or course of the proceedings, he could not avail himself of the same means of defense or of redress which are open to him in the second suit."

If instead of granting to the bankrupts a discharge, this judgment had refused it because of their fraudulent concealment of the goods, it is very clear that Harvey B. Densmore would not have been bound by it. He could, and most likely would have said, with effect, "I purchased this property before the proceedings in bankruptcy were commenced, and claim to be the owner of it. On the question of the validity of my title, I have not been heard—have not had my day in court. I was not a party to the bankruptcy proceedings, and therefore am not affected by the result." Such being the attitude of the plaintiff in respect to this judgment, he is clearly within the operation of the wholesome rule of mutuality above referred to, and therefore not in a situation to invoke successfully its aid in support of his title to the goods. On this point the ruling of the court below was clearly right.

For these reasons we must adhere to the judgment heretofore announced.

JUDGMENT AFFIRMED.

SAMUEL FRIED, APLELLANT, V. AMASA STONE, JR., THEODORE STAUFER, AND SAMUEL STAUFER, APPELLEES.

Equity. Upon the facts set out at length in the opinion, *Held*, That the petition as well as the evidence on the part of the plaintiff—appellant—contain no sufficient equity to entitle him to relief.

APPEAL from the district court of Burt county. Heard below before SAVAGE, J.

Uriah Bruner, for appellant.

First decree was final. Kent Com., 316. *Beisel v. Artman*, 10 Neb., 181. Jones on Mort., 1600. *Wilson v. Daniel*, 3 Dall., 401. *State v. Dodge Co.*, 10 Neb., 24. Plaintiff in this case had no notice that application would be made for a second decree, and was not present in person or by counsel when it was rendered. Entry of record decree was no vacation of fact. *Nuckolls v. Irwin*, 2 Neb., 60. Freeman Judg., 104 *a*. Court had no jurisdiction to render second decree. Freeman Judg., 117. *Gordon v. Longist*, 16 Peters, 97. Freeman Void Judicial Sales, 2, 42. Sale was unauthorized. *Wells v. Chandler*, 9 Reporter, 808.

John D. Howe and *M. R. Hopewell*, for appellees.

COBB, J.

This is an action brought to cancel a deed and set aside a sale of real estate, made upon a foreclosure of a mortgage. The mortgage was executed by Samuel Fried, the plaintiff and appellant, together with his wife and brother, to Amasa Stone, Jr., the principal defendant and appellee, to secure the sum of three thousand dollars with interest, payable

five years from date; interest payable semi-annually. The mortgage contained a clause, not unusual in such cases, providing that in case the said Samuel Fried should fail to pay any interest thereon when the same is due, or should fail to keep any of the covenants therein contained, on his part to be kept and performed, then the whole of said sum and interest should become due and payable. On the first day of April, 1876, there being two semi-annual installments of interest on the said sum due and unpaid, the said Amasa Stone, Jr., commenced an action against the said Samuel Fried, his wife, and brother, for the foreclosure of the whole amount of the said debt, interest, etc., and the defendants in said action making default, on the second day of May, 1876, judgment of foreclosure was entered in said cause for the whole amount of the principal, interest, and costs, including an attorney's fee.

It appears from the bill of exceptions that on the morning of the day upon which the said judgment of foreclosure was rendered, the said Samuel Fried applied to one of the attorneys of the said Amasa Stone, Jr., and desired to pay the interest then due and have the foreclosure suit dismissed; this was declined by the attorney, but the said Samuel Fried was assured that, while judgment would be taken in the case, that the same would remain unexecuted as long as he should keep the semi-annual installments of interest promptly paid. Accordingly, upon the rendition and entering up of the said judgment, there was added at the foot thereof a clause to the effect that if the said defendant Samuel Fried should at any time bring into court the principal and interest due, with costs, proceedings therein should be stayed until the further order of the court.

It appears that on the 3d day of May, 1876, the next day after the entry of the said judgment of foreclosure, the said Samuel Fried paid to the attorney of said Amasa Stone, Jr., on said judgment, the sum of three hundred and

ninety dollars; on the second day of October following, the sum of one hundred and fifty dollars; and on the 10th day of May, 1877, the sum of one hundred and eighty-two dollars.

It further appears that the semi-annual installment of interest which fell due, by the terms of the mortgage, on the first day of October, 1877, not being paid, the said Amasa Stone, Jr., on the 12th day of December of that year, the said district court being in session at the November term thereof, applied to the said court for "the further order" in said cause, contemplated by the clause at the foot of said judgment, as hereinbefore stated, which order was made by the court. The order, although it is called a supplemental decree, shows plainly by its recitals that it was merely intended to take off the stay of proceedings, which it was agreed should be the effect of the prompt payment of the interest semi-annually.

It further appears from the record that on the 13th day of September, 1878, an order of sale was issued to the sheriff of Burt county as a master commissioner to appraise, advertise, and sell the said mortgaged premises. In said order of sale the judgment is recited as "a supplemental judgment obtained in our said court at the adjourned November term, A.D. 1877," etc. It also appears that neither in the issuance of said order of sale, nor in the sale or confirmation thereof, was any notice taken of the payments made on said original judgment hereinbefore referred to. The property was appraised, advertised, and sold, and bid in by the said Amasa Stone, Jr., who conveyed that portion of it involved in this case to the defendants, Theodore and Samuel Staufer, who went into possession thereof before the commencement of this suit.

The original judgment entered in the said cause on the second day of May, 1876, was not final in the sense of sending the parties out of court. The court retained the cause for the purpose of making further orders in case the de-

fendants therein failed to pay the semi-annual interest promptly upon the same becoming due. This is no unusual thing for a court of equity to do.

The entry of the so-called second judgment, which, as above stated, was in reality no judgment, but only an order to carry the judgment into effect, the condition upon which the same had been stayed having been broken by the defendants, was not in all respects regular. There should have been proof by affidavit of the non-payment of interest. Yet that deficiency is supplied by the allegations in this case, by which it is admitted that the installment of interest which fell due on the first day of October, 1877, was unpaid on the 12th day of December of that year, when the order was entered.

The facts stated by the plaintiff in his petition give him no standing in a court of equity. By his non-payment of interest due on his mortgage, the same by its terms became due. Suit was commenced to foreclose it. As judgment was about being entered against him, although he made no defense, he did interpose sufficiently to obtain a condition by which such judgment should be stayed from time to time upon his doing certain things, to-wit, the payment of the interest semi-annually. He failed in the performance of this condition, and the court entered an order restoring the judgment to exactly what it would have been had no such condition been interposed, and the judgment was executed accordingly.

Now after the lapse of considerable time, the then defendant brings this suit to cancel the deed to the purchaser, made by the sheriff in the execution of such judgment. There are many insuperable objections to the granting of this relief. The Staufers purchased this land from Amasa Stone, Jr., in good faith. The plaintiff knew of the issuance of the order of sale, the advertisement, and sale of said land, and its purchase by Amasa Stone, Jr. He had even permitted himself to be dispossessed of said land by

proceedings in forcible detention without questioning the legality of the proceedings under which he had been divested of his title. On this ground alone equity would estop him from now coming into court to question the Staufers' title, upon any showing as to them, by his petition. As to the defendant Stone, the only fraud with which he is charged is in obtaining the order of December 12, 1877, and while it is not easy to see how the court's own records could be the subject of fraudulent misrepresentation to the court, in any case we have already seen that the alleged statement, which it is claimed was false and fraudulent, was true in point of fact and of law.

It has been repeatedly held by this court that the issuance of an order of sale was not necessary to the validity of a sale of real estate upon a judgment for the foreclosure of a mortgage, and such unquestionably is the law. There was but one judgment of foreclosure against the plaintiff, and the sale of the land was made by virtue of it, notwithstanding the date of its rendition and that the amount was mis-stated in the order of sale.

Neither the pleadings nor testimony show the plaintiff to be entitled to any relief in equity.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

SAMUEL FRIED, APPELLANT, V. AMASA STONE, JR., AND SWAN I. SWANSON, APPELLANTS.

COBB, J.

The facts in this case are identical with those of the preceding case of the same plaintiff and appellant v. Amasa Stone, Jr., Theodore Staufer and Samuel Staufer, defend-

ants and appellees, and constitute a part of the same transactions. For the reasons stated in the opinion in that case the judgment of the district court in this case is affirmed.

JUDGMENT AFFIRMED.

JOHN O'HARA, PLAINTIFF IN ERROR, V. OSCEOLA O. WELLS, DEFENDANT IN ERROR.

1. **Witness:** HYPOTHETICAL QUESTIONS. If hypothetical questions are resorted to in the examination of expert witnesses, they must be so framed as to fairly reflect facts, either admitted or proved by other witnesses.
2. ———. Although a non-expert witness is incompetent to give his opinion as to the existence of a dislocation of a limb, he may describe its appearance, as he saw it, to the jury.
3. **Physician and Surgeon.** Where no special agreement is made with a physician or surgeon respecting his services, the law implies an undertaking on his part simply that he will exercise a reasonable degree of care and skill in the treatment of his patient, not that he will effect a perfect cure.
4. **Instructions.** The giving of an instruction to a jury, uncalled for by the evidence, if not prejudicial, is not a sufficient reason for setting their verdict aside.

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

The plaintiff in the petition alleged as follows:

"The said John O'Hara, plaintiff, complains of the said Osceola O. Wells, defendant, and for cause of action says: That the said plaintiff, before and at the times hereinafter mentioned, had had the bone and ligaments of his left arm broken and fractured and displaced, and that the said defendant was a physician and surgeon, practicing as such in the city of Beatrice, Gage county, Nebraska; that on, to-

wit: the 30th day of October, A.D. 1878, the said plaintiff at the special instance and request of the said defendant, retained and employed the said defendant for a reasonable reward to be paid therefor as such physician and surgeon, to set and reduce the said broken and fractured bone and ligaments of his said arm to their proper position and place, and to attend to, cure and heal the same; and the said defendant undertook and entered upon said retainer and employment; yet the said defendant, not regarding his duty in the premises, so carelessly, negligently, and unskillfully set and reduced the said fracture of said arm and the displacements thereof, and so negligently and unskillfully bound up and dressed and bandaged the same, and unskillfully and negligently nursed and attended to the said fracture and injury, that the said plaintiff, by reason of such unskillfulness and negligence, has wholly lost the use of his said arm, and his said arm has become and still is permanently crooked, and the bones, ligaments, and joints thereof permanently displaced and out of their natural state, position, and condition, whereby plaintiff has been greatly and permanently injured, and rendered unfit and unable to follow his lawful business, and has also been put to great expense, to-wit: the sum of $200, in and about endeavoring to straighten and improve and cure his said arm to the damage of the said plaintiff $10,200; wherefore the plaintiff prays judgment against the said defendant for the said sum of $10,200 his damage so as aforesaid sustained, and his costs of suit."

The answer was as follows:

"The defendant answers the petition of the plaintiff in above entitled action, and

"*First*—Denies the same, each and every averment thereof not hereinafter expressly admitted, traversed, or explained.

"*Second*—For second answer to said petition, the said defendant admits that the defendant was at the times in

said petition mentioned, and now is, a physician and surgeon practicing as such in the city of Beatrice, in Gage county, Nebraska. The defendant also admits that the plaintiff broke his arm, and that on or about the 30th day of October last past, at the request of the plaintiff, the defendant undertook to and did reduce said fracture of plaintiff's said arm and the displacement thereof.

"*Third*—And said defendant, further answering said petition, expressly denies that he carelessly, negligently, and unskillfully set and reduced the said fracture of said arm and the displacement thereof, and further expressly denies that he negligently and unskillfully bound up and dressed and bandaged and attended to said fracture and injury, but on the contrary, avers the facts to be that in and about the reducing of said fracture of said arm, and setting and caring for said fracture and said fractured arm, this defendant used the proper degree of skill, care, and diligence in the execution of his employment; and the defendant further avers that he did properly set the broken bone of said arm, and properly reduced the dislocation and fracture thereof, and properly treated and cared for the same until the proper time had arrived to discharge the plaintiff as a patient, and until said arm was healed and cured, at which time the defendant did discharge said defendant from further treatment, and the defendant had the full and free use of his said arm, and was perfectly satisfied with the defendant's professional services, and thereafter, and about nine weeks after plaintiff's said arm was set, the plaintiff settled with the defendant for his services, and for good and proper services, and paid the defendant nine dollars—all the money he had—which was one dollar less than defendant's charge for his said services, and then and there agreed to pay the defendant the balance of said charge, to-wit: one dollar, which sum he has failed and neglected to pay, on account of which defendant insists that plaintiff cannot now, and is estopped from claiming

for bad and improper services, and on account of which defendant claims that the plaintiff owes the defendant $1.

"*Fourth*—And the defendant, further answering said petition, avers that if the plaintiff's said arm is as represented and described in said petition, that said condition is the result of plaintiff's acts, carelessness, and improper use of said arm after he was discharged by defendant as aforesaid, and for which this defendant is in no wise responsible; wherefore, and for all the reasons aforesaid the defendant asks judgment that plaintiff's petition be dismissed with costs, and that defendant have judgment for $1, the balance due him on settlement for said services, and for his costs in defending this action."

Colby & Hazlett, and *O. P. Mason*, for plaintiff in error.

On cross-examination of plaintiff, cited: 1 Greenleaf Ev., § 449. 1 Starkie Ev., § 164. Hypothetical question: *Woodbury v. Obear*, 7 Gray, 467. *Hunt v. Lowell*, 8 Allen, 169. *Shepherd v. Willis*, 19 Ohio, 144. Testimony of Ellingsworth: *Chapin v. Inhabitants*, 9 Gray, 244. First instruction: Chitty on Cont., 630. Ellwell's Med. Jurisprudence. Second instruction: Profatt on Jury Trial, 314. Third instruction: *Roberts v. Eddington*, 4 Esp., 88. *Waldron v. Coombe*, 3 Taunt., 162. *Clark v. Detroit*, 32 Mich., 348. Fourth instruction inapplicable to the issue: *Sawyer v. Lauer*, 10 Kan., 470. *Morris v. Platt*, 32 Conn., 75. *R. R. Co. v. Whitmore*, 19 Ohio State, 110.

A. Hardy and *A. H. Babcock*, for defendant in error.

On plaintiff's declarations and admissions, cited: *Barber v. Merriam*, 11 Allen, 322. *Matterson v. N. Y. Central R. R.*, 35 N. Y., 487. Whenever contract is laid more comprehensive than that which the law implies, it then becomes special, and must be proved as laid. *Reynolds v. Graves*, 3 Wis., 371. *Grindle v. Rush and Green*, 7 Ohio,

125, pt. 2. McClelland's Malpractice, 201 and 202. Third instruction: *Almond v. Nugent*, 34 Iowa, 300. *Sutton v. Facey*, 1 Mich., 242. Fourth instruction: *Pecria Ins. Co. v. Anapow*, 45 Ill., 87. *Camp v. Phillips*, 42 Ga., 289.

LAKE, CH. J.

The verdict is fairly and sufficiently supported by the evidence found in the bill of exceptions, and the objection that it is not must be overruled.

The other matters relied on as ground for a reversal of the judgment are certain rulings of the judge upon the admissibility of evidence, and in his charge to the jury upon the law of the case. These will be considered in the order in which they are presented to us by counsel.

The first of these rulings occurred during the cross-examination of the plaintiff. He was asked whether, while he was still under treatment by the defendant, he did not say to one Hulitt that his arm was "mending slowly," and "getting stronger?" This was objected to on the ground of its being immaterial, irrelevant, and incompetent. But the objection was overruled, and a negative answer given.

It is not claimed that, of themselves, this question and answer were at all prejudicial, and clearly they were not. The complaint is, that they were permitted afterwards to be made the basis for calling upon Hulitt to give a contradictory and perhaps impeaching statement on this point. But to this testimony of Hulitt no exception appears to have been taken. Indeed it does not appear that the judge ruled upon the objection, which is simply noted in pencil upon the margin of the page, opposite the question, so that we are relieved of the duty of saying whether, in this respect, the testimony were admissible or not.

It is claimed that the court erred in sustaining objections to two of the questions put to Dr. James D. Minkler. The first of these questions was: "You can state whether if the

plaintiff, holding the horse with the halter in his hand, received a jerk or sudden pulling, and a kick on the arm, what the effect would be as to dislocations?" The second was this: "A blow breaking the bone of the arm—the ulna—what tendency would that have as to dislocations at the wrists?"

Both of these questions were objectionable, and rightly excluded. They were hypothetical, and as such much too indefinite, not being confined to conditions like those under which the plaintiff's arm was injured. Where hypothetical questions are resorted to in the examination of expert witnesses, they must be so framed as to fairly reflect facts either admitted or proved by other witnesses, otherwise the testimony drawn out by them can have no real value, but may do much harm in the decision of the case. Besides, after these questions were ruled out, proper ones were put, and thus the opinion of the witness on the point fully obtained. In these rulings of the trial judge, as indeed in all others respecting the admissibility of expert testimony, we see no cause whatever for complaint.

As to the witness Boyd, he being neither a surgeon nor physician, the question put to him respecting the condition of the plaintiff's arm in January following the injury, "as to dislocation at the wrist," was rightly rejected on the ground of his incompetency. He was, however, properly permitted to tell the jury how the arm appeared at that time, in comparison with its appearance at the trial, and this was as far as he was competent to go.

It is claimed that the court erred in permitting the witness Ellingsworth to testify as to what the plaintiff said to him respecting his arm just after the splints were removed. His testimony was that the plaintiff showed his arm, and "said he felt satisfied, and that it was all right." It is said by counsel in argument, "that the plaintiff was no expert, and he knew nothing at that time as to whether his arm was all right or not."

It is possible that the plaintiff's want of knowledge on the subject rendered his opinion expressed to this witness of very little or no real value; but this the record shows was not the ground on which its exclusion was asked, the objection to it there being simply that what he had said was "immaterial and irrelevant," which very clearly was untenable. But independently of this technical criticism of the objection made in the court below, we think the admission entirely competent evidence, and of considerable value in view of the plaintiff's testimony respecting the condition and his use of his arm, especially of the wrist and elbow joints, and of the injury caused by his fall, in endeavoring to jump over a saw-horse some time afterwards. There is no error in this particular.

The errors alleged of the instructions are four. The first one complained of was in reference to the undertaking of a physician and surgeon in the practice of his profession. It laid down the rule that "the law implies an undertaking on his part that he will use a reasonable degree of care and skill in the treatment of his patient," etc., and that he is not liable in damages for want of success, "unless it is shown to result from a want of ordinary skill and learning, and such as is ordinarily possessed by others of his profession, or for want of ordinary care and attention."

It is conceded that this would be a fair statement of the law applicable to the ordinary engagements of physicians and surgeons, wherein they undertake no more than what the law expects of them. But it is claimed that it was not applicable to the case at bar, for the reason, as we understand counsel, that the defendant's engagement was, without qualification, to effect a complete cure. We do not so understand the case as made by either the petition or the evidence. We see nothing in it respecting the rights and liabilities of the parties at all unlike those cases where, without special agreement, physicians answer to the ordinary calls upon them by the sick for treatment. No special

agreement is here either alleged or proved; no certain result from the service rendered by the defendant was asked or promised. And so, we apprehend, the plaintiff's counsel must have regarded the case at the trial, for otherwise their management of it, especially in asking an instruction upon the implication of law, which was given, couched in substantially the same language as that of the one now objected to, could not be satisfactorily accounted for. The instruction stated the rule correctly, and it was entirely applicable to the evidence before the jury.

The second instruction to which exception is taken was in these words: "A party is not negligent if he use all the skill and diligence which can be attained by reasonable means." It is objected to this, *first*, that it assumes "there was no express contract;" and, *second*, that it is indefinite and vague, and does not say what party or who it is, whether the plaintiff, defendant, or some other person. The first of these objections is sufficiently answered by what we have said respecting the nature of the defendant's engagement; and as to the second, all that need be said is, that we regard the criticism as being without any merit whatever. It would be exceedingly unjust to the jury to indulge in the presumption that they did not, or possibly could not, comprehend the meaning of the word "party" in this instruction, when taken in connection with the rest of the charge. We are unwilling to admit that they could have been sufficiently stupid to have supposed that any one but a person occupying a relation similar to that of the defendant to the plaintiff was meant.

Exception is also taken to the charge that, "A medical diploma from a regularly constituted medical college is *prima facie* evidence of ordinary skill." It is true, as claimed by plaintiff's counsel, that there was no issue to which this was applicable, and why it was requested or given does not appear. That the defendant was what he held himself out to be, a competent practitioner of the

healing art, was not disputed, but conceded by the petition. He was sued as such. The gist of the complaint against him was simply that he performed his work on the injured limb "carelessly, negligently, and unskillfully." But while the instruction was uncalled for, it is not possible that it could have prejudiced the plaintiff, and therefore is not a sufficient reason for setting the verdict aside.

And finally, it is claimed that there was error committed in giving the fourth instruction requested by the defendant, which was that, "The patient must exercise ordinary care and prudence, and obey all reasonable instructions given him by the surgeon." It is conceded that, as an abstract proposition of law, the instruction may have been sound, but it is contended that there were no facts to which it was applicable. In this contention we think counsel labor under a mistake. The defendant testified that at the time of the removal of the splints, he "told him to be careful of his arm and work it—flex it—and break these attachments of the ligaments loose therefrom the callous." This was about the middle of December. Instead of being careful, however, it is shown by the testimony of the plaintiff himself that some time in February following, and while his arm was still in a weak condition, he injured it to some extent while engaged in the sport of jumping over a saw-horse with one Boyd. On the witness stand he said of this affair, "I was on the ranch of Boyd. I think it was about the middle of February. He had a carpenter's saw-horse, and we were jumping over it, and in jumping over I struck on the top of the horse, and it broke down under me, and I struck across with my back, and fell over that way, and struck the ground with my hand, and I got up and saw the wrist was swollen a little." And on this point there is the testimony of several witnesses to the effect that the plaintiff told them in substance that "his arm was all right until he fell over a saw-horse and broke it again," that this fall "was

what threw it out of place at the wrist and elbow," etc. There was at least sufficient evidence of this sort before the jury to warrant a finding that the dislocations complained of were caused by this fall, and not by the kick which produced the fracture. There is no error complained of for which a new trial should be granted, and the judgment will be affirmed.

JUDGMENT AFFIRMED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1883.

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

PRENTIS D. CHENEY, EXECUTOR, APPELLANT, V. THEODORE L. COOPER ET AL., APPELLEES.

Bill of exceptions. A judgment was rendered in the district court on the 5th day of October, 1882, and the term closed on that day. On the 1st day of December, 1882, a bill of exceptions was submitted to the attorneys for the defendant in error, who made the following indorsement thereon: "Examined and found correct, Dec. 1, 1882," and signed the same and returned the bill to the plaintiff in error. On a motion being filed in the supreme court to quash the bill of exceptions, because not completed and signed within the time required by law, *Held*, That the defendants' attorneys, by not objecting to the bill on that ground, and certifying to the correctness of the same, had waived the objection.

MOTION to quash bill of exceptions.

Appleget & Son, for the motion.

Mason & Whedon, contra.

BY THE COURT.

A trial was had in this case at the October term, 1882, of the district court of Johnson county, and judgment rendered in favor of the defendants. On the 5th day of that month the court adjourned *sine die*. A bill of exceptions was prepared by the plaintiff's attorneys and submitted to the attorneys for the defendants, who made the following indorsement thereon: "Examined and found correct. Dec. 1, 1882," and signed the same and returned it to the plaintiff's attorneys. The bill was signed by the judge on the 4th day of December, 1882. The defendants' attorneys now move to quash the bill of exceptions, "because not completed and signed by the court within the time required by law." This motion is supported by an affidavit, in which it is stated that the bill was presented to the plaintiff's attorneys on the 1st day of December, 1882. There is no order in the record extending the time within which the bill of exceptions should be prepared and submitted to the adverse party. Nor does it appear that an order of that kind was made. The only question for determination therefore, is the effect of the indorsement on the bill by the defendants' attorneys. The statute authorizes the preparation and signing of a bill of exceptions after the close of the term at which the decision is rendered. It provides that a draft of the proposed bill shall be served upon the adverse party or his attorney within a certain specified time, and for the proposal of amendments to the bill by the adverse party. While, if insisted upon, the bill must be presented to the judge for his signature within the time required by law, yet this requirement may be waived, and when a bill containing a certificate from the adverse

party that it is correct, without any objection as to the time he received it, or that the period has elapsed within which the bill should have been prepared and submitted to him, is submitted to the judge for his signature, it is his duty to sign the same. A party must act in good faith. If he object to the bill for any reason other than it is inaccurate, he must rely upon such objections, and refuse to receive and retain the bill for examination. He cannot be permitted to say in effect, "I am satisfied with the bill as prepared," and afterwards move in this court to quash the same upon some ground that existed, and to which he made no objections at the time he indorsed his approval thereon. If a bill is presented to the adverse party out of time, the proper course is to refuse to receive it. The plaintiff in error will then be advised of the necessity of securing if possible an extension of time. The motion must be overruled.

MOTION OVERRULED.

SAME V. SAME.

1. **Usury.** A negotiable promissory note secured by mortgage, transferred to a *bona fide* purchaser without notice before due, and for value, is not subject to the defense of usury.
2. **Dismissal of action.** Where an action is dismissed by the court, without a hearing upon the merits, the order of dismissal will not be a bar to a future action.
3. **Limitation of actions.** An action upon a mortgage will not be barred until ten years from the time the cause of action accrued.

APPEAL from Johnson county. Tried below before WEAVER, J.

Mason & Whedon (*P. D. Cheney* with them), for appellant.

The judgment is not a bar. *Hull v. Blake*, 13 Mass., 155. *Weller v. Moore*, 49 Mo., 229. Wharton's Ev., § 781. 3 Blackstone, 296. Freeman on Judgments, § 261. *Home v. Brown*, 16 How., 365. *Pillow v. Elliott*, 25 Texas, 323.

T. Appleget & Son, for appellees, cited: *Hendrix v. Rieman*, 6 Neb., 523. *Covington v. Sargent*, 27 Ohio State, 233. *Day v. Valitte*, 25 Ind., 43. *Sims v. Zane*, 24 Penn. State, 243.

MAXWELL, J.

This is an action to foreclose a mortgage executed in the year 1875 by Cooper and wife upon certain real estate in Johnson county. It is alleged that Joy and wife claim an interest in the premises. The defendants admit the execution of the mortgage, but plead as defenses thereto: *First*, Usury. *Second*, Deny that William G. Davis was ever the lawful owner of said mortgage and accompanying notes, but allege that said Davis was and is an imaginary person. *Third*, That in 1878 said Davis commenced an action on said notes and mortgage in the United States circuit court for the district of Nebraska against these defendants, and a judgment was rendered thereon in their favor. *Fourth*, That the cause of action did not accrue within five years. Judgment was rendered in favor of the defendants, and the action dismissed. The plaintiff appeals to this court.

It is unnecessary to determine whether there is usury in the original contract or not, as the proof clearly tends to prove that Davis purchased the notes in question before maturity for a valuable consideration, and without notice of any defense thereto. This being so he took them free from the defense of usury. *Wortendyke v. Meehan*, 9 Neb., 221. And a *bona fide* purchaser, for value, of a negotiable promissory note secured by mortgage, before maturity and without notice, takes the mortgage as he does the note, discharged of all equities which may exist

between the original parties. *Webb v. Hoselton*, 4 Neb., 308. *Moses v. Comstock*, Id., 516. *Carpenter v. Longan*, 16 Wall., 271. *Pierce v. Faunce*, 47 Me., 507. *Potts v. Blackwell*, 4 Jones Eq., 58. *Fisher v. Otis*, 3 Chand., 83. *Reeves v. Scully*, Walk. Ch., 248.

The testimony of B. F. Perkins shows that he commenced an action of foreclosure on some of the notes in question in the district court of Johnson county in the name of Mary D'Arcy, which action was dismissed; but when the action was commenced, or the reason for dismissing the same, does not appear, and the testimony is too indefinite as against the positive evidence in favor of Davis, to show that she was the owner of the notes or any of them. It appears that in 1878 an action was commenced to foreclose the mortgage in question in the circuit court of the United States and that the court made an order requiring Davis to appear, and submit to an examination in said cause. That the time for such examination was extended until the 3d day of January, 1880, prior to which time it is alleged that Davis died. And the following order was on the 12th day of January, 1880, made in said court: "Said plaintiff having failed to comply with the order of this court entered herein on the 14th day of November, 1879, it is now ordered by the court that this cause be and the same is hereby dismissed, at the costs of said plaintiff."

On the 21st of the same month a motion was made to revive said judgment in favor of Cheney as executor of the estate, when the following order was made: "Upon due consideration of the motions of said plaintiff for an order of dismissal entered herein, and for an order of revivor herein, it is this day ordered by the court that said motions be and the same are hereby denied, and said case to stand dismissed."

It is contended by the appellees that this is a final judgment, which is conclusive of the rights of Cheney as execu-

tor of Davis, and the case of *Hendrix v. Rieman*, 6 Neb., 516, is cited to sustain that position. In that case the action was revived in the name of Jennie A. Rieman as administratrix of the estate of S. D. Rieman, deceased. The defendant answered, denying that Jennie A. Rieman was administratrix. The testimony was not preserved, and the court held that it must be presumed that the findings were based on sufficient proof. The circuit court does not find that Cheney was not executor of the estate of Davis, nor does it appear that its refusal to permit the action to be revived was upon that ground. So far as this record discloses there has been no adjudication upon that question. A judgment to be conclusive must be final and upon the merits. But where there has been no trial or no submission of the case on the pleadings, a judgment of non-suit is not conclusive. The rule is thus stated by the supreme court of the United States: "A judgment of non-suit is only given after the appearance of the defendant, when from any delay or other fault of the plaintiff, against the rules of law in any subsequent stage of the cause, he has not followed the remedy which he has chosen to assert his claim as he ought to do. For such delinquency or mistake he may be *non-pros'd*, and is liable to pay the costs. But as nothing positive can be implied from the plaintiff's error as to the subject matter of his suit, he may reassert it by the same remedy in another suit if it be appropriate to his cause of action, or by any other which is so if the first was not." *Homer v. Brown*, 16 How., 365. Wells Res Adjudicata, § 453. It is pretty clear that the judgment of dismissal in the U. S. circuit court is not a bar.

The only remaining question is that of the statute of limitations, it being contended that more than five years have elapsed since the notes became due.

In *Hale v. Christy*, 8 Neb., 264, it was held that an action to foreclose a mortgage could be brought at any time within ten years from the time the cause of action

accrued. As the statute would run against the note in five years, it is probable that after the expiration of that time the remedy would be against the mortgaged premises alone, but that question does not arise in this case.

The testimony tends to show that the plaintiff is entitled to recover, and against this testimony there is an entire failure of proof. There are a number of vague insinuations, as that Davis was a myth, that this is a mere device to evade the usury laws, etc., but no evidence upon those points. Courts must be governed by the testimony in a case, and have no authority to base a judgment on mere conjecture. The judgment of the district court is reversed, and as the testimony is all before the court a decree of foreclosure will be entered in this court in favor of the plaintiff.

DECREE ACCORDINGLY.

MATHIAS PANKO, PLAINTIFF IN ERROR, v. SAMUEL IRWIN, DEFENDANT IN ERROR.

Practice. The title to the land in controversy having been obtained by the plaintiff in error through a conveyance from the defendant, in whom it was found to be by the judgment sought to have reversed, to the end that the litigation may cease, and each party left secure in his rights, it is ordered that the petition in error be dismissed at the costs of the plaintiff in error.

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

Mason & Whedon, for plaintiff in error.

J. L. Mitchell, for defendant in error.

LAKE, CH. J.

By the judgment of the district court brought here for review, the legal title to the land in question was found to

be in the defendant in error. Since the petition in error in this case was filed, Irwin's ownership has been recognized by Panko, by taking a conveyance of the premises under him. The controversy between them respecting the title being thus terminated, to the end that the litigation may cease, it is moved on behalf of Panko that such an order may be made in the case as will secure that result, and at the same time confirm the title in him.

This can be successfully accomplished probably in either of two ways, viz., by reversing the judgment of the district court and dismissing the action brought by Irwin for the land, or by dismissing the petition in error, thereby leaving the judgment in his favor intact, to inure to Panko's benefit by force of the conveyance before referred to.

While either of these methods would be effectual in the accomplishment of the desired object, an objection lies to the former, in this, that there being no stipulation by Irwin as to the course to be pursued, it might have the effect also to prejudice him, at least in the matter of costs, to which by the judgment he is entitled. And in addition to this, it would seem to be unfair to the court below to reverse its judgment in the absence of a stipulation that it should be done, and without giving any sufficient reason for doing it. To the latter, however, there can be no serious objection made by anyone. By pursuing it, both parties would be left in possession of all their rights—Panko to the fee of the land through the conveyance from Irwin, and the latter to his costs, to which, both in the court below and here, in the absence of an agreement to the contrary, he seems to be entitled.

The petition in error will therefore be dismissed at the costs of the plaintiff in error.

JUDGMENT ACCORDINGLY.

THE B. & M. R. R. CO., PLAINTIFF IN ERROR, V. CHRISTIAN SCHLUNTZ, DEFENDANT IN ERROR.

1. **Eminent Domain:** WITNESS. The owner of land taken for right of way by a railroad company, having resided upon and improved it for several years, who swears that he knows what it is worth, is a competent witness on the question of its value.

2. ———: ———. So, too, are other persons who have resided for several years in the immediate neighborhood of the land, and who seem, upon examination, to be well informed of its situation, condition, and value.

3. ———: ———: DAMAGES. On the trial of a question of damages for an injury to growing crops, neither science nor unusual skill being involved, the witnesses should be confined in their testimony to a statement of the facts showing the injury, and should not be permitted to express opinions as to the amount of the damage or loss occasioned thereby. MAXWELL, J., dissenting.

4. **Railroad:** DAMAGES FOR RIGHT OF WAY. An award of damages, under the statute, for right of way for a railroad, embraces only those damages which may reasonably be anticipated upon the assumption that the road will be built and operated with due care and skill, and with no unnecessary injury to property outside of the right of way.

5. **Appeal from Award.** An appeal from the award of commissioners takes to the district court only those matters covered by the award. It does not include wanton or negligent injuries done to growing crops outside of the right of way during the construction of the road.

6. **Instruction to Jury.** The objection to an instruction that it is not sufficiently explicit, especially in civil cases, will not be regarded unless the matter were brought to the attention of the trial court by a request for one that was satisfactory.

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

Marquett & Deweese, for plaintiff in error, on question of damages and method of examining witnesses, cited:

Railroad Co., in Matter of, 53 Barb., 457. 35 Howard's Pr. (N. Y.), 420. *R. R. Co. v. Hummel*, 27 Pa. St., 99. *R. R. Co. v. Lazarus*, 28 Pa. St., 203. *M. V. R. R. Co. v. Doran*, 17 Minn., 188. *R. R. Co. v. Payne*, 16 Barb., 273. *R. R. Co. v. Young*, 33 Pa. St., 175. The damages are to be shown by facts, but must be estimated by the jury, and not of opinions of witnesses. *Evansville R. R. v. FitzPatrick*, 10 Ind., 120. *Farrard v. C. R. R.*, 21 Wis., 435. *Harrison v. Iowa R. R.*, 36 Ia., 323. *Alabama R. R. v. Burkett*, 42 Ala., 83. *F. E. & M. V. R. R. v. Whalen*, 11 Neb., 587. *City of Parsons v. Lindsay*, 26 Kan., 430. Damages outside of right of way. *Eaton v. R. R.*, 59 Me., 520. Mills on Eminent Domain, sec. 220. *Perry v. Worcester*, 6 Gray., 544.

Chapman & Beeson, for defendant in error, on competency of witnesses, cited: *Smalley v. R. R.*, 36 Iowa, 571. *Snyder v. R. R.*, 25 Wis., 60. *Dalzell v. Davenport*, 12 Iowa, 440. Damages: *R. R. v. McComb*, 60 Me., 290. *R. R. v. McClure*, 29 Ind., 536. *R. R. v. Lee*, 13 Barb., 169. *Mason v. R. R.*, 31 Me., 215. Mills on Eminent Domain, secs. 165, 168. *Cooper v. Randall*, 59 Ill., 317.

LAKE, CH. J.

The matters assigned for error, and relied on by counsel as cause for a reversal of the judgment, are found in the evidence on the question of damages, and in the instructions of the court to the jury. The first point made by counsel for the plaintiff in error in their brief is, that the defendant and certain of his witnesses were permitted "to testify as to the value of the land before and after the location of the road, without showing themselves qualified to fix such values."

The defendant himself was the first witness called. He was subjected to a very lengthy examination upon the question of his competency to testify as to the value of the

property. He swore explicitly that he knew its value, and from the fact that he had lived there for twelve years, had made the improvements upon it, and appears to have possessed ordinary intelligence at least, I am satisfied he was qualified to give his opinion on that point. So, too, of the other witnesses, most of whom were residents of the immediate neighborhood, and all of them well acquainted with the property for several years, and evidently as well informed as to its situation, condition, and value as any that could have been called. In this respect there was no error.

The second objection urged to the ruling of the court on the admissibility of evidence is, that several of the witnesses were permitted, against objection, to give their opinions as to the amount of damages which the defendant had sustained on account of the location of the road, and its subsequent construction by the railroad company.

