

REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

October Term, 1877,

VOLUME VI.

BY
GUY A. BROWN,
OFFICIAL REPORTER.

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By GUY A. BROWN, REPORTER OF THE SUPREME COURT,
In behalf of the People of Nebraska.

THE SUPREME COURT
OF
NEBRASKA.

CHIEF JUSTICE.
GEORGE B. LAKE.

ASSOCIATE JUSTICES.
DANIEL GANTT,
SAMUEL MAXWELL.

ATTORNEY GENERAL.
GEORGE H. ROBERTS.

CLERK AND REPORTER.
GUY A. BROWN.

DEPUTY.
HILAND H. WHEELER.

DISTRICT COURTS

OF

NEBRASKA.

JUDGES.

A. J. WEAVER,	-	-	-	FIRST DISTRICT.
S. B. POUND,	-	-	-	SECOND DISTRICT.
JAMES W. SAVAGE,	-	-	-	THIRD DISTRICT.
GEORGE W. POST,	-	-	-	FOURTH DISTRICT.
WILLIAM GASLIN, JR.,	-	-	-	FIFTH DISTRICT.
E. K. VALENTINE,	-	-	-	SIXTH DISTRICT.

PROSECUTING ATTORNEYS.

JAMES P. MAULE,	-	-	-	FIRST DISTRICT.
GEORGE S. SMITH,	-	-	-	SECOND DISTRICT.
CHARLES J. GREENE,	-	-	-	THIRD DISTRICT.
M. B. REESE,	-	-	-	FOURTH DISTRICT.
C. J. DILWORTH,	-	-	-	FIFTH DISTRICT.
J. B. BARNES,	-	-	-	SIXTH DISTRICT.

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

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

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

The Rules of Court now in force are published in Vol. 5 of these Reports.

This volume contains a report of all decisions handed down prior to the January Term, 1878, not previously reported. The decisions of the January and April Terms, 1878, will appear in the next volume.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

OCTOBER TERM, 1877.

PRESENT:

HON. GEORGE B. LAKE, CHIEF JUSTICE.

" DANIEL GANTT,
" SAMUEL MAXWELL, } ASSOCIATE JUSTICES.

CHARLES H. FREY, PLAINTIFF IN ERROR, V. WENZEL
DRAHOS, DEFENDANT IN ERROR.

1. **Conveyance:** DESCRIPTION OF PROPERTY: APPURTENANCES.
The property as described in a mortgage was "one frame grain elevator warehouse, * * * with all the appurtenances thereto belonging." Under this description the plaintiff claimed title to an engine house, together with the engine and boiler complete; also an office building, and a stationary Fairbanks scale—the former situated over fifty feet, and the latter over one hundred feet distant from the warehouse, and entirely disconnected therefrom. *Held*, That as a matter of law, the property in question could not be regarded as appurtenant to the warehouse, nor did it pass to the mortgagee under the general term "appurtenances thereto belonging."

2. ———: ———: ———. By the term "appurtenances" is commonly understood in law, purely incorporeal hereditaments usually annexed to lands or to houses. But the word may be used by parties to a contract in a broader and much more comprehensive sense, and when the proof shows that it was so used a corresponding effect should be given to it.
3. ———: ———: EVIDENCE. Where there is no ambiguity in the description of property in a deed, parol testimony is not admissible to show what was in fact conveyed. Nor is it competent for a witness to give his opinion as to what was appurtenant to property conveyed, and a question which in effect called for such an opinion was rightly excluded.

ERROR to the district court for Cuming county. Tried below before GRIFFEY, J. The facts were as follows:

On the twentieth of November, 1874, the Grange Company, of Cuming County, was the owner of a certain frame grain elevator warehouse, situated on ground leased by them of the Sioux City and Pacific R. R. in West Point. On that date the Grange Company executed a chattel mortgage on said building to the Milburn Wagon Company, describing the property as one frame grain elevator warehouse; and, after said description, in the granting clause thereof, grants "*all the appurtenances thereto belonging.*" This chattel mortgage was made to secure certain promissory notes made by said Grange Company to the said Milburn Wagon Company. On the twenty-fourth day of June, A.D. 1875, the mortgage was foreclosed, the building described therein sold, and a bill of sale thereof made to the said Milburn Wagon Company, describing the property as the said grain elevator, with all its appurtenances, "the same as held and described in said mortgage."

On the sixth day of December, A.D. 1875, the said Milburn Wagon Company executed a bill of sale to

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Wenzel Drahos, the defendant in error, of the following described property, to-wit: "The Grange elevator; one engine, stationary; engine-house; one twenty-six-flue boiler; one frame office; one pair Fairbanks standard scales, together with all appurtenances thereto belonging."

On the fourth day of March, A.D. 1876, upon two executions issued out of the county court of Cuming county, and directed to the sheriff of said county, the following property was levied upon by said sheriff, as the property of said Grange Company of Cuming county, to-wit: One ten-horse engine and boiler; one engine house; one Fairbanks hay scale, complete; one office, ten feet by twelve; one grate bar; five wrenches; one gauge-cock; one cast-iron pump and pipe; one driving belt; four bars of iron, in addition to some other property, which was duly advertised for sale, to satisfy said executions.

On the thirteenth day of March, A.D. 1876, and before the sale on said executions, the said property last herein described was taken from the possession of the sheriff upon an order of replevin, at the suit of the said Wenzel Drahos, the defendant in error, against Charles H. Frey, the sheriff, Drahos claiming title to the property by virtue of his purchase from the Milburn Wagon Company. The court below found in his favor, and Frey brought the cause here by petition in error.

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

It is admitted by the defendant in error that the property in question was owned by the Grange Company of Cuming County, at and before the twentieth

day of November, 1874, but it is claimed that these articles of personal property, passed, by the chattel mortgage above referred to, as "appurtenances" to the frame grain elevator warehouse, to the Milburn Wagon Company, and that the title of the defendant in error is derived from said chattel mortgage, through the said Milburn Wagon Company as purchasers at the foreclosure sale of said mortgage.

It makes no difference that these articles of property are specifically described in the bill of sale from the Milburn Wagon Company to the defendant in error; if this specific property did not pass to the said Milburn Wagon Company under the said chattel mortgage then the defendant in error derived no title under the bill of sale from the said Milburn Wagon Company. This we think is admitted by the evidence of the defendant in error.

If this is true, then the bill of sale from the Milburn Wagon Company to the defendant in error is no evidence of title in the defendant, and should not have been allowed as evidence in the trial of the case in the court below, because it assumes the very question in controversy.

Neither do we think that the chattel mortgage should have been allowed as evidence in the first instance without laying a foundation by showing that this identical property and each article of it was *appurtenant* to the frame grain elevator warehouse. It in fact was no evidence at all without such foundation, and should have been excluded. The law requires the best evidence. 1 Greenleaf on Evidence, 97-99.

The main question to determine in this case is, did the property in dispute pass with the frame grain elevator warehouse by the foreclosure of the chattel mortgage to the said Milburn Wagon Company?

Frey v. Drahos.

Appurtenances are things belonging to another thing as principal, and which pass as incident to the principal thing. The term as used in conveyances passes nothing but the land and such things as belong thereto, and are part of the realty, or, as some authorities put it, whatever is necessary to the commodious enjoyment of a thing. Burrill's Law Dictionary.

When applied to conveyances of real estate, the term *appurtenances* has but little, if any signification. The instrument would include just as much without the word as with it. It cannot be made to include any thing not belonging to the realty. If it could be made to include articles pertaining to the business carried on upon the realty, then the sale of a farm with its appurtenances, would include the farming implements used on the farm. On the other hand, whatever belongs or pertains to the realty, or is necessary to its proper enjoyment (such as an easement, a right-of-way or the like) would pass under the term appurtenances, and we have no doubt the same rights would pass without the word as with it.

Suppose we apply the same rule to the case under consideration, and leave out the word "appurtenances," what would pass in a conveyance of one frame grain elevator warehouse? Would an engine, boiler, scales, and scale house pass, situated, as the evidence in this case shows, from sixty to one hundred feet from the said warehouse, and having no connection with it at all, and purchased and erected, not for the purpose of running said warehouse alone, but for the general business of the Grange Company, who contemplated running different kinds of machinery at the place where situated? We think not.

The term appurtenances, though not synonymous, is frequently used in the same sense with fixtures, and the

law applicable to fixtures will no doubt apply with equal force to appurtenances.

On the question whether such property and machinery, situated, not sixty or one hundred feet from the principal thing mortgaged, but situated in and against the principal building, are fixtures, so that they constitute a part of the real estate, or principal thing, we refer to the following authorities holding that such property are not fixtures and do not pass with the realty, or principal thing. *Murdock v. Gifford*, 18 N. Y., 28. *Potter v. Cromwell*, 40 N. Y., 287. *Teaf v. Hewitt*, 1 Ohio State, 511. *Hill v. Wentworth*, 28 Vt., 428. *Bartlett v. Wood*, 32 Id., 372. *Gale v. Ward*, 14 Mass., 352. *Sheldon v. Edwards*, 35 N. Y., 279. *Cresson v. Stout*, 17 Johns., 116.

Stevenson & Carrigan, for defendant in error.

I. The first error complained of is that the court erred in admitting the bill of sale from the Milburn Wagon Company to said plaintiff Wenzel Drahos as evidence. Upon this proposition we urge that it was incumbent upon the plaintiff below to establish by testimony title to the chattel in question, and certainly the most direct and expeditious mode that could be adopted was the introduction of a conveyance to him from his immediate grantor, and following that by such testimony as would satisfactorily establish title and right of possession in him. We further urge that the order in which testimony is received on the trial of a cause is discretionary with the presiding judge, and will not be reviewed by an appellate court.

II. The second error complained of is the introduction of the chattel mortgage from the Grange Com-

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pany to the Milburn Wagon Company, the foreclosure of the same for the reason that it was not first shown that the "identical property, and each article of it, was appurtenant to the frame Grange elevator warehouse."

The identity of the chattels in controversy with those contained in the chattel mortgage were questions of fact for the jury, and the question as to the chattels being included in the general term appurtenances, is one of law for the court to decide. The mortgage was then properly admitted as evidence of title, and the best and only evidence that could have been introduced.

III. We have then, as disclosed by the record between the parties thereto, a common source of title of the subject matter of controversy, a conveyance in the nature of a mortgage to the Milburn Wagon Company, foreclosure and sale of the mortgaged chattels purchased by the Milburn Wagon Company at the sale, conveyance by the last named corporation to Wenzel Drahos. No line of testimony could be more complete and perfect, provided, of course, the description of chattels in the mortgage from the Grange Company, and the subsequent conveyances, cover the chattels replevied in this action.

IV. The evidence discloses that the elevator warehouse was erected for the purpose of handling and storing grain; that the chattels in controversy consist of one ten-horse power engine and boiler complete; one frame office, one pair of Fairbanks scales complete, one engine-house, wrenches, etc.; that the engine and boiler were used as the propelling power of said elevator, and placed within a convenient distance for that purpose, and without which the elevator would be

wholly useless for the purposes of its construction. The scales and office were used for the purpose of weighing all grain that was placed in said grain elevator, the same being erected for that purpose and for no other, and without which it would be impossible to carry on the business for which said elevator was erected, in a successful manner. We must then conclude that the elevator warehouse was the principal, and the engine, boiler, scales, office, etc., were accessory and incident thereto, and consequently passed with the sale of the principal.

It is contended by the counsel that the word "appurtenances" is used in the same sense as fixtures, and the rules of law governing the latter are applicable to the former; in this we think the counsel is in error.

We find that where a conveyance is of a factory or mill, etc., *eo-nomine*, with the privileges and appurtenances, if the article in question is an essential part of the mill or factory, it is included in that term and passes therewith, whether real or personal property. *Farrar v. Stackpole*, 6 Maine, 154. *Lathrop v. Blake*, 3 Foster, 46. *Baldwin v. Walker*, 21 Conn., 168. *Hoskin v. Woodward*, 45 Penn. State, 42. *Pickerell v. Carson*, 8 Iowa, 544.

LAKE, CH. J.

The vital question presented in this record is whether the property in dispute was included in the mortgage given by the Grange Company to the Milburn Wagon Company.

The description in the mortgage of the property conveyed is, "One frame grain elevator warehouse situated on the ground of the Sioux City and Pacific R. R. Company east of their side track, nearly opposite the pas-

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senger depot of said R. R. company, in the city of West Point, Cuming county, Nebraska, with all the appurtenances thereto belonging."

If the property in controversy was covered by this description then the judgment of the district court is right and should be sustained, but if otherwise, it is wrong and must be reversed. The following is a list of the property, viz.: One ten-horse power engine and boiler complete, one grate bar, five wrenches, one gauge cock, one pump and pipe, one rubber belt, four bars of iron, one engine house, one Fairbanks scale complete, and one office ten by twelve feet in size, none of which articles was either in, or attached to the warehouse mentioned in the mortgage.

But it is claimed on the part of the defendant in error that, although this property was not specifically mentioned in the mortgage through which he derived his pretended title, yet it was covered, and the title passed from the Grange Company, by force of the words "*appurtenances thereto belonging*," and it was upon this construction of the instrument alone that he recovered in the court below.

Not only was none of this property in, or attached to the warehouse, but, excepting the rubber belt, was located and used not less than fifty feet distant therefrom. In fact, as shown by the testimony, the office building and Fairbanks scale were at least one hundred feet away, and were used by the Grange Company in the prosecution of the other business in which they were engaged as well as in that of handling grain. The rubber belt was the means of connecting the engine with the machinery of the warehouse when in operation; at other times it was taken off and laid aside.

No case was cited by counsel for the defendant in error which goes so far as to hold that property of this

description, and situated as this was with reference to the warehouse, would pass as an appurtenance. Indeed we have been unable to find one that would sustain us in so holding.

What is an appurtenance? It is said that "The term is commonly confined in law to the purely incorporeal hereditaments that are commonly annexed to lands or to houses, and may as well include common as any other right." Bouvier's Law Dictionary, 29. *Lister v. Pickford*, 34 Beav., 576. And in *Harris et al. v. Elliott*, 10 Peters, 25, is mentioned a saying of Lord Coke, that "A thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal." It is, however, doubtless true that the word is frequently used in a more enlarged and comprehensive sense, and when it can be gathered from all the attendant circumstances that it was so understood and used by the parties, a corresponding effect should be given to it in the interpretation of a contract. But here we have no fact or circumstance to indicate that the parties intended to use it in any other than its purely legal sense. It is not at all probable that the Milburn Wagon Company would have omitted a specific mention of the office building and scale, situated at least one hundred feet from the warehouse, if it had been the understanding that they were to pass by the deed. Nor is it reasonable to suppose that the engine and engine house of the value of several hundred dollars, and more than fifty feet distant, would have escaped particular mention, had it been intended that they should be conveyed. We feel bound to hold, therefore, that the property in controversy was not, in law, appurtenant to the elevator warehouse, and did not pass by the mortgage to the Milburn Wagon Company.

It is also assigned for error that the court excluded

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from the jury evidence that the Grange Company refused to include this particular property in the mortgage when requested to do so.

There is no doubt that the rule governing the admission of evidence in explanation of written instruments, or, perhaps more properly, to connect the instrument to the precise subject upon which it was intended to operate, is substantially as claimed by counsel for plaintiff in error. But there was nothing in the case as made by the defendant in error which called for this sort of proof, for under no circumstances that we can conceive could this property be treated as appurtenant to the warehouse. And, besides, the questions by which it is said this proof would have been elicited were very clearly objectionable, and we perceive no error in the rulings of the court in this respect.

On this point the witness Karl was asked, "What particular property the mortgage was to cover?" This was very properly excluded. There was no ambiguity in the mortgage as to the property which it purported to convey, and the question clearly called for incompetent testimony.

Again, the same witness was asked "What were the appurtenances to the elevator warehouse at the time of giving said mortgage?" This, too, was incompetent. It in effect called for the opinion of the witness on a question which it was the province of the jury to decide. It was the office of the witness to detail facts and circumstances within his knowledge showing the situation of the property, and its exact relation to the warehouse, leaving to the jury, under proper instructions, the determination of the question whether it was appurtenant or not. These remarks will apply with equal force to each of the other questions in respect to which it is claimed the court erred.

State, ex rei. Noonan v. City of Lincoln.

For the reason, therefore, that the verdict was not warranted by the testimony and law of the case, the judgment of the district court must be reversed, and a new trial awarded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. THOMAS J. NOONAN, v.
THE MAYOR AND COUNCIL OF THE CITY OF LINCOLN.

1. **License Money:** DEPOSIT BY APPLICANT BEFORE LICENSE ISSUES. Under the statute relating to licenses for the sale of malt, spirituous, and vinous liquors, the authorities of a town or city have no authority to pass an ordinance appropriating money placed in the hands of the treasurer before the allowance of a license. Money thus deposited with the treasurer, without the allowance of a license, is the property of the applicant subject only to his disposal.
2. ———: ———. When such license is allowed, the applicant must then pay into the treasury the amount required for a license "before such license shall be issued."

APPLICATION for Mandamus.

Mason & Whedon, for the relator.

R. O. Phillips and *S. J. Tuttle*, for the respondent.

GANTT, J.

An alternative writ of mandamus was allowed by this court on application of the plaintiff; the respondents filed their answer to this writ, and the cause was tried before the court.

The main facts in the case are as follows: On the twenty-first day of April, 1877, the relator deposited with James McConnel, then city treasurer, the sum of three hundred dollars, and took his receipt for the same, and on the same day he placed in the hands of the city

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clerk a bond and petition for a license to sell malt, spirituous, and vinous liquors.

Some blanks in the petition were filled up on the twenty-third day of the same month, and then these papers were endorsed "filed" by the clerk.

By reason of some alleged irregularities by the city authorities, the application of the relator was deemed insufficient by them; and the papers were returned to the relator, who on the seventh day of May following filed with the city clerk another application for such license, and on the fourteenth day of the same month this application was by the city authorities refused and rejected. From the evidence it also appears that the money so deposited with McConnel was attached in his hands by the creditors of the relator.

Now upon these facts, is the relator entitled to have a peremptory writ of mandamus against the respondents commanding them to cause the proper ordinance to be passed and to issue a warrant or order to be drawn in favor of the relator for the above sum of three hundred dollars? This is the only question for determination.

Under section thirty-three of the act to incorporate cities of the second class, the mayor and council have no power to draw an order on the treasurer for the payment of money, unless the same "has been ordered by ordinance in pursuance of some object provided for in the act."

The objects and purposes for which cities of the second class are "authorized and empowered" to appropriate money and draw orders on the city treasurer are specifically and clearly stated in the act; and the mayor and council cannot exercise any other than the powers so delegated. They can pass ordinances ordering the issue of warrants on the city treasurer only "in pursu-

ance of some object provided for by the act." Gen. Stat., 151.

Again, section five hundred and seventy-two of the act for the license and sale of liquors requires the applicant for a license to file with the county clerk the petition of at least ten freeholders setting forth certain facts, and at the same time he shall also file his bond to the county as is required by the act; and the third subdivision of this section provides that he shall pay into the county treasury "for the use of the school fund" the amount of the license "and file the treasurer's receipt therefor in duplicate with the county clerk before such license shall be issued." By section five hundred and eighty-six, "all the powers and duties devolving upon the county commissioners shall belong to and be exercised by the proper authorities of any or all incorporated towns and cities of the state within the incorporated limits thereof, and the license money required to be paid to the county treasurer may be paid to the treasurer of the town or city, who shall account for the same, and his receipt therefor shall be equivalent to the receipt of the treasurer of the county for all the purposes named in section five hundred and seventy-two." One of these purposes is that the money shall be "for the use of the school fund, to be distributed as other moneys," and the town or city treasurer "shall account for the same" for such purpose. Now, under this law, the applicant for a license must first file with the county clerk, or a person authorized by a town or city to receive the same, the petition and bond required by the first and second subdivisions of section five hundred and seventy-two, and if the license is allowed upon his application, then, under subdivision three of this section, he must pay the license money to the county or city treasurer, as the case may be, and file

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the treasurer's receipt therefor in duplicate with the clerk "before such license shall be issued." When the money is so paid, the treasurer holds it "for the use of the school fund, to be distributed as other moneys;" but until a license is allowed, he has no authority to receive it as school money; he cannot distribute it as such, and he cannot apply it to the school fund. The statute makes no provision for him to receive it before the allowance of a license, and therefore until a license is allowed, it is the money of the applicant; and if he places it in the hands of the treasurer without a license having been first allowed, the treasurer must necessarily hold it as a private individual, and not as treasurer, in trust for him as a deposit to be disposed of only by direction of the applicant, for it is not the property or fund of the city and cannot be credited to any fund belonging to the city, and therefore, according to the facts of the case at bar, the respondents have no control over the money of the relator in question in this case, and have no authority to pass an ordinance to appropriate the same, or to draw an order in respect to the same. Their delegated powers in this regard extend only to the passing of ordinances ordering the appropriation of money and drawing of orders, "in pursuance of some object provided for in the act." The money accruing from licenses to sell malt, spirituous, and vinous liquors is by statute appropriated to the use of the school fund. In respect to the attachment of the money in the hands of McConnel by the creditors of the relator, and in respect to his rights of exemption, under the laws of this state, it is not necessary, and indeed is not now proper to express an opinion. The question propounded must be answered in the negative, and the writ must be

DENIED.

State, ex rel. Brown v. Weston.

THE STATE, EX REL. GEORGE L. BROWN V. JEFFERSON B.
WESTON, AUDITOR.

1. **Constitutional Law : APPROPRIATIONS.** The rule observed as to appropriations in the case of *The State, ex rel. Roberts v. Weston*, 4 Neb., 216, applies only to those officers whose salaries are fixed by the constitution itself, and not to those whose compensation is left to the discretion of the legislature. As to the latter, specific appropriations by the legislature are necessary to authorize their payment from the state treasury.
2. ———: **LEGISLATIVE APPROPRIATION.** Section six of the act of February 24th, 1875, providing for a state board of immigration, is not a sufficient appropriation of money by the legislature to authorize the auditor to draw his warrant on the state treasury for the payment of the incidental expenses incurred by the secretary of the board.

LAKE, CH. J.

This is an application for a peremptory writ of mandamus to the defendant, as state auditor, to compel that officer to draw his warrants upon the state treasury in payment of the sum of one thousand dollars, alleged to be due to the relator for incidental expenses incurred by him while holding the office of secretary of immigration, under an act of the legislature, approved February 24, 1875.

That the account rendered by the relator is just and should in justice be paid by the state, is not questioned, and the only defense interposed is that there is no law authorizing the respondent to audit and pay the claim.

This application is made upon the supposition that the case falls within the rule laid down in *The State, ex rel. Roberts v. Weston*, 4 Neb., 216, in which we held that no legislative appropriation was necessary to authorize the payment of the salary of a state officer whose office was created, and salary fixed by the constitution of 1875.

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The decision in that case was based upon the constitution itself—Section twenty-five of the schedule—which provides that “The auditor shall draw the warrants of the state quarterly for the payment of the salaries of all officers under this constitution, whose compensation is not otherwise provided for, which shall be paid out of any funds not otherwise appropriated.” But this rule can be carried no further than we went in that case. It reaches only those officers who hold by virtue of the constitution itself, and not to those who hold their offices at the will of the legislature. As to the latter all compensation must depend upon the caprice of the legislature, and can be legally paid only in pursuance of a specific legislative appropriation. This is a constitutional requirement, enforced by a clause in section twenty-two, Art. III, of our present constitution, which declares that “No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law.”

It will be observed that this provision does not require the appropriation to be made by act of the legislature, but merely that it be “*made by law*,” so that it may be done either by direction of the constitution itself, that being the supreme law in the state, or by the legislature through the forms prescribed for drawing money from the public treasury. There is, therefore, no real conflict between these two provisions of the constitution which we have quoted, although at first blush there might perhaps seem to be.

The constitution, however, makes no direct provision for the payment of salaries fixed by act of the legislature, which must depend entirely upon the will of that body, to be expressed by an act duly passed. And in the absence of such an act no payment can be legally made.

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It was claimed on the argument that section six of the act of February 24, before referred to, was a sufficient appropriation to authorize payment to be made. But we do not so consider it. No particular portion of the public revenues is set apart upon which the auditor is authorized to draw in payment of these expenses. This section does nothing more than fix the amount of compensation to which the secretary of the board may be entitled, and when it is to be paid. As to the manner of payment, and out of what particular fund, it is silent.

For these reasons the prayer of the relator must be denied, and the application dismissed at his costs.

WRIT DENIED.

N. S. Scott, for the relator.

THE FREMONT FERRY AND BRIDGE COMPANY, APPELLEES,
v. THE BOARD OF COUNTY COMMISSIONERS OF DODGE
COUNTY, NEBRASKA, APPELLANTS.

1. **Estoppel:** BY ACTS IN PAIS. If a company, incorporated with the exclusive privilege to establish and keep a ferry and wagon bridge across a river, within a certain district, stand by and silently see and permit other parties to construct and complete another wagon bridge across the same river, within the same district—or acquiesce and consent to the erection thereof—it will, by reason of such silence or assent, be estopped from controverting, by injunction or otherwise, the right of the other parties to use and repair such bridge.

APPEAL from the district court of Dodge county.
Tried below before Post, J. The case is stated in the opinion.

W. H. Munger, for appellant.

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I. The facts stated in the answer, which are admitted by the demurrer, operated as a license to defendant, and such a license becomes irrevocable when, as in this case, defendant, acting under the same, has expended a large amount of money for the purpose of enjoying such license. 2nd *American Leading Cases*, page 751, where the subject is fully discussed in note. *Rerrick v. Kern*, 14 Serg. and Rawle, 267. *The Americoggin Bridge v. Bragg*, 11 N. H., 102. *Woodbury v. Parshley*, 7 N. H., 237. *Ricker v. Kelley*, 1 Maine, 117.

In *Clement v. Durgin*, 5 Maine, 9, the broad ground was taken that when the continuance of a license is necessary for the protection of an interest which has been acquired on the faith of an express or implied agreement that the license should not be revoked, the case will fall within the general principle that no man shall be allowed to falsify expectations which he has created, and on which others have been led to act; the court were clearly of the opinion that the interest of the plaintiff in the continuance of a dam which had been erected on the faith of this license was sufficient to preclude the defendant from recalling it subsequently, without a tender of the expense which had been incurred in erecting it.

But it is contended that as the defendant had no power to construct a toll bridge, the law of estoppel would not apply. The bridge in question is a public bridge; it was built by the public out of funds belonging to the public; is owned and controlled by the public; the same rules should not apply as in cases where aid is voted to a private individual or corporation.

Again, although the proposition submitted to the voters of Fremont precinct to vote \$50,000 bonds to construct said bridge, by virtue of which proposition

said bridge was built, contained a provision to make said bridge a toll bridge, yet if, by omitting or striking out the parts of said proposition which provide for tolls (the portion claimed to be illegal) the remainder would constitute a complete and valid proposition sufficient of itself (without the aid of such part so stricken out as illegal) to carry out the intent of the voter, then it is the duty of the court to give force to such remaining portion. *Santo v. The State*, 2 Iowa, 165. *Bank of Hamilton v. Dudley*, 2 Pet., 492. *Clark v. Ellis*, 2 Blackf., 8. *People v. Lawrence*, 36 Barb., 190. *Robinson v. Bidwell*, 22 Cal., 379. *Maize v. State*, 4 Ind., 342. *Warren v. Mayor*, 2 Gray, 84. *Dillon on Mun. Corp.*, Sec. 354. *Cooley's Con. Lim.*, 177.

II. In the present case the proposition is complete in every particular when the portion relative to tolls is omitted. It provided for the issuance of the bonds, when they mature, etc., and for the annual levy of a tax to pay them as they mature; this is all the law requires. It is true that the amount of tax is limited, but the presumption is that the county commissioners were satisfied that the one-mill was sufficient, and their judgment cannot be questioned in collateral proceedings. *Commissioners of Knox Co. v. Aspinwall*, 21 How., 544.

III. The object of the voter was to obtain a bridge; tolls was a secondary and immaterial matter. If there ever was a case in which equity would enforce a rigid rule of estoppel, it seems to me it should be enforced in the present case. Here we find plaintiff not only silently witnessing and acquiescing in the trespass upon the franchise, but aiding, encouraging, and assisting the defendant by the united voice and vote of each member of plaintiff corporation in the large expenditure of money.

Does plaintiff bring itself within the rule that to obtain equity it must do equity? Has not its action been such, that equity would require that, before the relief asked can be granted, it should offer to reimburse the defendant the amount of money it has expended?

If the defendant has no authority to collect tolls it can stop, and then there is a free bridge; if they refuse to stop, let the proper action be brought to compel them; if the law of estoppel applies in this case, then plaintiff cannot in this action enjoin the collection of tolls. They do not come within the rule required as stated by this court in *Shed v. Hawthorne*, 3 Neb., 179, which was an action to enjoin the collection of tolls on this same bridge.

W. A. Marlow, for appellee.

I. If the answer in this case is sufficient, it must be on the theory that precincts, counties, and cities can build and operate toll bridges. The only object in building the bridge in question is for the purpose of making it a toll bridge, in order to raise money to pay the interest on the bonds issued for that purpose.

County commissioners have no authority to build or operate toll bridges. They have power to lay out roads and build bridges, but when laid out and bridges erected thereon, they become public highways. The funds used for this purpose are raised by taxation on all the property within the county. When the funds are insufficient for the purpose of building such bridges as the public demands, then the commissioners have power to submit the question of issuing the bonds of the county or precinct to a vote of the people of the county or precinct, in order to aid them in building such

bridges as they were unable to build out of the funds collected by taxation in the ordinary way. The bonds when issued cannot be used for any other purpose. The funds thus raised are under the control of the commissioners, to be by them expended in erecting bridges on public highways; not in building toll bridges, grist mills, or in aiding any private enterprise. By an examination of the statutes it will readily appear that toll roads and bridges are unknown. *Gen. Stat.*, 234, 295, 954.