It appears from the bill of exceptions that several witnesses were examined as to the injury done to certain growing crops, outside of the right of way, during the construction of the road, by those engaged in it. In this connection several witnesses were permitted to give their opinions directly as to the amount of the damages done. Referring to some growing rye, the defendant himself was asked: "What damage was done to the crop?" The answer was "About ten dollars." To a similar inquiry respecting some wheat, this witness answered: "The damage to the wheat crop was eighty-five dollars." Testimony of like import was given by two or three of the other witnesses, one of them, Henry Inhelder, swearing that the damage to the wheat was $100. This was received under objections as to its competency.

In ruling upon this testimony, I think the court erred. Even if those injuries outside of the right of way were a proper subject of inquiry in this suit, which, however, I do not admit, the amount should have been left exclusively to

the jury to find from descriptions given by the witnesses of the crops, their value, and the particular injuries done to them. *Evansville, etc., Railroad Co. v. Fitzpatrick*, 10 Ind., 120. *Ferrand v. The C. & N. W. R. R. Co.*, 21 Wis., 435. *Lincoln v. Saratoga and Schenectady R. R. Co.*, 23 Wend., 425. *Alabama & F. R. R. Co. v. Burkett*, 42 Ala., 185. *Harrison v. R. R.*, 36 Iowa, 323. The question of the amount of the damages sustained by the trespass upon these crops was not one which called for expert testimony. Neither science nor unusual skill was involved in its solution. It was one which the jury, when the particulars of the injuries were brought to their notice, were quite as competent to answer as were the witnesses; and besides, its decision was within their own exclusive jurisdiction, which ought not to have been invaded.

But I am of opinion that back of this question of the competency of evidence lies the fact that this matter of damages by trespasses upon property outside of the right of way, was not then before the court for decision. The case had been brought there by an appeal from an award of damages by commissioners, under the statute, for the right of way for a railroad across the defendant's land. This award embraced only those damages which could then have been reasonably anticipated upon the assumption that the road would be constructed and operated with due care and skill, and with no unnecessary injury to crops or property not within the right of way. Pierce on Railroads, 218. It did not embrace those seemingly wanton or negligent injuries to growing crops, outside of the right of way, by driving teams hitched to plows, scrapers, etc., through them, described by several of the witnesses. The appeal brought to the district court, for decision by a jury, precisely the same questions that were covered by the award, and none other. Matters which the commissioners could not properly have considered to enhance the amount of their award were not proper to be given to the jury to affect their verdict.

In the charge of the court to the jury I see nothing of which complaint can reasonably be made, especially by the plaintiff. The third instruction given at the request of the defendant seems to be regarded by counsel as clearly erroneous. By it the jury were told to consider "any facts which, from the testimony, they should find injured the value of the premises, by a proper and legal use of the road." There was no error in this instruction. It was objected to, it seems, "in view of the character" of some of the testimony before the jury, especially that portion referring to the damages to the growing grain, to which I have already adverted. The error, it seems to me, lies not in the instruction, but rather in the admission of the illegal testimony, against objection, respecting the trespasses to the growing crops.

The objection that one of the instructions was not sufficiently explicit cannot be sustained. In a civil case especially, before this complaint will be regarded, the matter must have been brought to the attention of the trial court by a request for a satisfactory instruction, which was refused. *The Sioux City R. R. Co. v. Brown*, 13 Neb., 317.

For the errors I have pointed out, by which the verdict may have been increased to the amount of one hundred and ten dollars above what it would otherwise have been, the judgment should be reversed and a new trial granted, unless a *remittitur* to that extent be duly entered. If, however, such *remittitur* be filed, the judgment so modified should be affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., dissented from the third point, as stated in the syllabus.

WILLIAM H. ASHTON, APPELLANT, AND GEORGE L. SMITH, PLAINTIFF IN ERROR, V. CLAUDIUS JONES ET AL., APPELLEES AND DEFENDANTS IN ERROR.

1. **Assignment**: ASSIGNOR: ASSIGNEE. The assignor of property, assigned for the benefit of creditors generally, has no such interest in the distribution as will enable him to maintain an action for an injunction to restrain its appropriation by a single creditor through proceedings in attachment.

2. ———: ———. To such an action the assignee has no right, on his own motion, to come in as a defendant.

3. **Equity.** A defendant in an attachment suit cannot have the aid of equity to prevent a sale of the attached property under an order of the court, on a ground that would have been equally available to him in that suit.

Two cases on error and appeal from the district court of Seward county. Heard below before GEORGE W. POST, J.

D. C. McKillip and Harwood & Ames, for plaintiffs.

Hastings & McGintie and *George W. Lowley*, for defendants.

LAKE, CH. J.

This record comes here both by appeal and by proceedings in error. The appeal is by Ashton, the original plaintiff, and the petition in error by Smith, who sought, unsuccessfully, to be let in as a party defendant.

Ashton was a member of a co-partnership or firm, composed of himself and Peter Hinnegan, and known as Hinnegan & Ashton. The object of the action was twofold. *First*, to obtain an injunction against the confirmation of a sale of certain real estate belonging to the firm, which had been seized in attachment and sold by order of the court as the individual property of Hinnegan, who held

the legal title in his own name, at the suit of the State Bank of Nebraska against said Hinnegan and Ashton, on a partnership indebtedness; and, *second*, for an accounting between himself and Hinnegan respecting the partnership business, and the application of said real estate toward the payment of the debts of the firm, it having been rendered insolvent by the absconding of Hinnegan with a large sum of its money.

Smith's claim to be made a party rested upon the fact that, after the absconding of Hinnegan, Ashton, acting for the firm, had made to him an assignment of the partnership effects, including the property in question, for the benefit of all of their creditors, his object being the preservation of the estate of the insolvents for a ratable distribution, conformable to the trust he had assumed. The fact of Ashton having made the assignment was not disclosed by his petition, but was brought into the case by the answer of the defendants.

In the orderly examination of the questions presented, it will be best to inquire first whether Ashton is in an attitude to maintain his action. The defendants contend that he is not, and so the court below seems to have held. Two reasons are urged why he cannot maintain the action. *First.* Because by his deed of assignment, he had divested himself of all interest in, and control of, the property, and conferred them upon the assignee. *Second.* Having been a party defendant in the attachment suit, and thus had his day in court respecting the disposition to be made of the property, he cannot now be heard to question the correctness of the judgment by which the sale was made.

It is quite possible that there might be circumstances which would entitle an assignor to the aid of the equity power of a court in the proper enforcement of such a trust; but, however that may be, it is certain that none such are here shown. Doubtless, Ashton has a pecuniary interest in having the property of the partnership go toward the pay-

ment of the firm debts; but whether it shall be taken by a single one of the creditors, or distributed among them *pro rata*, cannot concern him. By the sale under the attachment, the proceeds will go to the State Bank, a creditor of the firm, whereby the result to Ashton will be essentially the same as if a distribution were to be made by the assignee. This appropriation of the property by a single creditor of the firm may be of some consequence to the others, but I fail to see how it can possibly be of any to the assignor. I conclude, therefore, that as against the State Bank especially, the plaintiff exhibits no such interest in the object to be attained by the injunction as will enable him to maintain the action. And, inasmuch as the claim of the bank will exhaust the property covered by the attachment, it is unnecessary to inquire as to the other defendants—the individual creditors of Hinnegan—in this connection.

But how does the fact that Ashton was a party defendant in the attachment suit affect his present standing before the court? Is he entitled to equitable relief as against a judgment to which he was a party? In that suit, the property in question was attached, and by the judgment of the court, ordered to be sold as belonging to Hinnegan alone. In obedience to that judgment, a sale was made without objection by Ashton to this or any of the steps in the attachment proceedings leading up to it. Having made no objection in that case, during its progress, to the character impressed upon the property by the judgment of the court, nor to the disposition made of it, I am of opinion that he cannot now be heard to do so as to any matter of which he could have availed himself there. Equity will not relieve against a judgment at law, where the case in equity proceeds upon a defense equally available at law. Story's Equity Jurisprudence, § 894. No special circumstance is shown to take the case out of this rule.

The application of Smith, the assignee, to be let in as a

party defendant, was rightly refused. In this particular, no principle of law was violated. As against him, nothing was sought by the plaintiff, nor could any interest which he had in the property as assignee have been at all affected by granting the prayer of the petition. Surely, the dismissal of the action did him no harm. This being so, it was the right of the court, under sec. 46 of the code, to refuse his application, and without delay determine the controversy between the parties before it. That section provides that: "The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in." This provision fully sustains the court below in the ruling of which Smith complains, although it is cited by his counsel in support of his claim to be made a party.

His counsel refer also to sec. 144 in support of his claim. This section, however, has reference solely to the amendment of pleadings, etc., and has no application here. It is possible that Smith has an interest in the property, which would be a proper subject of litigation. If so, and he desires to litigate it, he should resort to an independent action, and not seek to do so by championing the failing cause of one who has not.

For these reasons, I am of opinion that the judgment of the district court is right, and should be in all things affirmed.

JUDGMENT AFFIRMED.

JOHN HOLLENBECK, PLAINTIFF IN ERROR, V. ELIZA K. TARKINGTON, DEFENDANT IN ERROR.

1. **Practice:** MOTION TO DISMISS PROCEEDINGS IN ERROR. A motion to dismiss proceedings in error will not be sustained on the ground that the motion for a new trial was not made within the time limited by the statute. Nor will it for the reason that the bill of exceptions was not settled within the statutory time.
2. **Limitation:** PROCEEDINGS IN ERROR. Proceedings in error in the supreme court must be commenced within one year from the date of the rendition of the judgment complained of, without regard to the time when the motion for a new trial was decided.

MOTION to dismiss petition in error.

W. J. Connell, for the motion.

O. H. Ballou, C. H. Brown and *E. M. Bartlett, contra.*

LAKE, CH. J.

This case is a proceeding in error brought to reverse a judgment of the district court of Douglas county, which was rendered April 2d, 1880. The petition in error was filed August 19th, 1881. A motion is now interposed by the defendant in error to dismiss the petition on three distinct grounds. *First.* Because the motion for a new trial was not filed within the time limited by the statute. *Second.* Because the bill of exceptions was not settled within the statutory time. *Third.* Because the proceeding in error was not commenced within one year after the judgment which it is sought to have reversed was rendered.

As to the first two grounds we will only say that while they might be very good reasons for simply quashing the bill of exceptions relative to the trial, we have not hitherto gone so far as to hold them sufficient to warrant us in dismissing the case. Although a bill of exceptions may pos-

sibly embody all of the grounds on which a reversal of the judgment is sought, and but for which there would necessarily be an affirmance, still we regard it as the better practice, where it is desired to raise the question of its validity, to do so by a motion to quash. By pursuing this course we are relieved of the duty of examining the record to ascertain whether it may not present, as records not unfrequently do, other questions for consideration than those depending on the bill of exceptions. The motion, therefore, will not be sustained upon either of the first two grounds.

The third ground or reason assigned for the motion is based upon sec. 592 of the code of civil procedure, which provides that: "No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment or making of the final order complained of," etc. This section is, doubtless, applicable here. And the supreme court of Ohio, in considering a similar provision of the code of that state, by which the time for commencing proceedings in error was limited to three years, held it to be mandatory. *The Schooner Marinda v. Dowlin*, 4 Ohio State, 500.

But it is urged by counsel for the plaintiff in error that, inasmuch as the motion for a new trial was not filed until after the rendition of the judgment, and several months elapsed before it was finally ruled upon, the time of the limitation did not commence to run until the order overruling the motion was made. And this view we were disposed to adopt if it could have been done with due regard to the section of the statute from which we have quoted.

We are not aware that this precise question has been considered in Ohio, from whence our code was directly borrowed. But we find that the supreme court of Missouri has. In the case of *Ham v. St. Louis Public Schools*, 34 Mo., 181, the very question here presented, under a

similar provision of statute, was decided, but, as appears by a divided court, and it was held "that the time within which the writ of error may be brought should date from the day of the rendering of the judgment, without regard to the motion for a new trial." We take this to be a correct view of the effect of the statute, and must so hold in this case. The fact that the counsel for the defendant in error stipulated for a continuance of the case cannot change the result. By that act he only assented to a postponement of the hearing of whatever questions might be properly before the court, and it could not have the effect of waiving the question of jurisdiction over the subject matter of the proceeding.

MOTION SUSTAINED.

HENRY P. WEYRICH ET AL., PLAINTIFFS IN ERROR, V. JOHN F. HOBELMAN ET AL., DEFENDANTS IN ERROR.

Usury. Promissory note in the following form:

"BEATRICE, NEB. June 27, 1878.

"On or before the first day of January, 1880, we promise to pay to the order of P. Weyrich & Co., one hundred dollars, with interest at ten per cent from date until maturity, the principal to draw interest at the rate of twenty-four per cent per annum from maturity, until paid, as compensation and damages for non payment thereof." *Held*, In an action thereon, that the note was not usurious on its face, the twenty-four per cent being construed as a penalty, and the plaintiffs held entitled to receive interest at the legal rate. *See Conrad v. Gibbon, 29 Iowa, 120.*

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

Pemberton & Forbes, for plaintiff in error, cited: *Conrad v. Gibbon*, 29 Iowa, 120. *Downey v. Beach*, 78 Ill.,

53. Tyler on Usury, 204–217. *Bullock v. Taylor*, 39 Mich., 137.

R. S. Bibb, for defendant in error, cited: *Mo. Valley Ins. Co. v. Kittle*, 1 McCrary, 234. *Dow v. Updike*, 11 Neb., 95.

COBB, J.

This action was brought on a promissory note, of which the following is a copy:

"$100.00. "BEATRICE, NEB., June 27, 1878.

"On or before the first day of January, 1880, we promise to pay to the order of P. Weyrich & Co., one hundred dollars, with interest at ten per cent from date until maturity, value received; and if not paid at maturity, the principal to draw interest at twenty-four per cent per annum from maturity until paid as compensation and damages for non-payment thereof." Signed by defendants.

Defendants answered, setting up usury as a defense. A trial was had to the court, a jury being waived, who found for and rendered judgment in favor of the plaintiff, in the sum of one hundred dollars, and adjudged the costs against the plaintiffs. Plaintiffs bring the cause to this court on error.

No testimony outside of the note itself was offered by either party, so the question is fairly presented—is the contract, as evidenced by the note, an usurious one?

The provisions of the statute applicable to the question are as follows:

Chap. 34, General Statutes, sec. 1. Any rate of interest which may be agreed upon, not exceeding twelve dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money. * * *

Sec. 5. 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, and the defendant shall recover costs. * * *

Were the question an open one, to be decided upon reason unaided by authorities, the writer would probably be of opinion that the agreement to pay twenty-four per cent interest after maturity renders the contract usurious. But the question is not an open one, it having been often treated of by text writers of undoubted authority, and decided by the highest courts of England from the time of James the first, and by the supreme courts of several of our sister states, and in no case which has come to my knowledge has such a stipulation been held to taint the contract with usury. Parsons in his work on Notes and Bills, vol 2, p. 413, says: "So if the borrower agrees to pay the sum borrowed at a time certain, or on demand, with lawful interest, and if he fail to do so, so much more by way of penalty, even if it be called extra interest, this is not such usury as would affect the contract, because the borrower has a right to pay the principal and avoid the penalty. We should say, however, that if he did not pay the principal, nothing more than that with lawful interest could be recovered from him." In a note to the above paragraph the author cites numerous cases, English and American, in which the law of the text is fully sustained. See also Tyler on Usury, pp. 204 to 217, and the numerous authorities there cited. Taking the law, then, as it seems to be settled, the plaintiffs were entitled to a judgment for the face of the note, with interest thereon at the rate of ten per cent per annum and costs of suit.

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

REVERSED AND REMANDED.

WILLIAM H. HAWLEY, PLAINTIFF IN ERROR, V. THOMAS ROBESON, DEFENDANT IN ERROR.

1. **Practice in Supreme Court:** BILL OF EXCEPTIONS. Upon a hearing in this court in a case originating before a justice of the peace, and taken to the district court by petition in error, an objection as to the sufficiency of the bill of exceptions taken before the justice, not made in the district court, but raised for the first time in this court, will not be considered.

2. **Forcible Entry and Detention:** NOTICE TO QUIT. The statutory notice to leave the premises required to be given in an action of forcible entry [detention] against a tenant holding over his term, may be served as well before as after the expiration of the term. *Leutzey v. Herchelrode*, 20 Ohio State, 334.

3. **Evidence.** Where a paper is shown to have been destroyed, it is not necessary to prove that it has been searched for as a foundation for the introduction of parol testimony of its contents.

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

C. Hollenbeck and *J. E. Frick*, for plaintiff in error.

Demand must be made after expiration of lease, and while the tenant holds unlawfully. *Prickett v. Riller*, 16 Ill., 96. *Doran v. Gillespe*, 54 Ill., 366. *Clasp v. Paine*, 18 Maine, 264. *Smith v. Rowe*, 31 Maine, 212. The parol evidence of contents of notice to quit was inadmissible. 1 Greenleaf, § 558.

William Marshall, for defendant in error, cited: Maxwell's Justice, 249. Swan's Justice, 249. *Leutzey v. Herchelrode*, 20 Ohio State, 334. Cases cited by plaintiff are inapplicable, being rendered under statutes different from ours. *Secor v. Pertana*, 49 Ill., 525. *Preble v. Hay*, 32 Maine, 456.

COBB, J.

This is an action of unlawful detention tried before a justice of the peace of Dodge county. Judgment was rendered for the plaintiff. The cause was thereupon taken to the district court on error, where the judgment of the justice was affirmed, and the defendant brings the cause to this court on error.

The plaintiff (defendant in error) moved in this court to strike the bill of exceptions from the files, and assigned sundry grounds for such motion. I do not think that it would be conducive to a correct practice to examine these grounds on their merits. It does not appear that any exception was taken to the bill of exceptions in the district court. The case is brought here for a review of the rulings and judgment of the district court, in which it is alleged there is error. While it is unnecessary to say here—and it is not said that this court will in no case consider objections or points not raised in the court immediately below—yet it may be safely said that no technical point, or one involving mere matter of form, will be considered by this court when raised here for the first time. The objections to the bill of exceptions that it was not *sealed* by the justice, that it was not entered at large upon the docket of the justice, and that the justice did not certify to its correctness, are entirely technical, and, not having been raised in the district court, cannot be heard here.

It appears from the record that the defendant in error by parol lease let to the plaintiff in error a house and lot for the term of one year, commencing on the 12th day of April, 1880, and ending the 12th day of April, 1881. On the 4th day of April, 1881, defendant in error served on the plaintiff in error the usual statutory notice to quit, and on the 14th day of the same month commenced the action.

This presents the question whether the notice provided

for in section 1022 of the code may be served on a tenant before the end of his term, and while his lease is in full force, and rents paid and all conditions fulfilled. The statute, sec. 1022, p. 648, Comp. Stat., requires as a necessary condition precedent to the commencement of an action for the forcible entry and detention of property, or for its forcible detention only, that the party desiring to commence such action "notify the adverse party to leave the premises * * * which notice shall be served at least three days before the commencement of the action." This provision of our statute with many others was adopted from the statutes of Ohio. The supreme court of that state has passed upon the point precisely as raised and presented here, and upon quite similar reasoning of counsel. That court, in the case of *Leutzey v. Herchelrode*, 20 Ohio S., 334, cited by both parties in this case, held that the notice served May 31—the lease under which the defendant held not expiring until June 30—was sufficient. We see no sufficient reason why we should not follow that case as well to its conclusion as in the brevity of its statements.

The second point raised by the brief of the plaintiff in error is, that the court erred in permitting plaintiff below to show by parol the contents of the written notice to quit by defendant in error, on plaintiff in error. It appears by the bill of exceptions that the first witness introduced upon the trial was the defendant (plaintiff in error) who was sworn on the part of the plaintiff, and testified as follows: "I am defendant in this action. The plaintiff served a notice upon me; the notice was in writing. I have not the notice with me; I tore it up. My recollection is that when plaintiff served the notice on me, I told him 'Tommy,' meaning plaintiff, 'this don't amount to anything,' and I tore it up and threw the pieces on the floor before this suit was commenced." Thereupon the plaintiff was sworn and testified as follows: "I am the plaintiff. I served notice on the defendant. I have not the original

notice or copy of it." Plaintiff's counsel then asked; "What did that notice contain?" The defendant objected, among other things, that no proper foundation had been laid, etc., but the objection was overruled by the justice, and the witness answered: "The notice was in writing and signed by me. It described the premises the same as in the complaint. The notice was the ordinary three days notice. It said he was to quit on or before the 12th day of April." On his cross-examination witness answered: "I gave him the usual notice to quit. Judge Ghost wrote it out of the statute; it was in the usual form. It was the usual three days notice."

From the above it is evident that instead of serving the notice by copy, the plaintiff delivered the original to the defendant, who immediately destroyed it, so that at the time of the trial, neither the original notice nor any copy of it was in existence. Hence there was no reason for requiring the plaintiff to testify as to an exhaustive search for the original paper before allowing him to testify as to its contents. True, the notice was never served as required by law, but the defendant having received, read, and destroyed it, was chargeable with a knowledge of its contents the same as though it had been properly served.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. WILLIAM P. SQUIRES, v. JOHN WALLICHS, AUDITOR OF PUBLIC ACCOUNTS.

1. **Legislature:** CLERKS TO COMMITTEES. There is no law in this state authorizing a standing committee of either house of the legislature to employ a clerk, therefore a voucher for services so rendered, duly signed by the officers of the senate, will not authorize the auditor to draw his warrant for the amount so certified.
2. ——: ——. A clerk rendering services to two committees is not entitled to double compensation therefor.

ORIGINAL application for mandamus.

Brown & Ryan Brothers, for the relator.

Isaac Powers, Jr., Attorney-General, for the respondent.

MAXWELL, J.

This is an application for a writ of mandamus to compel the state auditor to draw his warrant in favor of the relator upon the following voucher:

"Legislative Voucher, 18th Session.

"The State of Nebraska,

"To W. P. Squires, Dr.

"For services as clerk judiciary from 2d day of Jan. to 27th day of Feb., 1883.

"61 days, at $3 per day	$183 00
"Mileage 100 miles, at 10 cents per mile	10 00
"Total	$193 00
"Deduct and drawn	60 00
"Balance due	$133 00

"I hereby certify that the above account is correct and just.

"(Signed) ALFRED W. AGEE,
President of the Senate.

"Attest:
"GEO. L. BROWN,
"Secretary of the Senate."

Upon presentation of the voucher to the defendant, he refused to recognize the right of the relator to compensation thereon because he had already drawn the sum of $243 as clerk of the committee on privileges and elections for the same time for which he rendered services as clerk of the judiciary committee. It is admitted that the relator was employed under a resolution of the senate authorizing each committee thereof to employ such clerks as it deemed necessary for the transaction of its business, and that the relator served for the time stated under such employment. Did the committee thus have authority to employ clerks?

Sec. 4, Art. III. of the constitution, reads as follows: "The terms of office of members of the legislature shall be two years, and they shall each receive for their *services* three dollars for each day's attendance during the session, and ten cents for every mile they shall travel in going to and returning from the place of meeting of the legislature on the most usual route: Provided, however, That they shall not receive pay for more than forty days at any one session; and neither members of the legislature nor employees shall receive any pay or perquisites other than their per diem and mileage."

Sec. 2 of chapter 48 of the Compiled Statutes, is as follows: "That the officers and employees of the senate shall consist of a president, secretary, assistant secretary, sergeant-at-arms, doorkeeper, enrolling clerk, engrossing clerk, chaplain, and one page."

Sec. 12 provides that: "The officers and employees of the house of representatives shall consist of a speaker, chief clerk, assistant clerk, sergeant-at-arms, doorkeeper, enrolling clerk, engrossing clerk, chaplain, and two pages."

Section 13 provides that: "There shall be paid to each of the several officers and employees named in this act, for the official services rendered by them under the provisions of this act, the following sums and no more: The president of the senate and speaker of the house of representatives

shall each be entitled to receive the sum of three dollars per day; the secretary and chief clerk, the sum of four dollars per day; the assistant clerks, the sum of four dollars per day; the sergeant-at-arms, the sum of three dollars per day; the doorkeeper, the sum of three dollars per day; the chaplains, the sum of three dollars per day; and the pages, the sum of one dollar and fifty cents per day; enrolling and engrossing clerks, three dollars per day."

Section 14 provides that: "It shall be the duty of the president of the senate and speaker of the house of representatives to preside over their respective houses, to keep and maintain order during the sessions thereof, and to do and perform the duties devolving on them by general parliamentary usage and the rules adopted by the two houses. It shall be the duty of the chief clerk of the house of representatives and the secretary of the senate to attend the sessions of the respective houses, to call the rolls, read the journals, bills, memorials, resolutions, petitions, and all other papers or documents necessary to be read in either house, to keep a correct journal of the proceedings in each house, and to do and perform such other duties as may be imposed upon them by the two houses, or either of them. The assistant clerk and assistant secretary shall be under the control and direction of the chief clerk and secretary respectively, and shall assist them in the proper discharge of their duties, and shall do and perform such other services as may be directed by the two houses or either of them. It shall be the duty of the sergeant-at-arms to enforce the attendance of absent members, when directed properly so to do, to arrest all members or other persons when lawfully authorized so to do, to keep and preserve order during the session of each house, to convey to the post-office the mail matter for the said members, and to receive from the said office the mail matter for the said members, and to deliver the same to them on each morning of the session; to obey and enforce the orders of the presiding

officers, and to do and perform such other duties as may be enjoined on them by law and the respective houses. It shall be the duty of the doorkeepers to prepare and keep in order the senate chamber and hall of the house, including cleaning and warming the same; to attend to and keep closed the door and bar of the respective houses, unless otherwise directed by the presiding officers thereof; and to do and perform such other duties as may be enjoined on them by either house. It shall be the duty of the engrossing clerk to correctly engross such bills as may be required to be engrossed by the committee on engrossed and enrolled bills, and to perform such other duties as may be required by either house. It shall be the duty of the enrolling clerk to correctly and neatly enroll all such bills as may be placed in his hands therefor, and to perform such other duties as may be enjoined on him by either house. It shall be the duty of the chaplains to open the sessions of each house with prayer, and to perform such other duties as may be imposed upon them. And it shall be the duty of the pages to act under and as directed by the presiding officers of the respective houses. It shall also be the duty of the sergeant-at-arms to procure a national flag and to place the same on the top of the capitol building, there to be kept during the time each or either of the two houses shall be in session, and after the adjournment of the two houses the said flag shall be taken down and kept down until the opening of the session of one of the two houses."

It will be seen that the constitution and statute fix the number of officers and employees of the legislature and provide what their duties shall be and the amount of compensation. It will not be claimed that without any additional legislation either house can employ clerks of committees and direct their payment out of the public treasury. The legislature, although the law making power, is itself regulated and controlled by law. Therefore, if additional employees are desired, the law must be so framed as to authorize their employment.

But it is said that such authority is found in section 2, chapter 101 of the 18th session laws, 1883, which is as follows: "The auditor of public accounts is hereby authorized and required, upon presentation of the certificate of the lieutenant-governor or speaker of the house of representatives, stating that the party mentioned in said certificate is entitled to compensation as per diem and mileage to the amount allowed by law, to draw his warrant on the general fund for the amount so certified to be due; provided, the said amount as certified shall, after examination and adjustment by the auditor of public accounts, and approval thereof by the secretary of state, be found to be correct."

It is claimed on the part of the relator that the section above quoted excepts from review by the auditor all claims expressly required by law to be audited and settled by other officers and persons, and that as the officers of the senate have certified to the correctness of the account, the approval of the auditor is merely formal.

Sec. 22, Art. III. of the constitution provides that: "No allowance shall be made for the incidental expenses of any state officer, except the same be made by general appropriation, and upon an account specifying each item. No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon, and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution. The auditor shall, within sixty days after the adjournment of each session of the legislature, prepare and publish a full statement of all moneys expended at such session, specifying the amount of each item, and to whom and for what paid."

Section 9 provides that bills making appropriations for the pay of all members and officers of the legislature, and

for the salaries of the officers of the government, shall contain no other provision.

Section 9, Art. IX., requires the legislature to provide that *all* claims upon the treasury shall be examined and *adjusted* by the auditor and approved by the secretary of state. Construing these provisions together, it is very clear that the voucher of the officers of the senate will not authorize the auditor to draw a warrant in favor of a party unless the claim is authorized by law. Thus, the compensation of members is fixed at $3 per day. Now suppose the legislature made an appropriation for the payment of articles to be donated to the members in addition to the compensation provided for in the constitution, could the auditor be compelled to draw his warrant for the articles so donated? That he could not will readily be seen, because by the act of drawing his warrant he in effect certifies that the claim is authorized by law. The law imposes upon him the duty of examining claims and makes him responsible for warrants improperly drawn, and in cases of doubt he should refuse to act unless the claim is adjudged valid.

In the case under consideration, he properly refused to draw the warrant sought, as, even if the claim is valid, the relator has already drawn $243 as clerk of another committee for services rendered during the same time that the alleged services in this case were rendered. These services, whatever they were, were supposed to be rendered to the state and not to the committee, and the state has already more than paid the relator for the same. There is no statute fixing the pay of clerks of committees or authorizing them to receive three dollars or any sum per day. The act approved Jan. 26th, 1883, "To provide for the payment of officers, members, and employees of the 18th session of the legislature," merely authorizes the payment of such employees whose compensation is fixed by law. The certificate of the presiding officer of either house stating that the party mentioned "is entitled to compensa-

tion as per diem and mileage to the amount allowed by law," does not authorize the auditor to draw a warrant for any sum whatever, unless the statute has fixed the amount of such compensation, which in the case under consideration it is clear had not been done.

A person accepting an election to either house of the legislature impliedly pledges himself to devote his time and services during the session to the interests of the state. The duties are of such a nature that they cannot be performed by proxy. The members are chosen because of their supposed fitness for the position and their knowledge of the wants of the people of the state, and are supposed to represent their views in the passage of bills. These services must be personally performed by the members; and clerks of standing committees of the legislature are unknown to our law. And until such law is enacted there is no authority either to employ such clerks, or to pay for their services. It follows that the writ must be denied and the proceedings dismissed.

JUDGMENT ACCORDINGLY.

WILLIAM J. WELLS AND L. G. CUMMINS, PLAINTIFFS IN ERROR, V. GIB TURNER AND AUGUSTUS SMITH, DEFENDANTS IN ERROR.

1. **Justice of Peace:** BILL OF PARTICULARS. Where a promissory note was left with a justice of the peace who copied the same into his docket and issued summons thereon, *Held*, A sufficient bill of particulars.

2. ——: JUDGMENTS. A justice of the peace having in his possession the evidence of indebtedness upon which the action is brought may render judgment on such evidence of indebtedness in the absence of any of the parties.

3. ———: ———: ERROR WITHOUT PREJUDICE. A justice must wait one hour after the time set for trial before rendering judgment against a defendant by default; but if he render judgment before the expiration of the hour, and the defendant does not thereafter appear, and it is apparent that there is no defense to the action, it is error without prejudice.

4. **Summons:** SERVICE. Where two defendants were served with summons separately, *Held*, That the words "with all the endorsements thereon," although appearing but once in the return of the officer, applied to both copies of the summons.

ERROR to the district court of York County. Tried below before GEO. W. POST, J.

Sedgwick & Power, for plaintiffs in error.

Hale & Conner, for defendants in error.

MAXWELL, J.

This action was commenced before a justice of the peace upon a promissory note. The justice copied the note into his docket as a bill of particulars and issued summons thereon, returnable April 22, 1881, at 10 o'clock A M. The summons was served on the defendants in the justice court (plaintiffs in error). At the time set for the trial none of the parties plaintiff or defendant appeared, but the justice having the note in his possession and no defense being made to the same, he proceeded to render judgment thereon.

In this it is claimed there is error. A justice having in his possession the evidence of indebtedness upon which suit is brought may, after waiting one hour after the time set for the hearing of a cause, proceed with the trial in the absence of the plaintiff. The statute provides that the justice shall wait one hour after the time set for the trial before proceeding therewith. And this should be done in all cases in order that defendants may have an opportunity to make their defense. But if there is no defense to an action, the fact that judgment was rendered before the expiration

of the hour will be error without prejudice. If the defendants below had appeared within one hour after the time stated in the summons and asked to make their defense, and the justice had refused to permit them to do so, the judgment would have been erroneous. But as there was no such request and apparently no defense they were not prejudiced.

Some objection was made to the service of the summons. The return is as follows:

"STATE OF NEBRASKA, } ss.
"YORK COUNTY, }

"Received this summons on the 14th day of April, 1881, and I hereby certify that on the 16th day of April, 1881, I served the within writ of summons on the within named L. G. Cummins by leaving a copy thereof at his usual place of residence. W. J. Wells, delivering to him a true and certified copy of same with all endorsements thereon.

"J. P. MILLER, Sheriff.
"By W. W. SHUFELT, Deputy."

The words "with all the endorsements thereon," were evidently intended to apply to the copy of each defendant. There is no claim that the copy served upon Cummins was not properly endorsed. But even if this return was defective, it would not avail the plaintiffs in error, because an amended return was afterwards made which fully meets their objections. It is clear that justice has been done and the judgment is affirmed.

JUDGMENT AFFIRMED.

LOUISA DEGERING, PLAINTIFF IN ERROR, V. SABINA FLICK AND JOSEPH FLICK, DEFENDANTS IN ERROR.

Replevin: FINDING: JUDGMENT. In an action of replevin, where the goods had been delivered to the plaintiff, the justice before whom the case was tried made a finding as follows: "I do find for the plaintiff and against the defendants for the goods and for all the costs of this action by her expended." *Held*, Sufficient to sustain a judgment in favor of the plaintiff.

ERROR to the district court for Adams county. Tried below before MORRIS, J.

Batty & Ragan, for plaintiff in error.

Tanner & Capps, for defendants in error.

MAXWELL, J.

In January, 1883, the plaintiff brought an action of replevin against the defendants before a justice of the peace of Adams county, to recover certain wearing apparel. The property was taken on the order of replevin, and delivered to the plaintiff upon her giving the undertaking required by law. On the trial of the cause the justice made the following finding and judgment: "I do find for the plaintiff and against the defendants for the goods and for all the costs of this action by her expended. Wherefore it is by me considered and adjudged that the plaintiff do have and recover from the defendants the peaceful possession of the goods here in controversy, together with all the costs of this action herein expended by plaintiff and taxed at $8.10, and she have execution hereon." The case was taken on error to the district court, the errors assigned being that the finding would not sustain the judgment. The district court reversed the judgment of the justice and held the case for trial. The plaintiff brings the case into this court by petition in error.

Sec. 1042 of the code provides that: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on trial, or on inquiry of damages, they shall assess adequate damages to the plaintiff for the illegal detention of property, for which, with costs of suit, the justice shall render judgment against the defendant."

The finding in this case is informal but it is not void. Properly the finding should have been that he found the right of property and right of possession thereof at the commencement of the action in the plaintiff, and then have assessed the damages. But liberally construed the finding amounts to that. It is equivalent to finding the issues in favor of the plaintiff—in other words, a general finding that the cause of action is sustained. This includes the right to the immediate possession of the property, and where the ownership is put in issue, the title also. This court will construe proceedings of a justice of the peace very liberally in all matters of mere form; nor will a purely technical objection be sufficient cause for reversal unless the person complaining of the error has suffered injury thereby. It is the policy of the law to encourage trials upon the merits in order that justice may be administered, and he that relies upon purely technical grounds for the reversal of a case must show that he has sustained injury by the alleged errors. No prejudice is shown in this case, the court therefore erred in reversing it. The judgment of the district court is reversed, and that of the justice reinstated.

JUDGMENT ACCORDINGLY.

JENNIE DEGERING, PLAINTIFF IN ERROR, V. SABINA FLICK AND JOSEPH FLICK, DEFENDANTS IN ERROR.

Replevin: FINDING: JUDGMENT. A finding that the plaintiff had possession of the property at the commencement of the action will not sustain a judgment of replevin against a defendant for wrongfully detaining it.

ERROR to the district court for Adams county. Tried below before MORRIS, J.

Batty & Ragan, for plaintiff in error.

Tanner & Capps, for defendants in error.

MAXWELL, J.

In January, 1883, the plaintiff commenced an action of replevin against the defendants before a justice of the peace to recover the possession of certain articles which it is alleged the defendants wrongfully detained. The return of the officer shows that the property was taken under the writ and delivered to the plaintiff upon an undertaking being given as required by law. On the trial of the cause a jury was waived, the cause being tried to the justice, who made the following findings: "I do find that the possession of the property here in controversy at the beginning of this action was in the plaintiff, and do so find and for costs of this action; wherefore it is by me considered and adjudged that the plaintiff do have peaceable possession of the property here in controversy from the defendants, together with all her costs of this action herein expended, and taxed at $7.50, and do have execution hereon."

The case was taken on error to the district court, the errors assigned being: 1st, That the finding of the court is vague, uncertain, and indefinite, and cannot maintain

the judgment of said court; 2d, That the court could not render judgment in favor of the plaintiff without first finding that at the commencement of the action the plaintiff had the right of possession of the property; 3d, That the court should have found the ownership and also the right of possession. The district court reversed the judgment of the justice and he'd the case for trial. The plaintiff brings the case into this court by petition in error.