The contract alleged in the answer between the Fremont Ferry and Bridge Company, and the board of county commissioners acting for and in behalf of Fremont precinct, is absolutely void. Have we a statute which authorizes it? Certainly not. The commissioners have power to build public bridges, but no other kind. *U. P. R. R. Co. v. Colfax county*, 4 Neb., 450.

If the commissioners had no power to make this contract then they have no power to enforce it.

Had the proposition in the first place been to build a public wagon bridge, and the stockholders and officers of the company had consented, they would be estopped from asserting their rights after the money had been expended. It requires two or more parties to make a contract; in this case we have but one. The company consented that the commissioners should build a toll bridge in behalf of the precinct. The commissioners had no power to accept this proposition.

The commissioners could not sue the company provided it failed to comply with the terms of the contract. The rule I understand to be this: County commissioners of a county can bring no suit, make no contract, or perform any official act except as provided by statute. *Ohio v. Yeatman*, 22 Ohio S., 546. *Stetson v. Kempton*,

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13 Mass., 271. *Smith v. Com'rs of Portage Co.*, 9 Ohio, 26. *Vincent v. Nantucket*, 12 Cush., 103. *Halstead v. Mayor, etc.*, 3 N. Y., 430.

II. The right to take toll is a franchise, and must be conferred by statute before the right exists. *Seymour v. The Milford and Chillicothe Turnpike Co.*, 10 Ohio, 476. *Wiswall v. Hall*, 3 Paige, 313. *Thompson v. N. Y. & Harlem R. R. Co.*, 3 Sandf. Ch. [625]. *Fall v. County of Sutter*, 21 Cal., 237.

III. The bridge and ferry company have an exclusive privilege at the point named to operate a toll bridge. The company has in all respects complied with the act of incorporation; so long as that statute is not repealed, neither private parties, private corporations, nor municipal corporations have any right to interfere in any way with this exclusive privilege; if they do a court of equity will restrain the interference. Hilliard on Injunctions, Sec. 44, page 536. *Walker v. Armstrong*, 2 Kan., 198. *Ogden v. Gibbons*, 4 Johns. Ch., 150. *Aiken v. The Western Railroad Corporation*, 20 N. Y., 370. High on Injunctions, Secs. 580, 581, 587. *The Niagara Falls International Bridge Company et al. v. The Great Western Railroad Company*, 39 Barb., 212. *Thompson v. The New York R. R. Co.*, 2 Sandf. Ch. [625]. *Osborn v. U. S. Bank*, 9 Wheat., 738.

GANTT, J.

The material allegations in the pleadings in this case are substantially as follows: The plaintiff was incorporated by act of February 18, 1867, as the "Fremont Ferry and Bridge Company," with the exclusive privilege to establish and keep a ferry and bridge across

the Platte river, at any point in township seventeen north, of range eight east of the sixth principal meridian, in the county of Dodge. The corporation established a ferry within the time required by the act, and it is alleged that within two years past the plaintiff expended large sums of money in the erection of a wagon bridge across said river; that the defendants threaten and are about to erect a wagon bridge across said river within the limits of its franchise, which will lessen the value of said franchise and take away from the plaintiffs a large amount of tolls which it otherwise would receive; and therefore prays an injunction restraining the defendants from building such bridge. In their answer the defendants aver that on the eighth day of October, 1870, a proposition was, according to law, submitted to the voters of Fremont precinct, in said county, at a special election, to vote bonds of said precinct to the extent of fifty thousand dollars, to construct a wagon bridge across the Platte river in said precinct; that the proposition received a majority of all the votes cast at such election; that the bonds were issued and disposed of, and with the proceeds thereof, a wagon bridge within said precinct, across said river, was constructed and completed in the spring of 1871; that at the time the proposition was submitted and voted upon, all the stockholders, directors, and owners of said ferry and bridge franchise were residents and voters of said precinct; that the plaintiff had full knowledge of the submission of the proposition to issue the bonds of the precinct and of the result of the vote thereupon, and also had full knowledge of the advertising for bids and of the erection of the said bridge; that the plaintiff, its directors, and all the stockholders acquiesced and consented to the same. It is further averred that in the spring of 1874 a portion of said

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bridge was destroyed, and that the plaintiff, by agreement with the defendants, assisted to repair the same, paying one-half of the expense of such repairs and receiving one-half of the proceeds arising from said bridge; that in the spring of 1876, a part of the said bridge was again destroyed, and that the only threats or acts complained of are those of repairing the said injury to said bridge so that the same may be fit for the use of the public. To this answer the plaintiff interposed a general demurrer, which was sustained, and the injunction was made perpetual. The case is brought here upon appeal.

Several questions were raised upon the argument of the cause, but we think the whole case, as presented for our consideration upon the issues raised by the pleadings, may be resolved into this one question: Whether the plaintiff, by its own conduct and acts, as set forth in the answer, is estopped from denying the defendants' right to repair and continue the use of the bridge erected by them in the spring of 1871. Perhaps an injunction to enjoin the building of the bridge in 1871 might have been properly granted if it had been applied for when the plaintiff first knew that steps were being taken to vote the bonds and construct the bridge. The omission to do so then was an implied assent to the erection of the bridge by the defendants for public use. The silence of the plaintiff when knowing its own rights, and having full knowledge of the steps taken by the defendants to build the bridge, will estop it after the completion of the work, or after large expenditures of money in its construction had been made; for such silence lulls to rest instead of warning to danger, and in the language of the books, it becomes a fraud. It is said that such silence, though negative in form, is operative in effect, and becomes suggestive in the seeming security it leads

to. But the case does not, however, depend merely upon an implied assent on the part of the plaintiff, for the answer distinctly avers that the plaintiff, its directors, and all the stockholders acquiesced and assented to the erection of the bridge by defendants, and the truth of this allegation is fully admitted by the demurrer.

This assent to the erection of the bridge, either by silence or by express consent, constitutes an estoppel in such case. And if the plaintiff is estopped from denying the use and enjoyment of the bridge as a public way, it certainly cannot enjoin the repairing of it, when such repairs become necessary from any cause whatever. Therefore, upon the facts admitted, we think considerations of public policy as well as recognized principles of justice between the parties, will not permit the plaintiffs to controvert the defendants' right to repair and enjoy the continued use of the bridge as a public way. In *Goodwin v. Cincinnati & Waterville Canal Co.*, 18 Ohio St. 179, it is said, that "where a party stands by, as we presume the plaintiff to have done in the present case, and silently sees a public railroad constructed upon his land, it is too late for him, after the road is completed, or large sums of money have been expended on the faith of his apparent acquiescence, to seek by injunction or otherwise, to deny the railroad company the right to use the property." *Pierson v. C. & W. Canal Co.*, 2 Disney, 104. *Doane v. Treasurer, etc., Wrights R.*, 752. *Hall v. Fisher*, 9 Barb., 30. *Gregg v. Wells*, 10 Adl. & Ellis, 90. *Bigelow on Estoppel*, 500. 2 Am. Lead. Cas., 571, *et seq.*

The demurrer should have been overruled in the court below; and, therefore, it is now ordered and adjudged that the demurrer be overruled; and it is further ordered, adjudged, and decreed, that the injunction

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granted by the district court be dissolved, and the petition of the plaintiff be dismissed with costs.

DECREE ACCORDINGLY.

NEBRASKA CITY, PLAINTIFF IN ERROR V. LUCIUS LAMPKIN,
DEFENDANT IN ERROR.

1. **Grade of Streets in Cities. DAMAGES.** Action to recover damages alleged to have been occasioned to a store building by reason of changing the grade of the street adjoining thereto. Under the issues it was necessary for the plaintiff to show the existence of a prior grade with reference to which the building was erected. *Held*, that to establish the existence of a grade for a street in a city the records and files pertaining thereto should be produced; that unless these be shown to be either lost or destroyed; secondary evidence will not be received. *Held*, also, that loose expressions made by officers of the city indicating that they supposed such a grade to have been established, are but hearsay, by which the corporation is not bound.
2. ———: ——— Where a city, in the reasonable exercise of an authority given by its charter, establishes a grade for its streets, and works them in accordance therewith, there being no provision of law for the payment of damages, an action will not lie.

ERROR from the district court of Otoe county. Tried before GANTT, J., at the March term 1873. The facts necessary to an understanding of the points passed upon by the court, appear in the opinion.

G. B. Scofield and *Calhoun & Croxton* for plaintiffs in error, in an elaborate brief containing cuts and profiles of the grading, and of the building alleged to be damaged by a change of grade, contended that the proof showed conclusively, that prior to the purchase of the

property by Lampkin, no grade had been established, and that none was established until 1869; that all of the testimony offered which tended to show that a grade had been established prior to the purchase was but mere hearsay and not worthy of credence. *Green v. Hepburn*, 7 Cranch, 590. *Davis v. Wood*, 1 Wheat., 6. 1 Greenleaf on Evidence, 128. That on the other hand, all the evidence offered on the part of the city, consisting of records of the city council, which were excluded by the court, showed that the grade was not established until 1869, after which the grading complained of was made, and the street in front of Lampkin's property cut down some three or four feet. But admitting a grade had been established prior to the erection of the building claimed to have been damaged by the excavation, still the city is not liable. Municipal corporations are not liable to an action for consequential damages to private property or persons (unless it is given by statute) where the act complained of was done by its officers under and pursuant to authority conferred by a valid act of the legislature, and there has been no want of reasonable care or skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable. *Callender v. Marsh*, 1 Pick., 418. *Rounds v. Munford*, 2 R. I., 154. *Rudcliff's executors v. Mayor of Brooklyn*, 4 Comst., 195. *Spague v. Worcester*, 13 Gray, 193. *Snyder v. Rockport*, 6 Ind., 237.

It seems to be well settled by an overwhelming number of authorities that "a municipal corporation is not liable to property owners for consequential damages necessarily resulting from either establishing a grade or changing an established grade of streets, although improvements were made in conformity to the first grade." Dillon on Corporations, 525. *Taylor v. St. Louis*, 14 Mo., 20. *Hovey v. Mayo*, 43 Maine, 322.

E. F. Warren, for defendant in error.

I. It seems to me, from an examination of the record, that about the only question for this court to decide is, whether a municipal corporation is absolutely unfettered in its supervision of the streets of a city. In this case there was evidence that a grade had been established prior to 1866, and no evidence whatever that a change had been legally made, and the question is presented to the court in this record, of whether the corporation can excavate and fill up upon the streets at pleasure, without regard to grade as established, without being called upon to respond in damages. The court charged the jury as follows:

"I further charge you, that if you find from the evidence that when the building was erected by Bokart (Lampkin's grantor), there was no grade established and recognized by and acted upon by the city council as a grade of Main street, and that Bokart erected said building without any such grade being made and fixed and recognized by said city council, then the plaintiff cannot recover. Buildings erected upon the streets of a city or town with corporate powers, prior to any grade whatever being made and recognized by the city authorities, are erected at the risk of the owner, as to the grade of the street which shall thereafter be established, without any liability on the part of the corporation."

And again, the court charged the jury:

"*Fourth.* If the jury believe from the evidence that the grading was done under, and in pursuance of authority conferred upon the municipal corporation of Nebraska City by its charter, and there was no want of reasonable care or skill in the execution of the power, then this corporation is not liable for consequential damages, and the plaintiff cannot recover."

This instruction was certainly very liberal for the defendant below, because the court had previously charged the jury "nor is there any evidence in this case that the grade of Main street has been changed, altered, and established by ordinance of the city council since the erection of said building."

The American courts have very generally followed the English decisions, which hold that the municipal corporation can at will alter and change a grade previously established, as well as establish one when none has been made. *Smith v. Washington*, 20 How., 135. *O'Connor v. Pittsburgh*, 18 Pa. St., 187. *Dillon on Mun. Corp.*, Sec. 783, 784, *et seq.* So with the Wisconsin cases. But in *O'Connor v. Pittsburgh*, 18 Pa. St., *supra*, Gibson, Ch. J., in his opinion, admits "it is inequitable" to exempt the corporation from liability, though he follows the rule and cites English authorities to sustain him. So in the leading Wisconsin case of *Alexander v. Milwaukee*, 16 Wis., 256, the court say: "As an original question there is much justice and equity in the Ohio cases;" and Paine, J., says: "I should now, if I felt at liberty to regard the question as a new one, hold that either the city or state was liable for such damages." The moral injustice of the English rule is admitted in Wisconsin, and Smith, J., in *Goodall v. Milwaukee*, 5 Wis., 32, approves the doctrine held in Ohio.

But the Ohio rule is different, and the rule in that state is admitted by courts holding the contrary view to be just, equitable, and "morally right." A municipal corporation, like an individual, is liable for injuries resulting to the property of others from the acts of such corporation, though acting *within* the *scope* of its corporate authority, and without any circumstances of negligence or malice. *Akron v. McCombs*, 18 Ohio, 229. *Little Miami R. R. Co. v. Martin*, 10 W. L. J., 54

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McCombs v. Akron, 15 Ohio, 474. *Crawford v. Delaware*, 7 Ohio St., 459. *C. & S. G. Ave. St. R. Co. v. Cumminsville*, 14 Ohio St., 546. Though it seems no liability would exist in case no grade had been previously established. 7 Ohio St., 459. 14 Ohio St., 546.

And in this young state, where no decisions have been rendered fixing corporate liability, and when, consequently, the argument *stare decisis* has no weight, no reason exists why exact justice should not be done. *Scott v. Field*, 7 Ohio 96.

II. Taking the most adverse view for defendant in error, the instruction of the court to the jury, in the extract first given, left all to the jury as a question of *fact*, and they were told that if no grade had been established before the building was erected, the city would not be liable; they were also charged that if the excavating and grading had been done under and in pursuance of authority conferred by statute, no liability would be incurred by the city. Therefore the jury must have found from the evidence these two facts: 1. A grade had been established by the city authorities prior to the erection of the building; and 2d. No change of grade had ever been legally made subsequently. The evidence warranted both these findings, and they are decisive of the case.

LAKE, CH. J.

The defendant in error recovered a judgment in the court below against the plaintiff in error for the sum of \$701.29 damages, alleged to have been occasioned by changing the grade of the street adjoining his lot, and working the same in conformity therewith, by which a valuable store building was rendered less accessible, and somewhat less valuable for business purposes than before.

There was no complaint of any direct encroachment upon the lot or property in question, but the damages

were the result, entirely, of lowering the street some three or four feet below what it was when the building was erected.

The answer of the city denied that the grade of the street was changed, but alleged substantially, that up to the time of the acts complained of no grade for this street had ever been established, and that this was but the lawful exercise of a power conferred upon the city council for which the corporation was not liable.

According to the theory of the case then, as made by the petition, even conceding the city would be liable for damages caused by changing a grade once established, in order to have justified a recovery, it was necessary to show the existence of a grade at the time the improvements were put upon the lots. On this point, however, there is a total want of legal proof. It is true that certain loose expressions made from time to time by certain officers of the city government would seem to indicate that they supposed such a grade had been made, but these cannot be dignified by the name of evidence; they are hearsay merely, by which the city cannot be bound.

To establish the existence of a grade for a street in a city, the records and files pertaining thereto should be produced. Unless these be shown to be either lost or destroyed, secondary evidence will not be received. This was a vital point in the plaintiff's case, and the failure of proof to sustain it requires a reversal of the judgment.

As to the liability of a municipal corporation for injuries to adjoining property caused by the grading of its streets, while there is some conflict in the authorities, the decided preponderance seems to be in favor of the rule that, when the corporation, in the reasonable exercise of an authority given by its charter, establishes a grade for its streets, and works them in accordance therewith, there being no provision in the charter or law for

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the payment of damages, an action will not lie. In such case the damages resulting to an adjoining proprietor belong to that numerous class of injuries to which the citizen is necessarily subjected for the public good, and fall within the operation of the rule *damnum absque injuria*.

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

REVERSED AND REMANDED.

HENRY O. JONES, APPELLEE, v. ELIZABETH DAVIS, APPELLANT.

Constitutional Law: JUDICIAL SALE. The act of the legislature of February 19, 1875, providing "for the more equitable appraisal of real property under judicial sale," is not repugnant to that provision of the constitution, of 1867, which declared that "no law shall be revised or amended unless the new act contains the entire act revised, and the sections amended," it being a complete law of itself, covering the whole subject of the appraisal of property for that purpose.

2. ———: ———: Neither is it repugnant to the constitutional provision which prohibits the passage of any law impairing the obligation of contracts, inasmuch as it merely changes the remedy or mode of enforcing the contract, which is clearly within the control of the legislature.

APPEAL from Douglas county. Tried below before SAVAGE, J. The facts appear in the opinion.

G. W. Ambrose, for appellant.

I. This act clearly falls within the decision of the court, in *Smails v. White*, 4 Neb., 353, and is unconstitutional in that regard

II. The contract was made, and suit prosecuted to final decree prior to the passage of the act of February 19th, 1875, and the act in question is obnoxious to the provisions of the constitution of this state, section twelve, article I, as well as the provision of section ten, article I, of the constitution of the United States, in that it impairs the obligation of the contract.

At the time of making the contract, the law allowed sales of this character to be had for two-thirds of the appraised value. This law was a part of the contract. The decree directed the land to be appraised, advertised, and sold, as directed by law.

At the time of the sale, the law allowed all liens and incumbrances to be deducted from the appraised value, and the sale to take place for two-thirds of the remaining sum.

Contracts designed to be protected by the provision of the constitution here invoked, are "contracts by which perfect rights—certain definite, fixed, private rights of property—are vested," as distinguished from rights growing out of measures adopted by the body-politic for the benefit of all. *Butler v. Penn.*, 10 Howard, 416.

All private contracts, in the ordinary legal application of that phrase, are understood to be embraced within the terms of this provision, and statutes giving mortgagors and owners and judgment debtors additional and new power and opportunities for redeeming property sold on foreclosure or execution, are declared void in their application to existing contracts. *Thorne v. San Francisco*, 4 Cal., 127. *Scobey v. Gibson*, 17 Ind., 572. *Iglehart v. Wolfin*, 20 Ind., 32. *Greenfield v. Dorris*, 1 Sued, (Tenn.), 548. *Oatman. v. Bond*, 15 Wis., 20. *Cargill v. Power*, 1 Mich., 369. *Ashuelot R. R. v. Elliott*, 52 N. H., 387. *Blackwood v. Vanvleet*, 11 Mich., 252. *Bronson v. Kinzie*, 1 Howard, 315. *McCracken*

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v. Hayward, 2 Id., 608. *Curren v. Arkansas*, 15 Id., 304, 319. *Baily v. Gentry and wife*, 1 Mo., 164. *Bumgardner v. Circuit Court*, 4 Mo., 50. *Harrison v. Stipp*, 8 Blackf., 455. *Stevens v. Andrews*, 31 Mo., 205. *Rawley v. Hooker*, 21 Ind., 144.

Brown & Thurston, for appellee, cited *Cooley's Con. Lim.*, 287. *Satterlee v. Matthewson*, 2 Peters, 380. *Jackson v. Lamphire*, 3 Peters, 280. *Stocking v. Hunt*, 3 Denio, 274. *Moore v. Gould*, 11 N. Y., 281. *Van Rennselaer v. Snyder*, 13 N. Y., 299. *Conkey v. Hart*, 14 N. Y., 22. *Thayer v. Seavey*, 11 Maine, 284. *Oriental Bank v. Freese*, 18 Maine, 109. *Holloway v. Sherman*, 12 Iowa, 282. *McCormick v. Busch*, 15 Iowa, 137. *James v. Stull*, 9 Barb., 482. *Howard v. Kentucky, etc., Ins. Co.*, 13 B. Mon., 285. *Read v. Frankfort Bank*, 23 Maine, 318. *Holmes v. Lansing*, 3 John. Cases, 74. *Evans v. Montgomery*, 4 W. & S. (Penn.), 218. *Chadwick v. Moore*, 8 Id., 459.

The law under consideration only affects the manner of procedure; it leaves a substantial and adequate remedy; it takes away no substantial right of the debtor. We believe it is impossible to say that by the change of the law, the remedy is so far taken away, or the protection of the debtor is so far removed, as to palpably and materially impair the obligation of the contract.

Unless the court can so say, under the authorities cited, it must permit the law to stand.

LAKE, CH. J.

This is an appeal from an order confirming a sale of real estate by a sheriff under a decree of foreclosure, and the only questions presented relate to the constitutionality of the act of the legislature of 1875, which provides

“for the more equitable appraisement of real property under judicial sale.”

It seems to have been supposed by counsel for the appellant that this act is open to the same objection which we found in *Smails v. White*, 4 Neb., 353, to the act then under review. It is clear, however, that it is not. This act is of itself a complete law, covering the whole subject of the appraisal of real property exposed to judicial sale; and it in express terms repeals those provisions of the statute under which appraisements were formerly made, so that now it is only necessary to look to this particular act to know what is required to constitute a valid appraisement.

It was expressly declared in *Smails v. White* that legislation of this character was unobjectionable and was not within the mischief designed to be remedied, nor repugnant to the constitutional provision which declares that “no law shall be revised or *amended* unless the new act contains the entire act revised and the sections amended,” etc. We must hold therefore that this objection cannot be maintained.

But it is further contended that the act in question violates both the constitution of this state and the constitution of the United States in this, that it has the effect to impair the obligation of the contract. It is true that the act was passed after the execution of the mortgage; and it is also true that it materially changes the mode of ascertaining the value of the property prior to its sale. Under the law as it stood when the contract was executed the appraisement was required to be made regardless of any incumbrances that might be resting upon it, and the sale must have been for at least two-thirds of the value of the property thus ascertained, while now, the sheriff is directed to ascertain all incumbrances of record, and, after deducting them, to return the remain-

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der as the real value for the purposes of the sale. This we regard as in no sense impairing the obligation of the contract, but merely as a change of the remedy or mode of enforcing the contract, which is clearly within the control of the legislature. *Morse v. Gould*, 1 Kern., 281. *Von Baumbach v. Bade*, 9 Wis., 559. *Walter v. Bacon*, 8 Mass., 468.

For these reasons the order of the district court confirming the sale must be affirmed.

AFFIRMED.

THE ATCHISON & NEBRASKA R. R. Co., PLAINTIFF IN
ERROR, v. EMELINE BATY, DEFENDANT IN ERROR.

1. **Constitutional Law: LEGISLATIVE POWER.** The legislative authority cannot reach the life, liberty, and property of the individual, except when he is convicted of crime, or when the sacrifice of his property is demanded by a just regard for the public welfare.
2. ——— : ———. The rights of every individual must stand or fall by the same general law that governs every member of the body politic in the land, under similar circumstances, and therefore a partial law which proposes to affect or destroy the rights of particular persons, or a particular class of persons, is not the law of the land.
3. ——— : **CONSTRUCTION OF STATUTE.** That part of the statute of June 22, 1867, which gives to the owner of live stock "double the value" of his property accidentally injured or destroyed on a railroad track is void.

ACTION to recover under section ten, Gen. Stat., 201, double the value of certain hogs of Emeline Baty, killed by the cars of the Atchison & Nebraska R. R. Co. Verdict and judgment below in favor of said Emeline Baty, and the railroad company bring the cause here by petition in error.

S. B. Galey, for plaintiff in error.

The judgment of the district court rendered in this cause ought to be reversed, for the reason that the statute allowing the owner of animals killed or injured upon a railroad track to recover double the value thereof upon failure of the company to pay the value claimed within thirty days after notice, is unconstitutional and void. See section two of an act, entitled "An act to define the duties and liabilities of railroad companies," page 201 of the General Statutes of Nebraska. The constitutional provision with which this section is deemed to be in conflict, is found under the title of "Education," and reads as follows:

"SEC. 5. All fines, penalties, and license moneys 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. 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."

The excess over the actual value of the animal injured or killed in cases like this is a penalty "imposed by legislative power for the purpose of punishment." *Bay City & E. Sag. R. R. Co. v. Austin*, 21 Mich., 410.

There is no principle upon which the legislature can be justified in declaring that, because a railroad company fails to pay the value of an animal killed or injured on a railroad track within thirty days after notice, the company shall therefore pay double the value, either to

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the owner or the school fund. The penalty is not imposed for failing to fence the road, nor for killing or injuring the animal, because the road was not fenced; nor because the killing or injury was negligent, willful, or malicious, but simply because the company fails to pay within thirty days after notice. Such an act is not within legislative power. It is an attempt to exercise an arbitrary power, making a rule regulating the payment of debts by railroad companies different from that prescribed for the payment of debts by others. Class legislation and special rules of government are repugnant to our constitution. All laws regulating the collection of debts should be general in their nature and application. *Walley's heirs v. Kennedy*, 2 Yerg., 554. *Cooley Const. Lim.*, 392, 393.

Again, this is a species of legislation which seeks to take private property for private use, which is forbidden by all governments whether written in their constitutions or not. The learned judge in the Michigan case above cited says, that "the power to multiply the sum of the whole damages by two, implies the power to multiply it by a hundred, and the excess, be it more or less, is so much beyond all the damages taken from one party and given to another."

It is a fundamental right retained by the people as much so as though it had been expressed in our constitution that the private property of one person cannot be taken by the legislature and given to another under any pretense other than that it is for the public use, and then only upon giving just compensation. *Cooley's Const. Lim.*, 175. *People v. Morris*, 13 Wend., 328.

S. P. Davidson, for defendant in error, cited *Tredway v. The S. C. & St. P. R. R.*, 43 Iowa, 527.

GANTT, J.

In this cause one question only is raised for determination by this court, and that is, whether that part of the statute of June 22d, 1867, which gives to the owner of live stock "double the value of his property injured, killed, or destroyed" on a railroad track, in case the same is not paid within thirty days after demand therefor is made upon the company, is "the law of the land." This question is one of importance. It involves an inquiry into the individual rights of property—the inquiry whether the title to the same can be divested without the assent of the owner, and the question of legislative power over such property. The term *right* in civil society is defined to mean that which a man is entitled to have, or to do, or to receive from others within the limits prescribed by law.

But what is the law in regard to private property? In a historical examination of the question we find that man in the rudest state of nature was not without some notions of exclusive property, and that jurists in every age, as civilization advanced, have maintained that what a man has obtained by the honest exertion of his own mind, or his own hand, is by natural right his own property. Indeed, it may be said, that the protection of this right is the main security to the enjoyment of life.

Burlamaqui (Polit. c. 3, § 15) defines natural liberty as "the right which nature gives to all mankind of disposing of their persons and property after the manner they may judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and so as not to interfere with an equal exercise of the same rights by other men;" and therefore it has been justly said, that "absolute rights of individuals may be resolved into the right of personal security—the

right of personal liberty—and the right to acquire and enjoy property. These rights have been justly considered and frequently declared by the people of this country to be natural, inherent, and unalienable.” Potter’s *Dwaris*, ch. 13, p. 429.

Cooley (Con. Lim., 358) says, that “the right of private property is a sacred right,” not introduced as the result of concessions, constitutional compacts, etc., but it is a fundamental law.

Then if experience can be taken as the guide, and expediency as the test, in solving the problem of government, it may be laid down as an axiom, that in every advanced step of mankind from the rudest state of nature to the more polished and refined civilization, the one leading purpose of the functions of government, as applied in each step to a higher civilization, was to secure, in greater degree, the natural rights of each individual in the social compact; and, therefore, in all the changes of government, whether by constitution or otherwise, this ancient law of individual right was the sacred shield of protection to life, liberty, and property. It is a fundamental principle lying beneath and behind all edicts, constitutions, and statutory law, and has become an established maxim in the doctrine of the common law. Webster says that “written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former.” 2 Webster’s Works, 392. Hence, it may be said with great propriety, that a constitution “measures the powers of the rulers, but it does not measure the rights of the governed;” that it is not the origin of rights, nor the fountain of law—but it is the “framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought.” Cooley Con. Lim., 37. *The People v. Huribut*, 24 Mich., 107.

The design of the constitution, then, is to protect the absolute rights of individuals, as well as to establish the framework of the political government, and define its limitations—wherefore it is called the supreme law of the land. It is, nevertheless, true that under the police regulations of civil society, property may be regulated so as to protect others from injury in the use of it. The maxim is, *sic utere tuo ut alienum non lædas*, and therefore however absolute and unqualified may be the title of the owner of private property, he holds it under the implied liability that his use of it shall not be injurious to others, nor to the rights of the community; but this does not infringe the right of or title to property.

This common law right of property is secured by our constitution. It declares that “no person shall be deprived of life, liberty, or property, without due process of law.” The terms “due process of law” and “the law of the land”—one or the other of which is found in all constitutions of the states—are said to mean the same thing; and it is quite clear that they are indifferently used in constitutions for the same purpose. They are said to refer to a pre-existing rule of conduct, and designed to exclude arbitrary power from every branch of the government. *State v. Doherty*, 60 Me., 509. *Norman v. Heist*, 5 W. and S., 171. *The State v. Simons*, 2 Spears, 767. Hence, these terms do not mean merely a legislative enactment; for, “if they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled, and destroyed; *and be deprived of his property*, his liberty, and his life, without crime. Yet all this he may suffer, if an act of the assembly, simply denouncing these penalties upon particular persons, or a particular class of persons be in

itself the law of the land within the sense of the constitution." *Hoke v. Henderson*, 2 Dev., 15. Webster interprets these terms to mean "that every citizen shall hold life, liberty, property, and immunities under the protection of the *general rules* which govern society. Everything which may pass under the form of an enactment is not therefore to be considered as the law of the land;" and he says, if this were so, "acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in every possible form would be the law of the land. There would be no general permanent law for the courts to administer, or even to live under. The administration of justice would be an empty form—an idle ceremony. Judges would sit to execute legislative judgments and decrees, and not to declare the law, or administer the justice of the country." 5 Webster's Works, 487. *State v. Doherty*, 60 Me., 509. *James' Heirs v. Perry*, 11 Mass., 404. *Lane v. Dorman*, 3 Scam., 240-1. *Commonwealth v. Bryne*, 20 Gratt., 165. *Bank of Columbia v. Okeley*, 4 Wheat, 243.