The gist of the action of replevin is the unlawful detention by the defendants of the plaintiff's property. *Haggard v. Wallen*, 6 Neb., 271. *Moore v. Kepner*, 7 Id., 38. *Ferrell v. Humphrey*, 12 Ohio, 113. An action of replevin can only be maintained against a defendant who is in possession of the goods when a demand is made or when the suit is commenced. Wells on Replevin, sec. 134 and cases cited in note I. The reason is, the action is brought to recover the possession of specific chattels which it is alleged are unlawfully detained. If the goods are not detained by the defendant he is not liable in that form of action; nor can the action be maintained by a plaintiff who at the time the action is brought is in possession of the goods. The justice in this case finds that the possession of the property in controversy at the commencement of the action was in the plaintiff. If this was so, the defendants could not be wrongfully detaining the same. It will be said that the intention of the justice was to find the *right of property* in the plaintiff, and not that she had possession. But how are we to know that fact? None of the evidence is preserved in the record, nor is there anything to show a mistake in the entry. We must be governed by the record. A finding that the plaintiff had possession will not sustain a judgment in favor of the plaintiff. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE GREAT WESTERN MANUFACTURING CO., APPELLANT, V. JOHN HUNTER ET AL., APPELLEES.

Bill of Exceptions: ALLOWANCE OF. By the seventh clause of Sec. 311 of the code of civil procedure, where the parties in an action agree upon a bill of exceptions by a written stipulation attached thereto, the clerk of the court is authorized to settle and allow it, independently of whether the judge is either disqualified or unable to do so.

MOTION to quash bill of exceptions.

Groff & Montgomery, for the motion.

S. H. Sornberger, contra.

LAKE, CH. J.

In this case a motion has been made to quash the bill of exceptions respecting the evidence and proceedings upon the trial. The ground of the motion is, that the bill was settled and allowed by the clerk of the court and not by the presiding judge.

Still another reason was urged in argument by counsel, viz., that the allowance of the bill, even if the clerk were authorized to make it, was too late. This point, however, is not included in the motion, and cannot now be considered.

It appears that the parties by their attorneys agreed upon the bill of exceptions, as to what it should contain, so that, under the statute, sec. 311 of the code of civil procedure, the clerk had authority to act, even if the judge were at the time within the district and able to do so. Comp. Stat., 571.

From the fact that affidavits have been filed respecting the ability of the judge to have acted in this matter—on the part of the plaintiff to show his absence from the dis-

trict, and consequent inability to do so, and on the part of the defendant denying it—we are led to infer that counsel have in a measure misapprehended the force of this provision as to the authority of the clerk. The seventh clause of the section provides that: "In case of the death of the judge, or when it is shown by affidavit that the judge is prevented by sickness or absence from his district, as well as in cases where the parties interested shall agree upon the bill of exceptions (and shall have attached a written stipulation to that effect to the bill), it shall be the duty of the clerk to settle and sign the bill, in the same manner as the judge is by this act required to do." From this it will be seen that "*where the parties interested shall agree upon a bill of exceptions,*" and attach thereto a written stipulation to that effect, the clerk is authorized to act, and may be required to do so, independently of whether the judge is either disqualified or unable to do so. Such being the law governing this matter, the motion must be overruled.

MOTION OVERRULED.

LAZAR BROWN, PLAINTIFF IN ERROR, v. C. W. EDGERTON, DEFENDANT IN ERROR.

Error: VACATION OF JUDGMENT: FINAL ORDER. An order of a district court vacating its own judgment during the term at which it was rendered, is not a final order, and therefore is not reviewable by proceedings in error.

MOTION to dismiss case brought up from Douglas county.

George W. Doane and *Warren Switzler*, for the motion.

Thurston & Hall and *A. N. Ferguson, contra.*

LAKE, CH. J.

The defendant in error moves the dismissal of this case for the reason that the order complained of is not "final," and therefore not a proper subject for proceedings in error.

Of orders made by district courts only such are reviewable in this manner as are by the code denominated "final." Sec. 582. "An order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, * * * is a final order," etc. Code, sec. 581.

The order in question was one which, on motion of the defendant, vacated a judgment against him on default during the same term at which it was rendered, to enable him to make a defense to the action. It is very clear that such an order is not covered by the above description. It was in no sense final; it did not prevent, although its effect was doubtless to delay for awhile, the entry of a judgment.

But, independently of the provisions of the code on this subject, it is a rule generally recognized by appellate tribunals that courts possess an unlimited power over their own judgments and orders in respect to their vacation and modification until the close of the term at which they are rendered, and that their action in this particular is not reviewable on appeal. Freeman on Judgments, sec. 90.

And this power seems to have been fully recognized by the legislature in the enactment of the several provisions of the code relative to the review by courts of their own judgments and orders after the term at which they are rendered. Code of Civil Procedure, sec. 602, *et seq.* We think it will be conceded that, in practice, this power is quite as essential to the ends of justice, if not much more so, during the continuance of the term as it is afterwards. This being so, it would hardly be reasonable to presume that the legislature would have formally given the power and provided for its exercise only after final adjournment,

if it had been supposed that the court did not possess it during the continuance of the term.

MOTION SUSTAINED.

CHARLES A. BALDWIN, PLAINTIFF IN ERROR, V. OSCAR L. FOSS, DEFENDANT IN ERROR.

1. **Error:** FINAL ORDER. An order of a district court requiring an attorney in an action to pay money alleged to have been collected by him into court "for the use of the plaintiff * * * and in default that execution issue therefor," is a final order and may be reviewed by proceedings in error.
2. ——: PRACTICE. The want of a bill of exceptions or a motion for a new trial is not sufficient to warrant a summary dismissal of proceedings in error.
3. **Attorney.** The right of an attorney to enter an appearance for a party in an action can be called in question only by the party himself.

MOTION to dismiss case brought up on error from Douglas county.

G. W. Shields, for the motion.

LAKE, CH. J.

The defendant in error moves the dismissal of this case, assigning therefor five several reasons, the *first* and principal one of which is, that the order of the district court brought here for review was not "final."

Referring to the record, we find that the order in question was made on motion of this defendant in error in a case wherein he was plaintiff and one Thomas Murry defendant, and several months after said case had been finally dismissed at his costs. There had also been a motion by

him for a vacation of the judgment of dismissal, which was denied. The object of the former motion was to require Baldwin, then the attorney of Foss, to pay into court, for his use, certain money claimed to have been collected by him from Murry in settlement of that suit.

The order complained of was, "that the said C. A. Baldwin pay into this court by the first day of the next June term, for the use of said plaintiff, the sum of $30.50, and in default that execution issue therefor." It will be seen that it directs the payment, unconditionally, of a definite sum of money within a specified time, on pain of its enforcement by a general execution. It completely fixes the rights of the parties to it, leaving nothing whatever for the court to do further in that regard. Freeman on Judgments, § 12. It was an order affecting a substantial right made in a special proceeding. Code of civil procedure, § 581. It was certainly a "final order," as we understand that term.

The *second* reason is, that there is no bill of exceptions; and the *third*, that no motion for a new trial was made. These two objections fall within the rule announced during the present term in the case of *Hollenbeck v. Tarkington*, *ante* p. 430, and are not sufficient to warrant a summary dismissal of proceedings in error. The right of the plaintiff to a decision of the questions presented by the petition in error does not depend upon either a bill of exceptions or a motion for a new trial.

The *fourth* reason of the motion is, that the cause "has not been properly nor diligently prosecuted in this court." And the *fifth*, that, "No summons in error has been issued or served herein." These two objections are completely answered by the record, which shows that, "The issuing and service of a summons in error is waived by the defendant in error," and his appearance entered by G. W. Ambrose, an attorney of this court, whose authority to act in the matter, although orally challenged by the attorney

now moving a dismissal, is not denied by Foss himself, by whom alone it can be called in question.

MOTION DENIED.

CHARLES H. B. ROUSS, PLAINTIFF IN ERROR, v. LUTHER R. WRIGHT ET AL., DEFENDANTS IN ERROR.

1. **Attachment:** RIGHT TO ISSUE. An affidavit for attachment before a justice of the peace containing as a statement of the plaintiff's cause of action, "that the said claim in said action is for damages in not delivering goods purchased," does not show that the case is for a debt or demand arising upon contract, judgment, or decree, and does not authorize the issuance of an attachment against a foreign corporation or a non-resident of the state.

2. **Action against Justice of the Peace.** In an action against a justice of the peace for wrongfully issuing an attachment against a non-resident of the state, the bill of particulars in the attachment case, read as evidence to the jury, was, in substance, "To damages by delay in receiving goods bought of defendant, and for delay caused by wrong shipment." And the affidavit for attachment was also read in evidence, in which the plaintiff's claim was stated as "for damages in not delivering goods purchased." *Held*, that an instruction to the jury that "there is no evidence introduced tending to show that defendant Wright acted negligently, wantonly, and corruptly in issuing said order of attachment," was erroneous.

THIS was an action brought in the district court of Douglas county against Wright, as a justice of the peace, and the sureties on his official bond, for the wrongful issuance of an attachment. Judgment below in favor of defendants, before NEVILLE, J., and cause brought here for review on a petition in error.

Warren Switzler and *Charles R. Redick*, for plaintiff in error.

1. The justice is liable where he acts beyond the limit of jurisdiction given him by law, either as regards the subject matter, person, or mode of proceeding. Cooley on Torts, 417. Swan's Justice, 10, 20. Hilliard on Torts, 185. Addison, 966. *Little v. Moore*, 4 N. J. Law, 74. *Hall v. Rogers*, 2 Blackf., 429. *Truesdell v. Combs*, 4 Gray, 83. *Adkins v. Brewer*, 3 Cow., 208.

2. Justice has no power to issue an attachment on a claim for unliquidated damages. Civil code, § 198. Drake, §§ 14, 15, 17. *Handy v. Brong*, 4 Neb., 60. *Ellist v. Jackson*, 3 Wis., 649. *Strock v. Little*, 45 Penn. State, 416. *McKean v. Turner*, 45 N. H., 203.

3. Bond is conditioned for "faithful performance of duties." Gen. Stat., 99.

4. In determining whether the claim is one for breach of contract and for an ascertained amount, or whether for unliquidated damages, the bill of particulars in the attachment case, the affidavit, and defendant Wright's knowledge of the facts should be taken together.

Simeon Bloom and *W. J. Connell*, for defendants in error.

This is not an action on an attachment bond for the wrongful issue of an attachment. The cases cited by plaintiff's counsel upon this branch of the subject as presented by them are therefore not applicable to the consideration of the matter herein involved. The attachment issued in this case could be sustained if a contest had arisen upon motion to vacate and dissolve the same. *Foundery v. Hovey*, 21 Pick., 455. *Lenox v. Howland*, 3 Caines, 323. *In re Marty*, 3 Barbour, 229. *Jones v. Buzzard*, 2 Arkansas, 415. *Bausman v. Smith*, 2 Indiana, 374. *Roelofson v. Hatch*, 3 Michigan, 277. *Humphreys v. Mathews*, 11 Illinois, 471. Certainly when the highest courts in the land have entertained diverse views on this proposition, a

mere justice of the peace, not required under the law to be trained and educated in legal knowledge, should not be subjected to a liability on his bond for what, at the most, can be regarded only as a doubtful error of judgment. The affidavit in attachment is the basis for issuance of the writ. If sufficient appear upon the face of the affidavit to constitute a *prima facie* compliance with the statute, then no right of action arises against the justice on his official bond. The authorities cited by plaintiff are not applicable.

COBB, J.

In its third instruction the court informed the jury "that the claim upon which the attachment was based was one arising upon contract, and that the affidavit filed in said Wright's court upon which said order of attachment was based, gave said Wright jurisdiction to issue said or der."

The following is a copy of the bill of particulars referred to as "the claim upon which the attachment was based."

"Isaac Levy vs. C. H. B. Rouss. } In justice court of Lu-
Bill of particulars. } ther R. Wright.

Plaintiff's claim.

"To damages by delay in receiving goods bought of C. H. B. Rouss, and for delay caused by wrong shipment, sixty dollars."

And the following is a copy of the substantial part of the affidavit:

"Isaac Levy being first duly sworn, deposes and says that he is the plaintiff in the above entitled action, and that the claim in said action is for damages in not delivering goods purchased, that the said claim is just, and this affiant believes that said plaintiff ought to recover the sum of $60 thereon. Affiant further says that the said defendant is a non-resident of the state of Nebraska."

The clause of the statute especially applicable to the case is in the following words: "When the defendant is a foreign corporation or a non-resident of the state, the attachment shall not be granted unless the claim is for a debt or demand arising upon contract, judgment, or decree." Code, § 198. The defendant in the attachment case being a non-resident of this state the jurisdiction or right or the part of the justice of the peace to proceed against him depended upon two facts, the absence of either one of which would render the proceeding illegal. 1. The defendant must have property in this state within the jurisdiction of the court, which must have been seized or levied upon by the officers of the court, otherwise no constructive service, by publication or otherwise, would be sufficient to give the court jurisdiction in the case. 2. The *claim* must have been "for a debt or demand arising upon contract, judgment, or decree," otherwise no attachment can be granted to give a justice jurisdiction by any character of service.

It is not denied that the plaintiff in this suit (defendant in the said attachment suit) was a non-resident of this state, nor that he had property in this state within the jurisdiction of the said justice. The case must therefore turn upon the question, Was the claim for a debt or demand arising upon contract, judgment, or decree?

The words "contract," "judgment," or "decree," are neither of them used, either in the bill of particulars or the affidavit for attachment, nor do I think that any equivalent language is used. "To damages by delay in receiving goods bought of C. H. B. Rouss and for delay caused by wrong shipment * * " is the language of the bill of particulars, and "for damages in not delivering goods purchased," is that of the affidavit. As I understand this language, it not only fails to charge a breach of contract, but does in effect charge a tort. But the court, when delivering its charge to the jury, had before it the whole tes-

timony in the case; and while it is not claimed that the justice may look elsewhere than to the statement of the plaintiff's claim, as contained in his affidavit for the attachment, for the grounds of his jurisdiction, yet, if upon the evidence in the case it appeared that the plaintiff's claim was for a debt or demand founded on contract, judgment, or decree, a court would hesitate to hold a want of jurisdiction on account of a faulty bill of particulars and affidavit. But an examination of the bill of exceptions fails to show that there was any pretense of contract between the plaintiff and defendant in said action out of which any cause of action could have arisen, but on the contrary shows the said parties to have been utter strangers to each other. I reach the conclusion therefore that the court erred in giving its third instruction to the jury.

The court also gave to the jury as its fourth instruction, the following: "4. You are instructed that there is no evidence introduced tending to show that defendant Wright acted negligently, wantonly, and corruptly in issuing said order of attachment."

In this instruction I think there is error. While I do not say that there is any evidence tending to show that the said justice (defendant) acted corruptly, nor I might say wantonly, in issuing said attachment, the papers themselves contain plain evidence of negligence in the issue of said attachment, and if by his negligence the defendant issued the attachment in a case prohibited by statute, it needs not that he should have done it corruptly or even wantonly to render him liable for the damages caused thereby.

Proceeding by attachment is a harsh remedy given by statute in certain specified cases. By its means, the private property of an alleged debtor may in such cases be seized in advance of a judgment or trial and held to abide the result of a suit. The law has thus invested certain officers with the power to issue a writ authorizing the seizure and holding of one man's property for an indefinite time to

answer to the unproved claim of another. But it has limited the exercise of this power to certain clearly defined cases. While these officers confine themselves to these cases the law protects them even against their own mistakes and errors of judgment, but when they step outside of the circle of duty thus drawn by the letter of the statute, they must answer in damages to such individuals as may suffer from such unauthorized act. "Every judicial officer," says Cooley in his work on Torts, p. 416, "whether the grade be high or low, must take care before acting to inform himself whether the circumstances justify his exercise of the judicial function * * * The officer is to judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his cognizance, or cases between persons who are not either actually or constructively before him for the purpose * * * "

It is not deemed necessary here to enter into a vindication of the law, or a defence of the decisions from the charge of inconsistency, in holding officers of inferior courts and tribunals responsible for certain acts, done under color of law, while those of the higher courts are relieved of such responsibility. Such charge, when occasion may arise for its examination, will be found to be without substantial foundation.

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

REVERSED AND REMANDED.

THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA AND THE LINCOLN & NORTHWESTERN RAILROAD COMPANY, PLAINTIFFS IN ERROR, V. WINFIELD S. BEEBE, DEFENDANT IN ERROR.

1. **Railroads:** DAMAGE TO TIMBER BY FIRE: OWNERSHIP OF LAND. In an action in the nature of an *action on the case* for the negligent use of a locomotive engine by the servants of the defendants by reason of which the timber land of plaintiff was damaged by fire, the plaintiff alleged ownership of the timber land, which was denied by the defendant. *Held*, That proof that plaintiff had been in the possession of the premises for a number of years next before and at the time of the injury was sufficient evidence of title *prima facie*.

2. **Competency of Juror.** The whole of the examination, and all of the answers of a juror upon such examination, as to his competency to serve as a juror in a given case, should be considered together, and if upon such consideration he seems to be competent his challenge for cause by one of the parties should be denied.

3. **The opinion or estimate of a witness** of the amount of damage to the owner of a tract of timber land, or to the land itself, caused by a fire running through it, is not admissible as evidence.

4. **New Trial:** TAXATION OF COSTS. An erroneous overruling by the trial court of a motion of a defendant for the re-taxation of costs in a case is not a ground for setting aside the verdict of the jury and granting a new trial in the case.

ERROR to the district court for Seward county. Tried below before GEORGE W. POST, J.

Marquett & Deweese and *Norval Brothers*, for plaintiffs in error.

D. C. McKillip and *Harwood & Ames*, for defendant in error.

COBB, J.

The first point raised by the plaintiffs in error in their brief is, that plaintiff's title to the land, upon which the growing timber was damaged by fire, having been put in issue by the answer, was not sufficiently proved to entitle the plaintiff to recover.

This being an action for the negligence of the servants of the defendants, is of the nature of an action on the case, as actions were classified before the adoption of the code, and as the injury complained of was to the property itself and not to the plaintiff's possession thereof, the title was a material point in the case, not only to be alleged in the petition but to be proved on the trial unless admitted by the defendants. But while it is true that in this state a perfect title to land must be derived from the government of the United States, and must be based either upon a grant or patent to the person claiming such title, his ancestor, or grantor, or upon a possession within the statute of limitations, yet the possession of such title is only necessary to discharge the obligation of a covenant of title or to defend against a lesser one. For all other purposes which occur to the writer actual possession under claim of right and without badge of servitude is sufficient *prima facie*. If this position is correct, then when the plaintiff proved that he was in the actual possession of the injured premises, claiming title thereto, the burden was thrown upon the defendant to prove title out of the plaintiff, in order to avail itself of the defense raised by the point under consideration. No such proof being offered, the plaintiff must, for the purposes of this case, be deemed as possessed of the title to the land in question.

The second point is, as to the competency of one of the jurors to sit on the jury, as disclosed upon his examination, as follows:

Q. Do you know anything about this case?

A. I have passed over the burnt district.

Q. Have you formed such an opinion as would hinder you from giving an unbiased verdict in this case?

A. I don't think it would be biased in any way.

CROSS-EXAMINATION.

Q. You have talked with the neighbors about this fire?

A. No, all I know is from passing over it.

Q. From what you have seen and heard have you or not formed any opinion as to which should recover?

A. I have not.

Q. You have formed no opinion as to the right to recover anything?

A. No, sir. Only passing by and seeing where the fire had passed.

Q. Did you have any conversation with them as to how the fire had originated?

A. No, sir.

Q. Then you can have no opinion in this case unless you have heard and discussed the facts, could you?

A. No, sir. I know nothing about it, whether it originated from the railroad or some individual. I don't know anything about it only from local reports.

Q. Did you say in your direct examination that you thought the plaintiff ought to recover?

A. No, sir. Mr. Beebe made the remark that considerable damage was done.

Q. Do you know the particular location of this forty acres?

A. No, sir. Seven years ago he offered to sell it to me.

Q. You know about the character of the trees and the size of them, do you?

A. I have not been on this piece of timber for six years.

Q. Then you don't know the extent of the damage?

A. No, sir.

Q. You have not seen the district since the fire occurred?

A. No, sir. Only in passing, and that is nearly a mile; no, probably a half a mile from it.

Q. In this case suppose no evidence was offered but what you know of the matter now, would you be of the mind that the plaintiff should recover or not?

A. I know nothing about it, I don't know whether the plaintiff owns the timber or not.

Q. Supposing that the defendants (?) offer in evidence what you know of the matter now, and no further testimony is offered in the case, would you, as a juryman, say that the plaintiff ought to recover?

A. Well, yes, from a certain local idea of the fire, and seeing it at that distance.

Q. Without any further testimony you would say the plaintiff ought to recover?

A. Yes, sir.

RE-DIRECT EXAMINATION.

Q. Do you say that he ought to recover from the railroad company?

A. I don't know, I would have to have testimony as to who did the damage.

Q. Simply from seeing the timber land there you think somebody ought to pay for it?

A. Yes, sir.

Q. You don't mean to say you think that the railroad company ought to recover, or somebody else?

A. I don't know who should recover, any more than I know that the fire damaged the man's timber by running through it.

EXAMINATION BY THE COURT.

Q. Have you formed an opinion as to how much damage has been sustained?

A. No, sir. I have not.

Q. You don't know anything about the amount of damage done?

A. No, sir.

Q. Nor the cause of the damage?

A. No, sir.

Q. Nor how it was caused?

A. Only what I hear through the country.

Q. Would that influence you in forming your verdict?

A. No, sir.

It will thus be seen that the examination of the juror was thorough and exhaustive. The object on the part of defendant's counsel evidently being to make the fact of the juror having passed along the road, and seen where a fire had run among the young and growing timber, disqualify him to sit upon the jury in the case. When it is borne in mind that the average juryman is not expected to pass a successful examination in logic or casuistry on short notice, it must be apparent that the exhaustive examination of this one signally failed to show him possessed of partiality as between the parties, preconceived opinion as to the merits of the case, or of temper such as would disable him to find a fair and impartial verdict upon the testimony in the case.

The third point made by the plaintiff in error is upon the admission of certain testimony introduced by the plaintiff in the court below for the purpose of proving the measure of damage to the timber land of the plaintiff by the fire set out by the engine of the defendant, and it urges the point that by the admission of such testimony the witnesses for the plaintiff were allowed to usurp the province of the jury in fixing the amount of plaintiff's damages.

The following quotations from the bill of exceptions show upon what foundation this point is based. The plaintiff, being on the stand as a witness in his own behalf and not having been examined as to his occupation or means of knowledge of the value of lands or other property, is asked the following questions on the part of the plaintiff:

Q. Do you know the value of this land just before the timber was burned, before this fire went through it?

A. Yes, sir. I know the value of it.

Q. What was it before the fire went through it?

A. I would not have taken less than four hundred dollars for what it went over.

On motion of defendant this answer was stricken out as irresponsive to the question and incompetent.

Q. The question is, what was the value of this forty acres of timber, not what you would have taken for it, but what was it worth?

A. It was worth what I said.

Q. I mean the forty acres, all of it?

A. It was worth eight hundred dollars.

Q. What was it worth after the fire went through it?

Defendant objects as being incompetent; witness has not shown himself competent to answer, and calls for a conclusion. Overruled, and defendant excepts.

A. It was worth—that's a pretty hard question to answer. Did you consider the burned timber worth anything?

Q. That is for you to say. What was the diminished value, what was it worth after the fire went through it?

A. Worth five hundred dollars or six hundred dollars.

Q. What was the diminished value of the land; what was the damage done by that fire?

Defendant objects as incompetent. Overruled, and defendant excepts.

A. Four hundred dollars damage to me—that is to the land.

* * * * * * * * * * *

Q. What was the value of the land and the timber on it as it stood before the fire went through it, the forty acres?

A. Eight hundred dollars.

Q. What was the value of the land as it was after the fire went through, with the timber burned?

Defendant objects as not laying a proper basis for the estimation of damages. Overruled, and exception.

A. About six hundred dollars, five hundred, or six hundred dollars. I consider that the damage to the land and the sale would be five hundred dollars.

Q. On what basis do you estimate the damage?

A. I looked at it in this way: I consider the timber eight hundred dollars before it was burned, and after it was burned it was not worth more than half as much. The burned timber if I could have used it or sold it, it would have been worth a little something to me, but it stood there perfectly worthless, some of it stands there now, some for post timber and some cannot be used for that. That is why I make the distinction between what the timber was worth and what I could really get out of it, and putting it to use.

The defendant moved to strike out all of this witness's testimony relating to his damages, because it is an improper and false basis on which the estimation is made. Overruled, and exception.

Mr. Healy, a witness for the plaintiff, after stating that he was acquainted with the value of timber land in Seward county, was interrogated, and answered as follows:

Q. Have you been on the land?

A. Yes, sir.

Q When did you see the land?

A. I think some time in the latter part of May or fore part of June, 1880.

Q. What was your object in going to the land?

A. It was to see how much damage that land with others had sustained by reason of the fire across it.

Q. You examined, did you, and found out the damage?

A. Yes, sir.

Q. State what that damage was?

Defendant objects as being incompetent. Overruled, and defendant excepts.

Q. State what the damage was, in your judgment?

Defendant objects as above; same record.

A. I would like to understand whether you mean the damage to all the land or by the acre.

Q. Well, the damage to the forty acres of timber land?

A. I should think it was depreciated at least one-half its original value.

Q. What was its original value before it was burned?

A. I think twenty-five dollars per acre at least.

Q. That is the forty acres was worth twenty-five dollars per acre?

A. Yes, sir.

Q. You think it has depreciated one-half?

A. At least, I should think. Yes, sir.

Q. The original value would be $1,000, you would say, for the forty acres, and has depreciated one-half, or $500?

A. Yes, sir.

It was in testimony that the forty-acre tract of land of the plaintiff is divided in nearly equal parts, as to number of acres on each side, by the Blue river, which runs through it in a nearly circular form. Also, that as far as damage to standing timber was concerned the fire was confined to the westerly side of the river. Yet all of the witnesses on the part of the plaintiff in the court below were interrogated and testified as to the damages by fire as applicable to the whole of the tract. It also appears from the plaintiff's own testimony that a part of this forty-acre tract is not timber land at all, but at the time of the fire had been under cultivation. The defendant in error, in his brief, says: "It would be manifestly improper for a witness to answer a question involving the whole issue, law as well as facts, on the question of amount of damages that should be recovered, such as, 'What amount of damages have the plaintiffs sustained by reason of the fire?' etc." I fail to see any difference between the question in that form and that in which it was in fact put, both to the plaintiff himself,

when on the stand as a witness in his own behalf, and the witness Healy. Bearing in mind that at most not to exceed half of the forty-acre tract was burned over, then what is the difference between the question "What was the damage to the forty of timber lands?" as put to the witness Healy, or the question "What was the diminished value of the land? What was the damage done by the fire?" as put to the plaintiff himself, and the question "What is the damage to the plaintiff in consequence of the fire?" which defendant in error in his brief admits would be erroneous?

Nearly all of the cases cited by defendant in error to sustain the rulings of the court below on this branch of the case are right of way cases, yet while most of them hold that in such cases it is proper to take the opinions of witnesses (shown to be possessed of sufficient knowledge on the subject) upon the value of the premises before and after the taking, but few have gone the length of holding that the witness may also give his opinion as to the amount of damage to the remaining estate, caused by the taking. It cannot be denied that as a general rule witnesses must testify to facts only. There are exceptions to this rule; one of which is, where persons professionally acquainted with the science or practice in question are called upon to testify on questions of science, skill, trade, and others of a like kind. Another exception is found in the decisions of some of the courts, notably those of Massachusetts, and courts following them, on this question of damages to the remaining estate after the carving of a right of way for a railroad out of it.

In the case of *Shattuck v. Stoneham Branch Railroad*, 6 Allen, 115, I understand the court to base its decision partly on some time-honored usage of that commonwealth, and partly on "necessity and obvious propriety." On the other hand, the courts of Ohio, Indiana, Iowa, and other states have adhered to that which is confessedly the general rule, and which I regard as the safer one, of confining the

testimony of witnesses to facts, including values, and leave it to the jury to find the measure of damages from all the facts proved. *Atlantic & G. W. R. v. Campbell*, 4 Ohio S., 583. *Clev. & P. R. v. Ball*, 5 Id., 568. *Morehouse v. Mathews*, 2 Comst., 514. *Dunham v. Simmons*, 3 Hill, 609. *Paige v. Hazard*, 5 Id., 603. *Troy & Boston R. Co. v. Northern Turnpike Co.*, 16 Barb., 100. *Can. & Niag. F. R. Co. v. Payne*, Id., 273. *Montgomery R. R. Co. v. Varner*, 19 Ala., 185. *Ala. & Flor. R. Co. v. Burkett*, 42 Id., 83. *Evansville, &c., R. Co. v. Fitzpatrick*, 10 Ind., 120. *Balt., Pittsburgh & Chic. R. Co. v. Johnson*, 59 Id., 480. *Same plaintiff v. Stoner*, Id., 579. *Chic. & Alton R. Co. v. S. & N. W. R. R. Co.*, 67 Ills., 142. *Harrison v. Iowa Midland R. Co.*, 36 Iowa, 323. *Prosser v. Wapello Co.*, 18 Id., 327. *Henry v. Dubuque, &c., R. Co.*, 2 Id., 288. *Dalzell v. City of Davenport*, 12 Id., 437. *City of Parsons v. Lindsay*, 26 Kan., 430.

In a recent case, *F. E. & M. V. R. R. Co. v. Whalen*, 11 Neb., 587, this court, in the opinion by the present Ch. J., say: "It is doubtless a proper course to take the opinion of experts as to the value before it is affected by the location of the road. This done, the testimony on the question of damages should be confined to those matters affecting the value proper to be considered, leaving the jury to draw their own inferences therefrom, unaffected by the judgment of others."

But were it conceded that the law, as applicable to questions of damage in right of way cases, is as claimed by defendant in error, it would not, as it appears to me, sustain his position in the case at bar. The opinion of a witness as to the amount of damage sustained by the owner of land by reason of the taking of the right of way for a railroad thereon, if admissible at all, which is not conceded, is so on the ground of necessity, because there is no other way of bringing the facts or true condition of the thing before the minds of the jurors to enable them to form their own opin-

ions of the amount of damage. But it can not be said that there is no other way of bringing before the mind of a juror the amount of the loss caused by the destruction of growing trees but by the opinion of witnesses who have passed over the ground. Certainly standing trees are susceptible of being counted and measured, and their value as timber or fuel can be ascertained the same as any other species of property, and it is not a matter of mere opinions. And such value in the dead and charred condition compared with that while the trees were growing, and thus the amount of the damage caused by the fire arrived at without resort to the opinions of witnesses interested or disinterested.

The fourth point made by the plaintiff in error is founded upon certain instructions given by the district court to the jury, and certain prayers of the defendant in that court for instructions, which were refused. We think that the case was fairly submitted to the jury by the instructions. One of these was upon the point of the negligence of the defendant company in allowing dry grass, etc., to accumulate on its track, and this instruction the plaintiff in error alleges was unsustained by evidence. We think differently. There was evidence to the effect that when the section hands attempted to burn off the dry grass at this particular point, some month or so before the fire, the grass was so wet from some cause that it burned only in spots, and that such burning was only renewed by the accidental burning for which the suit was brought.

The fifth point arises upon the refusal of the district court to retax the costs. It appears from the bill of exceptions and the motion of the defendant below for the retaxation of costs that the said motion to retax the costs in the case was made and submitted upon the following agreed state of facts, which was the whole evidence and proof introduced or offered by either party on the hearing of said motion, to-wit:

That the following, among other costs, were taxed against the defendant (in the court below) at the April, 1881, term of said court, as witness fees and mileage of plaintiff's witnesses, to-wit:

J. C. Davis,	2	days,	8	miles,	making	$4 80
Mrs. Davis,	2	"	8	"	"	4 80
O. I. Rodgers,	2	"	6	"	"	4 60
Wm. Rodgers,	2	"	6	"	"	4 60
Wm. Ashmead,	2	days,	8	miles,	making	4 80
Mrs. Ashmead,	2	"	8	"	"	4 80
I. Grimes,	2	"	8	"	"	4 80
I. T. Anderson,	2	"			"	4 00
O. Bemecher,	2	"	4	"	"	4 40
L. Drame,	2	"	12	"	"	5 20
George Davis,	2	"	8	"	"	4 80
Herman Bemecher,	2	days,	4	miles,	making	4 40

That each and all of said witnesses were, for the same identical days of said term of court for which the said above costs were taxed, witnesses for one Henry Wortendyke in a case then pending in said court, wherein said Henry Wortendyke was plaintiff and these defendants were defendants, and in said cause of Wortendyke against these defendants each of said witnesses was allowed and taxed against these defendants the same witness fees and mileage (being full fees as per diem and mileage in each case) as allowed and taxed in this case, and for attendance upon this court for the same days of the term as allowed and taxed in this case. That neither of said witnesses was subpœnaed as witness in either of said cases for said April term, 1881, of this court, excepting Herman Bemecker and L. Drame, but each and all of said witnesses were duly subpœnaed in this case, and also in said case of Henry Wortendyke against these defendants, to appear in said case at the December, 1880, term of said court, and appeared at said December term and were informed by the court that they were required under said subpœna to appear at the April, 1881, term of said court

without further notice, or being again subpœnaed. That defendants have paid one-half of the said witness fees and mileage in this case, as well as in the said Wortendyke case for said term of April, 1881. Said motion to retax costs was by said district court overruled and an exception taken.

That upon the agreed state of facts as above set out there should have been a retaxation of the costs and the same duly apportioned between the two cases in which the witnesses had attended, there can be no doubt; and its refusal can only be attributed to that loose practice in respect to costs which has prevailed in many of the courts, not to their credit but to the great injury of honest litigants. Yet I cannot see how the plaintiffs in error can avail themselves of the point under consideration in this proceeding. The erroneous refusal of the court to retax the costs could have no effect upon the verdict or judgment, and hence cannot be considered in a proceeding, the sole object of which is to obtain a new trial. The order to retax the costs was appealable, and such appeal would not necessarily have brought any other branch of the case before this court.

For error, in the admission of the testimony of the opinion of witnesses on the question of damages, alone, the judgment is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

LAKE, CH. J., concurs.

MAXWELL, J., dissenting.

To that part of the opinion of the majority of the court holding that, "the opinion or estimate of a witness of the amount of damage to the owner of a tract of land or to the land itself caused by a fire running through it is not admissible as evidence," I cannot give my assent, for the following reasons:

The witnesses called to testify as to the amount of damages were shown to be acquainted with the value of the land, and could testify as to the amount of damage sustained from their own personal knowledge. The opinions of such witnesses are admissible, not as being the testimony of experts, but as being founded upon *personal knowledge* of the subject. Such opinions become to a certain extent facts, and are the most satisfactory evidence that can be given as to the amount of damages. Thus, suppose a witness is called who knows the value of the property and the amount it is diminished in value by the injury complained of, his estimate, based upon personal knowledge and a personal examination of the premises, is certainly very much more satisfactory and more likely to lead to a correct verdict than a mere description of the premises to the jury and of the injury to the same.

In *Swan v. Middlesex*, 101 Mass., 177, it is said these opinions are admitted, not as being the opinion of experts strictly so called, for they are not founded on special study or training or professional experience, but rather from necessity, upon the ground that they depend upon knowledge which anyone may acquire but which the jury may not have, and that they are the most satisfactory and often the only attainable fact to be proved. *Dwight v. County Coms.*, 11 Cush., 203. *Shattuck v. Stoneham B. R. Co.*, 6 Allen, 116. *Whitman v. B. & M. R. Co.*, 7 Allen, 316. *Kellogg v. Krauser*, 14 S. & R., 137. *Warren v. Wheeler*, 21 Me., 484. *Clark v. Baird*, 5 Selden, 183. *Snow v. Boston & Me. R. Co.*, 65 Me., 230. *Brainard v. B. & N. Y. Cent. R. Co.*, 12 Gray, 407. *Vandine v. Burpee*, 13 Met., 288. *Snyder v. W. U. R. Co.*, 25 Wis., 60. *Diedrich v. The N. W. R. Co.*, 47 Id., 662. *Jacksonville, etc., R. Co. v. Caldwell*, 21 Ill., 75. *Ottawa, G. L. & C. Co. v. Graham*, 35 Id., 346. *C. & St. L. R. Co. v. Woosley*, 85 Ill., 370.

In the last case it is said (page 373): "The witnesses

first stated that they had personal knowledge of the alleged injuries on which the claim for damages is based, and detailed their character. It was then competent to receive their opinions as to the amount of damages sustained." *Cooper v. Randall*, 59 Ill., 317. *Keithsburg & Eastern Railroad Co. v. Henry*, 79 Id., 290. *Curtis v. St. P., etc., R. Co.*, 20 Minn., 28.

Pierce, in his valuable work on Railroads, page 227, says: "Opinions are admissible as to the amount of damage or benefit resulting to an estate from the construction of a railroad." The same rule applies to damage sustained by a party from the destruction of his property by fire set out by the employees of the company while in the performance of their duties, and unless witnesses are permitted to testify to the amount of damages in cases of this kind the jury will be uninformed as to the amount for which they should render a verdict, and will therefore be unable to perform their duty in a satisfactory manner. The judgment is fully supported by the evidence and is clearly right, and should be affirmed.

THE STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT OF OMAHA, PLAINTIFF IN ERROR, V. WILLIAM F. HEINS, TREASURER, DEFENDANT IN ERROR.

School Fund: CONSTITUTIONAL LAW. It is the true intent and meaning of the first clause of sec. 5 of art. VIII. of the constitution of the state, that all fines, penalties, and license money arising under the general laws of the state shall be paid over to the counties respectively where the same may be levied or imposed, and appropriated exclusively to the support of common schools in the several school districts of such county.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

George W. Doane, for plaintiff in error.

J. C. Cowin, for defendant in error.

COBB, J.

The school district of the city of Omaha made its relation on behalf of the state, and entered its motion in the district court of Douglas county for a writ of mandamus against William F. Heins, county treasurer of Douglas county, commanding him to appropriate exclusively to the use and support of the common schools in the city of Omaha, and for that purpose to pay over to the city treasurer of the city of Omaha, as *ex officio* treasurer of the board of education of said school district of Omaha, for the use of said school district, all moneys which have come into his hands from the police judge of said city of Omaha for fines, penalties, and forfeitures collected for offenses against the ordinances of said city of Omaha, or for misdemeanors against the laws of said state of Nebraska, committed within said city of Omaha, etc., which said motion and relation were accompanied by the affidavit of the secretary of the board of education of said school district to the effect that on the 20th day of December, 1881, he called in his official capacity as such secretary upon William F. Heins, treasurer of said county of Douglas, and was informed by him that Gustave Beneke, police judge of said city of Omaha, had paid into his, the said Heins', hands, as such treasurer, on the 4th day of November, 1881, the sum of $728.80, as the proceeds of fines and penalties collected by him, the said Beneke, as such police judge, for misdemeanors against the laws of the state of Nebraska committed within the said city of Omaha; that thereupon the said secretary demanded of the said William F. Heins that he should appropriate the fund so paid into his hands by the said Beneke to the use and support of the common schools

in the said city of Omaha, and for that purpose should pay the same over to the city treasurer of the city of Omaha, as *ex officio* treasurer of the board of education of said school district of Omaha, which the said Heins then and there refused to do, claiming that he was required under the constitution and laws to appropriate said fines to the use and support of the common schools in the various districts of the county of Douglas. Upon the hearing of said relation the same was overruled and such writ of mandamus refused, whereupon the said school district brings the cause to this court by petition in error.

Sec. 5 of Art. VIII. of the constitution, provides as follows:

"5. All fines, penalties, and license money arising under the general laws of the state shall belong and be paid over to the counties respectively where the same may be levied or imposed, and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivisions less than a county, shall belong and be paid over to the same respectively. And all such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue." We are without the benefit of a brief of counsel in this case, but from our memory of the short oral statement made at the bar we understand the position of the relator to be that the words "all such fines, penalties, and license money," as used in the latter part of the section, apply as well to the fines, penalties, and license money arising under the general laws of the state as to the "fines, penalties, and license money arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivisions less than a county."

While the point raised is not entirely free from difficulty, yet we think that we cannot agree to the proposition

without not only denying to the section, taken as a whole, its plain intent and meaning, but also violating that universal canon of construction which requires that, when possible, some force and effect be given to every sentence and word of a statute. The construction contended for cannot be given to the section without entirely rejecting the first clause, while by construing it to mean that the fines, etc., arising under the general laws of the state be paid over to the counties respectively where the same may be levied or imposed, and when so paid shall constitute a part of the school fund of such county, etc., effect and meaning is given to every word of the section, and a meaning, too, which is consistent with the balance of the section and the scope and obvious intent of the article.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE STATE NATIONAL BANK, APPELLANT, V. JOHN HAYLEN ET AL., APPELLEES.

Negotiable Instruments. The possession by the plaintiff of a negotiable promissory note maturing January 1, 1881, executed by the defendants, payable to the order of T. P. K., with the following words written on the back, "collection guaranteed and notice of protest waived this 26th of April, 1880. [Signed] T. P. K.," is evidence of title to such note in the plaintiff, and of its receipt of the same before maturity, for value, in the due course of business and without notice of infirmity.

APPEAL from the district court of Lancaster county in an action for the foreclosure of a mortgage given to secure a negotiable promissory note signed by defendants, payable to the order of Thomas P. Kennard, and by him indorsed in the manner stated in the opinion. The petition of plain-

tiff alleged *inter alia* that, "on the 26th day of April, 1880, said Thomas P. Kennard, for a valuable consideration, assigned said note and mortgage and the money due thereon to plaintiff." Defendants, in and by their separate answers, set up usury, fraud, etc., and denied the assignment to plaintiff, etc. Plaintiff replied, alleging purchase in good faith before maturity, for value, without notice of any equity. Judgment below before POUND, J., for defendants, and plaintiff appeals.

A. G. Scott, for appellant, cited: *Heard v. Dubuque County Bank*, 8 Neb., 10. *Robinson v. Lain*, 31 Iowa, 9. 2 *Daniels Neg. Instr.*, § 1781. *Upham v. Prince*, 12 Mass., 15.

J. H. Foxworthy and *J. C. Crooker*, for appellees, cited: 1 Daniels, §§ 666, 667. 2 Id., §§ 1752–1754. *McCunn v. Corby*, 11 Kan., 465. Story on Notes, § 120. *Tappan v. Ely*, 15 Wend., 364. *Dyer v. Gibson*, 16 Wis., 580. *Lancaster Bank v. Taylor*, 100 Mass., 18, 22. *Van Eman v. Stanchfield*, 10 Minn., 255. *Allum v. Perry*, 68 Maine, 232. *Matteson v. Morris*, 40 Mich., 52.

COBB, J.

There is no question made in the evidence of the plaintiff bank being the *bona fide* owner and holder of the note and mortgage, nor that it received the same before maturity in the ordinary course of business and without notice of any infirmity. Such ownership and purchase of the note and mortgage by the bank is placed beyond doubt by the testimony of its president. But the district court let in the defense of usury for the reason, as is stated in the judgment, "it (the plaintiff) holds the same" (the note) "as assignee, and not as endorsee." The writing on the back of the note given in evidence is as follows: "Collection guaranteed and notice of protest waived this 26th

of April, 1880, Thomas P. Kennard." This is exactly the form of endorsement which in *Heard v. Dubuque County Bank*, 8 Neb., 10, we held, following *Robinson v. Lain*, 31 Iowa, 9, to constitute an endorsement with an enlarged liability. There is no doubt a line of cases, many of them cited by counsel for appellees in this case, which hold to the contrary, but I cannot agree with their reasoning, however high their authority. It will be admitted that the possession of the note, with the payee's name written across the back, is evidence of ownership in the plaintiff. Yet it is claimed that while this would be the case if the payee's name stood alone on the back of the note, that here there are other words over the payee's signature to which it applies and upon which it has spent its force. Let us admit this, and then see whether the words taken together, including the signature, do not furnish still stronger evidence of a transfer of title in the note from the payee to the holder. By virtue of these words the payee agrees that he will pay the note in case of the holders using due diligence and being unable to collect it from the makers. He furthermore agrees that his ultimate liability to pay the note shall not be affected by reason of the neglect or failure of the holder to present it to the maker at maturity for payment, or to notify him, the payee, in case of its non-payment. Now what meaning could any of these words have except upon the proposition understood that the payee had disposed of the note, and parted with the title to it to some other person, to whom he guaranteed the payment and in whose favor he waived the duty of presentation and notice? With that proposition understood the words have the meaning usually ascribed to them, otherwise they have none.

Again, I think there can be no doubt of the right of the holder of this note to erase all of the words written above the signature of the payee on the back of the note, and either let it stand as a blank endorsement or to write there-

on the necessary words to make it a full or special indorsement. See 1 Daniels on Neg. Inst., § 672, *et seq.* It seems to me, then, that the possession of a negotiable promissory note, with the payee's name written across the back, is none the less evidence of the ownership of such note by reason of the endorser having also written a guaranty of collection and a waiver of protest upon said note and above his endorsement. Both of these are always for the benefit of the holder, and are concessions to him by the payee of the note when in the act of parting with the possession and title of the note to him, and for some consideration moving from him.

I therefore see no reason for departing from the doctrine of *Heard v. Dubuque County Bank*, and it will be adhered to. The note and mortgage having been endorsed and delivered to the plaintiff before maturity, and received by it for value in the ordinary course of business, without notice of any infirmity, it holds the same free from the taint of usury. All of the other issues in the case being found by the district court in favor of the plaintiff, it was entitled to a judgment for the full amount of the note and interest as claimed in the petition.

The judgment of the district court is therefore reversed, and the cause remanded to said court with the direction to enter a judgment in favor of the plaintiff for the full amount of principal and interest according to the terms of said note.

JUDGMENT ACCORDINGLY.

THE STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. OTTO PRIEBNOW AND MANNO FREY, DEFENDANTS IN ERROR.

1. **Indictment for Destruction of Trees.** Indictment examined and held to be sufficiently specific to sustain a conviction under sec. 88 of the criminal code. This section construed.
2. ———. It is sufficient to charge that the trees were "ornamental and shade trees," without giving the particular kinds or varieties to which they belonged.

BILL of exceptions from Cuming county district court on behalf of plaintiff filed under the provisions of §§ 515 and 516 of the criminal code.

Wilbur F. Bryant, district attorney, for the State, cited: *State v. Fenn*, 41 Conn., 590. *Parker v. The State*, 39 Ala., 365. *U. S. v. Barry*, 4 Cranch, 606. *McDevit v. The State*, 20 Ohio State. 23 Bishop Statutory Crimes, 443. Comp. Stat., 727, § 412. Wharton's Crim. Law, 614. *State v. Watrous*, 13 Iowa, 489.

No counsel opposing.

LAKE, CH. J.

This record is brought here by the district attorney of the seventh judicial district, pursuant to secs. 515 and 516 of the criminal code, for the purpose of having certain rulings of the court below, resulting in the discharge of the defendants in error from custody, reviewed.

Whatever the views of this court may be upon the questions presented, the judgment of the district court must stand as the law of that particular case, for sec. 517 of said code provides that, it "shall not be reversed, nor in any manner affected; but the decision of the supreme court shall determine the law to govern in any similar case which may

be pending at the time the decision is rendered, or which may afterward arise in the state."

The prosecution of the defendants was under sec. 88 of the criminal code, which is in these words: "If any person or persons shall willfully and maliciously, and without lawful authority, box, bore, bark, girdle, saw, cut down, injure, or destroy, to the amount in value of thirty-five dollars or upwards, any fruit, ornamental, shade, or other tree or trees, standing or growing in any orchard, nursery, or grove, the property of another, every such person or persons shall be imprisoned in the penitentiary and kept at hard labor not more than ten years nor less than one year, and shall, moreover, be liable to the party injured in double the amount of damages by him sustained."

The indictment in question charged the defendants as follows: "That Otto Priebnow and Manno Frey, late of the county aforesaid, on the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and eighty-one, and on several days between the said twenty-fifth day of November and the fourth day of December, of the same year, in the county of Cuming aforesaid, did unlawfully, willfully, maliciously, feloniously, and without lawful authority, cut down, injure, destroy, and carry away a large number, to-wit, one hundred and seventeen (117) of ornamental and shade trees, of various kinds, of the value of thirty-five (35) dollars and upwards, to-wit, one hundred and seventy-five (175) dollars, then and there standing and growing, the property of David Neligh, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Nebraska."

On the trial the defendants objected to the introduction of any evidence whatever on the ground that the indictment was not sufficient to support a conviction, and so the court below held. This ruling presents the principal question submitted for our present consideration.

In cases brought here as this one is, on behalf of the

state, the statute provides that the trial judge "shall appoint some competent attorney to argue the case against the prosecuting attorney," etc. No such appointment has been made however, the judge, as appears, having declined to act in the matter, although duly notified of this proceeding. Therefore we are deprived of the light which might have flown from an argument by one specially deputed to uphold the decision, and must decide the case without the aid which the legislature designed we should have. Besides, we are left unadvised, except by the district attorney's brief, as to the supposed defects which led to the conclusion that the indictment would not sustain a conviction. From this, however, we learn that it was contended that the charge against the defendants was not sufficiently specific, in this, that the kinds of trees and the manner and amount of injury were not set forth. Also that two distinct offenses were charged in a single count.

The indictment is specific enough to answer the requirements of the statute. It describes the trees as being "ornamental and shade trees," standing and growing in a grove belonging to David Neligh. This was enough. If they were ornamental or shade trees, *standing in the grove of another*, they were within the protection of the statute, and the defendants were legally liable for their unauthorized destruction, or injury. Whether they were cedar, pine, elm, oak, sycamore, or some other of the many varieties of trees used for those purposes, according to the dictates of individual fancy or circumstances, was unimportant—quite as much so as in an indictment for the malicious killing of a horse or cow, would be the particular breed of the animal killed, which no one, we apprehend, would contend should be averred.

The section of the statute under which this indictment was drawn makes the destruction of trees criminal, not because they are of a particular variety, for, by its terms, it includes all varieties, but because they are in an "orchard,

nursery, or grove," which is made the really distinguishing feature. This, we think, is apparent from the language of the section, "any fruit, ornamental, shade, or other trees, standing or growing in any orchard, nursery, or grove, the property of another." If any variety of ornamental or shade trees standing in such grove were not within the purview of the section, the contention that the particular kind destroyed should be charged to warrant a conviction would be sound, but with all varieties embraced, it is not.

The manner of committing and the extent of the injury are stated with sufficient particularity to sustain a verdict of guilty. That clause of the section under which the defendants were prosecuted, relating to the injury, is not well expressed, but nevertheless its meaning, we think, is not doubtful. The phrase "box, bore, bark, girdle, saw, cut down, injure, or destroy," must have been intended to be understood in the sense as if it read, "box, bore, bark, girdle, saw, cut down, *or otherwise* injure or destroy," thereby making injury to the trees to some extent or their absolute destruction an essential concomitant of each and all of the prohibited acts. The words, "or otherwise," or their equivalents, seem to be necessary to completely express the legislative intent, and must have been omitted by a mere oversight, for in the very next section, which relates to similar injuries less in extent than thirty-five dollars, they are found in their appropriate place, and serve not only to make the meaning of the sentence unquestionable, but the language symmetrical.

From this view of the meaning of the section, it logically follows that, to show a case within it, the indictment must charge that the injury to or destruction of trees amounts to at least thirty-five dollars in value. Does this indictment do this? We think it does by the express averment that the defendants did "cut down, injure, destroy," etc., "trees of the value of thirty-five dollars and upwards." And the manner of accomplishing the destruction is specifi-

cally expressed by the words, "cut down," which, of themselves, in the case of ornamental and shade trees, indicate that it was complete.

The objection that two separate crimes are charged is not good. Conceding all that is alleged against the defendants to be true, it is apparent that the only offense intended to be relied on was the one defined and punishable by sec. 88 of the criminal code. The words "and carry away," it is true, show a criminal asportation of the trees when cut down; but the cutting down and carrying away were the result of a continuous act, and taken together, as charged, constitute but a single crime. The averment that the trees were carried away was unnecessary, and ought to have been treated as surplusage. *Josslyn v. Commonwealth*, 6 Met., 236. *Same v. Tuck*, 20 Pick., 356. *State v. McClintock*, 8 Ia., 203. *State v. Hayden*, 45 Id., 11. On the whole we are of the opinion that the indictment was sufficient to have sustained a conviction, and that in holding otherwise the district court committed an error.

CAROLINE E. HUMPHRIES, APPELLANT, v. B. A. SPAFFORD ET AL., APPELLEES.

1. **Pleading**: CONSTRUCTION: PRESUMPTION. It is a reasonable presumption, and one indulged in the construction of pleadings, that the pleader has stated his case as favorably for himself as the facts warranted. Rule applied.

2. **Practice**: AMENDMENT OF PLEADING. Where the ends of justice seem to demand it, leave will be given in the supreme court to amend a petition so as to fully state the cause of action.

APPEAL from the district court of Lancaster county. Heard below before GASLIN, J., in absence of POUND, J.

W. F. Severance, for appellant.

J. S. Gregory, for appellees.

LAKE, CH. J.

It is quite possible that the petition in the court below failed to state correctly the plaintiff's case. Judging from the brief of her counsel, wherein he sets forth her claim, we are sure it did not. However, if it did, then the judgment gave her all she was entitled to have.

The action was brought for the foreclosure of a mortgage given to secure the payment of two promissory notes, bearing date of January 2d, 1882, each calling for the payment of one hundred and fifty dollars, in one and two years respectively, with interest at ten per centum, payable semi-annually. Each note had a clause to the effect that if any of the interest remained unpaid for ten days after it became due, the holder might "elect to consider the whole note due," and proceed at once to collect it.

After giving the terms of the notes and mortgage, the petition states—"that defendants have failed to comply with the conditions of said notes, by neglecting to pay the first note of $150, and six months interest thereon, amounting to $7.50, on January 2d, 1883, when the same became due and payable; and also in failing to pay the sum of $7.50 interest due on the note of $150 on January 2, 1883, due by its terms. That the plaintiff elects to deem the whole of said note not yet due by its terms due, because of failure to pay said interest. That no proceedings at law have been had for the recovery of the amount of said notes, and that there is due and unpaid thereon the sum of one hundred and sixty-five dollars, and interest thereon from January 2d, 1882, at ten per cent per annum." And for this amount judgment was prayed and rendered.

Pleadings must be construed reasonably. It is a reasonable presumption, and one which has become an established rule of construction, that a pleader will state his case quite as favorably for himself as the facts will justify. *B. & M. R. R. Co. v. Lancaster County*, 4 Neb., 307. *School Dist.*

No. 16 v. School Dist. No. 9, 12 Id., 241. The rule of the code that pleadings shall be construed liberally, does not dispense with the averment of any material fact. *Burr v. Boyer*, 2 Neb., 265. Thus tested, the petition would not support a judgment for more than was given. It is not alleged that no payments had been made on the notes, but simply that none were made at the particular times when by the terms of the notes they fell due. So, too, of the right to elect to consider and treat the notes as due for a failure to meet the several installments of interest. The provision in the notes is, that "upon a failure to pay any of said interest, *within ten days after due*, the holder may elect to consider the whole note due, and it may be collected at once." But the averment in the petition on this point is merely that there was a failure to pay the interest "on January 2d, 1883." So that, conceding all that is alleged to be true, payments may have been made at other times, and indeed must have been, if only the amount claimed were due.

If the amount actually due on the two notes be, as we infer from the brief of counsel, greater than is alleged, if she desire it, the plaintiff may take leave to amend her petition so as to correct the mistake, upon the terms of paying all accrued costs, and have the case remanded to the district court to make the amendment, and for further proceedings. We have no doubt whatever that an amendment at this stage of the case is in harmony with sec. 144 of the code, where the ends of justice seem to demand it. But if no amendment be desired, for the reasons stated the judgment will have to be affirmed.

JUDGMENT ACCORDINGLY.

JACOB A. SIDES, PLAINTIFF IN ERROR, V. DAVID BRENDLINGER, DEFENDANT IN ERROR.

1. **Award:** AFFIDAVITS IMPEACHING RECORD. To make affidavits used to impeach an award of arbitrators a part of the record so as to be available on proceedings in error, they must be embodied in a bill of exceptions allowed and signed by the judge, or clerk of the court, as the statute directs.
2. ———. In order to make a valid award, the arbitrators must pass upon all material matters submitted to them.
3. ———. Every reasonable intendment is to be made in favor of an award.
4. ———. The legal presumption, unless the contrary appear, is that arbitrators decide all matters submitted to them, and only those.
5. ———. It is not essential to the validity of an award of arbitrators upon an account, when not required by the terms of this submission, nor requested on the trial, that there be a special finding as to each separate item composing it, but a general finding is sufficient.

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

Isaac Powers, Jr., for plaintiff in error.

1. Arbitrators did not pass on all issues submitted to them. *Buntam v. Curtis*, 27 Ill., 374. *Yudor v. Scovell*, 20 New Hamp., 171. *Calcord v. Fletcher*, 50 Maine, 398.

2. Facts found and conclusions of law should be stated separately. Civil code, §§ 300, 867. *Murry v. Mills*, 1 Neb., 456.

3. Award is vague and uncertain. Morse, 346.

Joy & Wright and *Thomas L. Griffey*, for defendant in error, on first point made by plaintiff, cited: *Soper v. Frank*, 47 Vt., 368. *Bush v. Davis*, 34 Mich., 190. *Strong v. Strong*, 9 Cush., 560. *Emery v. Hitchcock*, 12 Wend., 156.

Second point. Case cited by plaintiff, 1 Neb., 456, is not a parallel case. Besides no exceptions were taken, no request as to findings, etc. *Light v. Kennard*, 10 Neb., 330. *Turner v. Turner*, 12 Id., 161.

LAKE, CH. J.

This is a petition in error on a record brought from the district court sitting in Dakota county. The error complained of is the refusal of that court to set aside an award of arbitrators, to whose judgment and decision certain matters of difference between the plaintiff and defendant had been submitted. The submission provided that judgment should be rendered by said court on the award, which was to be, and in fact was, made and signed by the arbitrators by the 27th day of December, 1880.

Five several objections were made to said award, which it is now urged that the court erred in overruling. 1. That it was not the impartial judgment of disinterested arbitrators. 2. That the arbitrators did not pass upon all of the issues submitted to them. 3. That they did not state the facts found by them, and their conclusions of law, separately. 4. That the conclusions and judgment of the arbitrators are not supported by the facts found by them. 5. That the award is too vague, indefinite, and uncertain to authorize the judgment rendered thereon. This last objection seems to go to the judgment rendered by the district court on the award as well as to the award itself.

The first objection may be disposed of summarily. There is nothing in the record to warrant it. Certain affidavits purporting to have been filed with the clerk of the court below are brought here and relied on to show that one of the arbitrators was disqualified, but they are no part of the record, and therefore cannot be considered. In order to have made these affidavits a part of the record, a bill of exceptions embodying them, allowed and signed by the judge

or by the clerk of the court, as the statute directs, was necessary. Forty days were given by the judge to prepare a bill of exceptions, but the opportunity does not appear to have been availed of, wherefore we can entertain only such objections as depend upon the submission and award alone.

By the terms of the submission, the arbitrators were authorized to determine "all matters in dispute existing between the said parties in their business relations as principal and agent, from the time Jacob A. Sides commenced transacting David Brendlinger's business as his agent until the present time. Also a certain promissory note given by the said Jacob A. Sides to David Brendlinger, bearing date April 2d, 1877, of eighty-two dollars, at twelve per cent interest, or any other unsettled business between them that may be in dispute." Bills of particulars were filed by the parties, in the form of itemized accounts, specifying distinctly what each demanded from the other.

The plaintiff's account runs from the fall of 1878 to the fall of 1880, and contains in all sixty-nine separate items for labor done, materials furnished, and money expended from time to time by him as the defendant's agent in the management of his three farms in Dakota county. On this account he claimed the right to recover the sum of six hundred and fifty-two dollars and three cents.

The defendant in his bill of particulars admits that four items of the plaintiff's account, amounting to three hundred and thirty-four dollars and thirteen cents, are correct, and denies the residue. He then gives an itemized statement of his own demand against the plaintiff, amounting in the aggregate to two thousand six hundred and thirty dollars and ten cents, for which, less the amount of plaintiff's account admitted to be correct, he asks judgment. This account covers substantially the same period as the plaintiff's, and is made up of various items, such as the use of grass land, rents collected from tenants, wheat, corn, potatoes, etc., one promissory note for $82 particularly mentioned in the submission, and cash loaned.

By a reply, the plaintiff admitted the items of cash and the promissory note. Two or three other items of the defendant's account were also admitted, but the most of it was denied. Upon these issues a trial was had before the arbitrators, who found, as shown by their award: *First.* That the plaintiff had received from the defendant in property, money, etc., as charged, specifying the items, but not including any of the corn charged against him in the year 1880 as having been sold to one M. O. Ayres for four hundred and seventy-five dollars, to the amount of one thousand dollars and twenty-seven cents; and *Second.* That the plaintiff should have of his account, without mentioning the items thereof, as a credit, the sum of four hundred and ninety dollars and forty-seven cents. As to the corn sold to Ayres, which it seems had not yet been paid for, the arbitrators found specially that it was sold by the plaintiff as agent for the defendant, and that the plaintiff had not purchased and paid for it as he had alleged in his reply. As a conclusion from these findings of fact the arbitrators awarded that the plaintiff was indebted to the defendant in the sum of five hundred and nine dollars and eighty cents, for which amount the defendant was entitled to judgment.

Under the second objection it is urged that this award is fatally defective because it does not contain a special finding as to each one of the items composing these two accounts. With this view we cannot agree. The arbitrators were not required by the terms of the submission to so find, nor does it appear that they were even requested to do so. In such case there is no reason for requiring any greater particularity in an award of arbitrators than is customary in the verdict of a jury, or the finding of a court.

The law doubtless is as claimed by counsel, that in order to make a valid award the arbitrators must pass upon all of the material matters submitted to them. But the position which seems to be taken, that because the award

fails to specify the particular finding on each separate item of an account it follows that the arbitrators did not pass upon them, is supported by neither reason nor authority. Every reasonable intendment is to be made in favor of an award of arbitrators. *Strong v. Strong*, 9 Cush., 560. *Bush v. Davis*, 34 Mich., 190. The legal presumption, unless the contrary appear, is, that arbitrators decide all matters which are submitted to them, and only those. 1 Am. Law Register (N. S.), 691. *Walker v. Merrill*, 13 Me., 173. *Chapin v. Boody*, 25 N. H., 285. *Spear v. Hooper*, 22 Pick., 144.

As to the plaintiff's account, the arbitrators say: "We award to Jacob A. Sides, of his account, as a credit, $490.-47." Now the fair and reasonable inference from this is, as it seems to us, that after fully considering the evidence applicable to each of the items composing the account they found them to be sustained to that amount, and that as to the residue they were unproved. This certainly would be sufficiently definite as a general finding of a court or jury to authorize a judgment, and why not in the case of arbitrators whose decisions are looked upon with peculiar favor by all courts? We are of opinion that it is.

The *third*, *fourth*, and *fifth* objections are entirely without merit. The findings of fact and conclusions of law are not united, but are separately stated as the statue directs. The only conclusions of law are, first, "that Jacob A. Sides is indebted to David Brendlinger in the sum of five hundred and nine dollars and eighty cents, for which amount he is entitled to judgment." And, second, "that the costs of this arbitration shall be paid equally by the parties, each paying one-half." The other findings are all of fact, and the conclusion that the plaintiff was indebted in the amount named resulted necessarily therefrom, that being the exact difference in favor of the defendant between the respective accounts as found and allowed by the arbitrators. The matter of costs was largely within the discretion of the ar-

bitrators, and seems to have been considerately disposed of. On the whole we are of the opinion that the judgment of the district court on the award should be in all things affirmed.

JUDGMENT AFFIRMED.

DUDLEY M. STEELE ET AL., PLAINTIFFS IN ERROR, V. JOHN G. DODD ET AL., DEFENDANTS IN ERROR.

1. **Attachment:** AFFIDAVIT. Although an affidavit setting forth a ground of attachment substantially in the words of the statute will support the writ as long as it stands unchallenged by a denial, when so challenged its truthfulness must be shown by competent proof of facts, or the attachment will fail. Facts examined and held not to warrant an attachment.
2. **Ground of Attachment:** REMOVAL OF PROPERTY. The mere fact of a removal of property out of the jurisdiction of a court, unless it be done with intent to defraud creditors, does not give the right of attachment.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Euclid Saunders and *Dilworth & Smith*, for plaintiffs in error.

Batty & Ragan, for defendants in error.

LAKE, CH. J.

This is a proceeding in error, and is brought to reverse an order of the district court for Adams county dissolving an attachment levied on the property of Lizzie E. Reed, one of the defendants.

The affidavit for the attachment was made by an attorney of the plaintiffs', in which several grounds were stated,

substantially in the words of the statute, and to the effect that the defendants were "about to convert a part of their property into money for the purpose of placing it beyond the reach of their creditors," that they "have property and rights in action which they conceal," that they "have assigned, removed, and disposed of a part of their property," and "are about to dispose of a part of their property, with the intent to defraud their creditors."

Although this affidavit is made up of conclusions merely, having none of the facts or circumstances from which they were drawn, it justified the issuing of the order of attachment, and was adequate to support it so long as it stood unchallenged by a denial of its truthfulness. But it was so challenged by the oath of Mrs. Reed, under a motion to dissolve, whereby the burden of showing that the conclusions in the affidavit for the attachment were warranted was cast upon the plaintiffs. *Hilton v. Ross*, 9 Neb., 406.

Recognizing the obligation imposed upon them by this rule, the plaintiffs produced several affidavits which they claim overcome Mrs. Reed's denial, and fully support the attachment. But the court below seems to have thought otherwise, and so do we. In these supporting affidavits we find no facts tending to show any concealment of property or rights in action by Mrs. Reed, or any design of placing her effects beyond the reach of, or in any other manner of defrauding, her creditors.

The first of these affidavits is that of G. D. Pierce, who made the one on which the order of attachment issued. The substance of it is, that during the years 1878–9 the defendants were engaged as partners, under the firm name of Dodd & Co., in the retail grocery business at Hastings, in this state. That, including her interest in that business, Mrs. Reed had real and personal property of the value of thirty-eight hundred and fifty dollars. That in 1879, about when the plaintiffs' claim fell due, Mrs. Reed sold her interest in the partnership to her partner, Dodd, and

also "disposed of all her other personal property, and converted the same into money," * * * * "with the intent to defraud her creditors." That she made several conveyances of real property, one in March, 1880, to Frank C. Phillips, for three hundred and fifty dollars, one in September of the same year to Carson J. Hamot, for the nominal consideration of fifteen hundred dollars, and one in September, 1881, to a Mrs. Paul, for the nominal consideration of one thousand dollars. No fraud is alleged by affiant of the first of these conveyances, but of that to Hamot he says, "no consideration whatever was paid," and that it was made "for the purpose and with the intent to defraud her creditors," and of that to Mrs. Paul, that she was without means to pay for the property, wherefore he "firmly believes that the conveyance * * * was without any consideration, and was made by the said Lizzie E. Reed for the purpose and with the intent to defraud her creditors." He further swears that "said Lizzie E. Reed has removed from said county of Adams, and has taken with her all her personal property, and that the only property remaining to her in said county, subject to attachment," is that seized in this action, and worth only about eight hundred dollars.

We find in this affidavit no fact or circumstance justifying the conclusion or belief of affiant that either of these sales was fraudulent, and especially so when taken in connection with Mrs. Reed's explanation of her temporary removal from the county, to which we shall hereafter refer more particularly. The inference that the conveyance to Hamot was fraudulent seems to have been based chiefly upon an admission by him that it was without consideration, and that it was re-conveyed to her in less than a year afterwards. This admission, however, is merely hearsay, and not binding upon Mrs. Reed. It cannot be used to her prejudice. Besides, even if Hamot gave no consideration, the transaction as evidence of fraud seems to be deprived of all force by the fact that he re-conveyed the

premises to her before the suit was instituted, and more than nine months before the order of attachment was issued. Then, too, we have the attendant circumstance, strong against the idea of there being fraud in the transaction, that Mrs. Reed's only indebtedness so far as disclosed was simply that to the plaintiffs, which was then less than four hundred dollars, a sum quite inconsiderable in comparison with what her property is admitted to have been worth.

As to the conveyance to Mrs. Paul, affiant's conclusion that it was fraudulent, as shown by his affidavit, rests entirely upon the facts that she herself was worth but little, and that her husband having then but recently failed in business had no means with which to aid her. These circumstances alone are not adequate to the establishment of fraud on the part of Mrs. Reed. Aside from the argumentative inference which affiant would have us draw therefrom, nothing is offered to show that the consideration mentioned in the deed was not actually paid; but even if it had not been paid, and the sale were on time, being in all other respects fair, a design to defraud the plaintiffs would hardly be reasonably inferable therefrom.

The only other affidavit relating to the question of fraud is that of George W. Barr, a traveling salesman of the plaintiffs. It, however, adds nothing important to the one we have just examined, being but a repetition merely of it as to the facts sworn to.

As to Mrs. Reed's removal from "the jurisdiction of the court" with a part of her property, which is charged by the plaintiffs to have been "with intent to defraud her creditors," she swears that in August, 1881, desiring that her daughter should have an opportunity to attend the State University, at Lincoln, "she went there with her and occupied rooms temporarily." That "she did not move from Hastings, but was only temporarily absent during the school term, and expected to return as soon as the term was

out." It appears that in accordance with this expectation she did return to Hastings and is now residing there.

The mere fact of a removal of property from the jurisdiction of a particular court, or from the state even, unless accompanied with an intent to defraud creditors, does not give the right of attachment under our law. The particular intent mentioned in the statute is essential to that right. Without such intent a debtor is at full liberty to change his place of abode and go with his effects whithersoever he wills, with all the freedom from lawful molestation of one not indebted. We are of the opinion that the court below took the correct view of the case, and the judgment will be affirmed.

JUDGMENT AFFIRMED.

TIMOTHY HUBBARD, APPELLEE, V. JOEL DRAPER ET AL., APPELLANTS.

1. **Foreclosure sale of real property:** APPRAISEMENT. A court may vacate an appraisement of real property ordered sold under a decree of foreclosure, but unless this is done there is no authority for making a second one until the property has been twice offered for sale, and remains unsold for want of bidders.

2. ———. The fact that the sale was made in view of a second and unauthorized appraisement is not of itself sufficient ground for setting it aside when in fact it conforms to a prior and valid one as to the price realized. In such case the error is without prejudice.

APPEAL from order confirming sale, made by POUND, J., in the district court for Otoe county.

Edwin F. Warren, for appellants.

S. H. Calhoun, for appellee.

LAKE, CH. J.

This is an appeal from an order of the district court for Otoe county overruling exceptions to and confirming a sale of some lots in Nebraska City, made under a decree of foreclosure.

The chief and perhaps only real objection to the sale seems to have been that it was made under an illegal appraisement. The decree ordering the property to be sold was made Oct. 12, 1880, and a stay for nine months taken.

On the 11th of August, 1881, an order was issued to the sheriff to carry the decree into execution, under which the property was appraised and advertised to be sold, but, before the day of sale arrived, this order was, by direction of the plaintiff's attorney, recalled, and an *alias* order issued. Under this second order a new appraisement was had, a sale made, which, on motion of the defendants who prosecute this appeal, was set aside.

The ground on which this sale was vacated is not manifest, as we have in the record nothing to indicate which of the several distinct exceptions were sustained. It is probable, however, that it may have been because of its having been made under the second appraisement, when it ought to have been made under the first, which had not been set aside, nor had there been any offer of the property under it.

An appraisement may, of course, be vacated by the court for any sufficient reason, but unless this be done, there is no authority for making a second one until the property has been twice offered for sale, and remains unsold for want of bidders. Code of civil procedure, § 495.

A third *alias* order for the sale of property was issued to the sheriff on the first day of March, 1882. Under it the sale now in question was made. From the sheriff's return it appears that this sale was nominally made under the second appraisement, whereby the valuation was considerably lower than that fixed by the first. Under this sale

but a very small number of the lots covered by the decree were disposed of, most of them remaining unsold for want of bidders.

But, although this sale was made nominally pursuant to the second valuation, the prices actually realized seem to be sufficient to answer the requirement of the first. At all events, it is not shown that they were less than two-thirds of the value as fixed by the first appraisement. For instance, block six in Hail & Co.'s addition to Nebraska City, consisting of twelve lots, is described in the decree as a whole, and was so appraised under the first order of sale at two hundred and forty-three dollars and sixty-one cents, two-thirds of which is one hundred and sixty-two dollars and forty cents. The sheriff sold six of these lots, or one-half f the whole block, for one hundred and sixty-seven dollars, thus realizing for one-half of this particular piece over four dollars more than he would have been justified in taking for the whole.

The residue of the property sold was six l t in block ninety-nine, in Nebraska City. These lots were, it seems, incumbered by quite an amount of taxes, and their value, after deducting these liens, was fixed at the sum of two hundred and thirty-two dollars and forty-three cents. The amount realized by the sale was one hundred and sixty dollars, which was more than two-thirds of their net value. The fact that the return of the officer shows the sale to have been made in view of a second and unauthorized appraisement is not of itself a sufficient ground for setting it aside, when in fact it conforms to a prior and valid one, as to the price realized.

One other objection is made to the confirmation of this sale. It is, that in making the appraisement the appraisers deducted from the gross value of some of the property covered by the decree certain taxes for which a sale had been made and a deed executed by the treasurer to the purchaser. This point is supported, it seems, by one affidavit on the

part of the defendants, and denied by one on the part of the plaintiff. There is no bill of exceptions, however, showing what the evidence before the district judge was, and it cannot, therefore, be here considered. As to the points of objection made to this sale the record discloses no prejudicial error, and the order confirming it must be sustained.

ORDER AFFIRMED.

FRANCIS HAIR, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Practice in criminal cases:** CONTINUANCE. H. was indicted for horse stealing at the October, 1882, term of court, plead not guilty, and the cause was continued on the motion of the state, the next regular term being in April following. A special term of court was afterwards called, and held in December of that year, at which H., against his objections, was tried. *Held*, That the continuance being general operated to continue the case to the next regular term.

2. ———: ———. The facts stated in an affidavit in support of a motion for a continuance for the purposes of the motion will be taken as true. And where sufficient facts are stated a continuance should be granted. *Williams v. The State*, 6 Neb., 334, adhered to.

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

Sam L. Savidge and *Hamer & Conner*, for plaintiff in error, cited: *Johnson v. Dinsmore*, 11 Neb., 394. *Billings v. McCoy*, 5 Id., 190. *Williams v. The State*, 6 Id., 338.

Isaac Powers, Jr., Attorney General, for the State, cited: *State v. Roorbacker*, 19 Iowa, 154. *Bledson v. Commonwealth*, 6 Rand., 673. *Jones v. The State*, 11 Ind., 357. *McLean v. The State*, 28 Kan., 373.