It is, however, true that, subject to the qualified negative of the governor, the legislature possesses all the legislative power of the state; but as it is said in *Taylor v. Porter*, 4 Hill, 144, "under our system of government the legislature is not supreme. It is only one of the organs of absolute sovereignty which resides in the whole body of the people," and, therefore, as the "security of life, liberty, and property lay at the foundation of the civil compact, to say that the grant of legislative power included the right to attack private property would be equivalent to saying that the people had delegated to their servants the power of defeating one of the great ends for which government was established." Smith's Const. Law, 484. This one great end of government is the protection of the absolute right of individ-

uals—the life, liberty, and property of each citizen of the state.

Now, from a review of the law in respect to private property and the limitations of the constitution, it seems clear, that when a legislative act interferes with the title to the property of the citizen, or with his enjoyment and disposal of such property, and such act is called in question as unconstitutional and void, its authority and binding force must be tested by the fundamental principles in respect to the rights of private property, the constitutional limitations and the maxims of the common law, which constitute the basis of our system of laws; and it also seems clear that, from the earliest history of civil society, down through all ages, one of the leading functions of government has been to protect life, liberty, and private property of the individual as sacred. Then, upon what principles or theory can these absolute rights of individuals be infringed or affected by legislative act, or the title to private property be divested and be appropriated by the government without the assent of the owner?" The answer to the question is that, when demanded by the public exigencies, private property may be taken, either by right of eminent domain or by way of taxation, and this modification of the law of natural right becomes an absolute necessity in the maintenance and administration of the government; but in exchange for this sacrifice of property, the individual receives the protection and security guaranteed to him by the government; and when property is taken by right of eminent domain, it is said to be "a universal and permanent proposition in every well-regulated and properly administered government, whether embodied in a constitution or not, that private property cannot be taken for strictly private purposes at all, nor for public without just compensation." *The People v.*

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Morris, 13 Wend., 328. And, again, in the administration of criminal jurisprudence, the government takes private property by way of fine or forfeiture, upon the conviction of certain crimes, and this exception to the general rule seems to rest rather upon the principle that the penalty which must otherwise have fallen upon the person is redeemed or ransomed by this pecuniary fine, according to the ancient maxim, *qui non habet in aere luat in corpore*, and therefore in the superior courts of England fines were frequently denominated ransoms. *Broom and Hadley's Com.*, 630.

The above seems to be the only instances in which the government justly has the right to divest title to the property of the citizen, and therefore it may be stated as an established maxim in the polity of the state, that the legislative authority cannot reach the life, liberty, or property of the individual, except when he is convicted of crime, or when the sacrifice of his property is demanded by a just regard of the public welfare. *Taylor v. Porter*, 4 Hill, 745. *Wilkinson v. Leland*, 2 Peters, 658.

Again, it seems clear that the statute in question is incompatible with another provision of the constitution. It will not be pretended that the act was intended to define a statutory criminal offense. Still, it is impossible to regard the excess beyond the value of the property in any other light than a penalty, not resting in contract, but a penalty or fine for the purpose of punishment; but this penalty or fine is by the statute given to the party claiming damage for the accidental loss of his property, and hence the act must come in conflict with that provision of the constitution which declares that "all fines and penalties," etc., "shall be appropriated exclusively to the use and support of common schools."

The statute seems to be obnoxious to another just rule in the administrative policy of the government. It may be considered a well-settled rule in respect to the operation of the laws, that corporate companies and natural persons are placed precisely upon the same ground; and "this is the true ground, and the only one upon which equal rights and just liabilities and duties can be fairly based." Now the statute in question is partial. It applies to one class only; but it is said that the law-makers "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for the rich and poor, for the favorite at court and the countryman at plough," and this rule is said to be "a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." Cooley Const. Lim., 392. In *Walley's Heirs v. Kennedy*, 2 Yerg., 554, it is held that "the rights of every individual must stand or fall by the same rule or law that governs every member of the body politic, or land, under similar circumstances; and every private or partial law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void." Hence, "that is not legislation which prescribes a rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government." *Ervine's Appeal*, 16 Pa St., 266.

If, however, the legislature has authority by enactment to declare that, for an injury of the kind in question the injured party shall be entitled to receive "double the value" of the property injured, then, does not the authority imply the power in the legislature to make it a hundred times the value of the property; and the

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excess beyond the damages sustained, whatever it may be, is so much property taken from one person and given to another. If this legislative power exists in respect to the case under consideration, why shall it not on the same principle apply to simple debt, and therefore, if upon demand by the creditor the debtor fails to pay within a certain time, he may by legislative decree be compelled to pay double, treble, or a hundred times the amount of the debt, according as the legislature may decree by legislative enactment. And whatever the object of such legislation may be, it eventuates in a decree taking property from one man and giving it to another; but such legislation is repugnant to the fundamental principles of individual rights, the maxims of the common law, and the constitutional limitations, and therefore it cannot be "the law of the land." *Bay City and Sag. R. R. Co. v. Austin*, 21 Mich., 401. *Lewis v. Webb*, 3 Greenleaf, 326, 330. *Holden v. James*, 11 Mass., 396. *James v. Reynolds*, 2 Texas, 251.

It may be observed in conclusion that, although the inquiry whether a legislative act is unconstitutional assumes an importance from the fact that it is not only a matter of delicacy, but also because it is an inquiry into the boundary lines of the power given to a separate department of the government, yet, "where it is clear that the legislature has transcended its authority, it is imperatively required of the courts" to maintain the paramount authority of law; and after a careful investigation of the question involved in the inquiry first propounded, it seems clear that the statute in question is repugnant to the fundamental principles in respect to individual rights, the limitations and guarantees of the constitution, and the maxims of the common law, and therefore the judgment of the court below must be reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

Fremont Building Association v. Sherwin.

THE FREMONT BUILDING ASSOCIATION v. JOHN E. SHERWIN, COUNTY TREASURER OF DODGE COUNTY, NEBRASKA.

1. **Precinct Bonds.** Precinct bonds may be issued to aid in building a public wagon bridge across the Platte river, that being a work of internal improvement.
2. ——— : **TOLL BRIDGE.** Where the vote is regular in all other respects, it is not a valid objection to the bonds issued in pursuance thereof that the proposition contained a provision for collecting tolls from persons crossing the bridge—especially after the bonds have passed into the hands of innocent purchasers.
3. **Internal Improvements: PROPOSITIONS VOTING AID TO.** In voting aid to works of internal improvement, it is not necessary that the proposition shall contain a provision for the levy of a tax to pay the *principal* of the bonds, but simply to pay the *interest* as it falls due. As to the *principal*, it is made the duty of the proper officers to levy taxes to pay it, independently of any vote on that subject; but this cannot be done until after the year 1880.

ORIGINAL application for injunction. The facts appear in the opinion.

W. A. Marlow, for the plaintiff, *inter alia*, read the provisions of the road law, Sections 15, 16, Gen. Stats., 954, contending that the law applied to public highways and public bridges, and not to any toll road or bridge or any private enterprise; that a toll bridge was not a public highway but strictly a private enterprise, and no authority existed under the statutes of Nebraska to aid any such enterprise by voting precinct bonds; that if the power to do so was not expressly given, it was prohibited; that the fact the precinct pretended to own and operate the bridge when built, would not make the bonds valid; that the acts of the county commissioners in issuing the bonds were *ultra vires* in that sense which makes them invalid in the hands of any one. *U. P. R. v. Colfax County*, 4 Neb., 450 Sedgwick

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Const. and Stat. Law, 533. Dillon Mun. Corp., 455. *Loan Association v. Topeka*, 20 Wall., 655. *Leavenworth County v. Miller*, 7 Kan., 474. *National Bank v. Iola*, 9 Id., 689. *Clark v. Des Moines*, 19 Iowa, 199.

LAKE, CH. J.

This is an original application for a temporary order of injunction to restrain the collection of a tax levied upon the property of the plaintiff by the commissioners of Dodge county, to pay the interest on certain bonds of Fremont precinct, in said county, issued for the purpose of constructing a wagon bridge across the Platte river. This proceeding is taken upon the theory that the bonds in question were issued without authority of law and are absolutely void even in the hands of *bona fide* holders, by whom it is alleged that some of them are now owned.

The first objection urged against these bonds is that they were issued to aid in the construction of a *toll* bridge, which it is insisted there is no authority for a county or precinct to do. But even conceding that these governmental agencies have no legal right to engage in the business of toll gatherers—which can hardly be questioned—this furnishes no valid excuse for the repudiation of these bonds, especially when they have been negotiated, and have passed into the hands of innocent parties. They bear no infirmity on their face, but, on the contrary, purport to have been issued for a lawful purpose, and in strict conformity to the statute authorizing this sort of precinct indebtedness.

In the case of *The Union Pacific Railroad Company v. The Commissioners of Colfax County*, 4 Neb., 459, this court held the building or repair of a public bridge across the Platte river to be a work of "internal improvement," which a county might aid by the issue of its bonds, as provided in the act of February 15th, 1869,

and to this construction of the act in question we still adhere.

By section seven of this act there is given to precincts the same privilege of voting aid to works of "internal improvement" as is conferred upon the counties of the state. When bonds are voted by a precinct the county commissioners are required to issue them as in other cases, but they must contain a statement showing their "special nature." In every formal requisite these bonds are faultless, but it is sought to invalidate them by going back to the proposition under which they were voted and pointing out certain defects therein. The chief of these defects is that it was proposed to make said bridge self-sustaining by the collection of tolls from persons crossing it.

In *State of Missouri, ex rel. Neal v. Saline County*, 48 Mo., 390, it was held that a material omission in the submission of the question of voting county aid to a railroad company was not sufficient to render its bonds void in the hands of *bona fide* holders. In that case it appeared that the vote did not specify *the amount* to be issued, which the statute authorizing the aid imperatively required, and the county records showed the defect in this particular, yet the court held it to be "an error or irregularity of which the county authorities should have taken notice, but which—the election having been passed upon and approved by them—should not affect strangers." As to the fact which was urged upon the attention of the court, as it is in the case before us, that the records showed the irregularity, the court said: "This is true; and doubtless the equity of the relator would be stronger had it been otherwise. But, practically, it makes but little difference. Purchasers would ordinarily only inquire whether the law authorized the vote, and whether the vote had been

taken. It is very seldom that they inspect the record, or if they should do so, that they would be able to detect the error. When these bonds were negotiated, it seems not to have been discovered by any one, even by those in charge of the records, and who participated in the proceedings; and it would be altogether wrong to punish the relator for not having found it out."

We think these remarks of the learned judge pronouncing the decision in that case apply with much force in the case we are considering. These bonds recite the fact that they were "issued in pursuance of and in accordance with a vote of the electors of said Fremont precinct, at a special election held on the eleventh day of November, 1870, at which time the following proposition was submitted:

"Shall the county commissioners of Dodge county, Nebraska, issue their special bonds on Fremont precinct, in said county, to the amount not to exceed fifty thousand dollars, to be expended and appropriated by the county commissioners, or as much thereof as is necessary, in building a wagon bridge across the Platte river in said precinct, * * * which proposition was duly elected, adopted and accepted by a majority of the electors in said precinct voting in favor of the proposition." * * * Then follows a statement that the bonds were issued in pursuance of said vote, and under the provisions of the act of February 15th, 1869, above referred to.

Here, then, we have a plain recital of facts which actually occurred, and which, under the statute, gave to the commissioners ample authority to issue the bonds. There is not the least intimation that it was in contemplation to make this improvement a toll bridge, and the reasonable inference to be drawn from the facts disclosed by the bonds themselves is that it would be free to all.

But, whatever effect the proposition in the submission—to make this a toll bridge—would have had if urged at the proper time as a reason for restraining the negotiation of these bonds, it most certainly furnishes no just ground for resisting their collection after they have been put upon the market, and transferred in due course of business to innocent parties. There is no principle either of equity or morality that would be subserved if this were held to be sufficient to defeat the obligation assumed by the precinct in good faith, and by which large sums of money have been procured and expended for the benefit of the people residing therein.

The building of this bridge was essentially a public enterprise, undertaken for the benefit of the people at large, and it cannot be deprived of that character by the mere fact of the commissioners having, at the instance of the precinct, exacted an illegal charge for its use. If, as is contended, a precinct has no authority to operate a toll bridge, then the payment of tolls by those desiring to use it, may be successfully resisted; but the fact of their imposition, however illegal, cannot be held to invalidate a tax levied in pursuance of the statute to meet the obligation assumed by the precinct in making the improvement.

Another point urged in the brief of counsel against the validity of this vote, is that there was no provision for the levy of a tax to meet these bonds as they should fall due. This objection is not supported by the facts. The record shows that the proposition to levy a tax as it should be found necessary, not exceeding one mill on the dollar valuation on all the taxable property in Fremont precinct, to keep up the necessary repairs on the bridge, to meet the contingent expenses, and also to pay the interest and principal of said bonds as they fell due, was adopted. There was, therefore, a full compliance

with the requirements of section nineteen, chapter thirteen, General Statutes, upon which this objection is based. It is true that the amount of the levy is limited to one mill on the dollar, but the presumption is that this rate was considered amply sufficient by the commissioners, and for aught that now appears, it is so.

But we are of the opinion that this section of the statute has no application to this sort of vote; it relates solely to the question of borrowing money, or of extraordinary outlays by a county other than for the purposes of internal improvement.

By section two, chapter thirty-five, General Statutes, which was passed March 3d, 1870, and subsequently to the statute cited by the counsel, it is provided that "the proposition of the question" (of aiding a work of internal improvement) "must be accompanied by a proposition 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 collected to pay any of the principal of said bonds until after the year 1880."

It will be observed, that by this statute the proposition voted upon need be "accompanied" only "by a provision to levy a tax annually for the payment of the *interest* on said bonds as it becomes due," while as to the *principal*, it is made the duty of the proper officers, at the proper time, to levy a tax sufficient to meet it as it becomes due, regardless of any vote that may have been taken or omitted on that subject.

Failing to discover any valid objection to the tax in question, the prayer of the plaintiff must be denied, and the case dismissed.

JUDGMENT ACCORDINGLY.

CHARLOTTE TURNER, APPELLEE, v. A. C. ALTHAUS,
TREASURER, THE CITY OF OMAHA, AND OTHERS, APPEL-
LANTS.

1. **Taxes: ACTION TO RECOVER.** An action at law is the proper remedy to recover taxes illegally paid, when the same have been paid under protest, to prevent distress and costs.
2. ———: **POWER OF THE LEGISLATURE.** The power to arrange and distribute the administrative functions of government, and to change the same from time to time, as the public exigencies may require, belongs exclusively to the legislature, and this includes the authority to incorporate towns and cities.
3. ———: ———: The taxing power is vested in the legislature, and it is exclusively within its province to apportion and direct the assessment and collection of taxes.
4. **Constitutional Law.** The court cannot pronounce an act of the legislature void merely because it may be imperfect or impolitic, or for any supposed inequality or injustice in its operation, if it be upon a subject-matter fairly within the scope of legislative authority. To bring the validity of a legislative act within the control of the judiciary, it must be clearly subversive of the constitution.
5. ———: **PRIVATE PROPERTY.** The private property of a citizen cannot, by the exercise of legislative power in any form, be taken from him and given to another, or to a corporation. Such act would be judicial, depriving the citizen of his property without due process of law.
6. ———: **CITIES OF THE FIRST CLASS.** Section twenty-four of the "act to incorporate cities of the first class," approved, March 28, 1873, authorizing and empowering the mayor and council of such cities to levy and collect taxes for general purposes, is not unconstitutional; and under this law, all property within the limits of a city as incorporated, which is taxable according to the laws of the state, is subject to taxation by the municipal corporation for general purposes.
7. ———: ———. The court cannot classify the property within the limits of such city or tax district, into such as shall be taxable, and such as shall be exempt from taxation. The judiciary can only determine as to the constitutionality or unconstitutionality of a legislative act.

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Per LAKE, CH. J., and MAXWELL, J.

8. **Practice.** DEMURRER. When a demurrer only specifies as ground therefor, that the facts stated in the petition are not sufficient to constitute a cause of action, the court, in its decision of the demurrer, should confine itself to that single objection.
9. **Misjoinder of Causes.** And even if there be a misjoinder of distinct causes of action, if the defendant do not object, it is not within the province of the court to do so.
10. **Legal and Equitable may be joined, when.** Legal and equitable causes of action may be properly joined whenever they fall within Sec. 87 of the Code of Civil Procedure. This section of the statute is not in conflict with Sec. 9, Art. VI, of the constitution, by which district courts are given "both chancery and common law jurisdiction."

THIS was an action brought by Charlotte K. Turner, to restrain the city of Omaha from collecting taxes assessed upon the lands of the plaintiff, lying within the incorporate limits of the city of Omaha, but remote from the business or residence portion of said city, not subdivided into blocks and lots, and used exclusively for agricultural purposes. Also, to recover from said city certain of said taxes paid by the plaintiff.

To the petition a general demurrer was interposed, which was overruled and a decree entered for the plaintiff. Defendants appeal.

John M. Thurston, for appellant.

I. The decision of the court below was based solely upon the case of *Bradshaw v. The City of Omaha*, 1 Neb. 16, and if the opinion announced in that case can be supported by reason, common sense, or the authorities, and is to stand as the law of the land, then the cause of action set out in the petition is a good one, and the decision of the court below should be affirmed.

It is necessary, therefore, in order to secure the reversal for which we contend, to attack directly and squarely the soundness of the law laid down by this court in the last named case. We do this confidently and fearlessly, believing that it is only necessary to point out the fallacy of the argument in the opinion delivered by MASON, Ch. J., cite the overwhelming array of authorities in opposition thereto, and suggest the dangerous usurpation therein made, by the judiciary, of the constitutional powers belonging exclusively to the legislative branch of the government, to convince the court that that decision is wrong, and should be overruled.

It is but justice to state that the decision in *Bradshaw v. Omaha*, was not concurred in by LAKE, J., whose decision in the court below was therein reversed.

II. It is true that the courts of Kentucky, and of Iowa have passed upon this question, and have come to conclusions the same as those reached in *Bradshaw v. Omaha*, the latter case indeed following and resting solely upon them. The courts in those cases arrogate to themselves the power of trying as a matter of fact the questions as to whether or not land included within the limits of a city is sufficiently benefitted by the municipal government to authorize the levy of taxes upon it.

Thus, the power of establishing taxation districts is taken away from the legislature, and assumed by the judiciary. Thus it becomes a question, which the municipal authorities are bound to determine at their peril, whether any particular lot or tract of land is used for city or agricultural purposes, and it becomes an extremely delicate and important question whether the man who resides upon an acre tract, cultivated as a garden, is to be taxed or not.

It becomes important, too, to know, if it be ten rods or a hundred rods from the post-office, whether it needs police protection, and is benefitted by the fire department, and as the facts may be in each particular case, so must taxes be levied or the land escape their payment.

Thus will a municipal corporation be involved in a vast multitude of vexatious litigations. Litigations, too, which will be never ceasing, as each year the status of property is changing, and what to-day is purely agricultural lands may next year become necessary for residence or business purposes, and *vice versa*.

III. The decision in *Bradshaw v. Omaha* was based somewhat on the allegation of the bill, which upon demurrer stood as confessed, that the land in that case had been brought by amendment of the charter within the incorporate limits against the consent of the owner, not because it was necessary for municipal purposes, but because the corporation, having incurred a large debt, wanted more property to tax.

The court was evidently influenced somewhat by the English idea of municipal corporations. In England a municipal charter is regarded as in the nature of a contract. A city cannot be chartered without its consent, so its assent, either express or implied, is necessary to the legality of any amendment of its charter. The charter there is presumed to confer special and exclusive rights which are a consideration for the supposed contract. In this country the contract theory is exploded. A municipal corporation is merely a political subdivision of the state. A charter is a public act which the city cannot refuse to accept or act under. Obligations are imposed, and powers conferred, which must be met and exercised by the corporation. Among these are the levy and collection of taxes for the support of the local government.

The sovereign taxing power of the state is conferred *pro tanto* upon the municipal authorities, subject only to the limitations as to district, amount and manner of levy provided by the legislature.

IV. All sovereign power is vested in three branches of government—the executive, legislative and judicial. Each within its own proper sphere is supreme, and cannot be controlled by the others.

V. The power of the legislature to legislate on all matters is supreme and without limit, except where controlled by the constitution, and where the constitution is silent upon any particular subject, the legislature has as much power over it as has the Parliament of Great Britain. *Potter's Dwarris on Stat. & Const.*, 61. *S. & E. R. R. Co. v. Cooper*, 33 Penn. St., 282. *Ex-Parte Newman*, 9 Cal., 503. *Fletcher v. Peck*, 6 Cranch, 428. *People v. Draper*, 15 N. Y., 545. 1 Kent's Commentaries, 488. *People v. Denniston*, 23 N. Y., 247.

VI. The legislature has the sole power to determine what taxes shall be levied, for what purposes, what property shall be taxed, and in what proportion; and, also, to fix or establish a district for taxation purposes; and may levy such tax either *per capita*, on property specially benefited, or upon all real property within the district taxed. *Providence Bank v. Billings*, 4 Peters, 514. *McCulloch v. Maryland*, 4 Wheaton, 428. *Scovill v. Cleveland*, 1 Ohio St., 138. *Gordon v. Cornes*, 47 N. Y., 608.

VII. All Omaha charters provide that taxes for general purposes shall be levied upon all the property in the city. General Statutes of 1857, 58, 61, 65, 69, 70, 71 and 73. The legislature has therefore established a

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district and caused a tax to be levied on all property therein.

VIII. The legislature may extend the corporate boundaries of a city so as to include all adjacent property, with or without the consent of the owners of such property, and may compel such property to pay taxes for indebtedness either accrued or to accrue, even though not beneficial to such property. *Dillon on Munic. Corp.*, 80. *Layton v. New Orleans*, 12 La., 515. *People v. Hill*, 7 Cal., 97. *St. Louis v. Russell*, 9 Mo., 507. *St. Louis v. Allen*, 13 Mo., 400.

IX. The constitutional prohibition against taking private property for public purposes without compensation, refers solely to the exercise of the right of eminent domain, and not in any event to the exercise of the taxing power. *Gilman v. Sheboygan*, 2 Black, 510. *People v. Mayor of Brooklyn*, 4 Comst., 419. *Town of Guilford v. Supervisors*, 13 N. Y., 143. *Scovill v. Cleveland*, 1 Ohio State, 135. *Hollenbeck v. Hahn*, 2 Neb., 400. *Booth v. Woodbury*, 5 Am. Law Reg., 202. *Howell v. Buffalo*, 37 N. Y., 267. *Potter's Dwarries on Stat. and Const.*, 404.

B. E. B. Kennedy, for appellee.

I. This case is fully sustained by the judgment of this court in the case of *Bradshaw v. The City of Omaha*, 1 Neb., 16, and unless the court feels constrained to reverse that judgment, the appellee need go no further than to cite that case and the authorities upon which it rests. The counsel for the appellants concedes that this case rests upon the same principles and a similar state of facts with the *Bradshaw* case, but contends that that decision is contrary to law and reason, and should be reversed.

The able and exhaustive judgment of the court in that case—the character of authorities cited in its support, and the fact that the very salutary principles of law and common right there enunciated have been since cited with approval, and followed by more recent decisions of the ablest jurists, both state and federal, in this country, would seem to render it a work of supererogation to do more than call attention to them.

II. Many nice distinctions have been drawn between taking of private property for public use by right of eminent domain, and taxation, but except as to the mode of compensation, there is no substantial distinction resting in law or common justice. *The People v. The Mayor of Brooklyn*, 4 Com., 419. Sedg. on Constitutional Law, 647.

To sustain either, there must be a public necessity, and although the legislative will or discretion is generally decisive of such necessity, and generally not reviewable, yet the courts may review such action to the extent necessary to determine whether it is obnoxious to constitutional limitation, repugnant to public policy, or subversive of the natural rights of the citizen.

If the legislative will is the end of the law, it may include the entire territory of the county within the city limit for taxation for general municipal purposes.

The court is not absolutely concluded by the opinion of the legislature as to the use or necessity for which the property is taken. Its judgment will be respected by the court unless the use be palpably private or the necessity plainly without reasonable foundation. *Dillon on Municipal Corporations*, 450, sec. 465, and notes 2 and 3.

III. It is obnoxious to the constitution, because it takes private property for public use without just com-

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pensation. *Buel v. Ball*, 20 Iowa, 282. Dillon on Mun. Cor., 633 and 634, and notes 1 and 2.

And it makes no difference whether it is taken by the original act of incorporation or by amendment enlarging the corporate limits.

The theory of compensation to the owner of the property within the municipal boundaries by reason of the protection or benefits derived from the municipal government, applies to the property used, or occupied, or required for city purposes, and is co-extensive only with "that point or line where it ceases to operate beneficially to the proprietor in a *municipal point of view*." *Langworthy v. Dubuque*, 16 Iowa, 271. *Fulton v. Davenport*, 17 Id., 407. *Durant v. Kauffman*, 34 Id., 194. *Cheaney v. Hooser*, 9 B. Monroe, 330. *Sharp v. Dunavan*, 17 Id., 223. *Maltus v. Shields*, 2 Met. (Ky.), 553. *Covington v. Southgate*, 15 B. Mon., 491. *Arbegust v. Louisville*, 2 Bush. (Ky.), 271. Dill. on Corp., 633, 634, and notes 1 and 2.

Our legislature seems to have taken the same view, and have placed a construction on this statute. Gen. Stat., 109, 110, 1873.

G. W. Ambrose, on behalf of parties interested in similar questions pending in the circuit court of the United States for Nebraska, by consent of the court, argued in favor of sustaining the judgment below, and filed the following brief:

I. Every person who places his property within the jurisdiction of the state assents, by that act, to the universally conceded principle that the people, in their collective capacity, reserve the right to resume such portions of the property as may be necessary for the public use. This may be done in two ways only, by taxation and eminent domain, both of which rest on the same

foundation. In either, compensation must be made to the citizen, in money, or the protection assured by the government to that property, or "in the increase of the value of his possessions by the use of which the government applies his money raised by the tax."

In other words, compensation must follow—result in the one case as in the other. If no compensation, either in the protection of life, liberty, or property, is the result from taxes levied and enforced against the citizen, what right has the state to exact my money, which is property, for the public use, under the guise of taxation, any more than it would have to exact my farm, for the benefit of my neighbor, even with compensation, or for a public use, without compensation, under the guise of eminent domain? If either may be done, all may. But say you, the legislature supposes compensation as the result of taxation. But what is the fact? May it not be enquired into. Suppose the legislature should say, the building of a railroad across my farm shall be deemed compensation for the land taken, in that it affords me increased facilities for trade and commercial intercourse with the world. Is not the supposition in one case equally as good as the other? Would the case put stand the test of judicial scrutiny? Would it not be the substitution of "legislative supposition" for compensation in protection in the one case and money in the other? If the equivalent, as a matter of fact, is wanting in either case, the court should not hesitate to brush aside the *suppositious* "will of fluctuating and hasty legislation."

"The taxing authority is, after all, but one arm of that tremendous power of eminent domain, at the foot of which, so far as uncontrolled, every citizen lies prostrate; and the consequences of the earlier decisions leaving this engine in the hands of unrestrained legislative authority, seem to have awakened that conservative jealousy of

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power which never lies long dormant in the breast of our people. Certain it is, that the more recent constitutions and the more recent judicial decisions show a disposition not to abandon the taxing power to the often ill regulated and despotic will of our fluctuating and hasty legislation." Such are the strong words of that able writer, Mr. Sedgwick, in his treatise on statutory and constitutional law, page 647.

But it is said that it is not within the judicial function to control or circumscribe the legislative discretion. Suppose an extreme case: There being no constitutional inhibition upon the power to tax, the rate of taxation, the subjects or purposes of taxation, and thus unrestrained this "legislative discretion" should assume to lay a tax for some suppositious purpose equal to the value of the entire property upon which the tax was laid; need I stop to discuss such a proposition and refute by argument that it would be beyond judicial control, because the legislative will has already acted upon the subject, and therefore it is the end of the law?

It is no longer discretion when the legislature has passed an act which contravenes a principle of the organic law or a "common right," but it is a want of power, and therefore becomes a wrong, which it is the especial function of the judiciary to right.

The legislative power to prescribe the rule, subject, and purposes of taxation is no higher than that of the same body to prescribe the uses of the right of eminent domain. The power to do both resides in the legislative department to whom the delegation is made.

"But it may be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted." *Kramer v. C. & P. R. R. Co.*, 5 Ohio, St., 149. In *People v. Smith*, 21 N. Y., 597, there is a distinct recognition of the doctrine for which I am contending—that it does not rest solely with the

legislature to say whether a just compensation has been made or provided for, or whether the use for which the tax is laid, or property authorized to be condemned, is a public one or not, but that if the policy of the view taken by the legislature is contrary to "common right," or the use be not a public one, then the legislative act ceases to be due process of law, and the duty of the court is plain to so pronounce. *Wilkinson v. Leland*, 2 Peters, 658. *Jackson v. Frost*, 5 Cowen, 346. *Jackson v. Lyon*, 9 Cowen, 664. *Hampshire v. Franklin*, 16 Mass., 76. *Taylor v. Porter*, 4 Hill, 140.

"The legislature, in the plenitude of the taxing power, cannot have constitutional authority to exact from one citizen, or even from one county, the entire revenue for the whole commonwealth. Such an exaction, by whatever name the legislature may choose to call it, would not be a tax, but would be undoubtedly the taking of private property for public use." Cooley on Taxation, 178. *Lexington v. McQuillan's Heirs*, 9 Dana, 517.