MAXWELL, J.

The plaintiff was indicted for horse stealing at the October, 1882, term of the district court of Kearney county. He plead not guilty to the indictment, and the state not being ready to proceed to trial asked for and obtained a continuance of the cause upon the ground of a "want of material testimony." The order for a continuance required "the prisoner to enter into bonds with approved security that he will appear at the district court for Kearney county, on the first day of the next term thereof," recognizance being fixed at $400. The next regular term of the court was called to be held in April, 1883. In November, 1882, a special term of the district court of Kearney county was called to be held in December of that year, and the plaintiff was notified that he would then be tried upon said indictment. At the special term he filed a motion for a continuance supported by affidavits, in which he stated that he had been led to believe that the cause had been continued to the regular term in April; that he had been unable to procure bail up to that time, but had been endeavoring and expected soon to do so; that the horses he was charged with stealing he had purchased in good faith of one John Drum, of Chapman station, Kansas, and had paid full value for the same; that he can prove by said Drum that he did buy said horses in good faith and did not steal the same, and that he can not safely proceed to trial without the testimony of said Drum, etc. The motion was overruled, a trial had, and the plaintiff found guilty and sentenced to imprisonment in the penitentiary for ten years.

The first ground upon which a reversal is sought is, that the court erred in overruling the motion for a continuance. Where a motion for a continuance is based upon the grounds stated in an affidavit which accompanies the motion, the facts stated in the affidavit for the purposes of the motion will be taken as true, and if sufficient grounds are shown

and reasonable diligence has been used by the party filing the motion a continuance should be granted. The court will not permit to be filed, nor consider, counter affidavits in such case because it will not in that proceeding permit an issue to be raised as to the truthfulness of the affidavit. *Williams v. The State*, 6 Neb., 334. The prompt disposition of causes is very desirable, but it is of much greater importance that justice be administered. To this end a reasonable opportunity should be given a party, where he makes a proper showing, to procure his testimony, and if necessary a continuance should be granted. In the case at bar the record shows that at the October term the cause was continued generally—in effect to the next regular term—on the motion of the state. Afterwards, and within two months, a special term was held and the cause tried against the objections of the plaintiff. In his affidavit for a continuance he states that he purchased the horse for which he was indicted and found guilty of stealing, of one Drum, and states his place of residence and sufficient reasons why he has failed to procure his testimony. These statements being taken as true certainly were good grounds for a continuance. It is very evident, too, that the case having been continued to the regular term it should not have been taken up against the objection of the accused and tried at a special term called for another purpose. Such practice might lead to great hardship by enabling the state to procure its witnesses and insist upon a trial at a time when the accused could not be prepared to make his defense.

Objection is made to the severity of the sentence. Our statute fixes the punishment at not less than three nor more than fifteen years. Crim. code, § 117. The sentence certainly seems excessive. The opinions of the ablest jurists coincide that it is the certainty and not the severity of punishment that deters from crime. The law fixes the minimum and maximum of imprisonment and leaves the court to adjust the punishment according to the circum-

stances attending the commission of the crime. If no fact is shown except that of the theft, there seems to be no good reason for a term of imprisonment much, if at all, in excess of the minimum fixed by law. Certainly a sentence for ten years cannot be justified. The bail in this case was fixed at $400 by the court, showing that the offense was not considered by it of so unusual a character that a very large sum was required to secure the presence of the accused. And we see nothing in the testimony calling for unusual severity in the sentence; but as the cause must be reversed for the refusal to grant a continuance, it is unnecessary to decide this question.

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

REVERSED AND REMANDED.

ENOCH HUNTER, PLAINTIFF IN ERROR, V. THE STATE, EX REL. D. C. PATTERSON, DEFENDANT IN ERROR.

1. **County Seat Contest.** The town of W. received 293 of a total of 410 votes cast on the question of removal of the county seat of W. county. *Held*, That mere allegations of fraud and illegal voting, without any statement of facts upon which the charges were based, were not a sufficient defense in an application for a mandamus to compel the county officers to remove and keep their offices at the town of W.

2. ———: MANDAMUS: PLEADING. Where in the defense to a mandamus to require certain county officers to remove and hold their respective offices at a town receiving more than three-fifths of all the votes cast at an election for the removal of the county seat, there was no claim or allegation of the bribery of voters, *Held*, That that matter must be pleaded to be available.

ERROR to the district court for Wayne County. Heard below before BARNES, J.

Andrew Bevins, for plaintiff in error.

At time notice was served an injunction was in full force restraining removal of county seat, offices, etc. The injunction being against the county was binding on all individuals acting for the county. *People v. Sturtevant,* 5 Seld., 263. Mandamus will not lie. High Ex. Leg. Rem., 23. *The State, ex rel. Reed, v. Ramsey,* 8 Neb., 291. Result of an election cannot be decided by mandamus. *The State v. Palmer,* 10 Neb., 203.

Britton & Northrop, for defendant in error. Injunction was not binding on defendants below. It did not run against them but against county commissioners. Mandamus lies. *State v. Sherwood,* 15 Minn., 221.

MAXWELL, J.

An election was held in Wayne county on the 5th day of December, 1882, for the relocation of the county seat of that county. The whole number of votes polled at that election was 410, of which the town of Wayne received 293, which being more than three-fifths of all the votes cast, entitled it to become the county seat. On the 9th day of March, 1883, D. C. Patterson, as relator, applied to Judge BARNES, at Ponca, for a peremptory writ of mandamus to compel the clerk, treasurer, judge, and sheriff of said county to remove their respective offices, with the records and papers pertaining thereto, to the town of Wayne. A peremptory writ was awarded, it is claimed upon insufficient notice. Afterwards the plaintiff by his attorney, A. Bevins, filed a motion for a re-hearing, which was had at West Point. On the re-hearing the plaintiff introduced in evidence a petition in a cause then pending in the district court of Wayne county, to enjoin the county commissioners from removing the records of said county to the town of Wayne. The district judge adhered to his decision granting a peremptory writ of mandamus, and from that decision the plaintiff brings the cause into this court, the

evidence to show that the mandamus should not have been granted being the petition in the equity case above referred to. We have read the evidence carefully and do not find a single fact stated showing fraud in the election. There are charges of fraud, illegal voting, etc., without stating what was done. The question here involved was before this court in *State v. Thatch*, 5 Neb., 94, where it was held that a party who charges that an election has been carried by fraud must state the facts on which he bases his charge. It is also alleged that certain citizens of Wayne, naming them, entered into a bond to the county to furnish free of charge to the voters of said county the necessary offices and buildings for five years for the use of the county. It is alleged that a sufficient number of votes were changed by this offer to carry the election in favor of the town of Wayne. These are mere allegations in a petition in an action upon which no proof has been taken and therefore cannot be accepted as facts. They are not pleaded as a defense to the mandamus and therefore cannot be considered. *Jefferson Co. v. The People*, 5 Neb., 127. If the proof in the equity case should show that the election was carried in the manner indicated it will then be necessary for this court to determine in that case whether such acts constitute bribery, so as to avoid an election. But there is no issue to that effect presented in the pleadings, and it would be improper to determine that matter upon the meagre allegations in the petition in equity now before us as evidence, with that action undetermined. The petition at the most shows that an action is pending to enjoin the county commissioners from removing the records, and would not preclude a court from granting a mandamus against the other county officers requiring them to remove their respective offices. As a rule, in case of a county seat contest, a court should have clear and unmistakable proof that an election for that purpose, fairly conducted, has resulted in the majority required by law in favor of the locality claiming to have been se-

lected as the county seat. And if the right is not clear, the writ should be refused. In any case sufficient time should be given all parties in order that a fair hearing may be had. Whether sufficient time was given in the first instance in the hearing before the judge of the district court it is unnecessary now to inquire, as it seems to be conceded that the plaintiff had ample opportunity to present his case at West Point. And taking all the testimony offered by the plaintiff it fails to show that the district court erred in granting the mandamus. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

ANNA M. G. MCCORMICK, PLAINTIFF IN ERROR, V. CHARLES RIEWE, DEFENDANT IN ERROR.

Replevin will not lie to oust a tenant from the occupancy of a building.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

George W. Ambrose and *George E. Pritchett*, for plaintiff in error.

W. J. Connell and *Charles R. Redick*, for defendant in error.

MAXWELL, J.

This case was before this court in 1881, and is reported in 11 Nebr., 261. The facts are stated in that opinion and need not be repeated. The former judgment was reversed, and upon the second trial a verdict was returned in favor of Riewe for the sum of $447.94, upon which judgment was

rendered. The plaintiff brings the cause into this court by petition in error. The only error relied upon is the refusal of the court to give the following instruction: "The jury are instructed that if they find that the tenancy of the defendant expired on or before June 1st, 1878, and that he was thereafter unlawfully holding over his term, and that on the 7th day of June, 1878, W. J. Sweezy served upon the defendant the notice to quit, which is in evidence, that the plaintiff can maintain the action and you should find a verdict in her favor." This instruction was properly refused.

Riewe was in possession of a frame building under a lease. If, as is claimed by the plaintiff, the defendant was holding over after the expiration of his term, the law provides a summary remedy to recover the possession by proceedings in forcible entry and detention. In such action notice to quit must be given and the rights of the plaintiff and defendant will be inquired into and protected, and the judgment of the trial court may be reviewed on error. But replevin will not lie. *Riewe v. McCormick*, 11 Neb., 261. It is pretty clear in this case that there was an attempt to override the law and trample upon the rights of the defendant, and that the process of the court was used as a cover to perpetrate a wrong.

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

JUDGMENT AFFIRMED.

GEORGE W. MOWERY, PLAINTIFF IN ERROR, v. P. P. MAST & CO., DEFENDANTS IN ERROR.

Negotiable Instruments. Where a negotiable instrument is lost after it becomes due, a recovery may be had thereon in a court of law.

ERROR to the district court for Adams county. Tried before POUND, J., in the absence of GASLIN, J.

Batty & Ragan, for plaintiff in error, cited: 1 Nash Practice, 555. *Mores v. Trice*, 21 Gratt., 556. *Kinsdale v. Bank*, 6 Wend., 378. *Hopkins v. Adams*, 20 Verm., 407. *Posey v. Decatur Bank*, 12 Ala., 802. 2 Daniels, 1477–8. 2 Parsons on Notes and Bills, 302.

O. B. Hewett, for defendant in error, cited: *Mason v. King*, 15 Ohio, 242. 1 Wait's Actions and Defenses, 166, and cases cited.

MAXWELL, J.

This is an action on a guaranty made by Mowery to Mast & Co. upon a promissory note, the note being lost after it became due. The guaranty is as follows: "For value received we hereby guarantee the payment of the within note, and waive protest, demand, and notice of non-payment thereof, G. W. Mowery." The action was commenced before a justice of the peace, who rendered judgment in favor of Mowery, and dismissed the action. Mast & Co. appealed the cause to the district court, where they recovered judgment for the sum of $111.43. Mowery brings the cause into this court by petition in error. It is alleged in the petition that after the note became due, Mast & Co. were, and still are, the owners and holders of said note, and at no time have sold, assigned, transferred, or endorsed the same in any manner. It is also alleged that after said note became due, and while in the hands of Mast & Co.'s attorneys for collection, it was lost, and plaintiffs have not been able to find it, though diligent search has been made for the same. These facts are not denied in the answer, and are therefore admitted. The principal ground of error relied upon is that the action should have

been brought in a court of equity, and not of law, and therefore the justice of the peace had no jurisdiction.

The authorities upon this question, both in England and this country, are conflicting, the chief difficulty being the authority of a court of law to require the plaintiff to give indemnity against the note if it should afterwards be found in the hands of an innocent holder who acquired it before due.

Among the grounds upon which the English courts require the action to be brought in a court of equity are: First, that the person paying a note or bill is entitled to receive it on payment as evidence of such payment. Second, that the instrument may afterwards be found, although supposed to be lost or destroyed. Third, the instrument may have been negotiated before due, therefore indemnity is required. The rule is different, however, both in this country and England, where the note sued on is not negotiable. And the authorities are pretty nearly unanimous that where the instrument is clearly shown to have been destroyed, no indemnity is necessary. Where a negotiable instrument, in such form that the legal title will pass to the holder by delivery, is lost before it becomes due, there is good reason for requiring a bond of indemnity from the person who has lost the instrument, if he bring an action on such lost instrument to recover the amount due thereon. In such case the action should be brought in a court of equity, which may impose suitable conditions upon the plaintiff before he will be permitted to recover. But where it is clearly shown that an instrument is lost after it has become due, and an action is brought thereon by the actual owner, no indemnity would seem to be necessary. The instrument will stand on the same ground as though it was non-negotiable, and a recovery thereon by the actual owner will be a complete bar to an action by a party who has received the instrument after it became due. In the case at bar it is admitted on the pleadings that Mast & Co.

have not transferred the note in question, and that it was lost in the office of their attorney after it became due. This being the case, a court of law had jurisdiction. *Thayer v. King*, 15 Ohio, 242. Story's Eq. Juris., § 86a, and cases cited. The action, therefore, was properly brought before a justice of the peace. The judgment must be affirmed.

JUDGMENT AFFIRMED.

GEORGE W. FORGY, APPELLANT, V. SAMUEL W. MERRYMAN ET AL., APPELLEES.

Mortgage on U. S. Homestead. One M., in 1871 entered a quarter section of land as a homestead under the laws of the United States. In 1875 he executed a mortgage upon the same. In 1877 he made final proof and received a patent. Afterwards he conveyed by quit claim deed to one R. *Held*, That R., being a stranger to the transaction, could not question the validity of the mortgage.

APPEAL from the district court of Fillmore county. Tried below before DAVIDSON, J.

Burr & Kelly for appellant, cited: *Cheney v. White*, 5 Neb., 261. *Bellinger v. White*, Id., 339. *Skinner v. Reynick*, 10 Neb., 323. *Knight v. Leary*, 54 Wis., 459. *Jones v. Yoakum*, 5 Neb., 265. *Smith v. Steele*, 13 Neb., 1. *Nycum v. McAllister*, 33 Iowa, 374. *Simmons v. Yurann*, 11 Neb., 516. *Bateman v. Robinson*, 12 Id., 508. *Blanchard v. Jamison*, *ante* p. 244. *Watson v. Voorhees*, 14 Kan., 328. *Robbins v. Burr*, 54 Ill., 48. *Miller v. Little*, 47 Cal., 174. *Seymour v. Saunders*, 3 Dill., 437.

Lamb, Billingsley & Lambertson for appellees, cited: U. S. Statutes, § 2,290 *et seq.* *Oaks v. Heaton*, 44 Iowa,

119. *Dawson v. Merrill*, 2 Neb., 119. *Id.*, 3 Neb., 458. *Brewster v. Madden*, 15 Kan., 249. *Warren v. Van Brunt*, 19 Wall., 654. *Evans v. Folsom*, 5 Minn., 422. *Platte v. U. P. R. R.*, 99 U. S., 38. *Penn v. Ott*, 12 La. Ann., 233.

MAXWELL, J.

On the 29th day of June, 1871, Samuel W. Merryman entered as a homestead the north-west quarter of section 22, township 6, range 4 west, in Fillmore county. In December, 1875, he executed a promissory note as follows:

"$1,500. Peoria, Ill., Dec. 4th, 1875.

"Four years after date I promise to pay to Edward A. Casey or order, fifteen hundred dollars, at Peoria, value received, with interest at ten per cent per annum from date. Interest payable annually.

"S. W. MERRYMAN, SR."

At the same time, to secure the payment of said note he executed a deed of trust upon said land to Jacob Darst, as trustee for said Casey. Various sums, amounting in the aggregate to $400, were paid as interest on said note. In March, 1877, Merryman made his final proof, and received a patent for said land, August 10th, 1877. In August, 1879, Samuel W. Merryman, for the consideration of one dollar, executed a quit claim for said land to Leslie Robison. There is also a quit claim deed from Mrs. Hunt, a daughter of Merryman, and her husband, to Robison for the land in question. These deeds to Robison, although absolute on their face, are in the nature of mortgages, he at the time of the delivery of the same having executed to Samuel W. Merryman, Jr. a bond providing that upon "1st, the payment of six hundred dollars on or before the 22d day of September, 1880, with

interest from date at the rate of eight per cent; 2d, the payment of one thousand dollars on or before the 22d day of September, 1881, with interest at eight per cent from date, payable annually; 3d, the payment of eight hundred and sixty-one dollars on or before the 22d day of September, 1882, with interest from date, payable annually, at eight per cent;" time being made the essence of the contract, he would reconvey said land. The Casey note and mortgage were transferred to the plaintiff before they became due, and in February, 1882, he commenced an action in the district court of Fillmore county to foreclose the same. To the petition filed in that case an answer was filed purporting to be made jointly by Samuel W. Merryman, Mary D. Merryman, and Leslie Robison. The answer admits the execution of the note and mortgage, but states in substance that said mortgage was made upon premises the title of which was in the United States, and that the same "is a cloud upon the title of said Robison, and tends to depreciate the value thereof." On the trial of cause in the court below, the court found for the defendants, and dismissed the action. The plaintiff appeals to this court.

The uncontradicted testimony of Samuel W. Merryman, Sr., is, that he makes no defense to the action, nor has authorized any one to appear for him. The question for determination, therefore, is this: Can a subsequent purchaser or lien holder plead and prove as a defense in his own favor, that a prior mortgage, of which he had full notice at the time of his purchase, was invalid because the legal title to the mortgaged premises was in the United States at the time of the execution of the mortgage? Both derive their rights from the same person.

Suppose Merryman at the time the mortgage was made had executed a lease of the premises in controversy for ten or more years, could Robison raise the objection that Merryman did not possess the legal title and therefore could

not make a lease for that length of time? Such a defense, if available under any circumstances could only be taken advantage of by the lessor and not by a stranger. *Worcestor v. Eaton*, 13 Mass., 371. *Wheaton v. East*, 5 Yerg., 41.

A mortgage or deed of trust in this state is not, as at common law, a conveyance, but simply creates a lien. *Kyger v. Ryley*, 2 Neb., 28. *Webb v. Hoselton*, 4 Id., 308.

The lien in this case was evidently created to secure a *bona fide* debt, and it is very clear that a third party, a stranger to the transaction, cannot attack or defeat the same. He took his title or interest, as all the proof shows, with full notice of the existence of such lien, it being recognized by his grantors, who conveyed to him merely by quit claim deeds. Besides, for aught that appears in this record the property may be amply sufficient to satisfy both debts. It is the interest of Merryman that this property should be applied to the payment of the debt, as otherwise he would be liable on the note to be collected from any other property he may possess. The land, therefore, as against one who took it with knowledge of or subject to the mortgage, is the primary fund for the payment of the debt, and must be so applied. *Halsey v. Reed*, 9 Paige, 446. *Johnson v. Corbett*, 11 Id., 265.

We have no doubt of the validity of the mortgage, even as against Merryman, but it is unnecessary to discuss that branch of the case as Robison is not in a position to raise the question.

It follows that the judgment of the district court must be reversed, and a decree will be entered in this court in favor of the plaintiff.

DECREE FOR PLAINTIFF.

PETER BRONDBERG, PLAINTIFF IN ERROR, V. WILLIAM M. BABBOTT, DEFENDANT IN ERROR.

1. **County Court:** JURISDICTION. Under the provisions of the statute as it stood previous to the amendment of 1883, the jurisdiction of the county court in civil cases was limited to sums not exceeding five hundred dollars.
2. ——: APPEAL TO DISTRICT COURT. A district court cannot acquire jurisdiction of a cause on appeal from the county court if the county court had no jurisdiction of such cause.
3. **Jurisdiction:** WAIVER. Want of jurisdiction of the subject matter cannot be waived by consent of the parties, and an appeal from the judgment in such a case confers no jurisdiction on the appellate court.

ERROR to the district court for Otoe county, where the cause had been brought on error from the county court by the defendant and judgment of that court reversed by POUND, J., and same dismissed. The plaintiff claimed by his petition in the county court $588.60, and that amount was indorsed on the summons, but the judgment was for $500 only and costs, the defendant not appearing except to prosecute proceedings in error to the district court.

Watson & Wodehouse, for plaintiff in error.

The error, if any, was without prejudice, and county court had jurisdiction to render judgment for amount it did. *Dillon v. Russell*, 5 Neb., 484. *Reynolds v. Reynolds*, 10 Id., 574. Defendant did not open up judgment, hence could not prosecute error. *Clendenning v. Crawford*, 7 Neb., 474. District court had jurisdiction. Comp. Stat., p. 611, § 601. *Adams Express Co. v. St. John*, 17 Ohio State, 641.

C. W. Seymour, for defendant in error, cited: *Clay v. Barlow*, 123 Mass., 378. *Bremaugh v. Worley*, 6 Ohio

State, 597. *Belford v. Parrish*, 22 Ohio State, 371. *Brauer v. Luntzer*, 12 Neb., 476. Maxwell's Practice, 41. *Watson v. McCartney*, 1 Neb., 131.

COBB, J.

At the date of the proceedings involved in this case the jurisdiction of county courts in civil actions was limited to five hundred dollars, the language of the statute being, "and shall have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding five hundred dollars exclusive of costs." Comp. Stat., 205. The summons issued by the county judge, as well in the *ad damnum* clause as in the indorsement, stated the plaintiff's demand for which the suit was brought at five hundred and eighty-eight dollars and sixty cents. The copy of the plaintiff's petition in the county court, returned in the record, shows that the plaintiff's claim against the defendant in that court was for damages for failing to furnish material and pay for the making of five thousand eight hundred and eighty-six barrels at ten cents per barrel, making the amount of his claim $588.60.

It seems to be well settled that in a court of limited jurisdiction it is the amount stated in the *ad damnum* clause of the writ that gives jurisdiction even in cases where the petition or bill of particulars states a different amount as that for which judgment is demanded. But here all parts of the record agree and show the claim to have been for a single item of damages amounting to a sum beyond the jurisdiction of the court either to try or to take the first step towards trying.

There is a wide difference between jurisdiction of a party and jurisdiction of the subject matter of a law suit. If the court has jurisdiction of the subject matter, although no steps have been taken to obtain jurisdiction of the defendants, if he voluntarily comes before the court and partici-

pates in the trial, or after the trial takes an appeal or writ of error, as a rule he waives all objections to the jurisdiction of the court. But it is quite different when the subject of the suit is not within the jurisdiction of the court. In the case at bar the formal stipulation of the defendant would not have conferred jurisdiction upon the county court to try and adjudicate upon the case as presented by the record, and certainly his after appearance for the purpose of taking the case to the district court upon error, could have no such effect.

Counsel for plaintiff in error contend that upon the district court finding error in the judgment of the county court, it should have reversed the judgment, and retained the case for a trial *de novo* in the district court. Such is doubtless the law in all cases, except where the error consists in the lower courts assuming jurisdiction of a case where the law does not give it. The case of *The Adams Express Company v. St. John*, 17 Ohio State, 641, cited by counsel for plaintiff in error, is to this effect, no more. The court, in the opinion, say: "The only question involved in this case is, whether upon reversal of a justice's judgment in the common pleas, on the petition of the defendant, for the reason that the justice had no jurisdiction *of his person*, the cause can properly be set down for trial and final judgment against the defendant's consent? We answer the question in the affirmative. The defendant, by filing his petition in error, submits himself to the jurisdiction of the court for trial of the case under the statutory provision on that subject."

It must be confessed that we find some difficulty in reconciling the view which we are obliged to hold in this case, with the provision of the statute cited by counsel for plaintiff in error.

"Sec. 60. When the proceedings of a justice of the peace are taken on error to the district court, * * * and the judgment of such justice shall be reversed or set

aside, the court shall render judgment of reversal and for costs that have accrued up to that time in favor of the plaintiff in error, and award execution therefor, and the cause shall be retained by the court for trial and final judgment as in cases of appeal."

It is true that this statute makes no distinction between cases in which the justice had jurisdiction of the subject matter of the action and where he had not; but it can scarcely be possible that the legislature intended to place cases of slight error on an equal footing with the most flagrant usurpation of jurisdiction on the part of the lower court. The law has always preserved a clear distinction between a total want of jurisdiction to act and erroneous action in the exercise of an undenied jurisdiction, and such distinction cannot well be abolished without the intent of the legislature to do so being clearly and unequivocally expressed.

The supreme court of Wisconsin has repeatedly held (in the absence of a statutory provision exactly like that of ours above quoted, it must be admitted) that upon appeal from a justice of the peace or other lower court to the circuit court, in a case where such justice or other lower court had not jurisdiction of the subject matter of the action, the appellate court acquires none. *Cooban v. Bryant*, 36 Wis., 605. *Stringham v. Board of Supervisors*, 24 Id., 594. *Felt v. Felt*, 19 Id., 208. To the same effect was held by the supreme court of New York. *Malone v. Clark*, 2 Hill, 657; and of Kentucky, *Stephens v. Boswell*, 2 J. J. Marshall, 29; and such is the current of authority.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

LAKE, CH. J., concurs.

MAXWELL, J., dissenting.

I admit that if the county court had no jurisdiction of the subject matter, that the district court could acquire none. But the county court did have jurisdiction of the subject matter to the extent of $500, the exact amount for which judgment was rendered. The summons may be treated as a nullity. It did not give the court jurisdiction of the *person* of the defendant, and the judgment, therefore, was null and void. But the defendant instituted proceedings in error to reverse the judgment, and thereby submitted to the jurisdiction of the court. *Fee v. Big Sand Iron Company*, 13 Ohio State, 563. The judgment of the court below having been reversed, the statute made it the duty of the district court to retain the case for trial. There is a material difference between a case where the county court has no jurisdiction of the subject matter—as in an action of slander—and that under consideration, where it had authority, upon service of a valid summons, to render the judgment complained of. I am unable, therefore, to give my assent to the conclusions of the majority of the court. The judgment should be reversed, and the cause remanded to the district court for trial.

J. A. GRIMISON, PLAINTIFF IN ERROR, v. H. C. RUSSELL, DEFENDANT IN ERROR.

1. **Negotiable Instruments.** A memorandum upon a note made contemporaneously with and delivered with it, and intended as a part of the contract, is a substantive part of the note, and qualifies it the same as if inserted in the body of the instrument, and with it constitutes a single contract. *Benedict v. Cowden*, 49 N. Y., 396.

2. ———. An instrument in the form of a promissory note, but which by its terms is only to be payable on the condition of another certain note therein named being not paid, is not a negotiable promissory note.

ERROR to the district court for Colfax county. Tried below before GEORGE W. POST, J.

Phelps & Thomas, for plaintiff in error, cited: 1 Daniels, 35. 1 Wait's Actions and Defenses, 534, 538, 539; 545–549. 8 Southern Law Review, N. S., 526, and cases cited in notes 4 and 5. *Leeds v. Lancashire*, 2 Comp., 205. *Hartley v. Wilkinson*, 4 Maule & Selwyn, 25. Brandt on Suretyship, § 79. *Lang v. Pike*, 27 Ohio State, 498. *Kingsbury v. Westfall*, 61 New York, 360.

M. B. Hoxie & L. D. Chambers, for defendant in error, cited: *Bailey v. Freeman*, 7 Johns., 280. *Nelson v. Boynton*, 3 Metc., 400. *Bainbridge v. Wade*, 16 Q. B., 89. *Henry v. Coleman*, 5 Vermont, 402. *Brill v. Crick*, 1 Messon & Welsby, 232. *Saunders v. Bacon*, 8 Johns., 485. 2 Parsons Notes and Bills, 517, and cases cited.

COBB, J.

This action was brought in the district court on a note, of which the following is a copy:

"$103.10. SCHUYLER, NEB., August 13, 1877.

"Ninety days after date, we, or either of us, promise to pay to Geo. H. Wells or order, one hundred three 10-100 dollars, for value received, negotiable and payable without defalcation or discount at the banking house of Sumner & Co., Schuyler, Nebraska, with interest at the rate of 12 per cent per annum from maturity until paid.

"In case this note is not paid at maturity and an action commenced thereon, we agree to pay a reasonable attorney's fee, not exceeding ten per cent on the amount due, the

same to be allowed by the court and included in the judgment. The conditions of this note are set forth in full upon the back of this note.

"(Signed) "W. WRIGHT.
"J. A. GRIMISON."

On the back is the following:

"This note is to be binding upon the signers only on the following condition: That a certain note for ($103.10) one hundred three 10-100 dollars signed by W. Wright and G. H. Wells, and made payable to Wells & Nieman of Schuyler, Neb., be not paid.

"W. WRIGHT.
"G. H. WELLS.
"J. A. GRIMISON."

"Pay H. C. Russell without recourse."

There was a judgment for the plaintiff below, and the defendant Grimison brings the cause to this court on error. There can be no doubt upon the authorities that the writing on the back of the note must be taken as a part of it, the same as though it were written on its face and above the signature. This would be so even had the memorandum not been signed as it was in this case by all or any of the parties. This question is thoroughly discussed by Judge ALLEN in *Benedict v. Cowden*, 49 N. Y., 396, and all the authorities cited. The question was, however, squarely before this court in the case of the *Polo Manufacturing Co. v. Parr*, 8 Neb., 379, and squarely decided. In the opinion by the then Chief Justice the court say: "The rule results from the principle that the construction of the note is to be gathered from the whole of it, as well from the words on the back as those on the face, therefore a memorandum upon the back of a note made by agreement of the parties before signing, will bind all of the parties to it."

It therefore follows that the note sued on, not being an instrument providing for the payment of a certain sum of

money absolutely and at all events, is not a negotiable promissory note within the law. It does not follow that it is not a legal instrument or that the plaintiff cannot obtain some measure of relief upon it. But in any suit for such relief he will be obliged to resort to such pleadings and proofs as are adapted to his rights as the holder of an assigned chose in action, and not to such as are only applicable to the rights of an endorsee of negotiable paper.

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

REVERSED AND REMANDED.

SUMNER & COMPANY, PLAINTIFFS IN ERROR, V. THE COUNTY OF COLFAX, DEFENDANT IN ERROR.

Taxes: EQUALIZATION OF ASSESSMENTS. The power of the county commissioners to equalize assessments or grant any manner of relief against over-assessments (except to refund illegal taxes, paid under protest, in the manner provided by law) can only be exercised while sitting as a board of equalization, and their power to hold such session is limited to a period of ten days, commencing on the third Monday of June of each year.

ERROR to the district court for Colfax county. Heard below before GEORGE W. POST, J.

Phelps & Thomas, for plaintiff in error, cited: Rev. Stat., U. S., § 3702. *Bank of Commerce v. New York City*, 2 Black, 620. *Bank Tax Case*, 2 Wall., 200. *Van Allen v. Assessors*, 3 Wall., 573.

Miles Zentmeyer, for defendant in error, cited: Comp. Stat., 411. *Sioux City & Pacific R. R. v. Washington County*, 3 Neb., 41.

COBB, J.

Upon the precinct assessor applying to the bank of plaintiffs in error for the purpose of assessing them for general taxation for the year 1881, the plaintiffs claimed and informed said assessor that twenty-five thousand dollars of their funds were invested in certain non-taxable government bonds, but did not show or offer to show them to him, for the reason that the same were in the city of New York. The assessor, without notifying said plaintiffs of his purpose so to do, returned his assessment of the taxable property and funds of said plaintiffs without deducting therefrom the amount of said non-taxable bonds. At the meeting of the board of equalization in June, 1881, the plaintiffs appeared before it and claimed to have the said sum of $25,000 deducted from their said assessment; but it does not appear that they presented any evidence of their right to such relief; nor that the board of equalization took any or what action upon their said claim. On the 25th day of May, 1882, the plaintiffs appeared before the board of county commissioners and presumably again urged said claim, whereupon the said board, upon consideration thereof, refused the said claim, whereupon the said plaintiffs brought the said matter into the district court by petition in error, and upon motion of the defendant in error the said cause was by the said district court dismissed for the want of jurisdiction to try the same, to reverse which action of the district court the action is brought to this court on error.

When the board of equalization was in session in June, 1881, it was its duty to act upon the application or claim of the plaintiffs. Upon its refusal to act it could no doubt have been compelled by mandamus. Its adjournment without day without acting on the said application was to all legal as well as practical intents and purposes a denial and rejection of the plaintiffs' application, and would

either have been so treated by the courts, or the said board would have been compelled to re-assemble for the purpose of acting on it. But on the 25th day of May, 1882, the county commissioners had no power to act upon, or jurisdiction of, the matter whatever. See *Sioux City & Pacific R. R. v. Washington County, etc.*, 3 Neb., 30, p. 40 of op. The board of county commissioners, then, having no power to grant the relief sought by the plaintiffs, no action against the county can be predicated upon their refusal, and it was not error on the part of the district court to sustain the motion of defendant and dismiss the proceeding in error.

It not only was not in the power of the county board to relieve the plaintiffs against the said assessment at the time designated, but they were expressly forbidden to do so by statute, and they would have done so at the peril of becoming personally liable for the taxes released thereby, at the suit of any tax payer. See § 146, chap. 77, Comp. Stat., 427. The power of the board of county commissioners to sit as a board of equalization, rectify the returns of assessors, and change the assessments of property, is limited by the express language of the statute to a term of time not exceeding ten days in any year, commencing on the third Monday of June, and in the nature of things ceases on or before the 10th day of July of each year, when by law it is the duty of the county clerk to make out and transmit to the auditor an abstract of such assessments. Sec. 70 *et seq.* of above chapter. The record of assessments, then, in a manner passes out of the hands of the assessing authorities, and any interference therewith by them thereafter would be inadmissible. The prevalence heretofore in many counties of a looseness of practice in this matter has gone far to invalidate and still farther to discredit the public proceedings in the important matter of the county finances. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

JOHN CATTLE, SR., APPELLEE, v. M. D. HADDOX ET AL., APPELLANTS.

1. **Usury.** Where a note and mortgage were given for the sum of $445.15, and only $380 received by the mortgagor, *Held*, On the facts proved, that the defense of usury was established.
2. **Report of Referee:** CONFLICTING TESTIMONY. Where the testimony is conflicting, the report of a referee will not be set aside as being against the weight of evidence unless it is clearly wrong.

APPEAL from the district court of Butler county. Tried below before GEORGE W. POST, J., on exceptions to report of referee.

Sibbett & Fuller and *W. R. Kelly*, for appellant.

R. S. Norval, for appellee.

MAXWELL, J.

This is an action to foreclose a mortgage executed by Haddox and wife upon certain real estate. The answer admits the execution of the mortgage, but sets up as a defense: *First*, Usury. *Second*, Payment. The case was referred to a referee who found as facts: That the consideration for the note and mortgage was the sum of $383. That on the 2d day of April, 1881, Haddox paid on said note the sum of $247.35; that there is still due and unpaid thereon the sum of $135.65. As conclusions of law the referee found that there was usury in the contract, and that the plaintiff was entitled to recover the balance of the principal without interest, being the sum of $135.65. Exceptions were filed to the report, which were overruled, and a decree entered in favor of the plaintiff for the sum of $135.65. The defendants appeal to this court.

The note was given for the sum of $445.15, when but

$383 were received by the maker, so that the plea of usury is clearly sustained.

The principal defense relied upon, however, is that the finding, that the note has not been paid in full, is against the weight of evidence.

It appears from the testimony that the mortgage was held at a bank in Seward, and that the mortgagor resided at Ulysses. On the 2d of April, 1880, Haddox and one Toup delivered to one Thropp, a justice of the peace and real estate agent at Ulysses, $450, to go to Seward and pay the amount due on the note, and have the mortgage released. Thropp went to Seward, and claims to have paid the amount due on the note, being $437.35, and obtained the note.

The plaintiff claims that Thropp merely paid the sum of $237.35 to the cashier of the bank, to whom the money was paid, having made a mistake in the computation of $200, which was not discovered until after the bank was closed. The cashier of the bank testifies that such a mistake was made, and points out the manner in which it was done. The cashier is corroborated by other testimony that convinces us that his testimony is true. It would subserve no good purpose to review the testimony at length, nor do we wish to cast reflections upon the testimony of any of the witnesses. The judgment is sustained by the clear weight of testimony, and is affirmed.

JUDGMENT AFFIRMED.

JAMES KYLE, PLAINTIFF IN ERROR, v. MILO CHASE, DEFENDANT IN ERROR.

1. **Bill of Exceptions.** Affidavits used on the hearing of a motion in the district court must be preserved in a bill of exceptions to be available in the supreme court.

2. ———. Depositions given or offered in evidence in the trial court must be embodied in a bill of exceptions to authorize the supreme court to consider them.

3. **Trial**: ABSENCE OF ATTORNEY. Where a case was reached in in its regular order on the docket, called for trial, and trial had in the absence of the attorney for the defendant, notice of the trial having been sent to his office, *Held*, No abuse of discretion.

ERROR to the district court for Lancaster county. Tried below before GASLIN, J., in absence of POUND, J.

W. H. Snelling, for plaintiff in error, cited: *Homer v. Conover*, 26 N. J. Law, 138. *Allegay v. Nelson*, 25 Penn. State, 332. *Byrd v. Blessing*, 11 Ohio State, 362. 1 Graham & Waterman on New Trials, 162. 3 Id., 675 *et seq.*

Foxworthy & Son, for defendant in error, cited: Maxwell's Practice, 392. Comp. Stat., 572. *Green v. Dodge*, 6 Ohio, 80. *Dorflinger v. Coil*, 2 Ohio, 312, and cases cited. *Lawson v. Bettison*, 7 Ark., 401. *Sampson v. Blair*, 22 Cal., 200. *Chambers v. Lane*, 23 Texas, 104.