Taxation is here recognized as one form of taking private property for public use, and in the view of the learned author and judge, because the legislature has seen fit, out of its abundant "discretion," to call it a tax, does not of necessity make it such, but that the courts shall be the final arbiter between the citizen and the legislature.

II. These lands were brought into the limits of the city and subjected to the burden of taxation at the same time as the lands in the Bradshaw case.

That they are agricultural lands only cannot be questioned, and the question simply is, are they taxable for the ordinary purposes of the city government.

There can be no difference on principle or authority, whether the lands were originally within the limits, or brought in afterwards by some act of extension.

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The court has passed upon the latter question in *Bradshaw v. Omaha*, 1 Neb., 16. And the authorities are not wanting in states where this question has been raised, since the decision of this court to sustain the ruling there made. *St. Louis v. Russel*, 9 Mo., 512. *Wells v. Weston*, 22 Mo., 384. *Cheaney v. Hooser*, 9 B. Mon., 345. *Covington v. Southgate*, 15 B. Mon., 491. *Sharpe v. Dunavan*, 17 B. Mon., 230. *Arbegust v. Louisville*, 2 Bush (Ky.), 271. *Morford v. Unger*, 8 Iowa, 82. *Langworthy v. Dubuque*, 13 Iowa, 86. *Fulton v. Davenport*, 17 Iowa, 404. *Durant v. Kouffman*, 34 Iowa, 194.

GANTT, J.

The plaintiff alleges that she is the owner of twenty-four and three-fourths acres of land situate "*within the incorporate limits of the city of Omaha*"; that the same is not laid off into lots, and is unoccupied and unsettled upon, except for agricultural purposes. Farnham street passes along the south side of the land, and it is alleged that the same was so extended without the plaintiff's consent and against her protest. The petition contains two causes of action, and in the first it is complained that the land was assessed and taxed for general city purposes, for the year 1874, viz.: for general fund, sinking fund, and school fund; that she paid all said taxes under protest to prevent a distress and sale of property; and it is alleged that said taxes were illegally and unlawfully assessed and levied on the said land, and therefore she prays that the "defendant, the city of Omaha, be ordered by the court to refund and pay" to her all the taxes so paid for the year 1874. In the second cause of action it is alleged that the same land was assessed and taxed for general city purposes for the year 1875, viz.: for general fund, sinking fund, and school

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fund; that said assessments are unlawful; that the land was placed upon the delinquent list for said year, and returned to the county treasurer, who advertised and was about to sell the same for the payment of said taxes for the year 1875. The plaintiff therefore prayed an injunction to restrain the sale of the land. To this petition the defendants demurred on the ground that the facts stated in the petition are not sufficient to constitute a cause of action. The demurrer was overruled, and a decree was rendered for the plaintiff as prayed in the petition.

As the action is one exclusively in equity, it may be observed in the first place, that the two counts in the petition set forth distinct and independent causes of action; the one is for the recovery of taxes alleged to have been illegally paid under protest for the year 1874 to prevent distress and costs, and the other is for an injunction to restrain collection of taxes assessed for the year 1875, on the ground that they were illegally assessed and levied.

In the first cause of action A. C. Althaus is made a party, but the facts stated therein show clearly that he has no interest in the matter complained of, and cannot under any circumstance, be made liable in such action. Again, from the statement of facts it clearly appears that the first count not only states a distinct cause of action, but also in this cause of action the plaintiff has an adequate and complete remedy at law; and to merge such cause of action into a purely equitable action, and thereby destroy the distinction between law and equity, must necessarily subvert the jurisdiction of the courts given by the constitution, which declares that they 'shall have both chancery and common law jurisdiction.' It is said that "to assume jurisdiction in equity of a cause which can as well be determined in an action at law is not to do equity, but to administer law in a form not legal. It would not be giving relief, but simply usurp-

ing power." And Brightly, in his treatise on Equitable Jurisprudence (460), says: "In general, when the plaintiff can have a remedy at law, as effectual as the one he seeks in equity, and that remedy is direct, certain, and adequate, a court of equity has no jurisdiction, and therefore a demurrer to the jurisdiction will be sustained." Adams, in his treatise on the doctrine of equity, says that if the redress is sufficient at law, there is no jurisdiction in equity, and that the cases in which jurisdiction in equity attaches, may be conveniently divided under two heads, viz.: 1. "Where the courts of ordinary jurisdiction cannot enforce a right; and 2. Where they cannot administer it." *Bennet v. Butterworth*, 11 How., 675. Story's Eq. Pl., §§ 10, 34. 9 Foster, 442. However, it is not enough that there is a remedy at law: "it must be plain and adequate, or in other words, as practical and efficient to the ends of justice and prompt administration as the remedy in equity." *Boyce Excr's v. Grundy*, 3 Peters, 215. But the doctrine seems well settled that an action at law is the proper remedy to recover back taxes illegally levied, when the same were paid under protest, to prevent distress and costs. *Allen v. Burlington*, 45 Vt., 202. *Erskine v. Van Arsdale*, 15 Wallace, 75. *Shoemaker v. Grant Co.*, 36 Ind., 175. It is an adequate and complete remedy in such cases, and therefore, I think that under the jurisdiction of our courts as fixed by the constitution, the first count constitutes no cause of action in equity and was improperly so brought, and the demurrer to it should have been sustained. It is very probable that the plaintiff based the right of action in equity upon the case of *Sturges v. Burton*, 8 Ohio St., 218, in which it is said that "by the provisions of the code the plaintiff may unite in one action all causes of action arising from the same transaction or transactions connected with the same subject of action, and this includes causes of action legal and

equitable, *ex-contractu* and *ex-delicto*." But the plaintiff's first cause of action does not even come within the rule laid down in the above case, for the reason that her two causes of action do not arise from the same transaction, as appears from what has already been said. But it must be observed that the case of *Sturges v. Burton* was decided in the year 1858, and the constitution then in force in that state was adopted in 1857, and by Art. XIV, section two, it is provided that the supreme court "shall have original jurisdiction in *quo warranto*, *mandamus*, *habeas corpus* and *procedendo*, and such appellate jurisdiction as may be provided by law." Section four provides that the "jurisdiction of the courts of common pleas, and of the judges thereof, shall be fixed by law," and section six provides, that "the district court shall have like original jurisdiction with the supreme court, and such appellate jurisdiction as may be provided by law." It will therefore be seen that the decision referred to cannot be authority in determining the constitutional jurisdiction of the courts in our state, for the reason, that under the constitution of the state of Ohio, with the exception of cases of *quo warranto*, *mandamus*, *habeas corpus* and *procedendo*, the jurisdiction of the courts is not fixed by the constitution, but must be determined by the legislature. In this regard there is no limit upon the legislative authority, and therefore the legislature may abolish either law or equity practice, and merge the two jurisdictions in the one or the other, or may unite in one action any number of different causes of action without any regard to the subject matter of the action. This legislative power does not exist under our constitution, which fixes the jurisdiction of the courts in respect to law and equity.

But another important question is, whether the land described in the petition is or is not exempt from taxation for city purposes.

As it is admitted by the pleading that the land "lies within the incorporated limits of the city of Omaha," the question is fairly raised by the second cause of action stated in the petition and the demurrer thereto, and in the discussion of this question it may be of some advantage, in the first place, to advert to some general principles in the administrative policy of the government. The powers of the state government are divided into three distinct departments—the legislative, executive and judicial, and no person or collection of persons, being one of these departments, can exercise any power properly belonging to either of the others, except expressly so authorized by the constitution. Under this division of distinct departments of the government, the apportionment of power to one department will of itself imply an inhibition of its exercise by the others, and according to this rule of apportionment, it is unquestionably the province of the legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable to local jurisdictions, and retaining others to be exercised by officers appointed by the central power, and to change such arrangements from time to time as the public exigencies may require; and this exercise of power includes the legislative authority to pass laws for the incorporation of towns and cities, for the power to pass such laws is not derived from the directions contained in the constitution, in relation to the organization of cities, but results from the grant of legislative power of the people to the legislature. *People v. Draper*, 15 N. Y., 545. *Bank of Chenango v. Brown*, 26 N. Y., 370. *Sanborn v. Commissioners of Rice Co.*, 9 Minn., 176. *Butler v. Supervisors of Saginaw*, 26 Mich., 27.

Again, by this apportionment, the taxing power is vested in the legislature, and therefore it is exclusively

the province of the legislature to apportion and direct the assessment and collection of taxes; and this power of taxation may be exercised to the full extent of the public exigency. It is said that taxation differs from the power of eminent domain in this, that it has no thought of compensation by way of return for that which it takes and applies to the public good, further than all derive benefit from the purposes to which it is applied; in other words, that "the support of government, and other objects of public utility promoted by taxation, are supposed to return to the individual the same which has been taken from him as his share of the public burden."

Washington Avenue, 69 Pa. St., 363. *Wynehamer v. The People*, 13 N. Y., 404. *People v. The Mayor, &c., of N. Y.*, 4 Comst., 419. A tax is defined as "a charge, apportioned either among the whole people of the state, or those residing within certain districts, municipalities, or sections." *Oliver v. Washington Mills*, 11 Allen, 274. And as the responsibility of passing laws devolves exclusively on the legislature, whether the taxing power be exercised by it wisely or unwisely, justly or unjustly, or in some instances it may be abused, yet the "interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise taxation." It is universally admitted that in the imposition of taxes, exact and critical justice and equity are not attainable, and hence it is not deemed essential to taxation that it should be levied according to the strict rules of abstract justice. Therefore, if the legislature keep within its proper legislative sphere of action, and do not impose burdens under the name of taxation which are not taxation in fact, its decisions as to what is proper, just, and politic, both in respect to the subjects of taxation and the kind and amount of taxes, must be final and con-

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clusive. *Providence Bank v. Billings*, 4 Pet., 561. *Shaw v. Denis*, 5 Gilmn, 418. *Wynehamer v. The People*, *supra*; Cooley on Const., 512; Potter's Dwaris, 419. *Kirby v. Shaw*, 49 Pa. St., 261.

It is, however, a fundamental principle of law that a citizen cannot be deprived of his private property except by the due and orderly administration of the law, through its appropriate tribunals, and not by force of an act of the legislature. Hence, the legislative department cannot, by the exercise of legislative power, in any form of legislation, take the private property of one citizen and give it to another or to a corporation. Such an act would be judicial, depriving a citizen of his property without notice or due process of law, and would be repugnant to the constitution, and contrary to the fundamental principles of all good government. Therefore, when the *sole* object of a legislative act is to take the property of one man and give it to another, the legislature transcends its legitimate power, and assumes the determination of grave questions, over which it has no constitutional authority. In such case the strict division of the powers of the government should be enforced and the legislature be restrained from such invasion of private rights. *Good v. Zercher*, 12 Ohio, 367. *Norman v. Heist*, 5 W. & S., 171. *Denny v. Mattoon*, 2 Allen, 361. *Greenough v. Greenough*, 11 Pa. St., 494. *Shawnee v. Carter*, 2 Kan., 131. *Holden v. James*, 11 Mass., 396. 2 Kent. Com., 13.

But the doctrine seems to be equally well settled "that no court can pronounce an act of the legislature void," because it may be imperfect or impolitic, or "for any supposed inequality or injustice in its intention or its operation, provided it be upon a subject matter fairly within the scope of legislative authority;" and to bring the validity of a legislative act within the control of the judiciary, it must be clearly subversive of the con-

stitution. There is no mixed power, partly legislative and partly judicial, to be exercised in concert or in common by the legislative and judicial departments of the government. The courts have no right to legislate, and the legislature have no right to adjudicate, for the reason that the line which separates them in the exercise of power is clear and distinct, and this principle is well settled and understood. It is said that if the courts were to declare an act unconstitutional, merely because in our opinion we may consider such act wrong and unjust, "it would be assuming a right to change the constitution, to supply what we might conceive to be its defect, to fill every *casus omissus*, and to interpolate into it whatever, in our opinion, ought to have been put there by its framers." *Sharpless v. Mayor, &c.*, 21 Pa. St., 161. 1 Vesey, Jr., 375. *Penn. v. Lord Baltimore*, Vesey, 446. *State of Georgia v. Stanton*, 6 Wallace, 71. *Cherokee Nation v. Georgia*, 5 Pet., 20, 30. *Armington v. Barnet*, 15 Vt., 749. *Maize v. Butler*, 4 Ind., 344. *Fletcher v. Peck*, 6 Cranch, 87. *Butler v. Supervisors of Saginaw*, 26 Mich.

Now, in the application of these general principles of law to the case under consideration, they would seem to afford a sufficient answer to the question propounded; but the importance of the question demands further examination. The city of Omaha derives its taxing powers from "an act to incorporate cities of the first class," approved, March 28, 1873. Section twenty-four of this act provides that, "the mayor and council shall have power to levy and collect taxes for general purposes, not exceeding ten mills on the dollar, in any one year, on *all real estate* and personal property within the corporate limits of the city, *taxable according to the laws of the state*, the valuation of such property to be taken from the assessment roll of the proper county, and it shall be the duty of the county clerk to permit

the city clerk to make out from the assessment rolls of the county an assessment roll for the city of *all* property liable to taxation, as above specified." By this act the legislature has made the city of Omaha a tax district, as well as a municipal corporation, and has made all real estate and personal property within its corporate limits liable to taxation, which is taxable according to the laws of the state. Now, the act is constitutional or it is not. If it shall be pronounced unconstitutional, and its passage an unauthorized exercise of legislative power, then it is wholly void, and the result of such determination would be, that the city is not a tax district, and there would be no authority in the municipal corporation to levy and collect any taxes within its corporate limits. This result seems clear from the fact, that the only question which the court can consider is, whether the act conflicts with the constitution, and not whether the court shall classify the property within the tax district into such as shall be taxable and such as shall be exempt from taxation. The court can only determine as to the constitutionality or unconstitutionality of the act, and when it goes beyond this inquiry, and attempts to classify the property into such as shall be taxable and such as shall not, it assumes the exercise of legislative power, which belongs exclusively to the legislative department of the government. But does the act conflict with the constitution? It provides for a tax on all real estate and personal property within the limits of the city, taxable according to the laws of the state. This is an evident intent to equalize the public burden so far as practicable, and unquestionably the establishment of such a system of taxation is a proper and legitimate subject of legislative authority. Cooley, in his treatise on Constitutional Limitations (503), says that "whenever the corporate boundaries are established, it is to be understood that whatever property is in-

cluded within those limits, has been included by the legislature, because it justly belongs there, as being within the circuit which is benefited by the local government, and which ought, consequently, to contribute to its government." But as the land described in the petition is not laid out into lots, but is used for agricultural purposes, it is insisted that it is not subject to taxation for city purposes. And the rule contended for is, that the theory of compensation to the owner of property within the corporate limits of a city by way of protection or benefit, derived from the city government, applies to property used and occupied for city purposes, and is co-extensive, only, with that line or point where it ceases to operate beneficially to the proprietor in a municipal point of view. Who is the arbiter to define this line—and where is it to be exactly found? If the judiciary is to act as such arbiter, then it seems clear that it must do one of two things, either to pronounce the act unconstitutional—and upon such decision as already shown the tax district will be destroyed—or it must, by legislative action, amend and change the law, and classify the property within the city limits, so as to subject part thereof to taxation, and exempt the other part from taxation, and this must be done by piecemeal as each case shall arise. But in the adjudication of cases which must constantly arise under the rule contended for, it seems impossible to discover any test or criterion by which uniformity and certainty of decisions may be obtained. The opinions of men are so diversified and varied, that what to one mind may seem clearly right and proper, to another may clearly appear to be wrong and unjust. By one court lands may be adjudged subject to taxation, and by another the same lands, or lands similarly situated, may be adjudged exempt from taxation. Which would be right? Who can decide the question? It therefore seems difficult to escape the conclusion that

the decision of each case, as it shall arise, must depend upon the caprice of the arbiter who determines it, for he cannot resolve the question upon any principle of legal science. Hence the exercise of judicial power in apportioning the taxes of a district affords no security against the abuse of the taxing power; but on the contrary, it may be fraught with more danger, and result in greater injustice, than a uniform system of taxation established by legislative enactment. But if the courts can exercise the power to arbitrarily classify the property of a tax district into such as shall be subject to taxation and such as shall not, why may they not extend the classification, and provide that lands used for growing corn shall be taxed, and those for growing wheat shall not; that lands used for gardens and orchards shall be taxed, and those occupied for manufacturing purposes shall not? And thus the classification may be extended to different kinds and uses and descriptions of property indefinitely.

If the power can be exercised in the one case, upon what principle shall the courts be inhibited from exercising it in the others? The principle upon which the authority must rest in the one case must be equally legitimate and apply with equal force in the others. However, I do not believe that such is the law; and I understand that it is an essential principle in taxation that there must be some system of apportionment, and the assessments should be uniform upon all the taxable property within the tax district. Again, if the rule contended for rests on the ground that lands within the tax district which are used for agricultural and horticultural purposes do not receive the same degree of benefit as other property in the district—and this seems to be the ground most strongly urged in support of the rule—then to be just and consistent in principle, the rule must apply with equal force to all kinds and de-

scription of property not in degree equally benefited with other property. But where shall the line be drawn between that which shall be taxed and that which shall not? Again, the rule will apply with equal force to road districts throughout the county, for lands adjacent to the highways will be more benefited by such public roads than lands distant from them; and hence the latter should be exempt from taxes to open and repair the public roads. In the erection of the public buildings of a county, the property in the town or city where they shall be located will be benefited more by reason of such location of public buildings than that in other parts of the county. So the property of the county in which the capital of the state is located is, in degree, benefited by reason of such location, more than that of other counties of the state, and therefore if the rule is correct in principle it must apply in such cases. It is only necessary to state these consequences which must result in the application of the rule to show it is impolitic, and fraught with danger in any attempt to enforce it by the exercise of judicial power.

Therefore, when tested by its legitimate and logical results, it seems clear that the rule contended for cannot be sustained on any ground of sound policy, and cannot by any just and fair system of taxation be applied in the apportionment, levy, and collection of taxes in a tax district. In *Kirby v. Shaw*, 19 Penn. State, 261, Gibson, J., in discussing the question of taxation, says: "It is illogical to argue from an extreme case, or from the abuse of a power to a negation of it;" and again, that in the levy of taxes, if "equality were practicable, in what branch of the government would power to enforce it reside? Not in the judiciary, unless it were competent to set aside a law free from collision with the constitution because it seemed unjust. It could interpose only by overstepping the limits of its sphere; by

arrogating to itself a power beyond its province; by producing intestine discord; and by setting an example which other organs of the government would not be slow to follow. * * * The taxing power must be left to that part of the government which is to exercise it." And it may be added, that it is "not every disproportion between the sum which a citizen pays, and the interest which he as an individual has, in the purposes to which it is applied, that can make a tax law void." *Gordon v. Cornes*, 47 N. Y., 614.

A tax is properly a charge apportioned among the people of a tax district, so that each individual within its boundaries shall pay his proportionate share of the public burdens, and hence a state tax is apportioned throughout the state, a county tax throughout the county, and a city tax throughout the city.

In support of the rule contended for, the plaintiff mainly relies upon the decisions of the supreme courts of Iowa and Kentucky, which have been followed in the case of *Bradshaw v. The City of Omaha*, 1 Neb., 16. It is conceded that the Iowa cases are directly in point, but with all due respect to which the able opinions of that court are justly entitled, it seems to me that in the decisions of that court upon the question under consideration, the court must arrogate to itself power which exclusively belongs to the legislature; and in reference to the conclusion reached in that state upon this question, Cooley, in his treatise on Const. Lim., 501. in a note says: "It would seem as if there must be great practical difficulties—if not some of principle—in making this disposition of the case." I think the principle fairly deducible from the Kentucky cases goes no further than this: that "where the original limits of a town are not filled up; and it has not in fact extended itself beyond them on either side," the adjacent vacant and farm lands cannot, by extension of the city boundaries

or otherwise, be subjected to taxation by the town for the mere purpose of increasing its revenues. And this deduction seems to be clearly sustained by the case of *Cheaney v. Hoover*, 9 B. Mon., 335; for in this case, after stating that it is the imperious duty of the legislature to provide specially for the government of towns by incorporation, it is said, that "if they be within the legislative discretion, whatever abuse of that discretion there may be in any particular instance, or whatever apparent oppression or injustice may be the consequence, there is no remedy for its correction but in an appeal to the legislature itself, unless the complaining party can rest his case upon some prohibition of the constitution, or some right secured by that instrument. An act of the legislature, not interdicted by the constitution, being the law of the land, no other department or tribunal can, upon its own sense of justice or propriety, arrest its operation. The wisdom and justice and discretion requisite for deciding on the expediency of all legislative measures must be assumed to be in the legislature itself, where the constitution has placed the power of adopting or rejecting the measure. And the judiciary, instituted for the purpose of administering the law, has no right or power to deny effect to a legislative act, except upon the ground of its being repugnant to the constitution, and of its being therefore, in consequence of the supremacy of that instrument, and of its express declaration, *no part of the law of the land.*" This was an action for the taking and conversion of one horse; the defendant averred that the property was taken by distress for the payment of taxes, and a judgment for the defendant was affirmed. In the state of Iowa the classification of real estate into such as shall be taxable and such as shall not, is by the court applied to cities without any regard as to whether the property is situated within the original limits of the city or is brought within

the tax district by extension of the original boundaries or otherwise. Passing the numerous cases found in the reports of that state on the subject, I will only bring into review the case of *Durant v. Kauffman*, 34 Iowa, 194, in which I think there is a great departure from the doctrine enunciated in the former decisions upon the question. In this case large tracts of land within the city limits are held subject to taxation for city purposes; but it is, however, said that "the mere fact that lands are included within the limits of the municipal corporation does not authorize their taxation for general city purposes;" for, "if the property proposed to be taxed derives no benefit from being within the city limits" it is exempt from taxation for such purposes. This is said to be the rule recognized by the various decisions of that state upon that subject, and that "there is no difficulty in deducing the rule from the adjudications, but there is, on account of its general terms, great difficulty in applying it to actual cases." And as an illustration of the rule, it is said, "there would be neither reason nor justice in permitting the proprietor of a large tract of land within a city to hold it for an opportunity to bring it into the market as city lots, and for no other purpose, under pretense that it is agricultural land, thus escaping taxation for general improvement of the city, the very thing which will bring his lands into the market, and thus add greatly to their value—a direct benefit to the owner. In such case the general improvement of the city, the building of streets near or in the direction of the lands so held, etc., by which the property of the city is advanced and an invitation to population is held out, all bestow direct benefits upon the owner of such property. The lands being part of the city in fact, and held by their owner for increase in value which he expects, because they are city lots, are benefited by the municipal government, and share in the benefits derived from the

expenditure of revenue raised by taxation. If property so held within the city, whether it be subdivided into lots and streets thereon, or dedicated to public use, or be *enclosed and cultivated as agricultural lands*, it ought to be subject to general municipal taxation. This result is directly deducible from the rule." And if this result is directly deducible from the rule, it will indeed be difficult to discover any part of the rule left to apply in the exemption of lands from taxation; for if under the rule *any* lands "enclosed and cultivated as agricultural lands" are "subject to general municipal taxation," why shall not the rule apply in the same way to *all* other lands similarly situated, and to vacant lands? Upon what principle can it be said that it shall so apply in the one case, and not apply in like manner in the other cases? It is said the lands are "*part of the city in fact*," and by the "general improvement of the city," they are "advanced, and an invitation to population is held out, and all bestow direct benefits upon the owner of such property," and he is "benefited by the municipal government, and shares in the benefits derived from the expenditure of revenue raised by taxation." If this be true, and no doubt it is, then the logical conclusion and actual result are as certain as cause produces effect—that all other lands within the original city limits must, in like manner, from the same cause be advanced, and the owners be benefited more or less by the expenditure of revenue raised by taxation for municipal purposes. But must the different application of the rule in the one case from that in the other, depend upon the supposed ultimate disposition the owner intends to make of his property? If this is the ground upon which the tax must be imposed in the one case, then it is quite clear that it is the *intent* of the owner in respect to his ultimate disposition of his property, and not the *land itself*, that is taxed. But upon what principle or authority can

this *intent* as to the ultimate disposition of his property be made the subject of taxation? It seems to me, it is alone upon the assumed right of legislative action by the court, that the application of the rule must rest.

Again, it is further said in illustration of the rule, that land within the city limits, used for purposes of dwellings or business, though "it be far from improved streets, nevertheless will be charged with the burdens common to other property." Now, if land "enclosed and cultivated," situated perhaps near the business part of the city, or at any point within its limits, shall be exempt from taxation, on the ground that it derives but little or no benefit from the fact of being within the limits of the city government, upon what ground can it be maintained that a single lot, with a small dwelling-house thereon, situated in some remote corner of the corporate limits, less benefited, shall be taxed to pay its proportionate share of the burdens of the city government? The argument is more imaginary than logical, and the proposition need only be mentioned to demonstrate its absurdity. Surely the rule is impolitic, inconsistent, and unjust. The reason given for the taxation of property in the one case is unanswerable, and applies with equal force to all other lands. It is this: that the claim for exemption "would be answered by the simple consideration of the fact, that cities are established for the very purpose of people living together in communities, increasing the general and individual prosperity; that such beginning is usually an inconsiderable population, with territory sufficient for its probable increase, and that because part of the land included within the limits of the city is not now wanted for actual occupation, *it cannot be deprived* of all the benefits of the city, and *released from all its burdens.*"

"Taxation must precede improvements, and the citizen must look to the municipal government for the benefit

to which he is justly entitled in the way of improvements. He cannot, in case that government fails to improve the streets leading to his property, or to establish and open such other streets as his wants require, or to do other things which his interest demands, separate himself from the body of the citizens and refuse to contribute, in the way of taxes, to the general good of the whole city. * * * * The police power of the city is exerted for his protection in maintaining good order, and if he be threatened by the evil-disposed, or should crimes be committed against his person or property, his safety is secured and offenders are brought to punishment by the municipal ministers of the law." And it might be added, that he is an elector in choosing the officers of the municipal government, entitled to all the rights and privileges of such government equally with every other citizen thereof. He may hold office and exercise the same rights and powers equally as any other citizen in directing the police regulations of the city and in the assessment of the taxes necessary to pay the public expenses of the common government.

Now, the sum of the whole matter is, that all the property of the city, or rather of the tax district, constitutes its wealth, and the cardinal principle in the imposition of taxes is, that they should be apportioned among all the citizens of the district according to the value of their respective properties; for all are benefited more or less, and *all* are equally protected by the laws of the common government; and upon this power to assess and tax the individual property depends the very existence of the government and the maintenance of the orderly administration of its police system.

In the case of *The City of St. Louis v. Russell*, 9 Mo., 508, the land of defendant had ever been occupied and cultivated as a farm, and by subsequent acts of legislation it was brought within the corporate limits of the

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city. The defendant complained that "his land has been embraced within the limits of the corporation of St. Louis against his consent," and he prayed "an injunction to restrain the city from selling his land for city taxes." It was by the supreme court decreed "that the injunction granted by the circuit court be dissolved, and the bill of complaint dismissed." In *Wells v. City of Weston*, 22 Mo., 385, the legislative act conferred power on the city "to assess and tax all real estate outside of and adjacent to the corporation, to the distance of one-half mile." The court says the only question is, "whether it is competent for the legislature to confer upon the city of Weston authority to tax, for local purposes, land lying beyond the corporate limits," and the decision is, "that the legislature cannot authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits."

In conclusion, for the purpose of guarding against any erroneous inference which might be drawn from this opinion, it is proper to state, that the issues in the case at bar do not present for our consideration one in which it may clearly appear that the *sole* object of the legislative act, extending the power of taxation by a city over a community or lands beyond its original limits, is to increase its revenues only, and not for the purpose of any municipal regulations or government over the same.

If this opinion is a correct exposition of the law, it is clear that the ruling upon the demurrer, and the decree rendered in the district court cannot be sustained; and, therefore, the demurrer must be sustained, and the injunction granted by the court below is dissolved, and the plaintiff's petition is dismissed with costs.

DECREE ACCORDINGLY.

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That the demurrer to the petition ought to have been sustained there is no doubt whatever. In this we are all agreed. But the majority of the court are of the opinion that this decision should be upon the ground alone that the facts stated were not sufficient to constitute a cause of action. This was the reason alleged in the demurrer, and the only one. Wherefore the court was precluded from inquiring as to whether the two causes were properly joined or not. Section ninety-five of the code of civil procedure provides that "the demurrer shall specify distinctly the grounds of objection to the petition. Unless it do so, it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action." So long, therefore, as the defendant did not object to the misjoinder of distinct causes of action, it was not within the province of the court to do so. But even if the demurrer had specified the misjoinder as ground of objection—which it no doubt was—we should place our decision solely on the ground that the alleged causes of action do not fall within the operation of section eighty-seven of the code of civil procedure, which permits legal and equitable causes of action to be united whenever they arise out of "the same transaction or transactions connected with the the same subject of action." That these two causes of action do not fall within a class that may properly be united under the section of the statute just quoted is very clearly shown in the opinion of our brother GANTT, and we think if the question were properly before the court, that the decision should be placed upon this ground alone.

The views of the majority of this court as to the constitutionality of the statute which permits legal and equitable causes to be united in one action are distinctly

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set forth in *Wilcox v. Saunders*, 4 Neb., 569, to which we refer. We there used this language: "In regard to the power of the legislature, under the constitution of 1867, to blend law and equity cases in one form of action by the abolition of the distinction formerly existing between them, and authorizing their joinder in the same petition, we entertain no doubt whatever. On the contrary, we think the authority to do all that the code provides in this particular is clear."

The decision in *Wilcox v. Saunders* was under the constitution of 1867; but, so far as this question is concerned, our new constitution makes no change whatever in the law; by each of them the district courts were given "both chancery and common law jurisdiction," so that what we said in that case is equally applicable in this. For the reason, therefore, that the petition fails to state a cause of action, the demurrer is sustained, the injunction granted by the court below dissolved, and the action dismissed at the plaintiff's costs.

DECREE ACCORDINGLY.

Mr. JUSTICE MAXWELL concurs.

CHARLES HALL, ET AL., PLAINTIFFS IN ERROR, V. TIMOTHY
VANIER, DEFENDANT IN ERROR.

1. **Arbitration.** In an action on an award, the defendant may set up as a defense that the arbitrators considered matters not submitted to them, or omitted to consider matters which were submitted, and may prove such matters in bar.
2. ———: **EVIDENCE.** Arbitrators are proper witnesses to testify concerning what matters were presented before them, and whether or not they had considered all the matters referred.
3. **Practice: INSTRUCTIONS TO JURY: VERDICT.** Where, from the testimony in a case, the facts are in dispute, it is error for the court to direct the jury how they shall find a verdict.

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

The opinion states the case.

W. J. Connell, for plaintiff in error.

E. Wakeley, for defendant in error.

MAXWELL, J.

Timothy Vanier as assignee of Z. Vanier, commenced an action in the district court of Douglas county against Charles Hall, Thomas F. Hall, and Watson Fletcher, to recover the sum of \$497.00 and interest on an award in favor of Z. Vanier, and against said defendants.

The defendants answered the petition of the plaintiff, denying that Timothy Vanier owned the claim sued on, and alleging that they are the owners and assignees of said claim. The defendants further allege that Z. Vanier, on the eighteenth day of August, 1870, assigned said claim in writing to C. C. Crowell, who owned the same at the time the action was commenced, and that Crowell has since sold and assigned the same to the defendants, who are now the owners thereof.

The defendants further allege, that on or about the fifteenth day of August, 1869, they entered into co-partnership with Z. Vanier, in the business of milling, and that said co-partnership continued about six months, and was then dissolved; that at the time of the dissolution of the firm, it had large liabilities outstanding, then amounting to about the sum of \$279; and also had certain credits due it; that the amount of said assets is unknown to defendant, but a portion of said credits are doubtful claims, and a full collection thereof cannot be made; that all matters in difference between Vanier

and the defendants were included in an agreement of submission to arbitrators who made an award; but that said award fails to find or award, or in any manner determine, the questions whether or not Vanier shall be held for his proportion of such liabilities, or whether he shall be fully discharged therefrom, and also fails to find what interest, if any, said Vanier shall have in the assets of the firm.

The plaintiff filed a reply to the answer of the defendants:

1. Denying that the assignment of the claim in dispute to plaintiff was made after the alleged assignment to the defendants, or after August 30, 1871.

2. Denying that plaintiff has no interest in said claim, but alleging that he is the owner thereof.

3. Denying that defendants are the assignees of said claim, and that on the eighteenth day of August, 1870, or any other time before the assignment to plaintiff, Z. Vanier, for a valuable consideration, or otherwise, assigned said claim to C. C. Crowell or any other person.

4. Denying that Crowell assigned said claim to defendants, but that if he has done so it has been done since the commencement of this suit.

5. Denying that said arbitrators failed to make an award on all the issues submitted to them.

On the trial of the cause, the court instructed the jury to find for the plaintiff, and against the defendants, for the full amount claimed in the petition. A motion for a new trial was made, which was overruled by the court, and judgment rendered on the verdict against the defendants, to reverse which they bring the case into this court by petition in error.

In an action on an award, the defendant may set up as a defense that the arbitrators considered matters not submitted to them, or omitted to consider matters

which were submitted, and may prove these matters in bar in an action at law to enforce the award. 2 Greenleaf on Evidence, sec. 78, and cases cited.

And although ordinarily they will not be bound to disclose the grounds of their award, yet they may be examined to prove that certain matters were or were not examined or acted on by them. *Id.* *Rook v. Brubaker*, 1 Rawle, 304. *Alder v. Savill*, 5 Taunt., 454. *Zeigler v. Zeigler*, 2 Sergt. & Rawle, 286.

In *Briggs v. Smith*, 20 Barb., 409, the court say: "In *Buller v. The Mayor*, 1 Barb., 334, before cited, the court remarked, that where there is not enough on the face of the award to show that it did not go beyond the submission, parol evidence might be resorted to, and that the arbitrators, or either of them, were competent witnesses to prove that fact, unless *mala fides* should be alleged. Here the defendant expressly stated, when the offer was made, that no bad faith on the part of the arbitrators was imputed. In such cases the evidence of arbitrators has often been admitted to show that they did, or did not, take into consideration any particular subject matter."

In the case of *Strong v. Strong*, 9 Cush., 576, the court say: "Indeed, on a first view of the subject we entertained some doubts of the admissibility of the testimony of Edwards himself. But the admission of such testimony seems to be required by the necessities of justice. It is received without challenge (see *In re Hicks*, 8 Taunt., 694) in the English courts. And though the general doctrine be, that an arbitrator cannot be suffered to impeach his own award (*Bigelow v. Maynard*, 4 Cush., 317), especially by declarations *in pais*, yet in cases like the present, this court, in sitting *at nisi prius*, has admitted the arbitrators to depose to facts which transpired at or during the arbitration,

tending to show the award to be void for legal cause." *Boston v. Gray*, 6 Met., 131.

"If the submission is made conditional by the clause of *ita quod arbitrium fiat de præmissis*, and recites several distinct matters which are specifically referred, and the arbitrators omit to decide one of the matters, and there are no general words in the award which can be construed to embrace a decision on such particular matter, the whole award is bad." *Ott v. Schroepfel*, 5 N. Y., 486. *McNear v. Bailey*, 18 Me., 201. Morse on Arbitration, 361.

Where, as in this case, the defense is, that certain matters submitted to them were not considered by the arbitrators, they are proper witnesses to testify concerning what matters were presented before them, and whether or not they had considered all the matters so referred. Morse on Arb., 361. 2 Greenleaf on Evidence, sec. 78. 1 Rawle, 304. *Alder v. Saville*, 5 Taunt, 454. *Zeigler v. Zeigler*, 2 Sergt. & Rawle, 286.

The court therefore erred in excluding the cross-examination of John S. Bowen, in relation to what matters were considered in making up the award. The court also erred in excluding testimony offered by the defendants in regard to the assignment of the claim in controversy, and in directing the jury to find a verdict for the plaintiff. The judgment of the district court is reversed and the cause remanded for a trial *de novo*.

REVERSED AND REMANDED.

THE STATE OF NEBRASKA, EX REL. MATTHIAS METZ V.
T. C. CUNNINGHAM, SHERIFF OF RICHARDSON COUNTY.

1. **Exemption:** The plaintiff sets forth in an application for mandamus that he is the head of a family, a resident of the state, and actually engaged in the business of agriculture; that he has neither lands, town lots, nor houses subject to exemption as a homestead under the laws of this state; that one F. commenced an action by attachment against him, and caused the same to be levied upon plaintiff's mules, harness, wagon, and on about twenty-four hundred bushels of corn; that plaintiff thereupon filed an inventory, under oath, with the officer holding the attachment, of the whole of the personal property owned by him, and claimed the property as exempt; that the officer refused to call to his aid three freeholders of the county and have the property appraised; and that the property was not taken for clerks', laborers', or mechanics' wages, or for money due and owing by an attorney at law for money or other valuable consideration received by said attorney for any person or persons. *Held.* 1. That the plaintiff was entitled to a release of the mules, harness, and wagon. 2. That the respondent take the necessary steps to have the property in question appraised as required by law, and to permit the plaintiff to select therefrom to the value of five hundred dollars.
2. —. Where an inventory, under oath, is made by a debtor, and filed with an officer holding an execution or order of attachment, he must call appraisers to ascertain the value of the property seized. He has no discretion in the matter.

ORIGINAL application for mandamus.

George P. Uhl, for the petitioner.

MAXWELL, J.

This is an application for a peremptory writ of mandamus to compel the sheriff of Richardson county to cause certain property, levied upon by him under an order of attachment, to be appraised as required by the statute, said property being claimed as exempt under the law, and to release other property which is specifically

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exempt by statute. The plaintiff sets forth in his application that he is the head of a family, and a resident of this state, and is actually engaged in the business of agriculture; that he has neither lands, town lots, nor houses subject to exemption as a homestead under the laws of this state; that one F. commenced an action against the plaintiff and caused an order of attachment to be issued in said cause, and the same was levied on a span of mules, and one set of harness, and a wagon, being the only team, harness, and wagon possessed by plaintiff; said order of attachment was also levied upon about twenty-four hundred bushels of corn, being all the grain possessed by plaintiff; that plaintiff thereupon filed an inventory, under oath, with the officer holding the order of attachment, of the whole of the personal property owned by him, and claimed the property so levied upon as being exempt under the law; but the officer refused to cause said property to be appraised; that the property was not taken for clerks', laborers', or mechanics' wages, or for money due and owing by an attorney at law for money or other valuable consideration received by said attorney for any person or persons. The prayer is for a writ directed to the respondent requiring him to release the mules, harness, and wagon, and feed for stock for three months, and that the remainder of the property of the relator be appraised as provided by law, and that he be permitted to select therefrom property to the value of five hundred dollars. The application is made upon notice to the respondent, and the proof fully sustains the facts set forth therein.

Our statute provides (Gen. Statutes, 616) that "all heads of families, who have neither lands, town lots, nor houses subject to exemption as a homestead under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property."

“Any person desiring to avail himself of the exemption as provided for in the preceding sections, must file an inventory, under oath, in the court where the judgment is obtained, or with the officer holding the execution, of the whole of the personal property owned by him or them, at any time before the sale of the property; and it shall be the duty of the officer to whom the execution is directed, to call to his assistance three disinterested freeholders of the county where the property may be, who, after being duly sworn by said officer, shall appraise said property at its cash value.”

This question was before this court in the case of *The People v. McClay*, 2 Neb., 8, and it was there held that when an inventory under oath was filed with the officer he had but one course to pursue, and that was to call three disinterested freeholders of the county and have them appraise the property, and if its value, as shown by the appraisement, did not exceed five hundred dollars, release it at once from the execution and return it to the debtor. We approve of that decision. The officer cannot question the correctness of the inventory. If the debtor has real estate which is exempt under the homestead law, or other personal property than that contained in his list, such personal property is liable to be seized for his debts, and he may be prosecuted for perjury. But when an inventory under oath is made by the debtor and filed with the officer holding the execution or order of attachment, he must call appraisers to ascertain the value of the property seized. He has no discretion in the matter, and cannot shelter himself behind an indemnifying bond.

Section five hundred and thirty of the code exempts certain specific articles from sale on an execution or order of attachment. Among the articles so exempted, if the debtor at the time is actually engaged in the business of agriculture, is one yoke of oxen, or pair of horses

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in lieu thereof. Mules are not named in the statute. But the object of the law is to exempt a team for the debtor; if, therefore, his team consist of mules they are exempt, although not specifically designated in the statute. The statute also provides that a wagon and the necessary gearing for the team shall be exempt. The articles *specifically* exempted may be claimed by the debtor although he is the owner of lands, town lots, and houses, which are exempt under the homestead law. The selection may be made by the debtor, his agent, clerk, or legal representative, and when made it is the duty of the officer holding the execution or order of attachment to release such property. If he fail to do so, he may be compelled by mandamus to perform his duty. A peremptory writ of mandamus is awarded as prayed in the application.

WRIT AWARDED.

TOOTLE & MAULE, ET AL., APPELLEES, v. PETER DUNN
AND THOMAS MOORE, APPELLANTS.

1. **Vendor and Vendee: Fraud.** Where a vendee has participated in the fraud of the vendor, by accepting from him a conveyance of real estate, with the intent to hinder, delay, or defraud the creditors of such vendor, the conveyance will be void as to those creditors, even though full consideration has been paid for such property.
2. **Fraud. EVIDENCE.** Fraud is never presumed, but must be proved, and the degree of proof necessary to establish it is the same in equity as at law.
3. ——— : ———. The question of fraudulent intent is one of fact and not of law.
4. **Real Property. BONA FIDE PURCHASER.** A *bona fide* purchaser, for a valuable consideration, without notice, is protected, whether purchasing from the fraudulent grantor or grantee.

APPEAL from the district court of Gage county. Tried below before WEAVER, J. The opinion states the facts of the case.

Hastings & McGintie, for appellants.

I. If by the testimony it be found that Dunn, at the time he conveyed the land, was insolvent, this does not vitiate the transfer; the statute does not deprive a man of the power to sell or otherwise dispose of his property although he may be insolvent. *Pecot v. Armelin*, 21 La., 667. *Smith v. Henry*, 2 Bailey, 118.

Many sales made in the ordinary course of business may, and do, defeat creditors who could have levied on the property sued had it remained in possession of the vendor a while longer, yet these sales are valid. *Atwood v. Impson*, 5 C. E. Green, 150.

II. Mere insolvency alone, then, does not vitiate any transfer; there must be coupled with it an intent to hinder, delay, or defraud creditors, and when the transfer is made, as in the case at bar, for a valuable consideration, there must be not only a fraudulent intent on the part of Dunn, but also a participation in that intent on the part of Moore; for our statute of frauds, General Statutes, section twenty-one, page three hundred and ninety-five, excepts from its operation all transfers of estates and interests which are made for a valuable consideration, unless it appears that the purchaser had previous notice of the fraudulent intent of the vendor *Seymour v. Wilson*, 19 N. Y., 417.

It is a fair and reasonable presumption to a man paying a full and adequate consideration in good faith for the property, that the purchase so far from diminishing the means of the vendor for paying his debts, will afford him a facility for so doing. *Pierson v. Tom*, 1 Texas, 557. And it would seem that notice of insolvency of

vendor by vendee would not vitiate a transfer—there must be notice of fraudulent intent; and it is upon these grounds that the rights of the grantee who acts in good faith and gives a valuable consideration are protected, although there may have been a fraudulent intent on the part of the grantor. *Heroy v. Kerr*, 21 Howard Prac., 409. *Carpenter v. Muren*, 42 Barbour, 300. *Waterbury v. Sturtevant*, 18 Wendell, 353. *Waters v. Riffin*, 19 Md., 536. *Hessing v. McClosky*, 37 Ill., 341. *Sibly v. Hood*, 3 Mo., 290. *Kittridge v. Sumner*, 11 Pick., 50. *Green v. Tanner*, 8 Met., 411. *Johnson v. Johnson*, 3 Met., 63. *Sands v. Hildreth*, 14 Johnson, 493. *Davis v. Tibbets*, 39 Maine, 279. *Blair v. Bass*, 4 Blackf., 539. *Thompson v. Sanders*, 6 J. J. Marsh, 94. *Violett v. Violett*, 2 Dana, 323. *Splawn v. Martin*, 17 Ark., 146. *Ewing v. Runkle*, 20 Ill., 448. *Frank v. Peters*, 9 Ind., 344. *Fifield v. Gaston*, 12 Iowa, 218. *Miller v. Bryan*, 3 Iowa, 58. *Palmer v. Henderson*, 20 Ind., 297. *Sisson v. Roath*, 30 Conn., 15. *Hutchinson v. Watkins*, 17 Iowa, 475. *Meigsell v. Williamson*, 35 Ill., 529. *Apperson v. Ford*, 29 Ark., 746. *Hamilton v. Staples*, 49 Conn., 316. *Leach v. Francis*, 41 Vermont, 670. *Byrne v. Becker*, 42 Mo., 264.

In the proof of a fraudulent intent the same rule prevails in equity as in law. The law does not presume fraud. It must be established by evidence; a court of equity is grounded on the same principles as a court of law in drawing inferences from the testimony placed before it. *Ford v. Chambers*, 19 Cal., 143. Bump on Fraudulent Conveyances, 564. *McConihe v. Sawyer*, 12 N. H., 396. *Doe v. Dignowitty*, 4 S. & M., 58. *Watkins v. Wallace*, 19 Mich., 57.

And the only exception we can find to this rule is where the price given by the grantee is wholly inadequate and unconscionable.

M. B. C. True, for appellees.

I. The rule at law, that fraud must be proven and will not be presumed, does not obtain in suits in equity. *Ward, et al., v. Lamberth*, 31 Ga., 160. *Hempstead v. Johnston*, 18 Ark., 141. *Hollister v. Loud*, 2 Mich., 324.

II. The question of fraudulent intent is scarcely ever susceptible of positive or direct proof, and must be established, if at all, by consideration of all the facts and circumstances in the case. *Wright v. Grover*, 27 Ill., 430. *Purkitt v. Polack*, 17 Cal., 327, 328. *Colquitt v. Thomas*, 8 Ga., 268. *Ward v. Lamberth*, 31 Ga., 160. *Hicks v. Stone*, 13 Minn., 438. *Sands v. Codwise*, 4 Johnson, 536. *Stadtler v. Wood*, 24 Texas, 624. *Weisinger v. Chisholm*, 28 Texas, 790.

III. Indebtedness of grantor at time of conveyance is *prima facie* fraud, and the burden of proving good faith, and that grantor had enough to pay his debts, is then thrown upon the one interested in defeating the suit. *Ellinger v. Crowl*, 17 Md., 375, and cases cited.

IV. A conveyance of property by one largely in debt, especially if these debts are about to ripen into judgments, together with subsequent possession and continued enjoyment of the property by grantor, create presumptions of fraud which require clear and satisfactory proof of fairness on the part of the actors to remove, and this presumption is stronger when the conveyance is to a relative of the grantor, and the fact that a full price was to be paid for the property is not sufficient to rebut the presumption. *Johnston v. Dick*, 27 Miss., 277.

V. Knowledge by vendee of fraudulent intent on part of vendor to hinder, delay, or defraud creditors,

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although he has paid valuable and adequate consideration, avoids the deed and leaves the property subject to the debts of the grantor. *Weisinger v. Chisholm*, 28 Texas, 790.

VI. If vendee had reasonable cause to believe vendor insolvent at time of the transfer, the sale is void. *Butler v. Breck*, 7 Met., 166-8. *Gillett v. Phelps*. 12 Wis., 393 *Green v. Tatum*, E. Green, 105.

VII. To rebut appearance of fraud, such a change of possession as is necessary to validity of a sale must be established by direct testimony. *Grover v. Gilbert*, 5 Phila. (Pa.), 135.

VIII. When a presumption of fraud has been raised, it devolves upon the party claiming under conveyance attacked, to explain and establish the *bona fides* of the transaction. *Merrill v. Lock*, 41 N. H., 491. *Purkitt v. Polack*, 17 Cal., 332.

IX. When transfer is assailed by creditors as fraudulent, such transfer, to be held valid, must be shown to be *bona fide* and upon valid consideration. *Ferguson v. Gilbert*, 16 Ohio St., 88, 96.

MAXWELL, J

On the first day of February, 1875, an attachment was levied on the south-east quarter of the north-west quarter, and the east half and the south-west quarter of the south-west quarter of section one, in township three north, of range seven east of the sixth principal meridian, in an action pending in the district court of Saline county, wherein Tootle & Maule were plaintiffs, and Peter Dunn was defendant. In November of that year, the plaintiffs in that suit re-

covered judgment against the defendant, Dunn, for the sum of \$1,138.43.

On the second day of March, 1875, another attachment was levied on the above described tracts of land in an action pending in the district court of Saline county, wherein Whitney, Bauserman & Co. were plaintiffs, and Peter Dunn was defendant. At the November term, 1875, of said court, the plaintiffs in said action recovered a judgment against Dunn for the sum of \$634.07.

On the twenty-first day of January, 1875, Dunn conveyed the above described premises by warranty deed to Thomas Moore, one of the defendants, for an alleged consideration of \$800, which deed was duly recorded on the twenty-seventh day of January, 1875. In November, 1875, the plaintiffs caused executions to be issued on their judgments, which executions were by the sheriff endorsed "no goods." The sheriff then levied the executions on the lands in question. This action was brought to set aside the deed from Dunn to Moore for the lands in controversy. It being alleged that said deed was made without consideration, and with the intent and for the purpose, as the said Thomas Moore then well knew, of delaying, hindering, and defrauding the said plaintiffs in the collection and amount of their claims.

Judgment was rendered in the court below in favor of the plaintiffs, to reverse which, the defendant, Moore, brings the case into this court by appeal.

Section seventeen, chapter twenty-five, General Statutes, 395, provides that: "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay,

or defraud creditors or persons of their lawful rights, damages, forfeitures, debts, or demands; and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded, shall be void."

Section twenty-one provides that: "The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

These sections of our statutes appear to have been copied substantially from 13 Eliz., C. 5, to prevent fraudulent conveyances.

In Twyne's case, 3 Coke, 80, P. was indebted to T. in the sum of £400, and he was also indebted to C. in the sum of £200. C. commenced an action against P. for the recovery of the amount due him; P. thereupon made a secret assignment to T. of all his goods and chattels without exception, in satisfaction of the debt, but continued in possession thereof, and sold a portion of the sheep and put his mark on others.

The court held that this was a fraudulent gift within the statute—13 Eliz., C. 5—although P. was actually indebted to T. in the sum of £400, and that a good consideration is not sufficient to take the case out of the statute, unless the deed be made *bona fide* also.

An intent to hinder, delay, or defraud creditors may be inferred from the grantors being insolvent at the time the conveyance is made, or from the fact that he is indebted in so large an amount that the conveyance necessarily will have that effect. But the question of fraudulent intent under our statute is one of fact and not of law. *Bona fide* purchasers, however, for a valuable

consideration without notice are protected, whether purchasing from the fraudulent grantor or grantee. In this case Moore swears positively that he paid \$800 in cash for the land, and that he did not know that Dunn was in embarrassed circumstances, and unable to pay his debts.

No witnesses were called to testify as to the value of the land in question. The appraisers in the attachments estimate its value at \$1,200, but their estimates are entirely *ex parte*, and we know nothing of their qualifications as experts. It is impossible, therefore, for us to say that the price paid by Moore for the land is so disproportionate to its value as to raise a presumption of fraud.

Fraud is never presumed, but must be proved, and the degree of proof necessary to establish it is the same in equity as at law. But from the nature of the case, it can not usually be established by direct testimony, and must therefore ordinarily be shown by circumstances. But where it is found that a vendee has participated in the fraud of a vendor, by accepting from him a conveyance of real estate, with the intent to hinder, delay, or defraud creditors of such vendor, such conveyance will be void as to those creditors, even though a full adequate consideration may have been paid for the property so conveyed. *Wright v. Brandis*, 1 Ind., 336. *Ruffing v. Tilton*, 12 Id., 260. *Chapel v. Clapp*, 29 Iowa, 194. Story's Eq., sec. 369. Twyne's case, 3 Coke, 81.

But the testimony in this case fails to establish the fact, that Moore purchased the land in question with knowledge that would lead him to believe that Dunn intended by such conveyance to hinder, delay, or defraud his creditors. The judgment of the district court is reversed, and the cause dismissed.

JUDGMENT ACCORDINGLY.

HARMON RAY, PLAINTIFF IN ERROR, v. NATHAN MASON,
DEFENDANT IN ERROR.

1. **Practice: BILL OF EXCEPTIONS.** Where evidence has been introduced in the court below, which is not properly a matter of record, a party who desires to avail himself of it in the supreme court, must preserve the same by a bill of exceptions.
2. ———: ——— Affidavits of jurors in support of a motion for a new trial, which are not embodied in the bill of exceptions, will not be considered by the supreme court.
3. ———: **COSTS IN CASES WHERE JUSTICE OF THE PEACE HAS JURISDICTION.** Where a justice of the peace has jurisdiction of an action, and it has been brought in any other court, the plaintiff cannot recover costs.

ERROR from the district court for Nemaha county.
Tried below before POUND, J.

J. H. Broady, for plaintiff in error.

E. W. Thomas, for defendant in error.

MAXWELL, J.

On the fifth day of November, 1873, the plaintiff in the court below, Mason, commenced an action against the defendant in the probate court of Nemaha county to recover the sum of one hundred dollars and interest, balance claimed to be due on a promissory note. On the trial of the cause in the probate court the jury found for the defendant. An appeal was taken to the district court, where the plaintiff recovered against the defendant the sum of three dollars. The court thereupon rendered judgment against the defendant for the costs of suit amounting to the sum of \$76.66. A motion for a new trial was filed by the defendant Ray, assigning various grounds for granting the same. A number of affidavits of the jurors that tried the cause appear in the record in

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support of the motion. It is unnecessary to consider the question of the admissibility of affidavits of jurors for the purpose of impeaching or explaining their verdict, as the affidavits filed in this case cannot be considered, not having been embodied in the bill of exceptions. Where evidence has been introduced in the court below which is not properly a matter of record, a party who desires to avail himself of such evidence in the supreme court must preserve the same by a bill of exceptions. The only error that can be considered in this case is the taxation of costs to the defendant. In this there is error. The rule is well established in this court that if a justice of the peace has jurisdiction of an action and it has been brought in any other court the plaintiff shall not recover costs. *Geere v. Sweet*, 2 Neb., 67. *Beach v. Cramer*, 5 Neb., 99. And the jurisdiction in such cases is determined by the amount recovered and not by the amount claimed. The judgment of the court below for the recovery of the plaintiff's costs against the defendant is reversed, and each party must pay his own costs in the court below.

JUDGMENT ACCORDINGLY.

GRANT THOMPSON, PLAINTIFF IN ERROR, V. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law:** AUTREFOIS CONVICT. It is indispensable to the plea of former conviction that the court, whose record is relied upon to sustain it, had jurisdiction over the alleged offense.
2. **Felony:** JURISDICTION OF POLICE JUDGE. The police judge in cities of the first class has no jurisdiction in cases of felony, except to recognize the accused to appear before the district court for trial

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8. ———: ———. Where the charge against the prisoner, in the police court, was *petit larceny*, and the jury returned a verdict of "guilty," and fixed the value of the property stolen at \$35.00. *Held*, that this verdict was no bar to an indictment for grand larceny in the district court for stealing the same property, as no valid judgment could have been rendered thereon.

4. **Evidence: PRESUMPTIONS.** It is a rule of evidence in trials for larceny of goods, that the finding of a portion of them in the exclusive possession of the prisoner, very shortly after the theft was committed, is presumptive evidence that he stole the whole, and may be sufficient to warrant a conviction accordingly.

ERROR from district court of Douglas county. Tried below before SAVAGE, J. The case is stated in the opinion.

Baldwin & Smythe, for plaintiff in error.

I. The complaint charged *petit larceny* and nothing else. The jury find the complaint to be true. There is no finding either by the court or jury that any offense other than *petit larceny* had been committed. In the district court, in the case of a person charged with the crime of larceny, the jury determine the value as a jurisdictional question, for a person charged in that court with grand larceny may, under such an indictment, be found guilty of *petit larceny*. But neither in the district or police court can a person on his trial be found guilty of any higher grade of, or other, offense than he is in the indictment or complaint charged with.

To take this case out of the rule here laid down and ever recognized in courts of justice, the state rely upon Gen. Stat., 798, Sec. 327.

It is provided by law that for the trial of misdemeanors committed outside of the city, justices of the peace shall have concurrent jurisdiction with the district court. For like offenses committed within the city, the police court has exclusive jurisdiction. There is no provision

in the statute authorizing a police judge to suspend a trial over which he has exclusive jurisdiction, and hold the party to bail for any other or higher grade of offense. *Commonwealth v. Squire*, 1 Metc., 258. *Lau-pher v. State*, 14 Ind., 237. *Wilson v. State*, 24 Conn., 57. *State v. Shepard*, 7 Conn., 55. *Thayer v. Boyle*, 30 Me., 479. *Hickey v. State*, 23 Ind., 21. *People v. McGowan*, 17 Wend., 386. *State v. Parmelee*, 9 Conn., 59.

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

I. The demurrer was rightly sustained.

1. A conviction by a court having no jurisdiction is in legal consequence no trial and cannot be a bar to an indictment in a court of competent jurisdiction. 4 Black. Com., 335. *Commonwealth v. Peters*, 12 Metc., 387. *State v. Odell*, 4 Blackf., 156.

2. The police magistrate had no jurisdiction in cases of grand larceny, except to examine and hold for trial. Genl. Stats., 128, Sec. 66.

3. There was no judgment rendered in the police court, simply a holding to await action, etc. If there had been a conviction of petit larceny in the court below, it would be no bar to an indictment for grand larceny, even if the court below had jurisdiction over both offenses, which it had not. An acquittal or conviction for a minor offense is generally no bar to a greater. *State v. Morris*, 1 Blackf., 37. *People v. Smith*, 57 Barb., 46. *Wilson v. State*, 24 Conn., 57. *State v. Warren*, 14 Ind., 572. The true test is, could there have been a conviction of the major offense at the time of the conviction of the minor?

4. The question of jurisdiction was properly raised by demurrer. 1 Chitty, 521. *Commonwealth v. Peters*, 12 Metc., 387. *State v. Odell*, 4 Blackf., 156. *Rex v. Fearnley*, 1 T. R., 316. 1 Leach, 425.

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5. Jurisdiction is a question of law—not of fact, and hence is not admitted by the demurrer. *Commonwealth v. Myers*, 1 Va. cases, 189.

6. The whole record is part of the plea of former conviction or former acquittal.

7. The prisoner should have had the verdict corrected if incomplete. 1 Bish. Crim. Law, sec. 998, and cases therein cited.

II. The verdict was sustained by the evidence.

Where one loses several pieces of property at same time and under same circumstances, and one is found to be stolen by a man, the presumption is the others were.

LAKE, CH. J.

I. At the June term, 1874, of the district court for Douglas county, the plaintiff in error was indicted for the crime of grand larceny, of which he was in due time convicted. To this indictment the plea of *autrefois convict* was interposed, which, upon demurrer, was adjudged insufficient. The question of the sufficiency of this plea is the principal point in dispute, and will first occupy our attention.

The plea, which by the demurrer stands admitted, shows that before the indictment was found, Thompson had been arrested and put upon trial before the police judge of the city of Omaha, upon complaint duly made, for stealing the identical property described in the indictment. In this complaint the value of the property stolen was fixed at thirty dollars, being five dollars less than was necessary to constitute grand larceny.