MAXWELL, J.

This is an action to recover commission for selling real estate. It is alleged in the petition, in substance, that in October, 1881, Kyle employed Chase to negotiate a sale of or find a purchaser for certain real estate owned by said Kyle, in the city of Lincoln, at a price not less than $2,800; that in pursuance of said employment, Chase did secure a purchaser for said real estate at the price named. Kyle, in his answer, admits that he employed Chase as alleged in the petition, but states he was to pay nothing for his services unless he secured a purchaser of said real estate, which he failed to do, but that said real estate was sold by one Lantz. On the trial of the cause a verdict was ren-

dered in favor of Chase. It is claimed that this trial was had in the absence of Kyle's attorney or without notice to him. This was one of the grounds in the court below for a new trial, and certain affidavits which purport to have been used on the hearing of the motion are in the record Chase's attorneys now move to strike said affidavits from the record because they are not embodied in a bill of exceptions. It is well settled that affidavits used in the district court to be available in this court must be preserved in a bill of exceptions. *Ray v. Mason*, 6 Neb., 101. *Credit Foncier v. Rogers*, 8 Id., 34. The reason is, they are merely evidence that may or may not be used on the hearing. While they are filed with the clerk, they do not thereby become a part of the record, nor is the party filing them required to read them on the hearing.

Therefore, if it is claimed that the court erred in overruling a motion for a new trial upon certain evidence before it, consisting of affidavits, such evidence must be certified as having been used on the hearing. Wells in his work entitled "Questions of Law and Fact," § 840, says: "Affidavits in support of any motion are not a part of the record until brought into it by a bill of exceptions. In this all the authorities agree, I believe without an exception. Citing in support thereof, *Garner v. White*, 23 O. S., 192. *Whaley v. Gleason*, 40 Ind., 405. The motion to strike the affidavits from the record must be sustained. The motion also includes the deposition of the plaintiff in error, Kyle, which was on file in the district court at the time of the trial. It is not referred to in the bill of exceptions as having been either read or offered in evidence. It cannot therefore be considered here. The law requires all evidence, written or oral, given or offered on a trial or hearing where it is sought to review a decision upon the facts to be preserved in a bill of exceptions. The fact that certain evidence is in the form of depositions and on file with the clerk does not require either party to read the same, and

there is no presumption that the deposition was read. How then can a party sustain his claim that the court erred in its ruling upon the evidence given or offered, unless it is made to appear what evidence was before the court. The deposition not being included in a bill of exceptions must be stricken from the record. But even if it was considered, we are of the opinion that the judgment should not be disturbed. The employment is admitted, and the sale was actually made to the person whom Chase seems to have secured as a purchaser, the only real contest being over the amount of commission.

And if we take the statement of Kyle's attorney, there does not appear to have been an abuse of discretion in calling the case for trial. It had been reached in its regular order in the docket. The attorney for Kyle had been present in court about half past ten o'clock in the forenoon of the day on which the trial was had, and supposed from the statements of attorneys that other cases would occupy the entire day. He made a request of the clerk that if the case was called he might be notified. Notice was sent to his office, but he was absent; the person in charge thereof was notified, but he, however, seems to have made no effort to notify the attorney. A court should grant a reasonable time to attorneys to appear in a case which, from the continuance of cases or other cause, has been reached sooner than expected. The necessary time must rest largely in the discretion of the court. The case should not lose its place on the docket or be postponed merely because the defendant's attorney is absent. If this rule prevailed it would afford an easy mode of effecting a continuance. It is only where a party has been diligent, and through no fault of his he has been deprived of a substantial right, that he is entitled to relief.

No diligence is shown in this case nor, so far as appears, any abuse of discretion by the court. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

JOHN F. MCNEE ET AL., PLAINTIFFS IN ERROR, V. THOMAS SEWELL, DEFENDANT IN ERROR.

1. **Sheriff:** LIABILITY OF SURETIES ON BOND. The sureties on the bond of a sheriff are liable in an action on a judgment of amercement against the sheriff for failing to return an execution.
2. **Action on judgment of amercement, where brought.** An action on a judgment of amercement may be brought against the sureties on an official bond in the county where the amercement was had although none of the defendants reside in such county.

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

Foxworthy & Son, for plaintiff in error, cited: Civil Code, §§ 54, 517. *Dunn v. Hazlett*, 4 Ohio State, 436. *Allen v. Miller*, 11 Id., 374.

A. W. Field, for defendant in error, cited: *Kane v. U. P. R. R.*, 5 Neb., 105. *Langdon v. Summers*, 10 Ohio State, 80. *Goodrich v. Omaha*, 11 Neb., 206.

MAXWELL, J.

In November, 1879, the plaintiff in error, John F. McNee, was elected sheriff of Thayer county, and executed an official bond to said county, with A. W. McKinney, Charles Sponsler, S. A. Mahoffer, and A. C. Sponsler as sureties, and thereafter entered upon the duties of his office. In the year 1880 certain parties recovered judgments against one Ellen Gray, in the district court of Lancaster county, upon which executions were issued and delivered to said McNee, as sheriff of Thayer county, who neglected to execute and return the same. Afterwards proceedings in amercement were instituted against him in the district court of Lancaster county, and the court found that said sheriff was liable

to amercement, and thereupon made an order that he be amerced in the amount of the debt, etc., of each of said executions. These amercement claims were assigned to the plaintiff, who brings this action against the principal and sureties on McNee's official bond. Two defenses are interposed. *First.* A general denial. *Second.* That the principal and sureties were, at the time of executing the bond, and now are, residents of Thayer county. The principal facts are admitted, and the only questions for determination are: *First.* Are the sureties liable? *Second.* Was the action properly brought in Lancaster county?

Sec. 513 of the code is as follows: "If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come to his hands, or shall refuse or neglect to sell any goods and chattels, lands, and tenements, or shall neglect to call an inquest and return a copy thereof forthwith to the clerk's office, or shall neglect to return any writ of execution to the proper court on or before the return day thereof, or shall neglect to return a just and perfect inventory of all and singular the goods and chattels by him taken in execution, unless the sheriff or other officer shall return that he has levied and made the amount of the debt, damages, and costs; or shall refuse or neglect on demand to pay over to the plaintiff, his agent, or attorney of record, all moneys by him collected or received, for the use of said party, at any time after collecting or receiving the same, except as provided in section four hundred and ninety-eight; or shall neglect or refuse on demand made by the defendant, his agent, or attorney of record, to pay over all moneys by him received for any sale made beyond what is sufficient to satisfy the writ or writs of execution, with interest and legal costs, such sheriff or other officer shall, on motion in court and two days' notice thereof in writing, be amerced in the amount of said debt, damages, and costs, with ten per centum thereon, to and for the use of said plaintiff or defendant, as the case may be."

Sec. 517 provides that: "No sheriff shall forward by mail any money made on such execution unless he shall be specially instructed to do it by the plaintiff, his agent, or attorney of record. In all cases of a motion to amerce a sheriff or other officer of any county other than the one from which the execution issued, notice in writing shall be given to such officer, as hereinbefore required, by leaving it with him or at his office, at least fifteen days before the first day of the term at which such motion shall be made, or by transmitting the notice by mail at least sixty days prior to the first day of the term at which such motion shall be made. All amercements so procured shall be entered on the record of the court, and shall have the same force and effect as a judgment."

Sec. 518 provides that: "Each and every surety of any sheriff or other officer may be made a party to the judgment as rendered as aforesaid, against the sheriff or other officer, by action, to be commenced and prosecuted as in other cases. But the goods and chattels, lands and tenements of any such surety shall not be liable to be taken on execution, when sufficient goods and chattels, lands and tenements of the sheriff, or other officer, against whom execution may be issued, can be found to satisfy the same. Nothing herein contained shall prevent either party from proceeding against such sheriff or other officer by attachment, at his election."

Sec. 54 provides that: "Actions for the following cases must be brought in the county where the cause or some part thereof arose: *First.* An action for the recovery of a fine, forfeiture, or penalty imposed by a statute; except that when it is imposed for an offense committed on a river, or other stream of water, or road, which is the boundary of two or more counties, the action may be brought in any county bordering on such river, water-course, or road, and opposite to the place where the offense was committed. *Second.* An action against a public officer, for an act done by him in

virtue, or under color of office, or for a neglect of his official duty. *Third.* An action on the official bond or undertaking of a public officer."

The statute makes the sureties on the official bond of the sheriff liable in an action upon a judgment of amercement. There is no claim that the judgment of amercement was not properly rendered, and no defense of that kind is interposed. There is no doubt, therefore, that the sureties on the bond in this case are liable.

Second. The action may be brought in any county where the cause of action or some part thereof arose. Now where did the cause of action arise? The judgments were recovered and executions issued in Lancaster county, and were returnable to that county. The wrong was in failing to return the executions to the court issuing the same.

That court, therefore, is given power by the statute to punish such wrong by amercement. The officer was ameable to the court issuing the executions, and the cause of action having arisen there, the action was properly brought against the sureties in the county where the cause of action arose.

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

JUDGMENT AFFIRMED.

WILLIAM C. DRAKE, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. Nuisance: HOUSE OF ILL-FAME: EVIDENCE. To authorize a conviction under sec. 210 of the criminal code, for permitting a house to be used as one of ill-fame, or for purposes of prostitution, it must be shown: That the house was of ill-fame, in fact, or in other words, a house resorted to for purposes of pros-

titution; that the prisoner was the owner, or had control of the house, and that he knowingly permitted it to be occupied as a house of ill-fame.

2. ———: ———. The bawdy character of the house may be shown by its general reputation and that of the persons frequenting it, together with other facts and circumstances which lead satisfactorily to that conclusion. It is not necessary to show particular acts of prostitution.

3. **Grand Jury.** After the discharge of the regular panel of grand jurors, the court may at the same term, if it shall be deemed necessary, order a new one to be summoned by the sheriff, under sec. 405 of the criminal code.

4. **Clerk:** SIGNATURE: OFFICIAL TITLE. It is not a valid objection to a jury so called together that the clerk omitted his official title to his signature to the venire.

5. **District Judges** may hold courts for each other.

ERROR to the district court for Lancaster county. Tried below before GASLIN, J., in absence of POUND, J.

L. W. Billingsley and *James E. Philpott*, for plaintiff in error.

Proof that the house was of ill fame must be *by facts*, not fame. *State v. Boardman*, 1 Am. Crim. Rep., 351. 2 Bishop Crim. Proc., § 91. *Caldwell v. The State*, 17 Conn., 467. Selection of grand jury. Comp. Stat., 618, 726. *McElvoy v. The State*, 9 Neb., 157. *Burley v. The State*, 1 Id., 397. Right of GASLIN, J., to hold term. Comp. Stat., 201. *Ellis v. Karl*, 7 Neb., 385.

Isaac Powers, Jr., Attorney General, for the State, cited: *State v. Brunell*, 29 Wis., 435. *Candy v. The State*, 8 Neb., 485. *Nuckolls v. Irwin*, 2 Neb., 63.

LAKE, CH. J.

The plaintiff in error was convicted under sec. 210 of the criminal code, for permitting a house, of which he was the owner, to be "used and occupied as a house of ill fame."

The first objection made to the conviction in the brief of counsel is, that the evidence was insufficient to warrant it. In this we think counsel is mistaken. The evidence to establish the guilt of the accused was overwhelming. It consisted not only of the uncontradicted testimony of a large number of credible witnesses residing in the neighborhood of the house, that it was of ill fame during the time laid in the indictment, but that it was frequented almost exclusively by persons of bad repute of both sexes for evil practices, including that of unlawful sexual intercourse. We will not quote from the evidence, but simply say of it that, from a careful perusal, we are satisfied it fully supports the verdict of guilty.

Perhaps the principal point urged in support of this objection deserves a more particular notice. That point is, that in prosecutions of this nature the evil character of the house must be established by proof of facts, and not by its reputation alone. While we do not think the evidence in this case open to such criticism, perhaps it is best that the rule be stated as we understand it.

Under this indictment the prosecution was required to show three principal facts. 1st, That the house was of ill fame, or, in other words, a house known to be resorted to for the purposes of prostitution. 2d, That the prisoner was the owner or had control of the house. And 3d, That he knowingly permitted it to be occupied and used as a house of ill fame.

Conceding that the prisoner was the owner of the house, and knew of the use to which it was put, the further fact that its reputation in the neighborhood was that of a bawdy house, or one of ill fame, would not sustain a conviction. But there must be added to these facts the additional one that it was really a house of ill fame—a house resorted to for acts of prostitution.

To establish the bawdy character of the house, its general reputation and that of the persons frequenting it were

competent evidence. It was not necessary to show particular acts of prostitution in the house. *State v. Brunell*, 29 Wis., 435. It was enough that, in addition to the bad reputation which the house was shown to bear, notwithstanding no family lived in it, some of its rooms were supplied with beds and some little furniture, and the walls hung with indecent pictures; that it had a bar at which intoxicating drinks were sold, and was the resort, especially on Sabbath days and in the night-time, of men and women of lewd and lascivious character, many of the women being known prostitutes and keepers and occupants of places of ill fame in the city of Lincoln, who, while visiting this house, indulged in drunken revelry and licentious practices fit only for a brothel, which the evidence of what transpired there clearly shows it to have been. *State v. McDowell*, Dudley (S. C.), 346. 3 Greenleaf on Evidence, § 186. *Commonwealth v. Stewart*, 1 Serg. & Rawle, 342. *Caldwell v. The State*, 17 Conn., 467.

Objection is made to the grand jury which found the indictment. Fault is found with the mode of selection, and generally that they were an unauthorized body. It appears that the regular panel for the term had finished their work and been discharged. That later in the term the presiding judge, by order, directed the sheriff "to summon without delay sixteen good and lawful men, residents of said Lancaster county, having the qualifications of grand jurors," to appear as a special grand jury. This order was executed, and by the grand jury thus brought together the indictment was presented. This method of selecting a grand jury is specially authorized by sec. 405 of the criminal code, which provides that: "After the discharge of the grand jury it shall be lawful for the court, when it shall be deemed necessary, to order the sheriff to call together a new grand jury, from the bystanders or neighboring citizens, of sixteen good and lawful men, having the qualifications of grand jurors, who shall be returned and sworn or affirmed, and shall

proceed in the same manner in all respects as provided by law in respect to grand juries." Whether a necessity exists for calling a grand jury after the regular panel have been discharged, is a matter left entirely to the discretion of the district court. If the power of ordering one be exercised, the necessity for so doing will be presumed.

The objection that the clerk in signing the venire omitted to give his official character is merely technical. When the omission was discovered, the court very properly permitted an amendment, which entirely cured the nominal defect. But even if there had been no venire, if the record showed that the sheriff proceeded upon the mere verbal order of the presiding judge, the jury would, nevertheless, have been a legally constituted body.

Finally, it is objected that Judge GASLIN, who presided in place of Judge POUND, the judge of that district, had no authority to act. This point is without the least merit whatever. Judge GASLIN was on the bench at the instance of Judge POUND, and constitutionally there. The Constitution, Art. VI., § 12, declares that: "The judges of the district courts may hold courts for each other, and shall do so when required by law." The case of *Ellis v. Karl*, 7 Neb., 381, is not in point as an authority. In that case, Judge POUND in his own district allowed an injunction in a case brought in another. This we held he had no authority to do without a showing that the judge of the district where the action was brought was for some reason unable to act in the matter.

We discover no error in the matters complained of, and the judgment is affirmed.

JUDGMENT AFFIRMED.

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

1. **Grand Jury:** SELECTION OF. Where no want of good faith in the selection of persons from whom grand jurors are drawn is shown, the mere fact that one of them did not reside in the precinct where he was supposed to, and from which he was drawn, will not invalidate an indictment found by them.

2. ———: ———. The list of electors voting at the next preceding general election in the county furnishes a suitable and fair basis for the selection.

3. **Continuance:** AFFIDAVIT FOR. An affidavit for a continuance, on account of absent witnesses, which fails to show that either their personal attendance or testimony will probably be obtained, if time be granted, is insufficient.

4. **District Attorney:** ASSISTANCE TO. The district attorney, in a criminal trial, may have the assistance of counsel employed on private account.

5. **Evidence.** The court did not err in refusing to order the sheriff to fire the revolver with which prisoner killed deceased, with the view of ascertaining its liability to go off at half-cock.

6. ———. In a trial for murder, evidence of criminal intimacy between the prisoner's wife and the deceased, not brought to his knowledge before the killing, is inadmissible.

7. ———: INSANITY. On the question of the prisoner's alleged insanity, non-expert testimony is admissible.

8. **Thanksgiving Day:** ADJOURNMENT OF COURT TO. The formal adjournment of court to, and opening of it on Thanksgiving Day, no step in the case being taken on that day, is not cause for a new trial.

9. **Instruction:** REASONABLE DOUBT. An instruction in which it is said that: "The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinarily prudent men with a conviction on which they would act in their most important concerns or affairs in life," sustained.

10 **Practice:** STATEMENTS IN PRESENCE OF JURY. It is not error for counsel in arguing, in the presence of the jury, the competency of a witness, based on testimony given of her admissions,

to make a fair reference thereto, to say it is "false," and that the witness will deny it.

11. ———: SEPARATION OF JURY. A separation of the jury before the taking of testimony is closed in a criminal trial, known to the prisoner or his counsel at the time it occurred, but not disclosed to the judge until after verdict, is not cause for a new trial.

12. ———. In such case a party is not permitted, without objection, to take the chances of a favorable result, and then, if disappointed, for the first time complain.

13. Judgment: AUTHENTICATION. A transcript of a judgment of the district court, brought to the supreme court for review, certified by the clerk of the court under his official seal, is sufficiently authenticated without the signature of the judge.

ERROR to the district court for Cass county. Tried below before POUND, J. Indictment for murder in the first degree and sentence of death.

Allen Beeson and *Sullivan & Wooley*, for plaintiff in error.

Plea in abatement should have been sustained. *Burley v. The State*, 1 Neb., 396. *Preuit v. The State*, 5 Id., 377. *Barton v. The State*, 12 Id., 260. *Clark v. Saline County*, 9 Id., 516. *State v. Conner*, 5 Blackf., 225. Continuance. Wharton's Crim. Law, § 2,930. *Williams v. The State*, 6 Neb., 338. *State v. Lewis*, 1 Bay, 1. Private counsel. *Meister v. The People*, 31 Mich., 101. *Com. v. Gibbs*, 4 Gray, 147. *Cuming County v. Tate*, 10 Neb., 193. Non-expert testimony as to insanity. *Schlencker v. The State*, 9 Neb., 251. Adjournment. 3 Graham & Waterman New Trials, 1411. *Chapman v. The State*, 5 Blackf., 11. *Pierce v. Atwood*, 13 Mass., 329. Reasonable doubt. *People v. Brannon*, 47 Cal., 96. *Jane v. Com.*, 2 Metc. (Ky.), 30. Statements of district attorney in presence of jury. *Carter v. The State*, 37 Tex., 362. *People v. Devine*, 44 Cal., 462. *White v. The State*, 10 Tex. App., 394

Separation of jury. *Eastwood v. People*, 3 Park. Cr., 25. On validity of judgment, cited: *Weed v. The People*, 31 N. Y., 465.

Isaac Powers, Jr., Attorney General, and *J. C. Watson, District Attorney*, for the State.

Continuance. *Werks v. The State*, 31 Miss., 490. *State v. Rorbacker*, 19 Iowa, 154. Assistant to district attorney. *State v. Bartlett*, 55 Maine, 200. 1 Bish. Cr. Pro., § 281. *State v. Fitzgerald*, 49 Iowa, 260. Excluding testimony of criminal intimacy. *State v. John*, 8 Ired., 330. *Sawyer v. The State*, 35 Ind., 80. Insanity. *Schlencker v. The State*, 9 Neb., 251. Adjournment. *People v. Lafumte*, 6 Cal., 202. Misconduct. *Davis v. State*, 33 Ga., 98. *Combs v. State*, 75 Ind., 215. Separation of jury. *Caw v. The People*, 3 Neb., 358. *Walrath v. The State*, 8 Id., 81. Judgment is good. *Eastman v. Hartlan*, 12 Wis., 296. *Chamberlain v. Ball*, 15 Gray, 352.

LAKE, CH. J.

The first objection to the judgment in this case is that made to the overruling of the plea in abatement. There are two points urged against the indictment, neither of which can be sustained. The first is, that one of the grand jurors by which it was found, although a resident of the county, did not live in the precinct from which he was drawn. That the utmost good faith characterized the selection of the jury is unquestioned. The statute, sec. 658 of the code of civil procedure, provides that the sixty persons from whom, for each term of a district court, jurors, grand and petit, are to be drawn, shall be selected, "as nearly as may be, a proportionate number from each precinct in the county." This provision should have a reasonable construction, but it would not be reasonable to hold that the mistake of the commissioners in supposing that a

person selected by them lived in one precinct of the county, when in fact he lived in another, would disqualify him for serving, or that it tended in the least degree to prejudice the prisoner. To so hold would be altogether too technical. It would be productive of no good, and result in infinite mischief in the administration of justice.

The second point is, that the selection was based on the vote of the county cast at the preceding general election. It is argued that it ought to have been made on the census returns; but why on them, rather than on the basis adopted, no satisfactory reason is given. The census returns would, in our opinion, approximate much less nearly to the actual ratio then existing between the precincts of persons qualified to serve as jurors than was reached by the basis adopted.

The statute is silent as to the mode of ascertaining who, of all the inhabitants of a county, are qualified to serve in this capacity. No provision is made for the county commissioners to enter upon a special inquiry with the view to an exact result. A particular enumeration evidently was not contemplated by the legislature, or provision would have been made for it. They are left to act upon the means at hand, and so long as those adopted are fair, and result in a reasonable approximation to the ratio named, it is all that could have been intended, and all that is required.

To be qualified as a grand juror, a person must be an elector of the county in which he is called to serve. There are also several other requirements in the matter of qualification to be observed, which, however, the census reports would not disclose. And even in the matter of the number of qualified voters in the county, and of the ratio existing between the precincts thereof at the time of making the selection, they would have been exceedingly unreliable, much more so than was the basis taken by the commissioners.

As the statute on this subject is, if we were called upon

to name a basis of selection at any time, we know of none accessible to the commissioners that would serve the purpose better than the votes cast at the latest general election. While this, probably, would not give a result mathematically accurate, in consequence of non-voters, yet, as the proportion between these and the whole number of electors may fairly be presumed to be about the same in all of the precincts, it is practically correct, and all that can reasonably be required. We see no error in the rulings respecting the grand jury, and the plea in abatement was properly overruled.

The affidavits for a continuance were insufficient. Most, if not all, of what it was claimed the absentees would swear to, if present, could not have been received in evidence because of its immateriality. In addition to this, the whereabouts of but one of the persons named was disclosed. He lived in Pennsylvania, but it was not shown that, even if time were given, either his personal attendance or testimony would probably be secured. There was no error in this particular.

It is further claimed that the court erred in permitting an attorney employed and paid by private parties, friends of the deceased, to aid the district attorney in the prosecution of the case. This claim is based on the following provisions of the statute: Sec. 15, Comp. Stat., 66, provides that, "It shall be the duty of the district attorney of each judicial district to appear in the district court at each term of the same," * * * "and prosecute and defend all actions, civil and criminal, and all matters whatsoever in which the state or county may be interested." Sec. 17 prohibits him from receiving "any fee or reward from or on behalf of any prosecutor or other individual for his services in any prosecution or business to which it shall be his duty to attend," etc.

As we understand the claim made by counsel, it is not that these sections prohibit the district attorney from hav-

ing the assistance of other attorneys in criminal prosecutions, but simply of attorneys employed on private account. And so under a similar statute it was decided by the supreme court of Massachusetts, followed by that of Michigan, in several cases cited. But the courts of other states, notably those of Maine, Iowa, and Kansas, under like statutes, have decided, and we think the weight of authority is, the other way. *State v. Bartlett*, 55 Me., 200. *State v. Wilson*, 24 Kan., 189. *State v. Fitzgerald*, 49 Ia., 260. But without regard to the preponderance of authorities, we think, as was said by the court in the case last cited, that such employments in this state have been "too long acquiesced in to be now called in question." It is a fact commonly known, that from the beginning of criminal trials in this state this practice has been quite general, and yet, so far as we are aware, not even an attempt has been made to put a stop to it by positive legislation on the subject, which doubtless would have been done if it had been regarded as illegal or in any way improper.

The request made on behalf of the prisoner, for the judge to order the sheriff to discharge some of the cartridges remaining in the revolver with which the deceased was killed, was properly overruled. The object of this request was, it is said, to sustain the theory of the defense, that the killing was accidental, the revolver having gone off, as was claimed, at half-cock. In the first place, the judge had no authority to require the sheriff to make the experiment; and in the second, the possibility of a discharge at half-cock could have been shown just as well with the chambers of the revolver empty as by an actual discharge.

There is no error in the several rulings adverse to the prisoner respecting the admissibility of evidence as to the alleged criminal intimacy between his wife and the deceased. Whatever in this regard was brought to the knowledge of the prisoner, which was of very little significance indeed, was admitted, although even this, considering the length of

time that had elapsed after the knowledge was acquired before the killing, was quite immaterial. *Sawyer v. The State*, 35 Ind., 80.

The non-expert testimony on the question of the prisoner's alleged insanity was admissible. The witnesses had known the prisoner for years, were more or less intimately acquainted with his habits and practices, and formed their opinions from facts within their own knowledge. Their testimony was clearly within the rule announced in the case of *Schlencker v. The State*, 9 Neb., 241.

Error is also alleged upon the fact that probably through inadvertence the court was, on the evening of the 29th of November, formally adjourned to the morning of the 30th, which in that year was Thanksgiving day—a legal holiday—on which the transaction of most of the ordinary business of courts is prohibited.

SEC. 38. "No court can be opened, nor can any judicial business be transacted on Sunday, or on any legal holiday except—I. To give instructions to a jury then deliberating on their verdict. II. To receive a verdict or discharge a jury. III. To exercise the powers of a single magistrate in a criminal proceeding." Comp. Stat., 202.

The formal adjournment to a time when the court could not convene must be treated as a nullity; so, too, must be the formal opening of the court on Thanksgiving morning. There was, therefore, no actual adjournment on the 29th of November, but practically only a recess or abstinence from business to the morning of December 1st, when the trial proceeded. The objection made to this irregularity is strictly technical, and entirely devoid of merit. The prisoner could not have been prejudiced by it in the slightest degree, and the objection must be overruled.

An exception was taken to an instruction to the jury upon the meaning of the term "reasonable doubt," as applied to the question of the prisoner's guilt. The jury were told that, "By a reasonable doubt, is not meant that

the accused may possibly be innocent of the crime charged against him, but it means an actual doubt, having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinarily prudent men with a conviction on which they would act in their most important concerns or affairs of life."

While there are some decisions which probably do not sustain this definition of "reasonable doubt," there are others which do, and we are satisfied with and approve it. It is not visionary, but has the qualities of being reasonable, practical, and capable of being understood by ordinary minds.

In the case of *Miller et al. v. The People*, 39 Ill., 457, an instruction of nearly the same import was sustained. It was in these words: "A doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such, that were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If after considering all the evidence you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." And in *Commonwealth v. Webster*, 5 Cush., 295, Chief Justice Shaw said, that to be proved beyond a reasonable doubt the evidence must be such as to "establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason of those who are bound to act conscientiously upon it."

In the case of *The State v. Ostrander*, 18 Iowa, 458, the supreme court of Iowa considered an instruction of precisely the same import as one given in this case, and the

sustained it. See also *Arnold v. The State*, 23 Ind., 170.

The prosecution offered the wife of the prisoner as a witness to contradict certain statements made by him and some of his witnesses in their testimony respecting certain admissions said to have been made by her to him affecting her character for chastity, and tending to show criminal intimacy between her and the deceased.

In arguing to the court the competency of the wife under the statute to testify, the district attorney narrated the statements which he proposed to disprove by her, and said they were "false," and that she would "deny them." Objection is made to this statement of the district attorney, and also to certain others made in his argument to the jury, by which he characterized the p'ea of insanity in criminal cases generally, as a "sham" and "device" resorted to by defendants when they had no defense, illustrating by a reference to the Guiteau case. It is claimed that it was unwarranted and had a tendency to prejudice the prisoner.

Although we are not now called upon to decide the question, it may not be out of place to say it is quite probable that the district attorney was right in his claim that the wife of the prisoner was competent to contradict the testimony of the prisoner as to her admissions to him. But however that may be, we see nothing in what was said by the district attorney deserving of censure, or not strictly within the limits of a fair conduct of the case. There may sometimes be circumstances when it would be practicable and proper to abstain from stating what a proposed witness would testify, in arguing the question of his competency to give evidence, as where the question is simply whether he is competent for any purpose. But that was not the question here. It was conceded by the district attorney that but for the fact of the prisoner having gone upon the witness stand and disclosed what he claimed were her admissions to him, she would have been incompetent. He based his claim that she was competent to give certain

testimony solely upon what he contended was the prisoner's waiver of his statutory right to exclude her by having himself voluntarily testified concerning it. In such case there is surely no impropriety in giving a fair statement of the testimony on which the claim of waiver is based, and to say that the proposed witness will disprove it.

Error is also alleged on what is called a separation of the jury, in disobedience of an order of the judge that they should be kept together during the periods of recess and adjournment. Several affidavits filed on behalf of the prisoner show that at the unauthorized meeting of the court and parties on the morning of the 30th of November, and before the taking of the evidence was completed, two or three of the jurors in the court room separated a little from their fellows and engaged in a brief conversation with bystanders. This was known by the prisoner's counsel, and probably by the prisoner himself at the time it occurred, yet no complaint was made to the judge, but the trial was permitted to proceed without objection until after verdict.

Although it is abundantly shown by the affidavits of the jurors themselves, and of the persons with whom they conversed, that nothing at all improper was said or done by either of them during the separation, even without this we are of opinion that under the circumstances no just ground of complaint is shown. The objection first appeared in the motion for a new trial, and came too late. If the separation were thought to be at all prejudicial to the prisoner, it ought to have been brought to the notice of the judge at once, upon discovery, so that an investigation could have been made, to the end that without further fruitless expense, if justice required it, the trial could have been stopped, that jury discharged, and a new one impaneled to try the case.

Parties litigant, even defendants in criminal cases, must deal fairly by the court. They are not permitted to with-

hold information of matters transpiring in the progress of a trial, whether prejudicial or otherwise, and thus, without objection, permit it to proceed to a conclusion, and then take advantage of them. Generally all objections not jurisdictional as to the subject of the litigation must be made at the first opportunity, or they are deemed to be waived. The rule in such cases is, that a party shall not be permitted without objection to take the chances of a favorable result, and then, if disappointed, for the first time complain.

The only remaining objection to be noticed is, that the record brought to this court does not show that the judgment was signed by the district judge; in other words, that it is not properly authenticated. There is nothing in this point. The very first clause of the petition in error asserts the fact that the judgment was rendered by the district court for Cass county, and relief is sought against it. A party cannot be heard to stultify himself. He may not in one breath assert that there is a judgment which he seeks to have reversed, and in the next that there is no judgment.

It is authenticated in the usual form by the clerk of the court, with his official seal, and that is sufficient for the purpose of this proceeding.

After a careful examination of the record, we discover no error, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

MARGARET GOTTSCHALK, PLAINTIFF IN ERROR, V. THE C., B. & Q. R. R., DEFENDANT IN ERROR.

Eminent Domain: DAMAGES. Where a lot abuts upon an alley upon which a railroad is built with the consent of the city authorities, if the owner of the lot is thereby deprived of a public right which he has enjoyed in connection with his premises, and in consequence thereof he sustains damages in excess of that shared by the public generally, he may recover for such excess.

ERROR to the district court of Platte county. Heard below before GEORGE W. POST, J.

W. S. Geer, for plaintiff in error, cited: *Southern P. R. R. v. Reed*, 41 Cal., 256. *Lockland v. R. R. Co.*, 3 Mo., 180. *Brady v. DesMoines & Fort Dodge R. R.*, 10 N. W. R., 754. *G. R. & I. R. R. Co. v. Heizel*, 38 Mich., 71. Dillon on Mun. Corp., 3d Ed., § 274.

A. M. Post (with *Marquett & Deweese*), for defendant in error, cited: Dillon on Mun. Corp., 576. *Milburn v. Cedar Rapids*, 12 Iowa, 246. *Barney v. Keokuk*, 94 U. S., 340. *Ind. R. R. Co. v. Hartley*, 67 Ill., 439. *A. & N. R. R. v. Gaviede*, 10 Kan., 552. *Mercer v. R. R. Co.*, 35 Penn. State, 99. *Brooklyn v. Railroad*, 47 New York, 475.

MAXWELL, J.

The plaintiff is the owner of certain lots in block 83 in the city of Columbus, which abut upon the alley running through said block. The defendant, in pursuance of authority from the mayor and council, located and constructed a railroad in said alley, by reason of which the plaintiff claims that the lot in question is damaged or diminished in value in the sum of $475, and this action was brought to recover the same. The cause was referred by consent to a referee, who found as follows:

First. That the plaintiff is the owner of fractional lots 7 and 8, in block 83, in the city of Columbus, Platte county, Nebraska; that she acquired title on the first day of June, 1861, and has ever since been in possession by herself or tenant.

Second. That said fractional lots abut upon the alley and street in question in this action.

Third. That the city of Columbus, Platte county, Nebraska, is a city of the second class.

Fourth. That in January, 1857, the plat of the village of Columbus was duly laid off, acknowledged by the proprietor, filed, and recorded in the office of the county clerk of said Platte county, Nebraska, which plat included the parcels of ground in question, said plat showing the various streets and alleys therein, including the street and alley described in plaintiff's petition.

Fifth. That said city of Columbus is the successor of the village of Columbus.

Sixth. That the Lincoln & Northwestern Railroad Company, an incorporation duly organized under the laws of the state of Nebraska, constructed a line of railroad into said city of Columbus.

Seventh. That the city of Columbus, by an ordinance duly adopted, authorized said incorporation to construct its side track across said street and along said alley in question in front and alongside of the property of plaintiff.

Eighth. That said ordinance contained a provision as follows: "The Lincoln & Northwestern Railroad Company shall be liable to pay all damages to private property which may be sustained by reason of this ordinance."

Ninth. That in pursuance of said ordinance, said Lincoln & Northwestern Railroad Company did construct its side track across said street and along said alley in question, and in front and alongside of the said property of plaintiff, and that it has been built and maintained since August 1st, 1880.

Tenth. That the Lincoln & Northwestern Railroad Company has leased said railroad, including said side track, for 999 years to the Burlington & Missouri River Railroad in Nebraska, an incorporation duly incorporated under the laws of the state of Nebraska, and said Burlington & Missouri River Railroad Company in Nebraska has consolidated with the defendant, a foreign corporation.

Eleventh. That the defendant is and was at the trial

and of the bringing of this action maintaining and operating said railroad and side track.

Twelfth. That plaintiff offered evidence to prove that she had sustained damages in the manner and in the amount as stated in her petition.

Thirteenth. Defendant admits that it is liable in this action to the same extent as the Lincoln & Northwestern Railroad Company would be liable had not said lease been made.

CONCLUSIONS OF LAW.

First. That the title to the fee of said street and alley in question is in the said city of Columbus.

Second. That the said city of Columbus had the authority to authorize said railroad company to build and maintain its said track across said street and along said alley.

Third. That the provisions of said ordinance, so far as the same relate to the street and alley in question, do not vacate said street and alley.

Fourth. That the provisions of said ordinance do not enlarge the common law rights of plaintiff to damages or compensation.

Fifth. That plaintiff is not entitled to recover compensation for the damages stated in the petition.

Sixth. That judgment in this action should be rendered in favor of defendant for costs.

The report was confirmed by the district court and the cause dismissed.

The petition sets forth certain damages which the plaintiff claims to have sustained by reason of the construction and operation of the road.

The defendant contends that as it had lawful authority from the city council to construct its road in the alley in question, therefore it is not liable, and as there is no direct physical injury to the plaintiff's property shown, she cannot recover.

The title to streets and alleys in this state vests in the public. Sec. 83 of the corporation law, provides that, "if it shall be necessary in the location of any part of any railroad to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for municipal or other corporation or public officer or public authorities, owning or having charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied, and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such railroad company to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purpose of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter." Comp. Stat., 146.

Sec. 21, Art. I. of the constitution of 1875, provides that, "the property of no person shall be taken or *damaged* for public use without just compensation therefor."

The constitution of Illinois contains a similar provision, and its proper construction was before the supreme court of that state in *Rigney v. City of Chicago*, 102 Ill., 64.

In that case it appears that Rigney was the owner of a lot twenty-five feet in width and 100 feet in depth, fronting on Kinzie street, in the city of Chicago. On the front part of this lot there was a two-story frame dwelling. In 1874 the city constructed a viaduct along Halstead street and across Kinzie at their intersection, about 220 feet west of the plaintiff's premises. In consequence of the construction of the viaduct all communication with Halstead street was cut off except by means of stairs, and the rental value of the plaintiff's property was reduced from $60 per month to $23, and the property itself from $5,000 at the time of the erection of the obstruction to one-third of that amount

after the construction. The court below directed a verdict for the city. There was no claim that Rigney's possession had been disturbed or that any direct physical injury had been done to his premises by reason of the obstruction complained of. The grounds upon which recovery was sought were, that the city by obstructing the plaintiff's communication with Halstead street by way of Kinzie street had deprived him of a public right which he enjoyed in connection with his property, and thereby inflicted upon him an injury in excess of that shared by him with the public at large, the action being brought to recover the excess. The action in this case is brought for the same cause. The case cited, therefore, is directly in point. The opinion contains an elaborate review of the authorities and particularly of the Illinois cases. It is there said:

"Under the constitution of 1848 it was essential to a right of recovery, as we have already seen, that there should be a direct physical injury to the *corpus* or subject of the property, such as overflowing it, casting sparks or cinders upon it, and the like; but under the present constitution it is sufficient if there is a direct physical obstruction or injury to the right of user or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which by the common law would, in the absence of any constitutional or statutory provisions, give a right of action.