The case having been tried to a jury, they returned a verdict of "guilty in manner and form as charged in the complaint," and assessed "the value of the property stolen at thirty-five dollars," an amount which showed the offense to be grand larceny, of which the police

judge had no jurisdiction to punish, but simply as an examining magistrate, to hold the defendant for trial in the district court.

Upon this verdict no judgment was rendered by the police judge, but he required the accused to give security for his appearance before the district court, which, being unable to do, he was committed to jail to await the action of the grand jury. Whether this order requiring bail to be given was based upon the verdict of the jury and the original complaint, or upon a new complaint, charging grand larceny, does not appear. The orderly and proper course would have been to make a new complaint, covering the case as made by the proofs when it was shown that the offense was, in fact, grand larceny. But, so far as the action of the district court is concerned, it makes no sort of difference whether the course pursued by the police judge was legal and regular, or otherwise; for if the value of the property reached thirty-five dollars, the offense was a felony of which he had no jurisdiction to adjudge the penalty, but of which the district court, through its grand jury, was required to take cognizance.

Section sixty-six of the act for the incorporation of cities of the first class fixes, in general terms, the criminal jurisdiction of the police judge, which is "to hear and determine all offenses against the ordinances of the city, and of *misdemeanors* under the laws of the state, arising within the limits of the city, when the fine which may be imposed does not exceed one hundred dollars, or the imprisonment three months; and he shall also have jurisdiction for the examination of offenders against the laws of the state for offenses arising within the city limits."

It is clear from this provision of the statute that, in a case of *felony*, no jurisdiction is given to the police judge to determine the question of guilt, and should he

assume to do so his judgment would be simply void; but by the last clause of the section he is given authority to inquire as to the probability of the accused being guilty, and whether he ought to be held for final trial in the district court, and, when the circumstances warrant it, to take the requisite steps to secure his personal attendance for that purpose. It should be borne in mind that it is an indispensable requisite to a plea of *former conviction*, that the court whose record is relied upon to sustain it had jurisdiction of the alleged offense. When this is wanting, so that no valid judgment could have been rendered on the verdict, it is no bar to a second prosecution. 3 Greenlf. on Evidence, 37. 2 Broom & Hadley Com., Am. Ed., 601. *Commonwealth v. Peters*, 12 Met., 387. *State v. Odell*, 4 Blackf., 156. It follows, therefore, that the demurrer in this case was properly sustained.

II. The objection that the verdict is not supported by the evidence is not well taken. The testimony clearly establishes the defendant's guilt. It shows that the two hogs which were the subject of the alleged larceny were both killed and taken from their pen on the same night, and were traced early the next morning to the prisoner's possession, where the entrails, one of the heads, and portions of the meat were found secreted in the ground under his house. The head was fully identified as belonging to one of the stolen hogs. Indeed, the prisoner admitted, when on the witness stand, that he took one of the hogs, but denied taking more than one. The presumption arising from this possession of one of the hogs is that he stole both of them, as the testimony showed that they must have been taken at about the same time. It is a familiar rule of evidence in trials for the larceny of goods, that the finding of a portion of them in the exclusive possession of the prisoner very recently

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after the theft was committed, is presumptive evidence that he stole the whole, and may be sufficient to warrant a conviction accordingly. 1 Phillips on Evidence, 4 Am. Ed., 634.

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

JUDGMENT AFFIRMED.

IN THE MATTER OF THE APPLICATION OF JOHN H.
SCHMITKER FOR A WRIT OF HABEAS CORPUS.

Liquor Selling: LICENSE: CITIES OF SECOND CLASS. A party who takes out a license to sell liquors in a city of the second class, under the authority of section 586, chap. 58, Gen. Stat., 855, is not required to take out a second license under an ordinance of the city, in order to legally conduct his business during the time and at the place mentioned in the first license.

APPLICATION for a writ of *habeas corpus*. The sections of the statute cited and construed by the court, are as follows:

“To levy and collect license tax on auctioneers, contractors, * * * , *dram shops, saloons, liquor sellers,*
* * * , and regulate the same by ordinance.” Subd. IV, Sec. 31, Gen. Stat., 144.

This provision was adopted March 1, 1871. At that time the following section of the criminal code was in force. Sec. 350, Chap. 29. Revised Statutes, 1866. (Same section, 586, Chap. 53, Gen. Statutes, 855.)

“All the powers and duties in this chapter devolving upon the county commissioners shall belong to and be exercised exclusively by the proper authorities of any or all incorporated towns and cities of this state, within the incorporated limits thereof, and the authorities of such towns and cities are hereby empowered to make all

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needful rules, and pass all necessary ordinances, decrees, or orders to carry out the intent of this chapter. They may determine what municipal officer shall receive the petition, file the bond, and receipt, and issue the license as in section three hundred and thirty-six required: *Provided, however,* That such incorporated cities and towns may require such additional sum to be paid for license under this chapter as to them may seem best, not to exceed one thousand dollars, which sum, together with the sum herein required to be paid to the county treasurer, may be paid to the treasurer of the town or city, who shall account for the same, and his receipt therefor shall be equivalent to the receipt of the treasurer of the county, for all the purposes named in section three hundred and thirty-six."

W. H. Morris, for Schmitker.

M. B. C. True (with whom was *W. J. Lamb*), for the city of Crete.

LAKE, Ch. J.

John H. Schmitker was arrested and imprisoned for an alleged violation of an ordinance of the city of Crete, regulating the keeping of saloons and the sale of intoxicating liquors. Crete is a city of the second class, and entitled to exercise all the powers given by the act providing for the incorporation of such cities.

It appears that Schmitker, on the fourteenth day of May, 1875, applied for and obtained a license in due form from the proper officer of said city, authorizing him to vend malt, spirituous, and vinous liquors in his building situated on lots seven and eight, block one hundred and forty-two, for one year, ending May 1st, 1876. The alleged violation of the ordinance of said city consisted of a sale of one glass of malt liquor at that place on the thirtieth of June, 1875.

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The license which he obtained was issued under an ordinance passed in pursuance of the authority of section five hundred and eighty-six, chapter fifty-eight, General Statutes, which provides that: "All the powers and duties devolving upon county commissioners," under the act regulating the license and sale of liquors "shall belong to and be exercised by the proper authorities of any and all incorporated towns and cities in this state within the incorporated limits thereof," etc. Attached to this license was a condition in these words. "Provided that nothing contained in this license shall authorize said J. H. Schmitker to sell or give away any malt, spiritous, or vinous liquors, without first having complied with the provisions of ordinance number forty, entitled "An ordinance defining saloons and fixing rate of tax thereon," approved April 21st, 1875.

Under this ordinance the authorities of Crete, in addition to the sum of twenty-five dollars, the amount charged and collected for the license already issued, sought to require of Schmitker the payment of the additional sum of two hundred and fifty dollars, and the taking out of a second license as a condition upon which he could legally engage in the sale of intoxicating liquors. Had they the authority to do this? We think not. There was, certainly, no authority of law for requiring a second license to be taken out as a condition upon which this traffic could be carried on, and the proviso attached to the license issued to Schmitker was merely void of effect, and he was fully justified in disregarding it.

It is contended by counsel for the respondent that the fourth subdivision of section thirty-one of the act to incorporate cities of the second class, passed March 1st, 1871, invests the authorities of the city with power to issue a second license, and demand this additional sum. But we cannot accept this construction of that statute when

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considered with reference to the duties enjoined upon cities by the section of the general license law before referred to. There is no real conflict between these two provisions, and they should both be considered in determining the extent of the authority conferred by the legislature upon the city.

We think it is clear that the legislature intended to intrust the legalization of the liquor traffic in cities and incorporated towns to the proper authorities thereof under the restrictions and limitations found in the general license law. And it seems equally manifest that these authorities, having once determined the sum to be paid, received the money and issued the license to carry on the business at a particular place within the city, they cannot exact an additional amount, and compel him to take out a second license covering the same time and place. At all events such is our decision.

It is unnecessary to determine to what particular fund these license moneys belong when collected, as that question is not involved in the case. All that we decide is that Schmitker was not required, under the law, to take out a second license in order to legally conduct his business during the time and at the place mentioned in the one he had already received.

For these reasons it is ordered that he be at once discharged from his said imprisonment.

JUDGMENT ACCORDINGLY.

WILLIAM A. BROWN, PLAINTIFF IN ERROR V. THE COMMISSIONERS OF OTOE COUNTY, DEFENDANTS IN ERROR.

- 1. County Commissioners: JURISDICTION OF.** The board of county commissioners is invested by statute with exclusive original jurisdiction in the examination and allowance of accounts against a county.

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2. ———: ———. The legislature having provided that an appeal may be taken to the district court from the decision of the commissioners in any matter within their jurisdiction, by any person aggrieved, this remedy must be followed or the decision of the board is final and conclusive.
3. ———: ———. As to accounts against a county, the jurisdiction of the district court is appellate only, and an original action on such demands cannot be maintained.
4. **Fees for Publishing Delinquent Tax List.** The publisher of the delinquent tax list for a county has no right to withhold from the treasurer the proof of publication, which the statute requires him to deliver to that officer, because of the non-payment of his fees, and if he do so it is good ground for a refusal of the county commissioners to allow his account for publishing the list.

ERROR to the district court of Otoe county.

It was an action brought by William A. Brown, to recover the sum of four thousand five hundred and thirty dollars, and interest from September 7th, 1874, for printing and publishing the "delinquent tax list" of said county, as required by the provisions of an act of the legislature of Nebraska, entitled "An act to provide relief for delinquent tax-payers," approved February 27, 1873. Gen. Stat., 940.

Among other defenses (relative to the manner of the execution of the work), the defendant alleged that the plaintiff in error had presented his account for the printing to the county board; that such board had passed upon, disallowed, and rejected the same; and that by such action Brown's course was limited by statute to an appeal from the decision of the board; and that the district court had no jurisdiction of an original action brought for such printing.

Upon trial before POUND, J. and a jury, the plaintiff obtained a verdict for \$935.50, whereupon the plaintiff filed motion for new trial, and the defendant for judgment *non obstante veredicto*, each of which was over-

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ruled by the court; both parties excepted and filed cross-petitions in error in this court.

S. H. Calhoun and *C. W. Seymour*, for plaintiff in error.

I. When a claim is presented to county commissioners and disallowed it may be taken to the district court by appeal or by commencing an original action. *Coms. of Leavenworth Co. v. Brewer*, 9 Kansas, 407.

II. In *Wapello Co. v. Suinaman*, 1 G. Greene (Ia.), 413, under a statute similar to ours the court say: "If a creditor is dissatisfied with the allowance made to him by the board of commissioners, he has his election either to appeal or to institute an action against the board."

III. Whenever the board of commissioners neglect to pay their liabilities, redress may be sought against them in the same way that it may against any other body corporate which is authorized by law to sue and be sued. *State v. Davis Co.*, 2 G. Greene (Ia.), 469. *Board of Com'rs. of Bartholomew Co. v. Ford*, 27 Ind., 17.

IV. Decisions of board are conclusive unless appealed from or an independent action against the county is brought. *Board of Com'rs. of Warren Co. v. Gregory*, 42 Ind., 32.

V. Assumpsit is proper remedy after rejection of claims by supervisors. *Price v. Sacramento Co.*, 6 Cal., 254.

E. F. Warren, for defendant in error.

An action cannot be maintained against the county. *Huff v. Knapp*, 5 N. Y., 65. *Brady v. Supervisors*, 10 N. Y., 665. *Commissioners v. Ranney*, 13 Ohio State,

388. *Shephard v. Commissioners*, 8 Ohio State, 354. *Snelson v. State*, 16 Ind., 29. *Gaston v. Commissioners*, 3 Ind., 497. *Graham v. State*, 25 Ind., 334-5. *State v. Buckels*, 39 Ind., 272-4. *Eldorado Co. v. Elstner*, 18 Cal., 144. *Arthur v. Adams*, 49 Miss., 404. *Carroll v. Board*, 28 Miss., 38. *County v. Corby*, 3 S. & M., 529. *Board v. Grant*, 9 S. & M., 77, 90. *Blackmore v. County*, 51 Penn. State, 160. *Glotfelter v. State*, 74 Penn. State, 74-83. *Martin v. Supervisors*, 29 N. Y., 645. *Supervisors v. Briggs*, 2 Denio, 26.

The principle of law is, that where a remedy is given by statute, it is exclusive, and must be followed. If the statute had provided *no* remedy, a suit could not be maintained, unless possibly under the common law, and it should be alleged and proved that the action of the board was *willful*. No such allegation is made in the petition, and so there is no such right of action shown. *Bartlett v. Crozier*, 17 Johns., 458.

LAKE, CH. J.

I. We do not consider it necessary to notice but a single one of the numerous questions presented in this record. The point made by counsel for the defendant in error, under the *third* head of his brief, we regard as radical, and practically decisive of the rights of the parties. Under this head it is contended that Brown having failed to appeal from the decision of the board of county commissioners upon his claim, that decision was final and conclusive of the rights of all concerned. I have examined all the authorities cited by counsel, both for and against this proposition, and am led to the conclusion, against a preconceived impression, that the point is well made. It is conceded on all hands that this account was one proper to be submitted to the board of county commissioners for their action. It was a demand which the board, under the law, was required to pass

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upon, and to determine whether it should be allowed and paid or not. *Whitewell v. Willard*, 1 Met., 216. *Stringham v. Board of Commissioners*, 24 Wis., 594. The statute conferring this authority upon the board provides that: "The board of county commissioners, at any meeting, shall have power * * * * to examine and settle all accounts of the receipts and expenditures of the county, and allow all accounts chargeable against the county, and when so settled county warrants may be issued therefor as provided by law."

In a very carefully considered case under a statute quite similar to this one, and which gave to the board of county commissioners power "to allow all accounts chargeable against such county not otherwise provided for," the supreme court of Indiana said: "We have, after much reflection and upon due consideration, reached the conclusion that the board of commissioners, in acting upon claims against the county *act in a judicial capacity*, and that their decisions are conclusive and binding alike upon the county and the claimant, unless appealed from or an independent action is brought against the county when the claim is disallowed." *Board of Commissioners of Warren County v. Gregory*, 42 Ind., 32. The only substantial difference between the Indiana statute and our own is, that while ours only provides for a review of the decision of the board by appeal, that of Indiana expressly declares: "That if a claim be disallowed by the board the claimant may either appeal from the decision, or, at his option, bring an action against the county." *Board of Commissioners of Bartholomew County v. Ford*, 27 Ind., 17.

And in New York, under a statute which gave to the board of supervisors power "to examine, settle, and allow all accounts chargeable to such county, and to direct the raising of such sums as may be necessary to defray the same," and no appeal from such decision being

provided for, it was held to follow, necessarily, that the decision of the board in respect thereof was final and conclusive. *Martin v. The Board of Supervisors of Green County*, 29 N. Y., 645. In such case the board has exclusive jurisdiction, and no action can be maintained for a county charge. *Brady v. The Supervisors of New York*, 2 Sand., 449. Same case affirmed in 10 N. Y., 260. Also *Gaston v. Commissioners*, 3 Ind., 497. *State v. Buckels*, 39 Ind., 272.

By the light of these decisions it seems very clear that, under a statute like ours, which confers upon county commissioners full and exclusive original authority "to examine and settle all accounts of the receipts and expenditures of the county, and allow all accounts chargeable against the county," their decision, whether in favor of or against the allowance of a claim within their jurisdiction, but for the right of appeal which is given, would be conclusive upon both the county and the claimant.

Under this construction of the statute, the holder of an account against a county is not compelled to accept the decision of the board as to the validity of his demand, but may obtain a review by the proper district court upon pursuing the steps which the statute directs. Section thirty-four, chapter thirteen, General Statutes, provides that: "Any person who shall be aggrieved by any decision of the board of commissioners 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 one of the commissioners within twenty days after making such decision, and executing a bond to such county with sufficient security to be approved by the clerk of the county, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant."

The legislature having provided this simple and ade-

quate mode by which the decisions of the board, otherwise final, may be reviewed, it necessarily precludes the idea that a claimant may totally disregard its action when unsatisfactory, and commence an original suit in the district court, or, if the amount claimed be within his jurisdiction, before a justice of the peace, and thus involve the county in expensive litigation, with no security whatever for the payment of the costs, in case the judgment of the court is no more favorable to the plaintiff than that given by the board.

The evident policy of our law is to discourage litigation in the courts in respect to all ordinary claims or accounts against counties, and to protect these agencies of the government against the expense and annoyance that would necessarily result if original actions were permitted to be brought upon them. But this policy would be very effectually thwarted if the statute in question were to receive the construction contended for by the plaintiff in error.

It is true that the supreme court of Kansas, in the case of *Commissioners of Leavenworth v. Brewer*, 9 Kan., 307, under a statute like ours, reached a different conclusion from that to which we have arrived. But the case is not satisfactory. In the opinion of Valentine, J., it is said: "It is true that the county commissioners in some cases act in a kind of *quasi* judicial character, and when they do so act their determinations are final unless appealed from." But the learned judge omits to mention any particular cases in which their decision would be regarded as partaking of that character, and in which an appeal would be necessary to avoid their determination as to the liability of the county.

Now we have no doubt whatever that the decision of the commissioners upon claims of this sort is a judicial act, and this is the view taken by nearly every court that has passed upon the question. Surely if their determi-

nation of such questions be not judicial, it would seem difficult to conceive of any that would partake of that character. As additional authorities on this point, we refer to *County of Yalabusha v. Carby*, 3 Smedes & Marsh., 529. *Ross v. Lane*, Id., 695. *The Board of Police of Attala County v. Grant*, 9 S. & M., 77. *Cuthbert v. Lewis*, 6 Ala., 262.

As supporting the doctrine of this Kansas case the court cited *Price v. Sacramento Co.*, 6 Cal., 255, in which it was held that an original action could be brought against a county on an account after its disallowance by the county commissioners. But this case, while it undoubtedly announces the true rule under the statute of California, is hardly applicable to that of Kansas, or of our own state. It was based upon this provision: "No person shall sue a county in any case, or for any demand, unless he or she shall present his or her claim or demand to the board of supervisors, and if they fail or refuse to allow the same, or some part thereof, the party feeling aggrieved may sue the county." And the refusal of the California court to follow *Brady v. Supervisors of New York*, above cited, was placed distinctly upon the difference between the statutes of the two states.

Considering the similarity of the statute to that under which the case of *Brady v. Supervisors of New York* arose, and also the distinction between these statutes and that of California, the case of *Price v. Sacramento Co.* should, we think, rather be regarded as supporting the conclusion we have reached—that under our law an original action cannot be maintained against a county upon an account which is required to be submitted to the commissioners for examination and allowance, and that in these cases the jurisdiction of the district court is not original, but appellate merely.

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II. But there is another reason urged on behalf of the county equally conclusive against the validity of Brown's demand, and which, in our opinion, would have been equally fatal, even if the case had been properly taken to the district court by appeal. The statute, section seven, of the act of February 27, 1873, provides: "The publisher of the paper printing such advertisement shall deliver to the county treasurer four copies of the paper containing said list, to each of which he shall attach his certificate under oath of the due publication of the delinquent list, as provided by law." This it appears Brown refused to do. He not only refused to attach the oath which the statute provides, but also refused to deliver the copies of the paper in which the list was published, except upon the condition of being first paid his charges therefor. Now it is very clear that Brown had no right to impose this condition upon the treasurer; having undertaken to do the work it was his duty to conform his action to the forms of the law, and submit his claim for examination and allowance to the commissioners, who are made the auditing board for such demands. It is true that in dealing with a private person the publisher of a legal notice might have taken the course here pursued without prejudice to his claim to compensation, and this fact may have led Brown to suppose that he could require pre payment at the hands of the county authorities. But whatever may have induced him to take this course, it effectually deprived the county of the benefit of the publication of the list, and, at the same time, furnished a valid reason for the commissioners to disallow his claim for payment.

For these reasons the judgment of the district court is reversed and the action dismissed at the costs of the plaintiff in error, Brown.

REVERSED.

HOWARD T. MARSHALL, PLAINTIFF IN ERROR, v. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law:** AUTREFOIS CONVICT. The rule of constitutional law cannot span country and country in such a way as to cause jeopardy in one country to free the party from trial in another, but as "a sort of merciful dispensation" a court may consider favorably the fact, if it exists, that the accused had been prosecuted and punished for the same offense in a foreign country, when it appears that he was convicted and his punishment was full and complete.
2. ——— : ———. If the accused is charged in one count, in an indictment, with an offense for which he was convicted in a foreign country, and also in a second count is charged with a different and distinct offense, the plea of *autrefois convict* is bad.
3. ——— : ———. When a defendant pleads not guilty, he cannot in connection with such plea, by other pleas raise questions in respect to a former conviction.

ERROR from the district court for Hall county. Tried below before Post, J. The facts appear in the opinion.

Edward Bates, for plaintiff in error.

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

The demurrer admits the facts, but denies their sufficiency in law, thus affirming, in the language of this court—CROUNSE, J., in *The People v. Loughbridge*, 1 Neb, 13—"conviction in one state is no bar to a conviction in another" for the same crime; for, in this instance, the courts of the state of Illinois had no jurisdiction to try an offense committed against and in the state of Nebraska. Wharton on Conflict of Law, § 934, and cases therein cited. 1 Bish. Crim. Law, § 984 (latter clause). *Com. v. Peters*, 12 Met., 387, 397.

And if both courts had jurisdiction the plea is still bad. Bish. Crim. Law, vol. 1, § 179. *Moore, Exr. v. State of Ill.*, 14 How, 13, 20.

Where the offense is a crime against two sovereigns, punishment by one state is not strictly a bar to punishment by the other. 1 Bish. Crim. Law, § 984.

Many of the cases hold, that although the punishment may not be strictly a bar, the court will take it into consideration and suspend sentence, etc. 1 Bish. Crim. Law, § 986.

But in this instance the record of the Illinois court shows that Marshall pleaded guilty, and that sentence was suspended.

GANTT, J.

The plaintiff in error was indicted for the offense of forgery and counterfeiting a certain school district bond for the payment of money, and in a second count for having in his possession, for the purpose of uttering and publishing as true and genuine, a certain false, forged, and counterfeited school district bond for the payment of money; and to this indictment he pleaded a former conviction, in a prosecution against him, by the name of H. T. Marshall, in the criminal court of Cook county, and state of Illinois. And in this plea he sets up, that to the former indictment he pleaded guilty, and on the fifth day of October, 1876, he was discharged by said criminal court of Cook county, and that the said prosecution against him was stricken from the docket of said court. To this plea of *autrefois convict* the state interposed a general demurrer, which was sustained by the court below. It is now complained that the court below erred in sustaining the demurrer, and also in not submitting the issue raised by the plea to a trial by a jury. In regard to the second ground of complaint, it is only necessary to remark, that the demurrer admitted the truth of the facts pleaded, and that under the ruling of the court they were not considered sufficient to constitute a bar or defense to this prosecution. Hence there was nothing

to submit to the consideration of a jury. The question raised by the first ground of complaint is: Do the facts stated in the plea constitute a bar or defense to the prosecution of the plaintiff in this state? The plea alleges the former conviction was had in the state of Illinois. This is a foreign state, and the principle seems well settled that the laws of a country do not extend beyond its territorial limits; and therefore it is said to be "an obvious principle that the maxim and rule of constitutional law cannot span country and country in such a way as to cause a jeopardy in one country to free the party from trial in another. On the one hand, it cannot prevent a foreign government from prosecuting for crime a person who has been tried for the same offense by our courts, and on the other hand, it cannot exempt from prosecution here, one who has been tried abroad."

1 Bish. Crim. Law, § 983. And if a man offends against two governmental powers, which equally bind him, it is not easy to see why "his paying the penalty of the law to one power should relieve him from liability to pay the penalty of the law to the other power. Still, though the strict rule of the law would be so, yet as a sort of merciful dispensation the courts would undoubtedly consider favorably to the defendant the fact, if it existed, that he had been punished for the same act in a foreign country." Ibid., § 986. But it seems that in order to make such punishment for the act in a foreign country a satisfaction and a bar to a future trial, upon the ground above stated, it is necessary that "it should be complete and should have been executed to its full extent." Whart. Conf. Laws, § 934. Now, according to these general principles of constitutional law, it seems quite clear the comity between nations and independent states cannot avail the plaintiff anything, because his plea of *autrefois convict* shows clearly that the former prosecution in a foreign state was dismissed, and he was

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discharged without any judgment having been pronounced against him, and without having suffered any punishment at all. Therefore, we think the demurrer was properly sustained. But again, as stated in this plea, that in the former prosecution the plaintiff was charged in the indictment only with forging, counterfeiting, and uttering a certain school district bond, but in the second count in the indictment, in the case at bar, he is charged with feloniously having in his possession, for the purpose of uttering and publishing the same as true and genuine, a certain school district bond for the payment of money, well knowing the same was forged and counterfeited. This is a distinct offense from that charged in the former prosecution in Cook county, Ill., and for this reason, also, we think the plea was bad, and the demurrer was properly sustained.

After the ruling of the court upon the demurrer, the plaintiff pleaded not guilty, and also two other pleas, involving the same questions raised and passed upon by the court, upon the demurrer to the plea of former conviction. It is now complained that the court erred in striking out these two latter pleas upon motion of the state. We however think the motion was properly sustained, for the reason that the subject matter attempted to be put in issue by them, was passed upon by the court, and was *res adjudicata*; and for the further reason that, after the party has pleaded not guilty, he cannot in connection with such plea raise the question of former conviction. The judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

Donovan v. Kloke.

MICHAEL DONOVAN, APPELLEE, v. JOHN KLOKE,
APPELLANT.

1. **Public Lands. TAXATION OF.** Lands purchased from the United States by private entry are subject to taxation as soon as the sale is completed by the payment of the purchase money. But, until this time, the land is not so liable, and every step taken by way of the assessment or levy of taxes is void.
2. ———: **PURCHASE OF.** The plaintiff, in 1869, purchased at private entry the south-east quarter of a section of public lands, and received the usual certificate. In 1873 this entry was cancelled and he was permitted to enter in lieu thereof the north-east quarter of the same section. But instead of issuing to him a new certificate, the old one, numbered 2,558, was so changed by writing across its face as to make it apply to the latter tract, but without changing its date. *Held*, that by this transaction as to the north-east quarter, the plaintiff became the owner in 1873, and not in 1869, the date of the certificate.
3. ———: ——— **CERTIFICATE OF PURCHASE. CHANGE OF.** Where a certificate of purchase is so changed, it will be given the same effect as if it were actually issued at the date of such substitution.

APPEAL from the district court for Cuming county. Tried below before SAVAGE, J. The opinion states the facts in the case.

Uriah Bruner, for appellant.

The admission of the testimony to show the error in the entry is incompetent and irrelevant.

Where contracts have an ascertained and fixed meaning, the acts of the parties under which the contracts are made are inadmissible. *Giles v. Comstock*, 4 N. Y., 270. 1 Best on Ev., 223, and citations.

Recitals in a deed are binding upon all claiming under the deed. *Douglas v. Scott*, 5 Ohio, 194. *Denn v. Brewer*, 1 N. J. L. (Coxe), 172. *Inskeep v. Shields*, 4 Harr. (Del.), 345. *Byrne v. Morehouse*, 22 Ill., 603.

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McLesky v. Leadbetter, 1 Ga., 551. *Stewart v. Butler*, 2 Serg. & R., 381. *Jackson v. Parkhurst*, 9 Wend., 209.

A party shall not claim an interest under an instrument without giving full effect to that instrument as far as he can. Williard's Eq. Jur., 545.

An order of a court authorizing a sale of real estate made subsequent to the sale, cannot be given in evidence to sustain such sale. *Lessee of Ludlow's Heirs v. Park*, 4 Ohio, 5.

Parol evidence, or other extrinsic evidence, is not admissible to vary, contradict, or explain the contents of a contract, except for ambiguity or uncertainty apparent on the face thereof. 1 Greenl. Ev., 275-6-7, 282. Parol evidence is admissible to explain a *latent* ambiguity in the deed. 1 Greenl. Ev., 284-6, 297 to 300. Best on Ev., 226.

The land is taxable. *Franklin v. Kelly*, 4 Neb., 90. *Carroll v. Safford*, 2 How., 441.

Crawford & McLaughlin, for appellee.

The plaintiff's entry of the south-east quarter was cancelled, and the money ordered to be refunded to him, or, if he preferred, he could have the north-east quarter; and he decided to take the latter, and the local officers, instead of giving plaintiff a new certificate, amended the old one, and now the attorney for defendant, who was then receiver of the land office, and who amended the certificate, when it was his duty to issue a new one and cancel the old, insists that plaintiff became the owner of the north-east quarter in 1869, instead of 1873; that by his act of amending said certificate he legalized taxes that were illegal and void.

We need cite no authorities to convince this court that such a proposition is untenable; nor do we deem it necessary to notice the authorities cited by defendant,

further than to say that they have no more application to this case than any other case before this court.

LAKE, CH. J.

This is an appeal from a decree of the district court for Cuming county, perpetually enjoining the defendant and his successors in office from executing or delivering a tax deed for the north-east quarter of section one, township twenty-three, range seven east, in pursuance of a tax sale of the land, for taxes levied for the year 1872, and the main question presented for our decision is, whether this land was liable to taxation for that year.

Donovan purchased this land directly from the United States, by private entry, and it was of course subject to taxation as soon as the sale was completed by the payment of the purchase price. *Bellinger v. White*, 5 Neb., 399.

But until this time the land was not so liable, and every step taken by the local county officers, by way of the assessment of the lands for taxation or the levy of taxes, was absolutely void. The ownership of the land, therefore, at the time of the levy of the taxes complained of, is the important fact to be settled.

The testimony bearing upon the question of ownership is brief and not at all conflicting. It appears from the evidence that Donovan, on the third day of April, 1869, at the local land office of the United States, at Omaha, entered and paid for the south-east quarter of the above mentioned section, and received the usual certificate therefor. By mistake, however, of the register, this purchase was entered upon the tract book as being the north-east quarter of the section, but the records of the receiver and the report of the sale transmitted to the general office at Washington, conformed to the certificate, and were correct.

By another mistake of the local officers Donovan's en-

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try conflicted with a prior one made June 3, 1868, on the same land, by one Gustave Romsnoski, and for this reason was duly cancelled by the commissioner of the general land office on the fourteenth of March 1873, as appears by his letter of that date. At this time, and by this very letter, Donovan was given the option either to take the north-east quarter, which was then subject to private entry, or, if he preferred it, a return of the money paid for the land he had actually purchased. He decided to take the land, and the patent under which he holds the legal title to the land in controversy was issued to him in pursuance of this arrangement.

By the terms of the option given to Donovan he was required to make his election as to which he would take within thirty days, and his ownership would date from the time that he did so. It is clear, therefore, that up to this time this land was the property of the United States, and any steps taken to encumber it, by the levy of taxes or sale to enforce their payment, would be absolutely void as against both the government and its grantee. We entertain no doubt whatever that the alleged levy of taxes for the year 1872, and the sale thereunder, were not only in violation of the first section of our revenue act, which declares that the property of the United States "shall be exempt from taxation," but also of the compact entered into between the state and the general government at the time of our admission into the Union, "that no taxes shall be imposed by said state on lands or property therein belonging to, or which may hereafter be purchased by, the United States."

It was urged with much earnestness by defendant's counsel that, inasmuch as the patent for this land recites the original certificate, No. 2,558, issued to Donovan at the time of his entry in April, 1869, he is estopped from denying that his ownership dates back to that time. Ordinarily this would be the proper construction to apply

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to such a recital, but it is not applicable to a case where, as here, it is shown by the certificate and other satisfactory evidence, that a mistake had occurred, resulting in the cancellation and loss of the first purchase, and that by a mutual arrangement between the government and the purchaser, as late as August 12, 1873, the certificate was so changed as to make it apply to other land taken in lieu of that first entered. The change noted on certificate No. 2,558 is in these words: "Amended to read north-east quarter section one, township twenty-three, range seven east, August 12, 1873," and signed by the receiver of the land office. This change was made in pursuance of the arrangement before mentioned between the commissioner and Donovan, by which the land in controversy was substituted for that originally purchased, and the certificate so changed must be given the same effect as if it were actually issued at the date of such substitution.

The holding of the district court, having been in conformity with these views was right, and a decree will be entered in this court making the injunction heretofore granted perpetual.

DECREE ACCORDINGLY.

D. H. HULL, PLAINTIFF IN ERROR, v. P. B. MILLER,
DEFENDANT IN ERROR.

- 1. Practice:** MOTION FOR NEW TRIAL. In an action at law, in order to obtain a review of the case in the supreme court, the party aggrieved must have presented to the court below, by motion for a new trial, his objections to the judgment or order of the court, and have obtained a ruling thereon.

THIS was a motion for a rehearing of the case reported in 4 Neb., 503.

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George P. Uhl, for the motion.

MAXWELL, J.

This is an action at law. The journal entry shows that "D. H. Hull, by his attorney, excepts to the rendering of judgment against section thirty-six, town two, range fifteen." An undertaking was then filed and the cause brought into this court by petition in error. No motion was made in the court below for a new trial, nor any attempt made in that court, so far as the record discloses, to obtain a rehearing or modification of the judgment. The case of *Gibson v. Arnold*, 5 Neb., 187, arose under the same statute as the case at bar, and it was held that the plaintiff having failed to take the necessary steps in the court below by filing a motion to obtain a vacation or modification of the judgment, could not be heard in this court. The leading case in this state on that question, *The Midland Pacific Railway v. McCartney*, 1 Neb., 398, has been followed, and the doctrine laid down therein adhered to, whenever the question has been raised. As no motion for a new trial was made in the court below, the motion for a rehearing must be denied.

MOTION DENIED.

STATE OF NEBRASKA, EX REL. FRANCIS SIMS, v. THE
COUNTY COMMISSIONERS OF OTOE COUNTY.

1. **Highway:** HOW CREATED. A highway may be created by legislative authority, exercised through a municipal corporation authorized to open streets, or through the general road law, or by dedication.

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2. ———: DEDICATION. A dedication is defined to be the act of devoting or giving property for some proper object in such manner as to conclude the owner. It may be made by parol, and may be presumed from lapse of time.
3. ———: PROCEEDINGS. When the inhabitants of a county desire the opening of a new road, or the discontinuance or change of a road heretofore established, at least ten land holders, residents of the county, must give notice, as provided by law, that *they* will, at a specified time, present a petition asking for the opening of a new road, or the discontinuance or change of a road heretofore established.
4. ———: ———. Proof of posting the notices should be made by affidavit of the party who posted the same, stating *when, where,* and by whom the notices were posted.
5. ———: JURISDICTION OF COUNTY COMMISSIONERS. The commissioners have no jurisdiction to locate a county road unless the petition mentioned above has been presented to them, and after due notice thereof has been given. *Robinson v. Mathwick*, 5 Neb., 255, adhered to.

THIS was an original application for a mandamus against the county commissioners of Otoe county, to compel them to draw their warrant upon the treasurer of the county for the sum of \$512.36, alleged to be due the relator on account of an award made in his behalf by appraisers appointed to view and assess damages accruing to the relator by reason of the laying out and opening of a public road through his premises in Otoe county.

The application showed substantially that in June, 1875, a petition in due form was presented to the defendant board, asking them to open and lay out a highway through certain lands of plaintiff, in section thirty, township seven, range fifteen, in Otoe county, included in road district number four of Otoe precinct, in said county; that thereupon the plaintiff remonstrated against the location of a road as proposed, and claimed damages to the amount of one thousand dollars in case the highway as proposed should be laid out and opened;

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that a commissioner was appointed to examine and report thereon; that at the January, 1876, session of the defendant board, John McCarthy, Conrad Mullis, and D. M. Anderson, were appointed appraisers to view the premises and assess the damages accruing to the said Sims, by reason of the opening of such highway; that said appraisers, under oath, examined, appraised, and awarded to Sims, as damages, the sum of eight hundred and twelve dollars and thirty-six cents, which said award was duly reported in writing to the said defendant board; that at the November, 1876, session, said board duly ordered a highway, or public road, opened, laid out, and recorded as prayed for, and that ever since that date the same was used and occupied as a highway by the public; that the defendant board refuse to pay, or order paid, the said sum so awarded, or any other sum, although the plaintiff has signified his acceptance of the award.

An alternative writ was allowed, and the defendant returned the same with the following answer:

“The board of county commissioners of Otoe county, Nebraska, for answer to alternative writ hereto attached, issued in this cause, say: That the said Francis Sims, plaintiff, ought not to have the peremptory writ, because the defendant admits the taking the matter of such road into consideration, and the appointment of John McCarthy, Conrad Mullis, and D. M. Anderson to assess the damages, but denies that such appraisers were sworn and * * avers that such appraisers were partial and made two separate reports at the same time, or rather made a report pretending to assess damages, and also a report recommending that no road be located upon the route upon which they were to assess damages. *

* * This defendant denies that such pretended assessment of damages was duly reported to this defendant, the board of county commissioners of Otoe county,

* * * the report convincing the board that the

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appraisers were interested; that no further proceedings were had in such matter. * * This defendant denies that there was ever any road opened as a highway as set forth in the writ and application therefor. * * * This defendant denies each and every averment in the said alternative writ, except as herein stated."

The cause was referred to S. S. Morehouse to take the testimony, upon whose report the cause was tried at the present term.

E. F. Warren, for the relator.

The right of appeal from an award is given to the claimant only, and no power is anywhere conferred to vacate or set aside an award of duly qualified appraisers, but the statute declares that "their award not exceeding the amount claimed, *shall be paid* to said claimant in full satisfaction for such damages." To permit the board of commissioners to review the action of the appraisers, and set it aside for being too great or too little, would be virtually to make the board themselves the appraisers, a thing not contemplated by statute. If the proceedings of the appraisers in the assessment of damages are irregular, the alleged errors should be brought up for review by writ of *certiorari* to the district court. *Runner v. Keokuk*, 11 Iowa, 543. When an assessment of damages has been made according to law, the commissioners cannot set it aside for any cause, but are bound to pay the money according to the award. *Stafford v. Mayor*, 7 Johns., 542. *Johnson v. Supervisors*, 19 Johns., 273. The assessment of damages is conclusive, under the statute, upon the board of commissioners, who are bound to proceed and levy such damages, and cannot inquire whether they are too high or too low. *People v. Supervisors*, 5 Cow., 292.

T. B. Stevenson, for the respondents.

MAXWELL, J.

A highway may be created by legislative authority, exercised through a municipal corporation authorized by law to open streets, or through the general road law, or by dedication. A dedication is defined to be the act of devoting or giving property for some proper object, in such manner as to conclude the owner. It may be made by parol, and may be presumed from lapse of time.

Section nineteen of the general road law provides that: "Whenever the inhabitants in any county desire the opening of a new road, or the discontinuance or change of any road heretofore established, *they* shall give at least twenty days notice, by posting a notice on the court house door, and at three other public places in the vicinity of the road sought to be located, changed, or discontinued, setting forth the time when they will apply by petition to the board of county commissioners, giving a particular statement of the location, change, or discontinuance sought to be effected."

Section twenty provides that: "Upon the presentation of a petition signed by at least ten land holders, residents of the county, *after notice given as provided in the preceding section*, the board of county commissioners shall proceed to hear the parties interested in the case," etc. In the case at bar the records fail to show *when* or *where* the notices were posted. But it does appear that two of the notices were signed by but one person. The statute requires those who are about to apply to the county commissioners for the opening of a new road, or the discontinuance or change of a road heretofore established, to give notice. This provision of the statute requires the notices to be signed by at least ten land holders and residents, and the same land holders and residents who sign the notices must sign and present

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the petition to the county commissioners. Proof of posting the notices should be made by affidavits of the party posting the same, stating *when*, *where*, and by whom the notices were posted. In *Robinson v. Mathwick*, 5 Neb., 255, this court held that in the location of a county road, the commissioners have no jurisdiction, unless the petition mentioned above be presented after due notice thereof has been given. It is also held that, "it is essential that all the facts necessary under the statute to authorize their action in any given case be affirmatively shown." No notice having been given in the manner provided by law, the county commissioners had no jurisdiction of the case. The writ must therefore be denied.

WRIT DENIED.

ALBERT J. ARNOLD, APPELLANT, v. EUNICE A. BAKER
AND JOSEPH A. BAKER, APPELLEE.

1. **Contract:** FRAUD; PLEADING. A contract procured by fraud will be rescinded at the suit of the party defrauded. But in such action the particular and precise circumstances which constitute the alleged fraud must be set forth in the petition. It is not enough to allege that a party by false and fraudulent representations induced another to enter into a contract, but he must state the facts on which he bases his claim for relief.
2. **Practice:** APPEAL TO SUPREME COURT. Where a demurrer to a petition in a suit in *equity* is sustained in the district court, the cause may be taken by appeal to the supreme court. *Stewart v. Carter*. 4 Neb., 564; distinguished.

THIS was an appeal from Platte county. The cause was heard below before Post, J., on demurrer to the petition, and judgment rendered against the plaintiff. The

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facts necessary to an understanding of the case are stated in the opinion.

S. S. McAllister, for appellant, cited 3 Washburn Real Property, 273. 1 Greenleaf Ev., Sec. 265. 6 Hill, 469. 4 Scam., 452.

Whitmoyer, Gerrard & Post, for appellees.

MAXWELL, J.

This is a suit in equity for the rescission of a contract on the ground of fraud. The petition alleges that "the defendant falsely and fraudulently stated and represented to the plaintiff that after the plaintiff had left said mining district (on Deadwood creek, Dakota Territory) that he had 'jumped' and taken the claim aforesaid, whereby he was at that time the lawful owner thereof, according to the mining laws of said district, all of which statements and representations were false, fraudulent and untrue, in this, to wit: That the said defendant was not at any time the lawful owner of said claim, or any interest therein according to the mining laws of said mining district."

It also appears from the petition that the plaintiff had previously owned one-fourth of the mining claim in question, and the defendant Baker claiming to be the owner of the entire claim had conveyed to him by quit claim deed three-fourths of such claim. It is not stated in the petition who was in possession of the claim at the time of the execution of the deed.

That a contract procured by fraud will be rescinded at the suit of a party defrauded is well settled. But in such action, the particular and precise circumstances which constitute the alleged fraud must be stated in the petition. It is not enough to allege that a party by false and fraudulent representations induced another to enter into a contract. But he must state the facts on which he bases his claim for relief.

The allegation in the petition that the "defendant was not at any time the *lawful* owner of said claim, or any interest therein, according to the mining laws of said mining district," is not such a statement of facts as will authorize this court to rescind the contract. The judgment of the district court therefore must be affirmed.

The action was properly brought into this court by appeal. Where a demurrer to a petition in suit in equity is sustained the case may be appealed to this court. In *Stewart v. Carter*, 4 Neb., 564, the petition contained two causes of action, one legal and one equitable. The cause was dismissed by the district court on the ground of misjoinder of causes of action. In such case it was held that the case should be brought into the this court by petition in error.

JUDGMENT AFFIRMED.

MINER MILTON, PLAINTIFF IN ERROR, v. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: MURDER.** At common law, on a charge of murder, malice is presumed from the fact of killing, unaccompanied with circumstances of extenuation; in such a case it devolves on the accused to disprove malice.
2. ———: ———: **EVIDENCE.** Under our statute to convict of murder in the first degree, the evidence must show that the party accused perpetrated the act purposely; that he did it with intent to kill; and of deliberate and premeditated malice.
3. ———: **MURDER IN SECOND DEGREE: PRESUMPTION.** Where a homicide is proved, the presumption is, that it is murder in the second degree.
4. ———: **MURDER IN FIRST DEGREE: STATUTORY DEFINITION.** The words "deliberate and premeditated malice" in the statutory definition of murder in the first degree, were intended to restrict murder in that degree to cases where deliberation was shown to have taken place before the commission of the crime.

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5. **Practice in Criminal Cases: INSTRUCTIONS TO JURY.** The charge of the court to the jury should be a clear and explicit statement of the law applicable to the facts in the case, and should cover all the questions involved in the issue.

THIS was an indictment for the murder of Henry King in Washington county on the 16th of May, 1876. The trial before SAVAGE, J., and a jury, resulted in the conviction of Milton of murder in the first degree, and sentence that he be executed on the 22d day of September following. He sued out this writ of error. The facts necessary to an understanding of the case appear in the opinion.

Carrigan & Osborn, for plaintiff in error.

To constitute murder in the first degree, the killing must be "purposely and of deliberate and premeditated malice, or in the perpetration of arson," &c. While we are aware that the courts have not permitted a liberal construction of the words deliberate and premeditation, yet all the cases recognize premeditation as an element essential to constitute the crime of murder in the first degree. *Whiteford v. Com.*, 6 Rand, 721. *Commonwealth v. Murray*, 2 Ashmead, 41. *Id. v. William*, 2 Id., 69. *People v. Sullivan*, 3 Seld., 369. *Anthony v. State*, 4 Meigs, 265.

While length of time between the formation of the design and its execution is immaterial, yet the design must be deliberate and premeditated. *Shoemaker v. State*, 12 Ohio, 43. In the statute of Indiana the adjective, deliberate, is omitted from the definition of murder; yet the court, in enumerating the elements necessary to make killing murder in the first degree, says: "There must be something more than an intention to kill;—the purpose must be premeditated." *Fahnestock v. State*, 23 Ind., 231. By premeditation is

meant previous deliberation, thinking and revolving in one's mind beforehand, exercising by previous thought or meditation. *People v. Sanchez*, 24 Cal., 71.

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

MAXWELL, J.

The instructions of the court to the jury, while stating the law correctly so far as they apply, are restricted almost entirely to the definition of murder, and the effect of intoxication.

The only question for this court to consider is whether the evidence sustains the verdict of murder in the *first* degree.

Murder at common law is thus defined: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied." 4 Blacks. Com., 194. When the fact of killing is shown, unaccompanied with circumstances of extenuation, the burden of disproving malice is thus stated: "We may take it for a general rule, that all homicide is malicious, and of course amounts to murder unless when *justified* by the command or provision of the law; excused on account of accident or self preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. * * * And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the court and jury; the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate guilt, for all homicide is pre-

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sumed to be malicious until the contrary appeareth upon evidence." 4 Blacks. Com., 201.

Our statute provides that: "If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another; or if any person, by willful or corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person; every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof, shall suffer death." Gen. Stat., 720. This section is copied from the laws of Ohio.

The supreme court of that state, in a circuit decision, in the case of the *State v. Turner*, Wrights Rep., 30, gave a construction to this section. The court instructed the jury that: "To convict of murder in the first degree you must, in addition to the points I have mentioned, be satisfied: 1. That the prisoner perpetrated the act purposely. 2. That he did it with intent to kill. 3. That he did it of *deliberate and premeditated* malice. The intention to do the injury must have been *deliberated* upon, and the design to do it *formed*, before the act was done, though it is not required that either should have been for any considerable time before. This supposes the party, by reflection, understood what he was about to do, and intended to do it in order to do harm."

In *The State v. Gardiner*, Wright's Rep., 399, the court, in instructing the jury, say: "The *design* or *purpose to kill*, may be deduced from the attending circumstances; the manner of inflicting the wounds; the kind of instrument with which they are inflicted, and its natural tendency to destroy life. It may be deduced also from the declarations of the prisoner made at the time, or before, or after the deed was done; but where reliance is placed on declarations, a jury should receive

them with great caution." See also *The State v. Thompson*, Wright's Rep., 623.

These cases are cited with approval in the case of *Shoemaker v. The State*, 12 Ohio, 54. *Fouts v. The State*, 8 Ohio State, 112. See also *Kaine v. The State*, 8 Ohio State, 306. *Leofner v. The State*, 10 Ohio State, 615.

In *Kaine v. The State*, 8 Ohio State, 311, Sutcliffe, J., quotes the several statutes of that state, defining the crime of murder, from which it appears that the word "*purposely*" was not used in the statutory definition of murder until the year 1815.

In the case of *The State v. Turner*, Wright's Rep., 27, the court say: "Murder in the first degree is the *intentional, unlawful* killing by one reasonable being of another, in the peace of the state, of *deliberate, premeditated* malice. Murder in the second degree is the *intentional, malicious*, and unlawful killing by one reasonable being of another, in the peace of the state, *without deliberate or premeditated* malice." In Ohio and Virginia, it is said, that where a homicide is proved, the presumption is, that it is murder in the second degree. If the prosecutor would make it murder in the first degree, he must establish the characteristic of that crime. Wharton's Criminal Law, Sec. 1111. *The State v. Turner*, Wright's Rep., 28. *Hill's case*, 2 Gratt., 594. And that was the rule adopted by this court in *Prueit v. The State*, 5 Neb., 385.

In *The State v. Turner*, Wright, 28, the court say: "To establish premeditated malice, some affirmative evidence should be given by the prosecution. But the evidence as to this, as well as all other ingredients of crime, or other thing connected with human transactions may be either positive or circumstantial. Whichever is resorted to, however, should be of a nature to convince the understanding of the jury."

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In the case at bar the proof fails to show that the purpose to do the injury had been *deliberated* upon by the prisoner before the perpetration of the act. It is true that one witness testifies that he heard him say in Blair, on the day on which the killing took place, "I am going to thump the old son of a bitch before this sun sets." And another witness testified, that in the month of July previous he had heard him say, "he would lay Mr. King out," whatever that may be. But it is apparent that these statements were not understood by those who heard them as threats to commit murder.

It appears that a lawsuit was pending between Jensen and the deceased, in regard to the land on which they both resided. The case was to have been tried at Blair on the day in question, but for some cause was continued. Christian and Milton appear to have been present as witnesses in the case. It is evident from Jensen's testimony in this case, that some animosity existed between him and the deceased on account of this lawsuit.

The Kings appear to have left Blair on their return home before the prisoner. Jensen, accompanied by Christian, left Blair after the Kings had gone, and overtook the prisoner some two or three miles from Blair, who thereupon got into Jensen's wagon. Jensen appears to have driven rapidly and soon overtook the Kings, who thereupon drove rapidly to one of the houses on the Conchman place, closely followed by Jensen.

Lena Michells, a witness, called on the part of the state, testified as follows:

Q. Which way were they coming? Which wagon was ahead?

A. I don't know; I guess Mr. King's.

Q. How fast did they drive?

A. Awful fast.

Q. How fast was Milton driving?

A. Just as fast as he could.

Q. Who was in Jensen's wagon?

A. There were three men in that wagon, and two in the Kings' wagon.

Q. Which team did you say was ahead?

A. Henry King's.

Q. Where was he driving?

A. To our place.

Q. Where were they driving—could you tell?

A. Yes, to our place.

Q. Just go on and tell us about what they did, and how they came up there—who was ahead?

A. The two wagons came up to the place; Miner Milton's wagon came first. He came up through the wheat, and King's wagon drove up the other side of the road, and came up through the garden, and came up to the place Miner Milton stopped at. He got some wood there and threw it to the Kings' wagon, and the Kings stopped too. Henry King said, "What do you want?" and Miner Milton said, "I'll fix you." Then the Kings got out of their wagon and came to the wood.

Q. State what the Kings did when they got out of their wagon?

A. Miner Milton got out of the wagon and took this long pole (pointing to the pole which had been previously introduced in evidence).

Q. Did the Kings have any clubs?

A. Yes. Henry had a little club, but Miner Milton took it from him and threw it away, and hit Henry with the club. My brother took it away; then he took the beetle (indicating the beetle which had previously been introduced in evidence).

Q. What did Henry have in his hands then?

A. Nothing.

Q. Did Henry King try to strike Miner when he hit him with this beetle?

A. I did not see him; Miner Milton struck him with this club; Henry went down and I run away.

Edward King, brother of the deceased, who had resided with him nearly three years prior to his death, testified on the trial that he knew of no trouble between Milton and his brother.

So far as the testimony in this case discloses, the only deadly weapon which the prisoner had in his hands at the time of the assault was the beetle with which the fatal blow was given, and that was not taken up until after the pole had been taken away from him. Had the testimony shown that he had made threats against the life of the deceased, or that he pursued or assaulted him with the intention of taking his life, it would have been sufficient to have sustained a verdict of murder in the first degree.

In many cases deliberate and premeditated malice may be deduced from the attending circumstances, when they are such as to indicate an intention to commit the crime. Where a person has *actually formed* the purpose maliciously to kill another, and has deliberated and premeditated upon it before committing the offense, the length of time that intervenes *between* the time such purpose is *formed* and its *execution* is not material, as it is the formation of such purpose after deliberation and premeditation, and carrying the same into execution, that constitutes the crime of murder in the first degree. The word "premeditated" means: "To think on, to revolve in the mind beforehand; to contrive and design previously." Webster Dict., 1028. The word deliberate means: "To weigh in the mind; to consider and examine the reasons for and against; to consider maturely; to reflect upon." Id., 349. Malice in criminal law is defined to be: "The doing a wrongful act intentionally without just cause or excuse." 2 Bouv. Law Dict., 91. The words "deliberate and premeditated

malice" in our statutory definition of murder in the first degree, evidently were designed to restrict murder in that degree to cases where at least some degree of deliberation was shown to have taken place before the commission of the crime.

Section one of the Pennsylvania act of April 22, 1794, defining the crime of murder in that state, and from which the statute of Ohio probably was copied, recites by way of preamble, that: "Whereas the several offenses which are included under the general denomination of murder, differ so greatly from each other in the degree of atrociousness, that it is unjust to involve them all in the same punishment" (therefore, etc.) "all murder which shall be perpetrated by means of poison, or by lying in wait, or any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration of, or *attempt to perpetrate* any arson, rape, robbery, or burglary, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree." Wharton's Crim. Law, 930.

The conduct of Jensen in the premises, while it forms no excuse for the prisoner, is wholly inexcusable in pursuing after Henry King to the house on the Conchman place. His statement that he was afraid of Milton, if he refused, is not entitled to much weight under the circumstances, his nephew being with him in the wagon. It is evident, too, that his nephew, if not himself, encouraged the assault. Had he been afraid of Milton, it is not very probable that he would have waited for him at the house until after the fatal blow was given, and then permitted him to accompany him in the wagon.

The charge of the court to the jury should be a clear and explicit statement of the law applicable to the facts in the case, and should cover all the questions involved in the issue. The instructions of the court in this case

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are defective in that regard, and left the jury in doubt as to the law on questions presented by the testimony.

This court will not weigh testimony, and set aside a verdict, simply because we would not have reached the same conclusion as the jury; but where a verdict has been rendered without evidence to sustain it on a material point, or where the evidence is clearly insufficient, it is our duty to set it aside, and grant a new trial. In this case, the testimony fails to show *premeditation* and *deliberation* on the part of the prisoner, and on that account alone the judgment must be set aside. The former trial took place but a few days after the occurrence, and therefore the testimony in the case probably was not as fully presented as it can be on another trial.

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

REVERSED AND REMANDED.

MOSES BANKS, PLAINTIFF IN ERROR, v. GEORGE P. UHL,
DEFENDANT IN ERROR.

1. **Practice in Probate Courts.** The practice in civil cases in probate courts in all essential particulars, was regulated by statute, and, except in a very few matters, was the same as that established for justices of the peace.
2. **Dismissal of Actions.** The dismissal of actions in the probate courts—now county courts—is governed by the rules applicable to cases commenced before justices of the peace.
3. ———. The plaintiff in an action brought in the probate court, could at any time before the case was finally submitted, and on his own motion, dismiss it. And the failure to pay the costs that had then accrued will not prevent him from exercising this right.

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4. ———. And such voluntary dismissal was, practically, a final disposition of the case, except as to unpaid costs, for which alone the court could render judgment against him.
5. ———. Nor was it any objection to the exercise of the right of dismissal that it was done in order to enable the plaintiff to proceed with another action, concerning the same subject matter, fraudulently instituted in another county.

ERROR from the district court of Nemaha county. Tried before POUND, J. The action was originally begun in the probate court by Uhl, October 15, 1873, for the recovery of an attorney's fee. The defendant, Banks, answered and demanded a jury November 3, 1873. Jury struck and venire issued November 4, 1873, and on same day the cause was continued by consent to December 2, 1873. On the twenty-ninth of November Uhl filed his motion to dismiss the action. On the twenty-second of November Banks filed motion to strike Uhl's motion to dismiss from the files. December 1, 1873, leave was given Banks to file an amended answer containing set-off, and on the following day the court sustained the motion to strike Uhl's dismissal from the cause, impaneled a jury, who returned a verdict against Uhl for \$20.52, upon which, with costs, judgment was entered. The cause was taken by Uhl to the district court, where at the November term, 1876, judgment was rendered reversing the judgment of the probate court at the costs up to that time of Banks, and the cause retained for trial in that court. Banks brought the cause here, and Uhl moved to dismiss. The ruling upon this motion is reported in 5 Neb., 240.

J. H. Broady, for plaintiff in error.

1. The mere filing of the paper to dismiss did not dismiss, because a dismissal is an action and judgment of the court, and the cause was not dismissed until the court said so. *Young v. Bush*, 36 How. Pr. (N. Y.),

240. *Wilder v. Boynton*, 63 Barb. (N. Y.), 547. *Averill v. Patterson*, 10 N. Y., 500.

2. The application to dismiss is in the discretion of the court, and may be refused. *Conner v. Dake*, 1 O. S., 170.

3. There are many good grounds for refusing to permit a party to dismiss, among which is a failure to pay all costs; or that the application was made in furtherance of a fraudulent design; or to enable the party applying to take advantage of his own wrong. *Young v. Bush*, *supra*. 10 John., 367. 1 Wend., 131. 12 Wend., 191. 7 Wend., 511. 7 Hill, 521.

4. The act of the legislature, Gen. Stat., p. 711, sec. 1 (1005), is expressly limited to supreme and district courts, and by implication excluded from probate courts, and hence does not apply; but if it did, could make no sort of difference, for it cannot be held to deprive any court of its powers and authority over its own files and records and litigant parties.

Geo. P. Uhl, pro se (with whom was *E. W. Thomas*).

The plaintiff may always dismiss his suit before a set-off is filed. *Kuhn v. Bohn*, 10 Iowa, 392. *Robinson v. Kious*, 4 Ohio State, 593.

Under the Gen. Stats., 684, section 999, and by that section, the payment of costs as a condition precedent is not indispensable, although, as the record shows in this cause, the costs were paid.

The district court was right in reversing the judgment of the probate court, and preventing the fraud which was thereby perpetrated. There was security for costs given in this cause, and the probate judge could have no reason for not dismissing the cause after the motion therefor was filed.

LAKE, CH. J.

The principal question in this case is whether the defendant in error, who was plaintiff in the probate court, could voluntarily dismiss his action. If he could, then the action of the court in permitting Banks to file an amended answer, setting up a set-off, and proceeding to an ex parte trial and judgment thereon, after Uhl had dismissed the action, was erroneous, and was properly reversed by the district court.

The practice in civil cases in the probate court was, in all essential particulars, regulated by statute, and, except in a very few matters, was the same as that established for justices of the peace.

As to the dismissal of actions there is no provision whatever in the act concerning probate courts, but in the second section of that act it is provided that "the provisions of the code of civil procedure relative to justices of the peace shall, where no special provision is made in this subdivision, apply to the proceedings in all civil actions prosecuted before said probate judges."

Referring to section nine hundred and ninety-nine of the code of civil procedure relative to justices of the peace, we find that, "judgment that the action be dismissed without prejudice to a new action may be entered with costs in the following cases":

"*First*—When the plaintiff voluntarily dismisses the action before it is finally submitted."