"As opposed to this view, appellee cites: *Chicago, Burlington & Quincy R. R. Co. v. McGinnis*, 79 Ill., 269. The facts of this case arose before the new constitution, and consequently its construction was not involved in it; besides there is nothing said in it that militates against the view here expressed, but on the contrary, so far as that case has any application to the one before us, sustains it.

"The case of *Stetson v. The Chicago & Evanston R. R. Co.*, 75 Ill., 74, is relied on for the same purpose. The question presented by that case was, whether, where a rail-

road company under authority from a city has located its track upon a public street, a bill in equity will lie at the suit of any owner of lots abutting on the street to restrain the company from operating its road until the damages claimed to have been done to the lots by reason of the construction and operation of the railway are ascertained and paid; and it was held that such a bill would not lie, but that the party would be left to his action at law for whatever actual damages he may have sustained, the court having held that where there has been no actual taking of property and the company has constructed its track under authority from the city, chancery has no jurisdiction. What was said with respect to the character of the injury was not at all necessary to a decision of the case, and must be regarded as mere *obiter*. But even if this were not so, all that is there said may be harmonized in the manner we have stated with the previous and subsequent decisions of this court upon that question.

"In this connection the *Chicago, Milwaukee & St. Paul R. R. Co. et al. v. Hall*, 90 Ill., 42, is also cited. That case went off on a question wholly different from the one under consideration, and much of what we have said with respect to the preceding case is equally applicable to that. It is said in the opinion in that case, in referring to the character of the injury for which a recovery may be had, 'the injury must be physical." There is no particular objection to this language if taken in its more appropriate sense as we have already explained. But admitting the language was used in the sense claimed by appellee, it must be regarded as having been inconsiderately said, and not warranted by the previous decisions of that court. It is not reasonable to suppose that it was intended by the language there used to overrule without even a reference to them, the case of *City of Pekin v. Winkel*, 77 Ill., 56. *Same v. Brereton*, 67 Id., 477. *City of Elgin v. Eaton*, 83 Id., 525. *City of Shawneetown v. Mason* 82 Id., 337,

and *Stack v. City of East St. Louis*, 85 Id., 377, all of which expressly hold that there may be a recovery for injuries other than those directly affecting the *corpus* or subject of the property, and in three of the cases the only injury complained of was in effect precisely like that complained of in the present case. The conclusion reached in all these cases is distinctly placed upon the ground that the new constitution has enlarged the right of recovery by extending its provisions to a class of cases not provided for under the old constitution, and to now turn round and hold, as we are urged to do, that the old test of direct physical injury to the *corpus* or subject of the property affected must still control as it did under the old constitution, would place this court in anything but an enviable position, and justly invite adverse criticism from an enlightened bar.

"The question then recurs, what additional class of cases did the framers of the new constitution intend to provide for which are not embraced in the old? While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury which is necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of the neighboring property, yet that is clearly a case of *damnum absque injuria*. So as to an obstruction in a public street, if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such

disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law.

"The English courts, in construing certain statutes providing compensation for injuries occasioned by public improvements, in which the language is substantially the same as that in our present constitution, after a most thorough consideration of the question, lay down substantially the same rule here announced. *Chamberlain v. West End of London Railway Co.*, 2 Best & Smith, 605. 110 E. C. L. R., 604. Id., 617. *Beckett v. Midland Railway Co.*, L. R. 1 C. P., 241, on appeal, 3 C. P., 82. *McCarthy v. Metropolitan Board of Works*, L. R. 7 C. P., 508. These statutes required compensation to be made where property was "injuriously affected," which the English courts construe as synonymous with the word "damaged." *Hall v. Mayor of Bristol*, L. R. 2 C. P., 322. *East and West India Docks Co. v. Gattke*, 3 McN. & G., 155.

"The rule we have adopted was unanimously sustained by the House of Lords in the McCarthy case, *supra*, and is believed to be in consonance with reason, justice, and sound legal principles, and while it has not heretofore been formulated in express terms, as now stated, yet the principles upon which the rule rests are fully recognized in the previous decisions of this court, particularly in *City of Shawneetown v. Mason*, 82 Ill., 337. *City of Pekin v. Brereton*, 67 Id., 477. *Chicago & Pacific R. R. Co. v. Francis*, 70 Id., 238. *City of Pekin v. Winkel*, 77 Id., 56. *City of Elgin v. Eaton*, 83 Id., 535."

In *Beckett v. The Midland Railway Company*, 3 Com-

mon Pleas L. R., 81, the action was brought to recover damages under the lands clauses consolidation act and railways clauses consolidation act, which provide for damages where land is "injuriously affected." In that case the road in front of the plaintiff's house, which had formerly been fifty feet in width, had been narrowed, by means of an embankment made by the defendants upon a portion of it, to thirty-three feet. There was testimony tending to show that the light in the lower portion of the house had been sensibly diminished, and that the narrowing of the road was a great discomfort, and occasioned inconvenience by reason of carriages being compelled to go to some distance beyond the gate before they could turn. The case was tried below before Cockburn, Ch. J., who left it to the jury to say whether there had been any diminution of light or of air by reason of the embankment, or any diminution in value of the plaintiff's house by reason of the contracting of the road in front of it. The jury found in the affirmative on both questions and returned a verdict in favor of the plaintiff for £802, upon which judgment was rendered. The judgment was affirmed in the appellate court.

In the case of *Mollandin v. Union Pacific Ry. Co.*, 14 Federal Reporter, 394, the United States Circuit Court for Colorado gave a construction to a clause in the constitution of that state similar to our own, and the case of *Rigney v. Chicago* was cited and approved.

Sec. 13 Art. I. of the constitution of this state, of 1866, provided that, "The property of no person shall be taken for public use without just compensation therefor." In our present constitution this section was amended by adding the words "or damaged." Under our former constitution if any portion of the real estate injured was appropriated, the law allowed full compensation for the injury, but if no part thereof was taken no damages could be recovered, however great the injury to the property. This being the state of the law at that time, what was the object of the amend-

ment spoken of? In the case cited from Illinois it was held that the words "or damaged" were equivalent to the words "injuriously affected" in the English statute, and we think that construction is correct. The constitutional provision therefore is, that private property shall not be taken or injuriously affected without just compensation therefor. The evident object of the amendment was to afford relief in certain cases where, under our former constitution, none could be given. It was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large. To this extent the property owner is entitled to recover. It is not necessary to entitle a party to recover, that there should be a direct physical injury to his property if he has sustained damages in respect to the property itself whereby its value has been permanently impaired and diminished. This is but justice. While public improvements are essential to progress and to the welfare of the race, yet as the public are to receive the benefits, whether by the opening of streets and public grounds or by the construction of railways, the party receiving the benefit should bear the burden. This should not be cast upon others. The question of the amount of damages is one of fact for the jury, and cannot be determined in the first instance by the court, and does not arise in this case. As, in our opinion, the petition states facts sufficient to show that the plaintiff in respect to the real estate in question has sustained damages in excess of that shared by her with the public generally, therefore to the extent of such damages she is entitled to recover. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

COBB, J., concurred.

LAKE, CH. J., dissenting.

For several reasons which I will briefly give, it is impossible for me to unite in the opinion announced in this case by the majority of the court.

My first objection to the opinion is, that it completely ignores one of the principal questions presented by the record for our decision, viz., that as to the proper rule of damages between an abutting lot owner and a railroad company for laying and operating a railroad within a street of a city. It leaves one-half of the case really undecided.

The matter of complaint is stated in the petition in two counts or causes of action: one for obstructing a street, and the other for obstructing an alley upon which the lots in question abut, by the defendant's railroad. No allusion is made in the opinion to the incumbrance of the street, and whether the rule applied to that of the alley is to govern is left entirely to conjecture. As this question will necessarily again arise on a new trial, the court below ought, I think, to have been advised as to whether its former ruling in that particular is also open to objection. This silence respecting it, whether so intended, or otherwise, is well calculated to leave the impression that it is not. For myself, however, I desire to say that where, as is the case in this state, the fee of alleys as well as of streets in a city is in the corporation for the use of the public, I am aware of no case in which any distinction in this respect has been recognized. The same principle I think should govern as to both.

The chief fault, however, that I find with the opinion of my brethren is, that while it lays down a rule which may perhaps find reasonable support in the authorities they cite, the case as made by the record is not within it. Indeed, I take upon me to say that they cite no case of which it can fairly be said that upon the facts of this one, the court deciding it would have sustained a recovery of damages.

The *gravamen* of the complaint here is, that the defendant's railroad track, on which it is running its cars, is laid across a street and along an alley of the city adjoining the plaintiff's lots, which are thereby damaged. Admitting all this to be true, I think it is clear by the light of authorities that the plaintiff's case is fairly within the rule of *damnum absque injuria.*

It seems to be conceded by my associates, and doubtless it is true, that but for the provision of our constitution which secures to owners of property simply "damaged" —not taken—for public use, just compensation, the road having been constructed under legislative authority, there would be no right of action for the act complained of. Where there is no permanent taking away of any portion of the street, but only the mere obstruction of passing trains to the temporary inconvenience of those wishing to use it, this is not such an element of damage to an adjoining estate as will authorize a recovery. *Caledonian Railway Co. v. Ogilvy*, 2 Macq. H. L. Cas., 229.

My associates concede also that the right to compensation given by our constitution is not at all unlike that secured by the sixty-eighth section of the lands clauses consolidation act and the sixth section of the railway clauses consolidation act of the English parliament, where lands are injuriously affected by a railroad. Therefore the adjudged applications of those sections by the higher English courts ought, I think, to have great weight with us in determining the full scope and effect to be given to sec. 21 of our bill of rights.

One prominent feature of the English decisions under those statutes is, that to justify a recovery the damage must be one for which an action would lie if the work causing it were not authorized by parliament. In the case of *Beckett v. Midland Railway Co.*, L. R. 3, C. P. 82, which may be regarded as a leading one on this subject, the principal question was as to whether certain premises fronting

on a street through which the company had built its road were "injuriously affected" within the meaning of the English statute.

Although the facts of that case were held sufficient to make the company liable, it is quite clear to my mind, from what was said by the judges in applying the law to them, that those of the one we are considering are not. In that case, the roadway in front of the plaintiff's premises, which had formerly been fifty feet wide, was reduced by the embankment for the railroad to thirty-three feet, in consequence of which the light in the lower portion of the house had been sensibly diminished, and great discomfort and inconvenience occasioned to the occupants by reason of carriages being compelled to go a considerable distance beyond the gate before they could turn. As to seventeen feet of the roadway, the occupancy by the company in consequence of the elevation of the railroad track, was exclusive. In thus permanently diminishing the light and rendering the approach inconvenient, a special injury was done to the plaintiff's property; and it was upon this ground that the recovery was sustained. Wells, J., in giving his views, said, that to entitle the claimant to compensation "two things must concur, viz., that he has sustained a particular damage from the execution by the company of the works authorized by the special act, and that the damage was one for which he might have maintained an action if the work was not authorized by parliament." And he said also, "that the injury he complains of was an injury to his estate, and not a mere obstruction or inconvenience to him personally, or to his trade, although it might have been the subject of an action if the works which occasioned it had not been executed under the sanction of parliament." And in *Rickett v. Directors, &c., of Metropolitan Railway Co.*, Law Rep., 2 H. L., 175, it was held that no case comes within the purview of those sections of the English statutes, "unless in respect of damage to the land itself, which damage

would have been the subject of an action at law before those statutes." In this case Lord Cranworth, in giving his view of the subject, used this language: "Both principle and authority seem to me to show that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundation of buildings upon it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature." See also the remarks of the Lord Chancellor Chelmsford, who took substantially the same view. And this being a decision of the House of Lords, the case is certainly entitled to great weight as an authoritative exposition of the law on this subject.

The only other English case I care to refer to in this connection is that of *Chamberlain v. The West End of London, etc., Railway Company,* 2 B. & S., 605 (110 Eng. Com. Law Repts.) This case was under the lands clauses consolidation and railway clauses consolidation acts, and in passing upon it Cockburn, Ch. J., said: "That if an action would have lain for the injury done by the company's works, unless their act had authorized them, then the land is injuriously affected, and compensation may be awarded." The injury here complained of was caused by an embankment made for the railroad in the street immediately in front of the plaintiff's premises to the height of the first floor windows, which effectually prevented access to the houses thereon except by a "deviation road," as it is called, which had to be made, and which was much less convenient than the old one had been before the obstruction.

A case cited by my associates, the one, indeed, on which they seem chiefly to rest for support to their opinion, which is made up chiefly of quotations from it, is *Rigney v. the City of Chicago*, 102 Ill., 64. As an authority, however, that case is much weakened, not only by the fact of it having been decided by a divided court, but also because it is directly opposed to that of the *Chicago, Milwaukee and St. Paul R. R. Co. v. Hall*, 90 Id., 42, wherein a like question, under the same constitutional provision, was decided the other way by a united court. In the last mentioned case, it was claimed that the plaintiff's premises fronting on a street in the city of Chicago were damaged by the laying of a railroad track in the street near his dwelling, and by leaving cars standing on the same, "thereby impeding access to and egress from his property." Also, "by reason of smoke, dust, and cinders being cast from locomotive engines, by passing on the tracks, upon his house and lot." As in the case before us, there was no complaint of either cut or embankment, but the tracks seem to have been on a level with the surface of the street. On this state of facts the court held that "the measure of damages is the loss sustained by the nuisance, the injury from jarring the building, the throwing of cinders, ashes, and smoke upon appellee's premises. The depreciation of the value of the property by these causes may be considered, but not general depreciation in value from other causes—mere inconvenience in approaching or leaving the property, or the noise and confusion in the vicinity. The injury must be physical."

In the case of *Rigney v. The City of Chicago*, the court professed to keep within the line of the English decisions to which I have referred. And it is quite possible that the facts of that case warranted the conclusion that the damages were such as to bring the city fairly within the rule of liability laid down by the English courts. The embankment complained of, although not directly in front

of the plaintiff's premises, was but a short distance away, and was such as to almost entirely prevent approach to them from Halstead street, one of the principal thoroughfares of the city.

But whilst forbearing the expression of an opinion as to whether the damages in that case were within the established English rule, I am very certain that those complained of in the case at bar are not. In this case there is no physical disturbance whatever of the lots, which appear to be practically unimproved. It is not claimed that the railroad is either above or below the surface of the street and alley, and therefore it is probably on a level with them. Neither is it claimed that any difficulty is experienced in crossing and re-crossing the road, or traveling along it, save when occupied by the company's cars. It does not appear that this portion of the road is within the limits of depot grounds, so it can be lawfully occupied by the company to the exclusion of the plaintiff and others who may have occasion to go there, only so long as is reasonable for the passage of moving trains over it. If more time is taken than is reasonable, to the hindrance and injury of another, the proper remedy may be found in an action for damages, not to the lots, but to the individual thus discommoded.

Again, the injury here complained of is not within the English rule of liability for still another reason, which is, that it is not different in kind, although perhaps different in degree, from that experienced by every other person having occasion to pass along the street or alley. "The fact that a claimant sustains damages greater in degree, if not different in kind, will not entitle him to a recovery." Lord Chancellor Chelmsford, in *Ricket v. Directors, etc., of Metropolitan Railway Co., supra.* No portion, either of the street or alley, is permanently taken away. There is "the mere obstruction of passing trains to the temporary inconvenience" of the plaintiff and others wishing to use them,

which "is not such an element of damage to an estate as will authorize a recovery." *Caledonian Railway Company v. Ogilvy, supra.*

And finally, the injury is not within that rule, for the additional reason that, even if the company had not been authorized by the legislature to occupy the street and alley for this new public use, the matter complained of is not such an injury to the plaintiff's lots as gives a right of action. Such an action, as I understand, can be maintained only on the ground that the injury is such as amounts practically to a taking of property, which that shown in this case clearly is not. A railroad laid upon a highway or street of a city, especially where the fee is in the public, is not necessarily a nuisance. Angel on Highways, 2 ed., §§ 242–244. "While the laying of a railroad on a highway without any peculiar or direct injury to the land owner is not a taking of his property, changes in its surface, and erections which destroy or materially obstruct his access to and use of it, and cause him special damage, may be treated as such taking; and this is the substantial result of many well considered authorities." Pierce on Railroads, 241. But detention and danger in crossing, the frightening of horses, and similar inconveniences and discomforts not amounting to a practical obstruction are, however, not a taking of private property; nor are such injuries, when not caused by negligence, actionable. The reason that an action for such injuries at the suit of a private person will not lie is, that they are not peculiar to him alone, but are shared in greater or less degree by the entire community. Probably it is otherwise where the fee of the street is in the adjoining proprietor, the land having been condemned only to the uses of an ordinary highway.

For these reasons I am of the opinion that the judgment of the district court is right, and ought to be affirmed.

MATHIAS SIMMERMAN, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law**: MURDER: EVIDENCE. To justify a verdict of murder in the first degree, the evidence must show the killing to have been done not only *purposely*, but also with *deliberation* and *premeditation*.
2. **Statutory Construction.** The term "deliberation and premeditation," used in defining the different degrees of murder, requires the act of killing to have been "done with reflection," and "conceived beforehand." Evidence examined, and *Held*, Not sufficient to bring the case within this rule.
3. **Unlawful Attempt to Arrest.** A person may resist an unlawful attempt at arrest, and if necessary, rather than submit, he may lawfully kill the person making it.

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

L. C. Burr, for plaintiff in error.

Isaac Powers, Jr., for defendant in error.

LAKE, CH. J.

The most important objection made to the conviction of the prisoner, and the only one made in the motion for a new trial is, that the verdict is not supported by the evidence, and to this we shall chiefly direct our attention.

The conviction was of murder in the first degree, the punishment of which is death. To have justified such a verdict the evidence should have been sufficient to show that the act of killing was done not only "purposely" but also with "deliberate and premeditated malice." If the evidence fall short of this, if it were only sufficient to show, at most, the act to have been done "purposely and maliciously, but without deliberation and premeditation," the conviction should not have exceeded murder in the sec-

ond degree, the punishment for which is imprisonment in the penitentiary not less than ten years, or during life, in the discretion of the court. Criminal code, §§ 3, 4. *Milton v. The State*, 6 Neb., 136. *Schlencker v. Same*, 9 Id., 241.

That the killing was malicious, without qualification, is possibly reasonably inferable from the manner of doing it, together with the fact that the provocation may have been inconsiderable. Malice is presumed when no considerable provocation appears. *Preuit v. The People*, 5 Id., 377. But as to the other essentials of murder in the first degree we are, after a careful examination of the evidence, constrained to say that they were not proved.

In construing a statute the language employed in it should generally be given its plain obvious import. *Follmer v. Nuckolls County*, 6 Id., 204. 10 Am. Law Register, 537. 1 Broom & Hadley's Commentaries (Am. Ed.), 70. In view of this rule, what is to be understood by the term "deliberation and premeditation" in the statutory definition of the different degrees of homicide? According to Webster, deliberation means, "The act of deliberating, or of weighing and examining the reasons for and against a choice or measure; mature reflection." And premeditation: 1. "The act of meditating beforehand; previous deliberation. 2. Previous contrivance or design formed," etc. "Premeditation differs essentially from *will* * * * because it supposes, besides an actual will, a deliberation and continued persistence, which indicate more perversity." Bouvier. One eminent author says of the statutory rule of deliberation and premeditation, that it requires the act to have been "done with reflection" and "conceived beforehand." Wharton on Homicide, § 180*.

The authorities are conflicting as to the time that is requisite before the act of killing, for the exercise of these operations of the mind. All agree, however, that some

time for deliberate reflection is necessary. This being so, it seems to follow necessarily that, where, as was the case here, the killing is the result of a sudden affray between parties before entirely unknown to each other, following quickly its commencement, and the person killed, without cause, began or provoked it, it cannot be said there was time for such reflection as the law contemplates. If this be not a correct view of the force of the term "deliberation and premeditation," then there is really no substantial distinction between the two degrees of murder.

Speaking on this subject the supreme court of Kansas has said: "The word 'deliberate' means that the manner of the performance was determined upon after examination and reflection; that the consequences, chances, and means were weighed and carefully considered. It is not only necessary that the accused shall plan, contrive, and scheme as to the means and manner of the commission of the deed, but that he shall consider different means of accomplishing the act." *Craft v. The State*, 3 Kan., 450. The last clause of this quotation, perhaps, goes too far in holding that it is necessary for the accused to have considered "different means" for the accomplishment of his purpose to kill. In all else, however, we regard the view thus expressed as sound. See also *Ake v. The State*, 30 Texas, 466. *Anderson v. Same*, 31 Id., 440. *Milton v. The State*, 6 Neb., 136.

Referring to the evidence, we find that the crime of which the prisoner was convicted was committed on the 16th of October, 1882, at Minden, in Kearney county. The first account given of the prisoner is, that in company with two companions he came to Minden on the day before. One of these companions was Belmont, who was with him when the crime was committed, and participated in it.

On the evening of the 16th, the prisoner and Belmont went into the dining room of the "Prairie House," one of the Minden hotels, seated themselves at the table, and or-

dered their suppers. Just as they had given their orders, a person who is called by the witnesses "Jack Woods," or "Sheriff Woods," entered the room, approaching them from the rear, presented a revolver at one of them, and told them to "throw up their hands" and consider themselves "under arrest." Instead, however, of obeying this order the parties instantly engaged in what shortly proved to be a deadly struggle. Either Belmont or the prisoner—as to which it was the witnesses disagree—seized Wood's revolver, or arm, jerked him partly around, while the other, or both together, instantly shot him to death.

But who was Jack Woods, or Sheriff Woods, as he is called interchangeably by the witnesses? Where did he live? Was he, as the title given him would imply, an officer of the law? If so, in what place and what was the extent of his jurisdiction? Did he have any warrant for making what really seems to have been an unauthorized assault upon peaceable men? If so, what was it? As to these questions there was no evidence at all before the jury. They may have known about these things, but there was no evidence before them.

The prisoner and his companion Belmont, who were they? Whence did they come to Minden, and whither did they go after this fatal encounter? Perhaps they were known residents of Kearney county; it may be they were not, but whencesoever they came, had they committed, or were they even suspected of having committed any offense, either in Kearney county or elsewhere? Did they know or had they ever heard of this man Jack Woods before? As to all of these matters, and many more which must have been susceptible of proof, the record is as silent as the grave. The object of the assault upon the prisoner by Woods is left entirely to conjecture. He may have been a good, law abiding citizen, and acting in the line of official duty; if so, it is not shown that the prisoner knew it. He may indeed have been a very bad man, and his motives in

making the assault bad, as the prisoner knew, or had reason to believe, consistently with the evidence submitted to the jury.

Even if Woods' object really were to arrest these parties, as it probably was, in the absence of all evidence on the subject, we are required to presume that it was unauthorized, and that they had the right to resist it.

On the subject of homicide in resisting an unlawful attempt to arrest, it is said in Wharton on Homicide, 2d ed., § 227, that, "Where A unlawfully attempts to arrest B, B is justified in resisting; and if A so presses B as to make it necessary for him to choose between submission and killing A, then the killing A is not even manslaughter," citing *State v. Oliver*, 2 Houston, 604.

Such being the state of the law, and such the evidence, or rather the want of evidence against the prisoner, we must hold that the verdict was unwarranted, and direct a new trial. There are some other questions discussed by counsel, but inasmuch as they were not raised in the motion for a new trial we will not now consider them.

REVERSED AND REMANDED.

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

1. **Jurors:** COMPETENCY OF. To be competent to serve as a juror in this state, one must be an elector of the county wherein he is called to serve.

2. ———. In the absence of a showing to the contrary, one who has served as a juror is presumed to have been in all respects qualified at the time of serving.

3. **Criminal Law:** ARGUMENT TO JURY: LIMITATION OF. An exception was taken by counsel for the prisoner to an order of

the court limiting their argument to the jury to two and a half hours; thereupon this time was extended thirty minutes. To the order thus modified no further objection was made; and it not appearing that more time was needed, nor that what was allowed was occupied, *Held*, That no error was shown.

4. ———: CRIMINAL RESPONSIBILITY: MENTAL CONDITION OF ACCUSED. If one charged with crime have the mental capacity to distinguish right from wrong *in respect to the particular act charged*, he is responsible.

ERROR to the district court for Hall county, GEO. W. POST, J., presiding, wherein the plaintiff in error was convicted of murder in the first degree and sentenced to death.

Abbott & Caldwell, for plaintiff in error.

Isaac Powers, Jr., for defendant in error.

LAKE, CH. J.

The errors assigned in this case may be conveniently classed under four heads: *First.* Rulings respecting the competency of certain persons to serve as jurors. *Second.* The restriction of counsel in their argument to the jury. *Third.* Rulings in the charge to the jury. *Fourth.* The insufficiency of the evidence to support the verdict. The last of these objections does not seem to be relied on, however, as it is not even mentioned by counsel in their brief. Therefore we will only say of it that, after a careful reading of the record, our minds are left in no doubt on that point, and we are satisfied that the evidence was in all respects ample to warrant the conclusion which the jury reached.

Under the first of these heads two objections to the ruling of the court below are made: *First*—The sustaining of the challenge of the state to the juror Porterfield; and *Second*—The overruling of the prisoner's challenge to the juror Hall.

To be competent to serve as a juror in this state, one must be an elector of the county wherein he is called to serve. Sec. 657, Compiled Statutes, 617. And to be an elector, a residence in the state for six months and in the county for forty days next before the election is required. Sec. 3, Compiled Statutes, 257. "That place shall be considered and held to be the residence of a person in which his habitation is fixed, without any present intention of removing therefrom, and to which, whenever he is absent, he has the intention of returning." * * * "A person shall not be considered and held to have acquired a residence in any county in this state into which he shall have come for temporary purposes merely, without the intention of making it his residence." * * * "The place where a married man's family resides shall generally be considered and held to be his residence; but if it is a place of temporary establishment only, or for transient purposes, it shall be otherwise." Sec. 32, Compiled Statutes, 261.

Tested by these clear and positive rules, the *voire dire* examination of Porterfield showed beyond all doubt that he was incompetent to sit as a juror. He was not yet an elector of Hall county. If an election had been held there on the day of the trial he would not have had the right to vote thereat. He was, it is true, then a resident of that county, but had not been so sufficiently long to fill the requirement of the law in this particular. To a question as to whether he was a voter, he answered, "I don't know. I have been here about twenty-four days." Further examination respecting his residence developed these facts: That, with his family, he had lived in Dodge county about twelve or thirteen years next preceding his removal to Hall county; that he himself went to Grand Island on or about the tenth of January, remaining two days, at which time he concluded "to go into business" there; and on the last day of that month removed thither with his family, and "went into business" on the following day. Under

this state of facts, we are at a loss to understand how it can be seriously contended that Porterfield was qualified to serve. The mere resolve that he would go there did not make him a resident of Hall county, and he became such only upon the subsequent abandonment of his residence in Dodge county by removing with his family to Grand Island.

The objection made to the juror Hall was "for cause," but no particular cause is specified either in the record or in the brief of counsel. So far as can be gathered from his *voire dire* examination he was in all respects qualified to serve. The only point on which he was at all pressed by counsel for the prisoner on his cross-examination was, as to whether he had formed an opinion upon the merits of the case, and he showed by his answers to questions propounded to him that he had not. In the absence of a showing to the contrary, one who has served as a juror is presumed to have been in all respects qualified at the time of serving. We see nothing deserving of complaint in the ruling of the court respecting this juror.

Under the second head nothing is shown which, fairly considered, puts the court in any degree at fault. It appears that before the commencement of their arguments to the jury, the judge announced that counsel would be limited to two and a half hours on each side, and that the prosecutor should have only fifty minutes of his time in which to close. To this order the prisoner's counsel objected and took exception. Thereupon, as the record states, the court "allowed counsel for the defendant to occupy thirty minutes more than was allowed them under the said order, that is to say, three hours in all." To the order as thus modified no exception was taken, nor does it appear in any manner that any further time was needed for a full presentation of the case to the jury, nor even that the time thus granted by the court was all occupied. In the absence of a showing to the contrary we must presume that

counsel had all the time they needed given them, or would have occupied, if no limitation had been made. No error is shown in this particular.

An exception was taken to the seventeenth instruction of the charge to the jury. It was in these words: "The law presumes the defendant to be of sound mind, and this presumption continues until evidence is given tending to show the contrary. When such evidence is given the evidence on the part of the state must be such as to leave in your minds no reasonable doubt that the defendant at the time of the alleged homicide was in that mental condition which would allow him to distinguish between right and wrong. If evidence has been given tending to show that at the time of the homicide the defendant was in that mental condition which prevented him from distinguishing between right and wrong you must acquit him, unless the state satisfies you of his legal responsibility beyond a reasonable doubt. But where insanity is shown to exist, if there remains a degree of reason sufficient to discern the difference between good and evil at the time the offense was committed, then the accused is responsible for his acts. If the prisoner killed the deceased, was the accused a free agent? In forming the purpose to kill, was he at the time capable of judging whether that act was right or wrong? Did he know at the time that it was an offense against the laws of God and man?"

And an exception was also taken to the refusal of the judge to give the following, tendered on behalf of the prisoner, viz.: "You should return a verdict of not guilty, unless you are satisfied beyond a reasonable doubt that the killing was not the offspring of mental disease in the defendant; and in case of mental disease, neither knowledge of right and wrong or ability to recognize acquaintances are to be adopted by you as tests of insanity, but you are to consider all those matters in making up your verdict."

The court, however, did give, at the request of the pris-

oner's counsel, the following: "If the jury believe that from any predisposing cause, such as inherited desire for strong drink, or inherited insanity, the prisoner at the time of shooting Michael Cress became incapable of governing his actions, or was unconsicous that he was committing a crime, he is not guilty of the offense charged in the indictment."

The only fault found by counsel with the seventeenth instruction is, that it made the ability of the accused to distinguish between right and wrong the test of criminal responsibility. If the first three clauses of the instruction be taken alone, they state the rule rather too broadly. They would import that if the accused were at the time able to distinguish generally between right and wrong, he was responsible for his act. This is not strictly correct. The better rule, we think, and the one adopted by this court in the case of *Wright v. The People*, 4 Neb., 407, is, in effect, that if one accused of crime have the mental capacity to distinguish right from wrong *in respect to the particular act charged*, he is responsible. And the converse of this proposition would also be true. This rule was afterwards approved in *Hawe v. The State*, 11 Id., 537.

If, however, these clauses be taken in connection with the rest of the instruction, and especially if taken also with the instruction given on behalf of the prisoner, which we have quoted, and which must be done, the charge on this branch of the case conforms substantially to the rule above stated. The latter clauses of the instruction show that what was said of the prisoner's mental condition had special reference to the act with which he stood charged, and we are satisfied the jury must have so taken it. The instruction refused did not conform to the rule of this court; was calculated to mislead the jury, and was rightly refused. There is no error in the matters complained of, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. JAY HALPHREY, DEFENDANT IN ERROR.

A Bill of Exceptions and petition in error on behalf of the state in a case where, in the district court, upon an appeal from a conviction of a misdemeanor before a county judge, the case was dismissed, filed in this court without leave of court obtained by the district attorney, will be dismissed.

ERROR to the district court for Howard county, NORVAL, J., presiding.

Paul & Bell, for plaintiff in error.

Henry Nunn, for defendant in error.

COBB, J.

Jay Halphrey was arrested on a warrant issued by the county judge of Howard county upon complaint and information of Robert Harvey, charging the said Jay with the crime of igniting a fire cracker or roman candle and firing the same off in the village of St. Paul, in Howard county, in violation of an ordinance of said village. Said Jay pleaded not guilty to the said information, and a trial was had to a jury, who found the defendant guilty, who was thereupon sentenced by the court to pay a fine of one dollar and costs. Thereupon said defendant gave notice of appeal and entered into a recognizance for his appearance at the district court with security, which was accepted and approved by the said county judge.

At the next ensuing term of the district court the said Jay Halphrey appeared by his attorney and filed his motion to dismiss said case for the following reasons, to-wit:

1. Because the county judge had no jurisdiction to try said case.

2. Because the information is insufficient and does not set out any offense.

Whereupon the court adjudged "that the county judge before whom said case was tried had no jurisdiction to try said case, and that the information made in said case is insufficient," and that the "said case be and is hereby dismissed at the costs of the plaintiff."

The record is filed in and the case sought to be brought to this court on error. The petition in error is signed by private counsel, not by the district attorney, and no leave has been given by, or application therefor made to, this court to file the same for the decision of the court on the points therein presented.

It is only necessary to call attention to the provisions of the statute on this subject to show that this proceeding as thus presented cannot be entertained. Sections 515, 516, 517 of the criminal code provide that: "The prosecuting attorney may present to the supreme court any bill of exceptions taken under the provisions of section four hundred and eighty-three, and apply for permission to file it with the clerk thereof for the decision of such court upon the points presented therein; but prior thereto, he shall give reasonable notice to the judge who presided at the trial in which the bill was taken of his purpose to make such application; and if the supreme court shall allow such bill to be filed, such judge shall appoint some competent attorney to argue the case against the prosecuting attorney, which attorney shall receive for his services a fee not exceeding one hundred dollars, to be fixed by such court and to be paid out of the treasury of the county in which the bill was taken.

"Sec. 516. If the supreme court shall be of the opinion that the question presented should be decided upon, they shall allow the bill of exceptions to be filed and render a decision thereon.

"Sec. 517. The judgment of the court in the case in

which the bill was taken shall not be reversed nor in any manner affected; but the decision of the supreme court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may afterwards arise in the state."

The record in this case having been improvidently received and docketed by the clerk, without the leave of the court as required by statute, must be dismissed.

JUDGMENT ACCORDINGLY.

C. N. PAINE & CO., PLAINTIFFS IN ERROR, V. CHARLES KOHL, DEFENDANT IN ERROR.

Instructions to Jury. An instruction by the court to a jury which assumes the admission or proof of a controverted material fact upon which there is a conflict of testimony is error, for which a new trial will be granted.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Batty & Ragan, for plaintiff in error.

Dilworth & Smith, for defendant in error.

COBB, J.

This was an action by C. N. Paine & Co. against Chas. Kohl for the agreed price of a frame building alleged to have been sold by the former to the latter while standing on rollers in the street in the city of Hastings. The building was to be moved to and upon a certain lot of said city by C. N. Paine & Co., but there is a conflict of testimony as to whether it was or was not a part of the contract that C. N.

Paine & Co. should, in addition to moving the building to and upon the lot of Kohl, also place it upon a good foundation. There is no conflict in the testimony that C. N. Paine & Co. did move the building to and upon the said lot, that it was not placed upon any foundation, and in that condition and shortly after its removal to and upon the said lot, it was destroyed by fire, which consumed a large portion of said city.

The jury to whom the cause was tried found their verdict in favor of the defendant.

The plaintiff who brings the cause to this court on error assigns sixteen grounds of error, but as we have come to the conclusion that there must be a new trial for error in the instructions of the court, the other errors assigned will not be examined.

Among the instructions given in charge by the court to the jury upon its own motion were the following:

2. If you find from the evidence that the plaintiffs moved said building upon defendant's lot, and had placed it in the position and upon the foundation that they were bound to do by the terms of the contract of sale, then there was a delivery of the building to the defendant, and the plaintiffs are entitled to recover, although said building was destroyed by fire before the defendant took actual possession of the same.

3. If you find from the evidence that the plaintiffs moved said building upon defendant's lot, but still had control of said building by their agents, and had not placed it in the position and upon the foundation they were bound to do by the terms of the contract of sale when said building was destroyed by fire, then the delivery of the building was not complete, and the plaintiff cannot recover therefor.

These instructions assume that it was either admitted by the plaintiffs, or proved without conflict of testimony, that it was a part of the contract of sale that the plaintiffs should

not only deliver the building on the defendant's lot, but place the same in position and on a foundation thereon, while on the contrary, as we have seen, there was a sharp conflict of testimony on that point. Indeed, the vital turning point in the case is whether by the terms of the contract C. N. Paine & Co. were to place the building on a foundation in position on the lot of Kohl, or only to move the same on to the lot and furnish Kohl timbers for the posts so that he could place it on the foundation himself. These instructions, which clearly take this question from the jury, are erroneous, and for that reason the judgment is reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

C. C. MCNISH, APPELLANT, V. HALE PERRINE AND D. W. CLANCY, APPELLEES.

1. **Tax Lien:** FORECLOSURE: PLEADING. In the foreclosure of a tax lien, the holder may join as many tracts or descriptions of real estate belonging to one defendant upon which he has a tax lien as he may see fit. In such case the tax due upon each tract will constitute a separate cause of action, and should be separately stated and numbered.

2. **Taxes:** FAILURE OF ASSESSOR TO SWEAR TO ROLL. A valid tax is the foundation of a lien for taxes upon real estate. Therefore, if it appears that the assessor failed to swear to the assessment roll, the lien for taxes cannot be enforced.

APPEAL from the district court of Cuming county. Heard below before BARNES, J.

M. McLaughlin, for appellant.

J. C. Crawford, for appellees.

MAXWELL, J.

This is an action to foreclose a tax lien. A demurrer to the petition was sustained in the court below and the action dismissed. The plaintiff appeals to this court.

It is alleged in the petition that on the first day of June, 1877, one Robert Kloke purchased at private tax sale, from the county treasurer of Cuming county, lots numbered 5 and 6 in block 29, in the village of Wisner, for the delinquent taxes of 1875, and paid therefor the sum of $14.10 and received a certificate of purchase, which was assigned to the plaintiff; that on the fourth day of June, 1877, the plaintiff purchased at private sale lots 9 and 10 in block 29, in said village, for the taxes of 1875, paying therefor the sum of $57.41; that said lots have not been redeemed from said taxes; that when the time for the redemption of said lots expired, R. M. Forbes was the owner of the same, and upon his promising to pay said taxes from time to time, the plaintiff failed to apply for and obtain a tax deed; that afterwards said Forbes sold said lots to the defendant, Perrine, who refuses to pay said taxes; that about the 1st day of February, 1882, the plaintiff offered to surrender said certificates to Clancy, the treasurer of Cuming county, and demanded a tax deed, which he refused to make; that said certificates are insufficient in law to authorize said treasurer to make a tax deed. *First.* Because they do not recite where the lots were sold. *Second.* Because the treasurer failed to attach his seal to the same. *Third.* Because there was no valid assessment for the year 1875, for the reason that the assessor did not swear to the assessment roll. The prayer is for a foreclosure of the tax lien, or if that cannot be had, for a mandamus to compel the county treasurer to execute a deed, etc.

The grounds of demurrer are—*First.* That the court has no jurisdiction of the subject of the action. *Second.* That there is a defect of parties defendant. *Third.* Several

causes of action are improperly joined. *Fourth.* That the petition fails to state a cause of action. These will be considered in their order.

Authority is expressly conferred by statute upon the district court in cases for the foreclosure of tax liens. The court therefore had jurisdiction of the subject matter. Comp. Stat., 432.

No defect of parties defendant appears on the face of the petition; the second ground of demurrer therefore cannot be sustained.

A party seeking the foreclosure of a tax lien may join as many tracts of land belonging to one defendant upon which he holds a tax lien as he may see fit. In such case the tax on each separate tract would constitute a distinct cause of action, and should be separately stated and numbered; but the failure to do so is not ground of demurrer. The third ground of demurrer therefore should be overruled.

The fourth ground, that the petition fails to state a cause of action, is more serious. It is alleged in the petition that the assessor for the year 1875 did not swear to the assessment roll, and that therefore the tax is invalid.

This court in a large number of cases has held that where a land owner comes into court and prays for the cancellation of a tax deed or an illegal tax which is an apparent cloud upon his title, he must do equity by paying all taxes justly due. *Wood v. Helmer*, 10 Neb., 65. *Boeck v. Merriam*, 10 Id., 199. *Hunt v. Easterday*, 10 Id., 165. *Southard v. Dorrington*, 10 Id., 119.

The reason of the rule is stated in *Wood v. Helmer*, page 75, as follows: "If the owner of the land does not wish to take the hazard of an adverse title being made to his land by tax deed, the legality of which remains undetermined, and files his petition in equity to enjoin the execution of such deed, he must do equity by paying or offering to pay his just proportion of the public burden." This we

regard as a correct statement of the law, and will be applied in all cases where the owner of land seeks relief. But this rule has no application where a party is seeking to enforce an adverse claim by tax proceedings against property.

In such case a valid tax is the very foundation of the proceedings. *Nebraska City v. Gas Co.*, 9 Neb., 339. *Morrill v. Taylor*, 6 Id., 245. *Hallo v. Helmer*, 12 Id., 87.

It has been held in a number of cases in this court that the failure of the assessor to swear to the assessment roll rendered the tax invalid. *Morrill v. Taylor*, 6 Neb., 236. *Lyman v. Anderson*, 9 Id., 367. *Hallo v. Helmer*, 12 Id., 87. This being so, and it being alleged as a part of the cause of action that the assessor did not swear to the assessment roll in the case under consideration, the plaintiff has obtained no lien upon said lots by the payment of the taxes due thereon. The demurrer was therefore properly sustained. The judgment must be affirmed.

JUDGMENT AFFIRMED.

SIMON H. KENNEDY, PLAINTIFF IN ERROR, V. CHARLES F. GOODMAN, FOR DEFENDANT IN ERROR.

1. **Promissory Notes:** THE CONSIDERATION of negotiable promissory notes may be inquired into in an action on the notes by the promisee against the maker.

2. **Account:** SETTLEMENT. A settled account is *prima facie* correct, and it will not be disturbed except for fraud or mistake in the settlement. But if fraud or mistake is shown the settlement will to that extent be considered as having been made upon mistake or imposition, and the omissions and mistakes will be corrected.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

Webster & Gaylord, for plaintiff in error, cited: 1 Parsons Contracts, 437. *Kansas Mnfg. Co. v. Gandy*, 11 Neb., 450. *Jarvis v. Sutton*, 3 Neb., 289. *Haynes v. Thorn*, 28 New Hamp., 386. *Sullivan v. Collins*, 18 Iowa, 228. *Kidder v. Blake*, 45 New Hamp., 530. *Cabot v. Haskins*, 3 Pick., 83.

W. J. Connell, for defendant in error.

MAXWELL, J.

Goodman brought an action against Kennedy in the district court of Douglas county, upon three promissory notes amounting to $2,715.38 and an account for $715.13. The answer is in substance a want of consideration for the notes as follows: It is alleged in substance that Kennedy was manufacturing "Hemlock Remedies" and furnishing the same to Goodman, who furnished the ingredients and charged the same to Kennedy. That there was an open running book account between the plaintiff and defendant, and that the notes were given to cover balances as the same appeared from this book account which was kept by Goodman. On the trial of the cause a verdict was returned in favor of Goodman for the sum of $4,000, upon which judgment was rendered. The errors assigned in this court relate to the giving of certain instructions, which will be considered hereafter.

There is testimony tending to show that Kennedy manufactured "Hemlock Remedies" for Goodman under a contract which was to continue for three years, at the expiration of which time the contract was renewed for two years longer; that Goodman furnished the ingredients, charging the same to Kennedy, and crediting him with the remedies furnished; that Goodman kept a book account showing the amount of hemlock remedies turned over to him from time to time, and charged Kennedy with all the

drugs, chemicals, and other articles furnished, and also for the rent of a building used as a manufactory; that the notes were given for balances found due Goodman from time to time as appeared from said books of account; that said books contained various charges against Kennedy in the computation of cost of goods furnished, in charging him more than the price agreed upon, with freight added, and in charging him for the loss of remedies broken while *in transitu*, and for shrinkage, etc.; that Kennedy, although he had possession of the account books, had never had an opportunity to examine the same and ascertain their correctness, and at the time of giving the notes he was not aware of the various errors, overcharges, etc.; that the amount of said erroneous charges is the sum of $3,750, and an itemized account, alleged to contain the correct charges, is attached to the bill of exceptions as a part thereof. Goodman introduced evidence tending to prove that monthly statements of the account were furnished to Kennedy, and by him taken to his place of business, and that at times he and Kennedy looked over said book accounts together; that there was no agreement that he should sell drugs, chemicals, and other articles at cost, and that the prices charged were fair and reasonable, and were agreed upon by the parties; that there were no errors or overcharges in the accounts, etc. One of the instructions given to the jury is as follows: "If you find from the evidence that monthly statements of defendant's account with plaintiff were received by defendant, which, with the account book offered in evidence, covered and included the several items now in dispute, and that the defendant had knowledge of such items at the several times of giving the notes sued on, and such notes were given by him with such knowledge for the purpose of covering and making settlement of such items and others, then the voluntary giving of such notes for such purpose would be final and conclusive to the extent that any of said notes covered said

disputed items, and the defendant Kennedy, by so giving said notes, would to such extent be estopped from claiming that any of such items were overcharges or fraudulent. The instruction was excepted to, and the giving the same is now assigned for error.

This is an action between the original parties. In some of the earlier cases an effort was made to place negotiable paper on the same footing as instruments under seal, even as between the original parties. *Pollams v. VanMicrop*, 3 Burr, 1663. *Livingstone v. Hastie*, 2 Caines, 246. 1 Parsons on N. & B., 176. The law is now well settled, however, that an action against a party to a negotiable instrument by his immediate promisee, a want or failure of consideration is a good defense. It is unnecessary to cite authorities upon this point because there seems to be no conflict. The formal making and delivery of an instrument for the payment or security for the payment of money will not preclude the maker, when sued by the promisee, from pleading and proving that no consideration was given. Thus, in the case of *Kansas Manufacturing Co. v. Gandy*, 11 Neb., 450, a wife had executed a mortgage upon her separate estate to secure the note of her husband. The instrument was formally and deliberately executed, but there was no consideration for it whatever, and the court held that the mortgage could not be enforced. The question was carefully considered in that case, and the authorities fully examined. Merely giving the note therefor will not stop Kennedy from showing errors or overcharges, or a want of consideration. If we consider the account as having been stated by the parties there is a *prima facie* presumption in its favor, and it will not be disturbed except there was fraud or mistake in the settlement. But where fraud or mistake is shown the account will be opened and the errors corrected. In *Chappedelaine v. Dechenaux*, 4 Cranch, 306, Chief Justice Marshall, in a suit to open a settled account and surcharge and falsify it, said: "If pal-

pable errors be shown—errors which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent."

This we regard as a correct statement of the law. Kennedy was not estopped, therefore, from showing errors or fraud in the account and the want of consideration for the notes. The court therefore erred in the above instruction, in directing the jury that he was estopped from showing these facts. The judgment must be reversed and the cause remanded for a new trial.

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2. It is not necessary to show that the goods were received from the thief. *Id*..... 1

3. And where received at several times, in pursuance of a conspiracy as to the particular goods, the values of the receptions may be aggregated in fixing the grade of the offense. *Id*..... 1

4. Jurors are not judges of the law in criminal trials. *Parrish v. The State*..... 61

5. Presumption from act done. *Id*..... 61

6. Justifiable homicide; self defense; evidence. *Id*..... 61

7. Sufficiency of proof required. *Id*..... 61

8. Reasonable doubt. *Id*.....66, 67
Polin v. The State..... 540

9. Verdict of guilty set aside where evidence fails to show that accused committed offense charged. *Staman v. The State*..... 68

10. Indictment for destroying trees. *State v. Priebnow*..... 484

11. Sentence; severity. *Hair v. The State*..... 505

12. Keeping house of ill fame; evidence. *Drake v. State*..... 535

13. District attorney may have assistance of counsel employed on private account. *Polin v. The State*..... 540

14. Trial for murder; refusal of court to order pistol discharged; evidence of criminal intimacy between prisoner's wife and deceased; insanity; argument of counsel; separation of jury. *Polin v. The State*..... 540

15. If one charged with crime have the mental capacity to distinguish right from wrong in respect to the particular act charged, he is responsible. *Hart v. The State*..... 573

16. Murder in the first degree; evidence necessary to convict. *Simmerman v. The State*..... 568

17. Unlawful attempt to arrest; resistance; justifiable homicide. *Id*..... 568

Damages. See TORTS.

1. Liability of railroads for killing stock at a point where line is not fenced. *U. P. R. R. Co. v. High*..... 14
B. & M. R. R. Co. v. Brinkman..... 70

2. Liability of railroads for destruction of property caused by overflow of water and ice owing to faulty plan and construction of railway bridge. *O. & R. V. R. R. Co. v. Brown* 170

3. Remote and uncertain in case stated. *Bridges v. Lanham* 369

4. To animals; threats of defendant to shoot plaintiff's stock. *Bolar v. Williams*..... 386

Dedication.

1. A dedication of property by the state to a private corporation in trust for a public use may be withdrawn at any time before its acceptance. The bringing of an action to recover the property from a subsequent donee is not an acceptance. *State Historical Association v. Lincoln* 336

Deed. SEE ACKNOWLEDGMENT.

Default. SEE JUSTICE OF THE PEACE.

Delivery. SEE NEGOTIABLE INSTRUMENT, 4.

Depositions.

1. Certificate of notary omitting the venue, but containing county and state where deposition was taken, *Held*, Good. *Glidden v. Moore*..... 85

2. When in the taking of a deposition of a witness, the adverse party has appeared and cross-examined, he is entitled to the benefit of the deposition, and may read such portions of it as he chooses, without being compelled to read the whole. *Converse v. Meyer*..... 190

3. An objection to the reading of a deposition, on the ground that it has not been shown that the personal attendance of

the witness could not be procured, to be availing must be made before the deposition is read. *Id*..... 190

4. Should be embodied in bill of exceptions. *Kyle v. Chase*... 528

Discretion of Court.

1. In regard to alleged prejudice of juror, as shown by conduct at trial. *R. V. R. R. v. Boyse*..... 130
2. Over writs and process. *Griffith v. Short*..... 260
3. Granting continuance. *Ingalls v. Noble*.. 272
4. Costs under sec. 82, code. *Kepley v. Irwin*..... 300
5. In allowing jury to take instructions to jury room. *Langworthy v. Connelly*..... 345

Dismissal. SEE ACTION, 7.

District Attorney. SEE CRIMINAL LAW, 13.

Divorce.

1. A decree for alimony making it a lien upon the defendant's real estate, *Held*, So far erroneous, and reversed. *Brotherton v. Brotherton*..... 186

Donation. SEE DEDICATION. GRANT.

Ejectment.

1. The obligor, in a supersedeas undertaking in an ejectment case taken on error to the supreme court, conditioned to pay the obligee "the value of the use and occupation of the property from the date of this undertaking until the delivery of possession" in case of affirmance. Judgment affirmed and suit on undertaking. Evidence, that at the date of the undertaking the property consisted of one and six or seven-tenths acres of land near the center of a large, enclosed, and cultivated field without improvements, except a root-house of but nominal value; but some time afterwards parties not in privity with either party to the said undertaking, erected two small frame dwelling houses on said premises. *Held*, That plaintiff could only recover the rental value of the premises without the houses during the occupancy of the same by the obligor in said undertaking. *Harbach v. Miller*..... 9
2. Where both parties claim under the same third person, it is sufficient *prima facie* to prove the derivation of title from him, without proving his title. *Barton v. Erickson*... 164

3. Under facts stated will not lie. *McKeighan v. Hopkins* ... 361
4. Final judgment. *Meglemere v. Bell*..... 378

Election.

1. Bond on appeal in contested election, need not be signed by appellant. *Clark v. Strong*..... 229

Eminent Domain. See CONSTITUTIONAL LAW. RAILROADS.

Equalization. See TAXES.

Equity. See INJUNCTION.

1. On facts stated, *Held*, That plaintiff was not entitled to relief. *Fried v. Stone*..... 398
2. Will not relieve judgment at law. *Ashton v. Jones*..... 428

Estoppel. See APPEAL, 4. RES ADJUDICATA.

1. In a suit brought on an undertaking entered into for the purpose of appealing from the judgment of a justice of the peace, *Held*, That the defendants were estopped to deny that an appeal had been taken in the case, in contradiction of their undertaking, executed in conformity to the statute, for the purpose of perfecting an appeal, although no appeal lay from the judgment of the justice. *Gudtner v. Kilpatrick*..... 347
2. By acts in pais. *Fried v. Stone*..... 402

Evidence.

1. Where an account is admitted to be correct, but it is alleged that it is paid, the burden of proof is upon the defendant to prove payment. *Magenau v. Bell*..... 7
2. Letter press copies of letters. *Ward v. Beals*..... 114
3. Parol, inadmissible to explain written contract. *Tootle v. Elgutter*..... 158
4. Of child to establish its parentage. *Comstock v. State*..... 205
5. Rape; emission presumed from fact of penetration. *Id*... 205
6. Effect of testimony of prisoner and failure to testify. *Id.* 205
7. Alleged illegality in assessment of property for taxation; burden of proof. *Towle v. Holt*..... 222
8. Irrelevant testimony on trial of action for price of wind mill sold with warranty. *Marsh v. Synder*..... 237
9. The oral declarations of the commissioners of the state,

who located, surveyed, and platted the city of Lincoln, are not competent evidence to prove the purpose for which the reservation of a block was made. This could be proved only by the plat and report of the commissioners, together with the act of the legislature confirming them. *State Historical Association v. City of Lincoln*..... 336

10. Where evidence offered at a trial can have no legitimate bearing on any matter put in issue by the pleadings, it is immaterial, and its exclusion is proper. *Id*..... 336

11. In an action for the value of a colt alleged to have been injured by the defendant, the only evidence to sustain the action was a threat of the defendant to shoot the plaintiff's stock if he did not keep it at home, and the fact that the injured animal was found on the defendant's premises. The jury having found for the defendant, *Held*, That as there was no testimony tending to show that the defendant committed the injury, the verdict would not be set aside. *Bolar v. Williams*..... 386

12. Application of rule of res adjudicata. *Densmore v. Tomer* 392

13. Hypothetical questions; testimony of non-experts. *O'Hara v. Wells*..... 403

14. When paper destroyed. *Hawley v. Robeson*..... 435

15. Opinion and estimate of witness, as to amount of damage, not admissible. *B. & M. R. R. v. Beebe*..... 463

16. Keeping house of ill fame. *Drake v. The State*..... 535

17. Murder; refusal of court to order revolver discharged; evidence of criminal intimacy between prisoner's wife and deceased; insanity; reasonable doubt. *Polin v. The State*... 540

18. Murder in first degree. *Simmerman v. The State*..... 568

Exception.

1. To admission of evidence necessary. *R. V. R. R. Co. v. Boyse*..... 130

2. To illegal testimony not waived by cross-examination. *Marsh v. Synder*..... 237

Felony. SEE CRIMINAL LAW.

Fences.

1. Duty of railroads. *U. P. R. R. Co. v. High*..... 14
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Final Order. SEE JUDGMENT.

Finding.

1. Under sec. 297, code. *Haller v. Blaco*..... 195
2. In replevin. *Degering v. Flick*.....448, 450
3. Arbitrators. *Sides v. Brendlinger*..... 491

Forcible Entry and Detention.

1. A party who has never been in possession of land cannot maintain an action against the owner of the fee for an alleged forcible entry and detention. *Haller v. Blaco*..... 195
2. Notice to quit may be served after as well as before expiration of term. *Hawley v. Robeson*..... 435

Foreclosure. SEE JUDICIAL SALE. MORTGAGE. TAXES.

Fraud.

1. The statute of frauds relative to the sale of land will not enable one who has accepted a conveyance of real estate to escape paying for it simply because the contract of purchase was not in writing. *Galley v. Galley*..... 174
2. Under 11th section of statute, where goods sold are left in possession of seller, burden of proof is on purchaser to show *bona fide* sale. *Densmore v. Tomer*..... 392
3. Term "creditors" defined. *Id*..... 392

Garnishment. SEE ATTACHMENT.

1. Rights of garnishee. *Fitzgerald v. Hollingsworth*..... 189
2. Equity of redemption in mortgaged personalty is subject to. *Burnham v. Doolittle*..... 214
3. Summons in; affidavit of mere belief sufficient. *Id*..... 216
4. In aid of execution; personal *judgment* against garnishee not allowed, but *order* to pay, etc. *Clark v. Foxworthy*..... 241
5. If personal judgment is sought, personal action must be had, sec. 225 code. *Id*..... 241
6. Summons in; no indorsement necessary. *Id*..... 241

Grand Jury. SEE JURORS.

Grant. SEE DEDICATION.

1. The word "claim" in U. S. land grant to B. & M. R. R. Co. is not restricted to such claims as shall afterwards ripen into perfect titles, but includes all that are made in due form, whether they are afterwards either perfected, abandoned, or forfeited, or not. *B. & M. R. R. Co. v. Abink*..... 95

2. To B. & M. R. R. was of a present interest and notice from the passage of the act to all persons dealing with public lands, within the prescribed limits, of the company's interest therein. And where after one location of its road, the railroad company changed its line pursuant to the act of congress, *Held*, That a purchaser of land from the United States, after the passage of the act, took it subject to the right of way under the new location afterwards made. *Rider v. B. & M. R. R. Co*..... 120

Guaranty. See Negotiable Instruments, 5.

1. A guaranty in these words, "Please let Mr. John Newman have credit for goods to the amount of one hundred dollars, and for the payment of which I hold myself responsible," *Held*, To be a continuing guaranty, and the limitation therein is as to the amount for which the guarantor will hold himself liable, and not as to the credit to be given. *Tootle v. Elgutter*..... 158
2. Where the leading object of a party promising to pay the debt of another is to promote his own interests, and not to become guarantor, and the promise is made on sufficient consideration, it will be valid although not in writing. In such case the promissor assumes the payment of the debt. *Fitzgerald v. Morrisey*..... 198

Homestead under U. S. Law.

1. Mortgage on, prior to patent. *Blanchard v. Jamison*..... 246
2. Mortgage on, prior to patent; grantor of mortgagor by quit claim cannot question validity of mortgage. *Forgy v. Merryman*..... 513

Homicide. See Criminal Law.

Husband and Wife.

1. The agreement by a husband that his wife will execute a mortgage upon real estate held in her name and to which she claims title, will not be enforced against her where there is no proof that she authorized the contract. *Nelson v. Bevins*..... 153
2. Where satisfaction of a mortgage due in three years, executed by a wife upon her real estate, was entered of record by the mortgagee upon the promise of the husband that his wife would execute a mortgage due in one year, upon the failure to execute the mortgage, *Held*, That the satisfaction would be set aside. *Id*..... 153

3. Separate property of wife not liable for any debt of husband. *Spellman v. Davis*..... 263

Indictment. SEE TITLES OF CRIMES.

Injunction. SEE EQUITY. RAILROADS, 12.

1. Assignor cannot maintain against attachment creditor. *Ashton v. Jones*..... 426
2. Defendant in attachment suit, cannot maintain, against sale of attached property. *Id*..... 426

Insanity.

1. As a defense; testimony of experts. *Polin v. The State*... 540

Instructions to Jury.

1. Sayings of law writers as to policy of law in punishing criminals, not essential parts. *Parrish v. The State*..... 60
2. Should be few, couched in plain, simple language, and conform to principles and policy of the law. *Id*..... 60
3. Not error to refuse to give, though correct in principle, if not warranted by the evidence. *Id*..... 61
4. Detached portions not technically correct will not invalidate or lead to reversal of judgment if whole charge taken together gives the law fairly and without prejudice to prisoner. *Id*..... 61
5. Should be confined to evidence and law applicable thereto; if given on an abstract proposition of law, or point not in the case, and verdict is supported by the proof made, judgment will not be disturbed. *Lamb v. Hotchkiss*..... 105
6. Erroneous, but without prejudice. *Converse v. Meyer*..... 191
7. When given as favorable as those requested, refusal is not error. *Comstock v. The State*..... 205
8. Taking instructions to jury room. *Langworthy v. Connelly*..... 340
9. Uncalled for by evidence, if not prejudicial, verdict will not be set aside. *O'Hara v. Wells*..... 403
10. Objection that instruction is not explicit in civil cases not regarded unless the matter were brought to the attention of the trial court by a request for one that was satisfactory. *B. & M. R. R. v. Schluntz*..... 421
11. Assuming proof of a material fact on which there is a conflict of testimony, erroneous. *Paine v. Kohl*..... 580

Interest. See USURY.

Internal Improvements.

1. Water grist mill is a work of. *Traver v. Merrick County*.. 327

Judgment. See COURT—COUNTY, 1.

1. Opening judgment, sec. 82, civil code; finding of district court not disturbed unless clearly wrong; discretion of court as to costs. *Kepley v. Irwin*..... 300
2. Relief provided by sec. 82, civil code, is a right earned by the defendant, by claiming the same, and doing the things therein required of him within the time limited by statute, and is not a question of power on the part of the court. *Savage v. Aiken*..... 315
3. Judgment *Held* Not final and cause remanded for judgment. *Meglemere v. Bell*..... 377
4. Judgment of non-suit not conclusive and final on merits. *Cheney v. Cooper*..... 418
5. Order vacating judgment during term at which rendered, not final. *Brown v. Edgerton*..... 453
6. Order to attorney to pay money into court is final. *Baldwin v. Foss*..... 455
7. Amercement of sheriff. *McNee v. Sewell*..... 532
8. For review in supreme court; authentication. *Polin v. The State*..... 541

Judicial Sale.

1. Land taken by attachment; sale same as upon execution. *Helmer v. Rehm*..... 219
2. Error in description. *Id*..... 219
3. Not set aside because order is simply erroneous. *Id*..... 219
4. Appearance and filing objections to confirmation waives defects in notice of sale. *Id*..... 219
5. Order of confirmation cannot be attacked collaterally. *McKeighan v. Hopkins*..... 361
6. Foreclosure; sale to appraiser; fraud; redemption. *Id*..... 361
7. Order of sale in foreclosure of mortgage not necessary. *Fried v. Sione*..... 402
8. Vacating appraisement; if not vacated second one cannot be made until property has been twice offered for sale and not sold for want of bidders. *Hubbard v. Draper*..... 500
9. A sale made in view of a second and unauthorized ap-

praisement is not of itself sufficient ground for setting it aside when in fact it conforms to a prior and valid one as to the price realized. In such case the error is without prejudice. *Id.* 500

Jurisdiction.

1. Action against maker and endorsers of note, where brought; summons how served. *Pearson v. Kansas Manufacturing Co* 211

2. Over person of appellant on appeal. *Id.* 211

3. Granting license to guardian to sell real estate of ward. *Dietrichs v. L. & N. W. R. R. Co* 356

4. County court. *Brondberg v. Babbott* 517

5. Appellate court cannot acquire, of subject matter, if lower court had not. *Id.* 517

6. Want of, of subject matter, cannot be waived by parties. *Id.* 518

7. Of subject matter and of person; difference stated. *Id.* ... 518

8. Amercement of sheriff. *McNee v. Sewell* 532

9. Foreclosing tax lien. *McNish v. Perrine* 582

Jurors.

1. Discretion of court in regard to alleged prejudice of juror as shown by conduct and appearance at trial. *R. V. R. R. v. Boyse* 130

2. A person who belongs to a religious denomination, as the Lutheran, is not thereby precluded from sitting as a juror in a case where a church organization of the same denomination, of which he is not a member, is a party. *Barton v. Erickson* 164

3. Competency; whole of examination and answers should be considered together. *B. & M. R. R. v. Beebe* 463

4. Selection of grand jury. *Drake v. The State* 536
Polin v. The State 540

5. Venire; omission of official title of clerk does not invalidate. *Drake v. The State* 536

6. Non-residence of grand juror in precinct from which drawn. *Polin v. The State* 540

7. Separation during criminal trial. *Id.* 541

8. Must be elector of county; presumption as to qualifications. *Hart v. The State* 572

Justice of the Peace.

1. Trial had at 1 P.M., case taken under advisement, and judgment rendered 8:30 A.M. next day. *Held*, That judgment was rendered "immediately" within meaning of sec. 1002 code. *Huff v Babbott*..... 150
2. Defendant entering appearance, but not appearing on day of trial, is not entitled to have judgment against him set aside. Sec. 1001 code. *Raymond v. Strine*..... 236
3. Defendant entitled to one hour in which to appear, and trial should not be had until that time has elapsed. *Andrews v. Mullin*..... 248
4. But if judgment be rendered before the expiration of the hour, and the defendant does not thereafter appear, and it is apparent that there is no defense to the action, it is error without prejudice. *Wells v. Turner*..... 446
5. Failure to file bill of particulars of set-off. *Andrews v. Mullin*..... 250
6. Proof of execution of bond, note, etc., not required. *Id.*. 250
7. Appeal from judgment by default. *Gudtner v. Kilpatrick* 350
8. Note held sufficient bill of particulars. *Wells v. Turner*.. 445
9. Having possession of evidence of indebtedness may render judgment in absence of parties. *Id*..... 445
10. Finding and judgment in replevin suits. *Degering v. Flick*.....448, 450
11. Proceedings liberally construed. Id..... 449
12. Wrongful issuance of attachment; liability. *Rouss v. Wright*..... 457
13. Bill of exceptions. *Hawley v. Robeson*..... 435

Lands—Public. See GRANT. HOMESTEAD.

1. Mortgage on government homestead prior to patent. *Blanchard v. Jamison*..... 246
   Forgy v. Merryman..... 513

Landlord and Tenant. See FORCIBLE ENTRY AND DETENTION. REPLEVIN, 7.

Legislature.

1. Clerks to committees unauthorized. *State v. Wallichs*..... 439

Lex Loci. See NEGOTIABLE INSTRUMENTS, 1.

Lien. See MORTGAGE—REAL PROPERTY, 2.

Limitations.

1. Part payment on promissory note removes bar of statute. *Sornberger v. Lee* 193
2. The receipt and indorsement on promissory note by the holder of money realized from a collateral left with him by the maker for that purpose, will remove the bar of the statute. *Id* 193
3. Dismissal, without a hearing on merits, not a bar. *Cheney v. Cooper* 415
4. Action on mortgage in ten years. *Id* 415
5. Proceedings in error. *Hollenbeck v. Tarkington* 430

Lincoln. See EVIDENCE.

Liquors.

1. Power of city council; ordinance closing saloons at 10 P.M. *Ex Parte Wolf* 24

Mandamus.

1. Writ lies:
   (*a*) Against county commissioners to include in estimate of taxes sufficient, within limits fixed by law, to pay claims against the county. *The State v Gosper County* .. 22
   (*b*) Only when relator has a clear legal right to the performance by the respondents of the particular duty sought to be enforced, and that he has no adequate remedy at law. *The State, ex rel. Beatty, v. Omaha* ... 265
   (*c*) To compel officers to remove and hold offices at new county seat; allegations of fraud, and illegal voting without statement of facts, no defense. *Hunter v. The State* 506
   (*d*) Against board of equalization. *Sumner & Co. v. Colfax County* 525
2. Demand must be made of county clerks and treasurers to keep books in a particular manner before action lies. *State, ex rel. Tutton, v. Eberhardt* 201
3. Defense to mandamus requiring officers to remove to new county seat; bribery of voters must be pleaded to be available. *Hunter v. The State* 506

Married Women. See HUSBAND AND WIFE.

Mills and Mill Dams.

1. Power of legislature. *Traver v. Merrick County* 332

2. Damages for want of use of mill, and the building of which was claimed to have been delayed. *Held*, Too remote and uncertain. *Bridges v. Lanham* 369

Mistake.

1. Of fact. *Langworthy v. Connelly* 347

Mortgage—Chattels.

1. Contest between mortgagee and execution creditors; facts stated. *Stuart v. Alexander* 37

Mortgage—Real Property.

1. Action to vacate a decree of foreclosure, correct a mistake, and foreclose mortgage; deceit by attorney; carrying on suit without knowledge or authority of plaintiff. *McDowell v. Gregory* 33
2. Rights of purchaser at foreclosure sale over assignee of judgment, which is a lien on premises. *White v. Bartlett* 320
3. Parties in actions of foreclosure. *Id* 320
4. Sale under foreclosure to appraiser; fraudulent appraisement; ejectment will not lie, but owner permitted to redeem. *McKeighan v. Hopkins* 361
5. U. S. Homestead. *Blanchard v. Jamison* 246
Forgy v. Merryman 513

Municipal. See CORPORATION.

Murder. See CRIMINAL LAW.

Negligence. SEE RAILROADS. TORTS.

1. Facts stated and owner of land *held* guilty of negligence in the keeping of a vicious bull near a path, along which persons were accustomed to travel (though not laid out as a public highway), and liable to administrator for death of intestate caused by said animal. *Glidden v. Moore* 84

Negotiable Instruments.

1. The validity of a promissory note made in Nebraska, but payable in New York, is to be determined by the laws of Nebraska. *Joslin v. Miller* 91
2. The holder of a collateral security for the payment of a promissory note, without special contract to that effect,

need not convert and apply the said collateral before bringing suit on the note. *Lormer v. Bain*..... 178

3. Promissory note; obtaining signature by mark through fraud; effect; evidence. *Griffith v. Short*..... 259

4. Accommodation note; indorsement by payee; delivery; payment not presumed. *Morris v. Morton*..... 358

5. Promissory note; indorsement of guaranty and waiver of notice of protest; possession evidence of title. *State National Bank v. Haylen*..... 480

6. Lost after due; recovery may be had in court of law. *Mowery v. Mast*..... 510

7. Memorandum on back of note. *Grimison v. Russell*..... 521

8. Promissory note payable on certain conditions, not a negotiable note. *Id*..... 522

9. Promissory note; consideration inquired into, when. *Kennedy v. Goodman*..... 585

New Trial. See Trial.

Nuisance.

1. Temporary obstructions in street. *State v. Omaha*..... 265

2. Indictment for; evidence. *Drake v. The State*..... 535

Objections. See Exceptions.

Occupying Claimants.

1. Action for mesne profits; allowance to *bona fide* purchaser; permanent improvements; rents and profits. *Harbach v. Miller*..... 12

Parent and Child.

1. Child competent to testify as to its parentage. *Comstock v. The State*..... 205

Parties.

1. Foreclosure of mortgage. *White v. Bartlett*..... 320

Partnership.

1. Pleading in action to subject individual property of members to payment of judgment against firm. *Leach v. Milburn Wagon Co*..... 106

2. *Quære*, whether an action can be brought against one member of a firm alone upon a joint obligation. *Id*..... 109

Patent Rights.

1. Act relative to sale of, *Held*, Void. *Wilch v. Phelps* 134

Payment. See EVIDENCE.

1. Certificate of deposit in bank. *Cedar County v. Jenal*..... 256
2. Mistake of fact. *Langworthy v. Connelly* 347

Physician.

1. Where no special agreement is made with a physician or surgeon respecting his services, the law implies an undertaking on his part simply that he will exercise a reasonable degree of care and skill in the treatment of his patient, not that he will effect a perfect cure. *O'Hara v. Wells*..... 403

Pleading.

1. In replevin, on appeal from justice, no bill of particulars having been filed, and no objections on that account, petition described property differently than affidavit of plaintiff in justice's court, *Held*, No departure. *School District No. 36 v. McIntie*..... 46
2. On appeal, petition filed; answer in nature of plea to general issue; and motion by defendant to strike petition because it set forth a different cause of action than that set forth in court below. *Held*, That motion should have been overruled. *Id*..... 46
3. In action to subject individual property of members of partnership to payment of judgment against firm. *Leach v. Milburn Wagon Co*..... 106
4. Submitting cause on pleadings without evidence; effect. *Blanchard v. Jamison*..... 244
5. An admission in a reply that the title to certain lands mortgaged was at the time of the execution of the mortgage in the United States, is not a valid defense, provided the mortgagor afterwards acquired title to the same. *Id*.. 244
6. On appeal from award of damages for right of way. *Gerrard v. O., N. & B. H. R. R*..... 271
7. Setting out cause of action under sec. 71, Gen. Stat., 924. *Kaeiser v. Nuckolls County*..... 277
8. Presumption that pleader states case as favorably as facts warrant. *Humphries v. Spafford* 488
9. Amendment in supreme court. *Id*..... 488

Practice in Supreme Court.

1. On motion to dismiss petition in error because there was no final judgment in county court, from which cause had been taken on error to district court, *Held*, That objection to form of judgment should have been first made in district court. *Marsh v. Synder* 8

2. Motion for rehearing must specify distinctly the grounds upon which it is based. *Spencer v. Thistle* 21

3. Bill of exceptions necessary to enable court to review alleged errors occurring at trial. *Edwards v. Kearney* 83

4. But the want of a bill of exceptions or a motion for a new trial is not sufficient to warrant a summary dismissal of proceedings in error. *Baldwin v. Foss* 455
Hollenbeck v. Tarkington 430

5. Judgment affirmed when evidence conflicting, if it be sufficient to support finding. *Galley v. Galley* 174

6. Or unless it is clear that weight of evidence is against it. *Charles v. Ashby* 251

7. Taking an order for leave to plead in the district court after an erroneous reversal of the judgment of a justice of the peace, the order being afterwards vacated, is not a waiver of the error, nor does it estop a party from prosecuting error to this court on the judgment of reversal. *Raymond v. Strine* 236

8. After verdict for defendant, in a suit on a note of $1,500, plaintiff assigned for error that he was entitled to judgment for thirty dollars, borrowed money, but did not offer to amend his petition. Judgment for defendant affirmed. *Griffith v. Short* 261

9. Transcript should contain pleadings constituting issue tried below. *Aliter*, judgment will be affirmed. *Galley v. Knapp* 262

10. Judgment *Held*, Not final, and cause remanded for judgmen. *Meglemere v. Bell* 377

11. The title to the land in controversy having been obtained by the plaintiff in error through a conveyance from the defendant, in whom it was found to be, by the judgment sought to have reversed, to the end that the litigation may cease, and each party left secure in his rights, it is ordered that the petition in error be dismissed at the costs of the plaintiff in error. *Panko v. Irwin* 419

12. Motion to dismiss not sustainable, when; limitation on commencement of proceedings in error. *Hollenbeck v. Tarkington* 430

13. Objection to bill of exceptions, not considered, when. *Id.* 430
Hawley v. Robeson 435

14. Amendment of pleadings. *Humphries v. Spafford* 488

15. Authentication of judgment of district court. *Polin v. The State* 541

16. Bill of exceptions, on part of the state, not presented as provided by secs. 515-517, criminal code, will be dismissed. *State v. Halphrey* 578

Precinct.

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