This provision most certainly authorized Uhl to dismiss his action upon his own motion, and without the consent of the court even. Nor did this right depend upon his first paying the costs that had then accrued. But in case they were not paid, he was liable to a judgment therefor, which could have been enforced by execution. And in the condition in which the case

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then was, this was the only judgment that could properly have been rendered. No set-off had yet been filed, and the dismissal of the action left nothing to which a set-off could apply.

It was also urged on the argument that the act of dismissal was of no avail, for the further reason that it was done in vacation, after the cause had been continued from the November to the December term of the court. But this position also is untenable. For many purposes the probate court, like that of a justice of the peace, is to be considered as always open. In the first section of the act concerning the jurisdiction of probate courts, it is declared that "such court shall be deemed to be always open, and any cause, matter, or proceeding may be proceeded with therein, after the giving of notice, or service of process in the mode prescribed by law." And by the last clause of section seven, that "such courts shall be deemed to be always open for the filing of papers," etc. In view of these several provisions of the statute, we have no hesitancy in holding that the voluntary dismissal by the plaintiff was, practically, a final disposition of the case, except as to the unpaid costs, if any there were, for which alone the court was authorized to render judgment against him.

Another point strenuously urged upon our attention was, that Uhl dismissed this action in order to enable him to proceed with another on the same cause of action, commenced in Richardson county, whither he had fraudulently induced Banks to go in order to get service of summons upon him there. Admitting, however, all to be true that is claimed as to Uhl's design in the matter, and it furnishes no ground whatever for denying to him the right of dismissing his case. His object in taking this step was not a proper subject of inquiry by the probate court. If his conduct were such as to call for a correction, the court to which he resorted in Richardson county was the one to apply it.

It only remains to determine the proper disposition to make of the case. On the reversal of the judgment by the district court the cause was set down for trial therein. Had there been an issue of fact to be tried this would have been eminently proper, but, in view of the fact that every step taken after the case was dismissed was unauthorized, there was but one of two courses for the district court to take, either to render such judgment, on the dismissal, as to the unpaid costs, if any there were, as the probate court should have rendered, or to have remanded the cause back to that court for such judgment.

However, as to costs, we have no data upon which to base a judgment, and we presume the district court was no better off, as there is no cost bill in the record showing the amount still unpaid. We have concluded, therefore, that the judgment of the district court reversing the judgment of the probate court must be affirmed, with costs. But the order retaining the case *for trial* is reversed; and the cause is remanded to the county court of Nemaha county—the successor of said probate court—with instructions to enter a judgment dismissing the action without prejudice, and for the costs remaining unpaid and that had accrued at the time of the voluntary dismissal by the plaintiff.

JUDGMENT ACCORDINGLY.

Cheney v. Woodruff, et al.

P. D. CHENEY, APPELLANT, v. B. WOODRUFF, ET AL.,
APPELLEES.

P. D. CHENEY, APPELLANT, v. WILLIAM RICHARDS,
ET AL., APPELLEES.

1. **Usury:** If the agent of the lender of money takes from the borrower a note and mortgage for the payment of a bonus or commission for making the loan, the transaction is tainted with the vice of usury. Such contract is void, and payment of the money so secured cannot be enforced by action upon the note and mortgage.
2. —: In law, it makes no difference whether the usurious interest is expressed in terms in the instrument given for the payment of the debt created by the loan, or whether it is taken as a bonus, or as commission, or is secured by any other corrupt agreement, device or shift, at the time of the contract.

APPEAL from the district court of Pawnee county. Tried below before Weaver, J. The two cases were substantially the same and were argued together. The actions in the court below were for the foreclosure of mortgages given to secure the payment of five notes for \$70.00 each, due respectively in one two, three, four, and five years from their date. The defense was usury, and that the notes were given as a bonus to secure the loan of \$500 at ten per cent interest. A decree was rendered below in each case in favor of defendants, and plaintiff appealed.

G. M. Humphrey and Brown, England & Brown,
for plaintiff.

T. Appelget, for defendants.

GANTT, J.

The defendant, B. Woodruff, obtained a loan of five hundred dollars through the plaintiff and one B. F. Per-

kins, to secure which he executed notes and mortgage to Byron Murray, Jr., and at the same time the defendant gave to the plaintiff the notes and mortgage in controversy in this action. This action is brought to foreclose the last mentioned mortgage; and the defendant pleaded that the only consideration of the notes and mortgage was a bonus upon the loan, and that the same is usurious. The court below sustained the defense and dismissed the cause of action, and the case is brought here upon appeal.

The plaintiff resides in the state of Illinois, and Perkins resides in Nebraska, and transacted all the business with the defendant in respect to the loan of the money. The inquiry is, was the transaction tainted with the vice of usury?

Perkins testified that he acted as agent for the defendant; that "all transactions between Cheney (plaintiff) and defendant was done through him, and after the money came he acted as the attorney of Cheney." The proofs further substantially show that prior to the transaction, Perkins had published a card in the newspapers that he had "money to loan in sums of one hundred dollars and upwards for five years, with right to pay at the end of one year." He thus publishes himself as a lender of money; but the proofs show that he was an agent to make loans, and he substantially testifies, in respect to loans made by him, that when collected, the money was generally placed in the bank of Russell & Holmes, and that "in some instances the money was reloaned without being sent back" to the lender. The plaintiff testifies that he was not acquainted with defendant, and had no correspondence with him pending the negotiation for the loan, that Perkins was not his agent in sending the application for the loan; but in contradiction to this he testifies as follows: "Perkins was to superintend the execution of the papers sent by me,

was to examine the abstract of title furnished by Woodruff, to see that the title was good, that the mortgage was filed. When everything was completed and made safe, Perkins was to deliver to Woodruff a check for five hundred dollars. From and after the time I sent him the check to be delivered to Woodruff on the execution of the notes and mortgage, Perkins was authorized to act as my attorney to superintend the consummation of the arrangement I had made, and do any thing in connection with the same to have the loan properly secured and the money paid to Woodruff that I could have done had I been personally present."

From this evidence the fact is clear beyond doubt that Perkins was a loan agent, and that from the initial point of negotiation with plaintiff, he was his agent and attorney in all matters connected with the transaction.

The plaintiff admits that the only consideration of the notes and mortgage in the action was "commissions" to him on the loan made to defendant. Now, did the plaintiff act as the agent of Byron Murray in making the loan? By letter of attorney, executed in 1872, and recorded in Johnson county, Nebraska, Byron Murray empowered and authorized the plaintiff for him to sell, assign, receive payment of, receipt for, satisfy or release any note, mortgage, judgment, or certificate of purchase; to release any lien or claim on real estate, mortgage deed on real estate, or appoint any person to do the same, and "this power to be exercised concerning any matter or thing mentioned in the state of Nebraska." This general authority given to plaintiff must be taken in connection with his evidence in the case. He testifies that his occupation is that of "loan agent and land dealer," and that he "acted for Woodruff in obtaining the money, and acted for the lender in having the same properly secured;" and he further substantially testifies that the money so loaned to defendant was collected by him for

Murray, and was in his hands when the loan was applied for, and that he had no correspondence with Murray in regard to making the loan; that he does not know of any other person receiving money of Murray for the purpose of being loaned in Nebraska than himself, and that he has made many similar loans of Murray's money; hence, it is clear from his own evidence, that at the time the loan was applied for, the money was in his hands as the agent of Murray, and that he had made many similar loans for Murray in Nebraska. And by virtue of the letter of attorney from Murray to him, he had very general authority over the loan after it was made, and also in respect to the securities given by the borrower. He cannot in one moment act as the agent of the borrower, and in the next as the agent of the lender. Such device or shift to evade the law, will not receive the sanction of courts. And in the eye of the law "it makes no difference whether the usurious interest is expressed in terms in the instrument given for the payment of the debt created by the loan, or whether it is taken as a bonus, or secured by any other corrupt agreement, device, or shift, at the time of the contract." *Richards v. Kountze*, 4 Neb., 205. And the mere fact that the bonus is called a commission, will not change the agency of the plaintiff from that of the lender to that of the borrower, or remove the taint of usury from the transaction, and therefore this case clearly comes within the rule laid down in the case of *Philo v. Butterfield*, 3 Neb., 259; but not within the exception to the rule: "That when the person who negotiates the loan acts *only* as agent for the borrower, the rule is different"—when the lender has not "by himself or his agent participated in any transaction prohibited by law, nor by any employment on his part afforded the means for infringing the law." In the case at bar the plaintiff was in the employment of the lender, he was intrusted with his money, and thereby the lender

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afforded him the means to violate the law. The whole transaction is but one contract, and according to the law, as settled in this state, it is badly tainted with the vice of usury. It may be observed that much of the testimony of Perkins consisted of his understanding of the business transactions in respect to the loan. His understanding is not evidence; the witness must state facts. *Lacey v. Central National Bank*, 4 Neb., 183. The plaintiff's cause of action must be dismissed with costs.

DECREE ACCORDINGLY.

WILLIAM HIGH, PLAINTIFF IN ERROR, v. THE MERCHANTS
BANK, DEFENDANT IN ERROR.

1. **Verdict.** WEIGHT OF EVIDENCE. In a jury trial where the evidence is conflicting, the verdict will not be set aside simply because the testimony to support it is not entirely satisfactory to the court.
2. ———: When conflicting testimony is fairly submitted to a jury, the court has no right to interfere with their finding, on the ground of a mere difference of opinion as to its weight.
3. **Error.** IRRELEVANT TESTIMONY. On a jury trial, the admission of irrelevant testimony tending to prejudice the adverse party is good ground for the reversal of the judgment.
4. ———: CHARGE TO JURY WHEN THERE IS NO EVIDENCE TO WHICH IT IS APPLICABLE. Where the court, in charging the jury, gives an instruction not called for by the evidence, and which is calculated to mislead them, the judgment will be reversed.

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

It was an action brought by High to recover \$500 which he claimed to have deposited in the defendant

bank, but which the bank claimed was put by the plaintiff into the bank by Eaton, its cashier, in his individual capacity, and to be used by Eaton for his and High's benefit in purchasing margins on wheat. The jury returned a verdict for defendant, upon which, after the overruling of a motion for a new trial, judgment was entered.

M. H. Sessions, for plaintiff in error, cited *Gatlin v. Wilcox*, 26 Ark., 309. *Blosser v. Harshbarger*, 21 Gratt., 214. *Dewey v. Chicago & N. W. R. R.*, 31 Iowa, 373. *Vail v. Strong*, 10 Vt., 457. *Meredith v. Kennard*, 1 Neb., 312. *Myers v. R. R. Co.*, 2 Id., 338. *Slaughter v. Fowler*, 44 Cal., 195. *Saving Association v. Hunt*, 17 Kan., 532.

Cobb, Marquett & Moore, for defendant in error, cited *Jones v. Chicago R. R. Co.*, 68 Ill., 380. *Pollard v. People*, 69 Ill., 148. *Coleman v. First National Bank*, 53 New York, 388. *Andre v. Johnson*, 6 Blackf., 375. *Houghton v. Slack*, 10 Vt., 520.

LAKE, CH. J.

I. The first error of the assignment is that the verdict is not supported by the evidence. On this point all that need be said is that although the testimony as to the purpose of the deposit is not entirely satisfactory still we think it sufficient to sustain the finding of the jury.

It is true that the plaintiff testified substantially, on his examination in chief, that the five hundred dollars was delivered by him to Eaton, then the cashier of the bank, as an ordinary deposit to be placed to his own credit. But opposed to this there is testimony tending pretty strongly to show that the money was in fact handed to Eaton, not as the cashier and agent of the

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bank, but as the agent of the plaintiff and one Marsh, and to be used by him in speculating on their account in what they termed "*wheat margins*." When testimony, thus conflicting, is fairly submitted to the decision of a jury, the court has no right to interfere with their finding on the ground of a mere difference of opinion as to its weight. *French v. Millard*, 2 Ohio State, 44. *Brown v. Hurst*, 3 Neb., 351.

II. It is also assigned for error that irrelevant testimony was admitted on the trial, which tended to prejudice the plaintiff's case. This testimony was given by the witness Clark, the successor of Eaton as cashier of the bank, who was asked "Whether the money ever did go into the funds of the bank?" To this he answered, "No, sir, it never got it." Now, in order to determine the relevancy of this testimony it is necessary to refer to the pleadings and see what the real issue was which the jury were called upon to decide, and to which the proofs should have been directed.

The plaintiff alleges in his petition that on or about the 25th day of August, 1874, he "deposited in said defendant bank, at its regular place of business * *

* the sum of five hundred dollars." And that afterwards on a proper demand being made by him payment of the money was refused. In the answer there is a general denial of the deposit having been made, and the issue thus formed was the only one concerning which there was any controversy on the trial. That the plaintiff had actually delivered to Eaton, the cashier of the bank, the sum of five hundred dollars seems to have been conceded. But it was insisted on behalf of the defendant that this money was not left with Eaton as a deposit in the bank, but for the purpose of being used by him in a wheat speculation in which Eaton, the plaintiff, and one Marsh, had agreed to engage.

Under this issue, therefore, the right of the plaintiff to recover did not depend upon the fact that Eaton placed this money with the funds of the bank, nor could he be defeated by showing that the cashier to whom the money was delivered had, without authority from the plaintiff, retained or converted it to his own use. The vital question was, in what capacity did Eaton receive this money which it was conceded was delivered to him at the bank, and during business hours? Was it as the cashier and agent of the bank, as was claimed on the one hand, or as the agent of the plaintiff and Marsh, and for the purpose of speculation, as was contended on the other? Upon this question the testimony objected to could throw no possible light, and ought to have been excluded for irrelevancy.

III. The only remaining objection relates to an instruction given to the jury and which it is claimed there was not only no testimony to warrant, but was calculated to mislead them in making up their verdict. The instruction was as follows: "A party cannot be silent when it is his duty to speak. And if the jury find from the evidence that Marsh, in the presence and hearing of plaintiff, stated that the money sued for in this case was given to George P. Eaton to be used in wheat margins for the benefit of plaintiff as soon as wheat fell to 90 cents, and you further find that the plaintiff did not deny this statement, this would be evidence against him."

This instruction assumes that there was evidence before the jury that Marsh had stated in the hearing of plaintiff that the money in question was in fact placed in Eaton's hands to be invested by him in a speculation in which the bank had no concern, and that by his silence the plaintiff had acknowledged the statement to be true. It is quite probable that this was given with particular reference to the testimony of the wit-

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ness Marquett, wherein he relates a conversation which took place in his office between Marsh and himself, in the plaintiff's presence, concerning this money. Mr. Marquett testifies that at this interview Marsh stated, among other things, that "he was dealing in wheat margins and that he met Mr. High on the street and asked him if he did not want to go into a wheat speculation, and he said he would go in \$500.00; and then they went to the Merchants Bank and gave the \$500.00 to Eaton." This is the nearest approach that was made to what the instruction implies there was testimony to prove, and we think it by no means warrants what was thus assumed by the court, especially in view of the fact disclosed by the testimony of Mr. Marquett that the plaintiff "*was strenuously urging that he had deposited it in the bank all the time.*"

Indeed the testimony on this branch of the case shows that on all occasions, and to all declarations made in his presence that the transaction with Eaton was anything else than a deposit in the bank, the plaintiff entered very emphatic protests. We think the instruction was not only unwarranted by the testimony, but had a direct tendency to mislead the jury, and falls within the rule laid down in *Meredith v. Kennard*, 1 Neb., 312, that when the court in charging the jury gives an instruction not required nor called for by any evidence, and it appears that such unnecessary charge was calculated to mislead the jury the judgment ought to be reversed. *Case v. Ill. Cent. R. R. Co.*, 38 Iowa, 581. *McLean v. Clark*, 47 Geo., 24.

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

REVERSED AND REMANDED.

THE NEBRASKA RAILWAY CO, PLAINTIFF IN ERROR, v.
L. VAN DUSEN, DEFENDANT IN ERROR.

1. **Appeal from Assessment of Damages for Land Taken by Railroad Company.** In taking an appeal from the assessment of damages for land appropriated by a railroad company, to the district court, the appellant is not required by the statute to execute an appeal bond.
2. ———: **PLEADINGS NOT REQUIRED.** In such appeal, it is not necessary to file pleadings in the case, in the district court—a jury is impaneled by the court to hear the proofs and assess the damages sustained by the owner of the land taken by the railroad company.

ERROR from the district court for Richardson county.

Schoenheit & Reavis, for plaintiff in error.

W. W. Wardell, for defendant in error.

GANTT, J.

The county judge of Richardson county, upon application of the plaintiff, selected and appointed commissioners, as prescribed by law, to inspect the real estate of defendant in said county, and assess the damages which he sustained by the appropriation of his land for the location, construction, and convenient use of the plaintiff's road. On the 27th day of January, 1876, the commissioners made report to the county judge, and on the same day the plaintiff gave notice of an appeal from the assessment of damages made by the commissioners to the district court, and within the time prescribed by law for taking such appeal the plaintiff filed a transcript of the record and proceedings in the case in the district court. In the meantime the plaintiff deposited the amount of damages assessed with the county judge.

November 21, in the same year, the defendant filed in the district court his motion to dismiss the appeal, on the ground, *first*, that "no appeal bond had been filed in the case;" and, *second*, because the plaintiff "had not prosecuted its appeal as provided by law." The motion was sustained, the appeal was dismissed, and judgment rendered in favor of defendant for costs. The plaintiff now complains that the court below erred in sustaining the motion and dismissing the appeal, and in rendering judgment in favor of defendant for costs.

In appeals from the assessment of damages in cases like the one at bar, it is not essentially requisite to file pleadings in the district court, and it has not been usually the practice to do so, but upon the appeal being taken and transcript filed a jury is impaneled to hear the proofs and assess the damages sustained by the owner of the land appropriated to the use of the corporate company. The main question, then, in the case is—whether an appeal bond is essential in order to perfect the appeal and to give the court jurisdiction of the cause. An appeal is exclusively a statutory right, and must be regulated by the statute granting it. In 3 Bouvier's Institute, 70, it said that an appeal "is regulated entirely by the provisions of the act; it cannot be extended beyond the plain and obvious import of the statute granting it;" and hence, the prime element in the interpretation of such statute is to ascertain and observe what the legislature exactly intended should be done, in order to perfect such appeal. In the construction of the statute, the rule is to give effect to the intention of the legislature whenever such intention can be ascertained by permitted legal means. Potter's Dwaris, 181. And no surmise or conjecture of any object which the legislature may be supposed to have had in view can be allowed to have any weight, unless such object can be clearly ascertained from the plain language

of the statute, and no subtle or forced construction can be resorted to for the purpose of limiting or extending its operations.

Now, upon an examination of the various acts relative to appeals, we find in the legislation of our state, that in appeals from judgments of the county court, and from decisions of commissioners appointed to adjust claims in probate matters, from judgments of justices of the peace, in both civil and criminal cases, from judgments of police judges, and decisions of county commissioners, the act granting an appeal, in each case specially provides for an appeal bond, the condition of such bond, and by whom it shall be approved; and further, in respect to appeals in equity causes, and cases in error from the district to the supreme court, an appeal bond is not necessary, unless the party taking such appeal desires it to operate as a supersedeas. Wherefore, it seems from all the above cases, the statute in each case specially provides for an appeal bond, prescribes the condition of such bond, and declares who shall approve it. Surely this course of legislation clearly indicates that the legislative intent is that an appeal shall be regulated only and wholly by the act granting it. And this rule of construction is not only found in the uniform course of legislation, but is supported by authority, and we think it is the only safe rule.

Section 97 of the act relative to corporations provides, that from the assessment of damages for lands appropriated by railroad companies "either party may have the right to appeal from such assessment to the district court of the county in which such lands are situated, within sixty days after such assessment;" but it does not require an appeal bond, or prescribe its conditions, or declare by whom it shall be approved; nor does the natural and obvious import of the language of the statute imply any such conditions to be performed in

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order to perfect the appeal. It is not, therefore, to be assumed that the legislature intended any such conditions to be performed. On the contrary, the appeal must be regulated only by the act granting it without imposing upon the party any conditions or terms not clearly within the statute.

The judgment of the court below must be reversed, and the plaintiff's appeal reinstated.

REVERSED.

A. C. RUDOLF & Co., PLAINTIFFS IN ERROR, v. R. L. McDONALD & Co. AND OTHERS, DEFENDANTS IN ERROR.

1. **Attachment: AFFIDAVIT IN.** An objection that affiant's name was omitted from the body of the affidavit, he having duly signed it at the close, is technical merely, and no ground for dissolving the attachment.
2. ——— : **VENUE; AMENDMENT OF.** The want of a venue, however, if taken advantage of by the defendant at the proper time, is a fatal defect, unless cured by amendment. And when the venue is omitted by mistake it is proper for the court to allow an amendment in accordance with the facts.
3. ——— : **MOTION TO DISSOLVE; WHEN TO BE MADE.** But to be available the motion to dissolve in such case must be made before final judgment in the action.
4. ——— : **SUBSEQUENT ATTACHING CREDITOR.** And a subsequent attaching creditor, even if he could take advantage of this defect at all, which we do not decide, is entitled to no advantage over the defendant in this respect.
5. ——— : ———. The true rule of practice in such case is, that where property is seized under an order of attachment, and no question of ownership is raised nor any fraud or collusion charged, final judgment in the action concludes all inquiry by third persons concerning the validity or regularity of the proceedings, no matter how erroneous they may have been, provided the court had jurisdiction.

6. ———: WAIVER BY DEFENDANT The defendant in attachment may waive anything when it will cause no substantial injustice to the other creditors, or is not intended to guard their rights, and if he do so, a subsequent attaching creditor can take no advantage of a former by reason of any such waiver.

ERROR from the district court for Seward county. The opinion states the case.

J. R. Webster and *L. C. Burr*, for plaintiffs in error, cited *Harrison v. King*, 9 Ohio State, 388. *Ward v. Howard*, 12 Id., 158. *Lane v. Morse*, 6 How. Pr., 394. *Vincent v. People*, 5 Parker, 88. *Cook v. Staats*, 18 Barb., 407. *Patterson v. Gulmare*, 2 Disn., 505.

Lowley & Leese, for defendants in error.

LAKE, CH. J.

The plaintiffs in error complain of the order of the court below in adjusting the priorities of liens acquired by several attachment creditors upon the property of Frederick Bick, their common debtor.

Two of these attachments, one by Hundley, Judd & Co., and that of McDonald & Co., were sued out and levied upon the property in question, simultaneously on the twenty-ninth of October, 1875. So that, as between these, neither acquired priority. On the day following Hundley, Judd & Co. sued out a second order of attachment, and this was immediately levied, subject to the two already upon the property. But the attachment on which the claim of the plaintiffs in error is based was not made until the thirteenth of November, and, as the sheriff returns, was subject to three others, as the statute directs.

In none of these cases does it appear that the defendant made any objection to the attachments, except in that of McDonald & Co., wherein he moved a dissolution, but

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upon what ground the record does not disclose. This motion, however, was overruled, and at the same time leave was given to file an amended affidavit, which was done without the least objection from Rudolf & Co. Indeed these plaintiffs did not at any time question the legality, nor the strict regularity of the prior attachments, until after final judgments had been rendered and the attached property had been ordered to be applied to their payment, when, on a mere motion for the adjustment of liens, they asked that these prior attachments be disregarded and theirs given precedence, on the ground of certain alleged defects in the affidavits on which the orders were issued.

The ground of objection to the two attachments of Hundley, Judd & Co. was that the affidavits have no venue, and to that of McDonald & Co. that the affiant's name, although duly signed at the close, was not inserted in the body of the instrument.

Of this last objection all that need be said is, that it is technical merely, possessing no merit whatever. The signature at the close was enough, although as a matter of form it is usual for the draftsman to insert the name at the commencement. But, even if this omission were material, it was wholly cured by the amended affidavit before referred to, wherein this formality was strictly observed. *Stewart v. Carter*, 4 Neb., 56±.

The want of a venue, however, was a much more serious matter, and would undoubtedly have been fatal had the defendant taken advantage of it in season, unless cured by an amendment in accordance with the facts, which it would have been proper for the court to have allowed. *Struthers v. McDowell*, 5 Neb., 491, and cases cited. But a motion to dissolve an attachment cannot be entertained after final judgment in the action has been rendered. Our practice in this particular is controlled by section two hundred and thirty-five of the

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code of civil procedure, which provides that "the defendant may; *at any time before judgment*, upon reasonable notice to the plaintiff, move to discharge an attachment as to the whole or a part of the property attached." This being the rule as to the defendant in the action, how is it with the plaintiffs in error? Even if it be conceded that they could take advantage of this defect at all—which is extremely doubtful—it is certainly clear that they are entitled to no advantage over the defendant in this respect.

Section two hundred and twelve of the code of civil procedure provides that "an order of attachment binds the property attached from the time of service." Property thus bound is in the custody of the law for the satisfaction of the claims for which it was seized, and the lien thus created will continue, unless voluntarily relinquished, or discharged in one of the statutory modes.

The rule to be deduced from these provisions of our law is, that when property has been seized under an order of attachment and no question of ownership is raised, nor any fraud or collusion charged, final judgment in the action concludes all inquiry by third persons concerning the validity or regularity of the proceedings, no matter how erroneous they may have been, provided the court had jurisdiction.

In addition to this, it should be borne in mind that the grounds upon which subsequent attaching creditors may interfere as against a former, even before judgment, are very few indeed, and while it may be true that the exact limit of interference is not definitely fixed, it is at least well settled that they can take no advantage of mere irregularities, although they may be such as would furnish good ground for objection on the part of the defendant. On this point the language of the court in *Ward v. Howard*, 12 Ohio State, 158, is so appropriate that we cannot do better than to quote a single paragraph,

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wherein it is said: "It can with no propriety be claimed that a subsequent attaching creditor is entitled to the same latitude of objection to the proceedings of a prior attaching creditor as the defendant in the action. On the contrary, anything may be waived by the defendant which is substantially no injustice to the other creditors, or is not intended to guard their rights. They can take no advantage of what may be properly regarded as informalities or irregularities in the proceedings, though constituting good ground for objection on the part of the defendant. The objections, therefore, that a proper undertaking was not executed, and that the facts were defectively stated in the affidavit, were properly overruled by the court. But the case must be one in which the law allows an attachment. If it be not, the objection of a subsequent attaching creditor stands on a like principle as a want of jurisdiction, and would be equally available as collusion or fraud."

The order of the district court being in full accord with these views must be affirmed.

ORDER AFFIRMED.

WILLIAM BAYS, PLAINTIFF IN ERROR, v. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

1. **Practice in Cases of Misdemeanor:** COMPLAINT. If the original complaint in a case of misdemeanor appealed to the district court be lost, the court may order a new complaint to be substituted covering the same offense as shown by the justice's transcript.
2. **Competency of Evidence.** On the trial of a person charged with the willful disturbance of a public school it is competent for the defendant to prove that he was a member of the district school board, and that what he did was in pursuance of an order of the board and in the honest discharge of his official duty. And it is error to exclude such testimony.

3. **Powers of the School Board: TEACHER.** The district school board is specially invested by statute with the general care and management of the school and the employment of the teachers, and as an incident to these powers, has a right to discharge a teacher for incompetence, or for any other sufficient cause, at the will and pleasure of a majority of its members.

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

Lamb, Billingsley & Lambertson, for plaintiff in error.

I. The court erred in permitting the state to file a substituted complaint. *Ganaway v. State*, 22 Ala., 772. *Reinhart v. State*, 29 Ga., 522. *Bradshaw v. Commonwealth*, 16 Grat., 507. Sometimes the court permits a copy to be filed, but it must be proved to be an exact copy. This is a new and original complaint.

II. The court erred in ruling out all the evidence offered by plaintiff in error, showing that he was a member of the school board, and that in dismissing the teacher he was acting only in the line of his official duty. And the court erred in giving the instructions asked by the state, numbered one, two, three, four, five, six, and in refusing the instructions asked by plaintiff in error, which were to the effect that the board had power to dismiss a teacher for sufficient cause, and that if the jury became satisfied that what the prisoner did at the time he did in good faith, thinking the board had the right to discharge a teacher, his action would not be willful as a matter of law within the meaning of the statute under which the prosecution was brought.

First. If the board had power to dismiss, either for cause or without cause, and the teacher was dismissed pursuant to the decision of the board, and defendant did nothing except in discharge of his duty, then the defendant should have been acquitted.

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Second. If the board did not have power to dismiss under the statute, yet if the defendant acted under the belief that he had such power, the evidence would be admissible as tending to eliminate the element of willfulness or criminal intent. *Ramsey v. Riley*, 13 Ohio Rep., 157. *Schottgen v. Wilson*, 48 Mo., 353. *Wilkes v. Dinsman*, 7 How., 89. *Reed v. Conway*, 20 Mo., 22. *Jenkins v. Waldron*, 11 Johns., 121. *Stewart v. Southard*, 17 Ohio, 402.

Third. Willfulness is defined as signifying an evil intent without justifiable excuse. It means not merely voluntarily, but with a bad purpose; in other words it means corruptly. 1 Bishop on Criminal Law, Sec. 428. *Chapman v. Com.*, 5 Wharton, 427, 429. *The State v. Gardner*, 2 Mo., 23. *Commonwealth v. Kneeland*, 20 Pick., 206, 220. *Lawrence v. Sherman*, 2 McLean, 488.

Fourth. The board had power to dismiss a teacher. They could do so at pleasure. Statutes of 1867, Sec. 6, page 353. *Nebraska City v. Jones*, 1 Neb., 176. *Knowls v. City of Boston*, 12 Gray, 340. *Eastman v. District Township*, 21 Iowa, 591. They certainly have the power to remove for cause. General Statutes, chapter 68, page 961, sections 45, 56, 82, and 63. Sections eighty-two and ninety-one define the power and duties of county superintendents, but give them no power to dismiss a teacher. The power to employ teachers, which is given to the district board, implies the power to remove. It was decided by the New York court of common pleas that, under the local law prevailing in the city of New York, the power to employ teachers carries with it the power to dismiss them. *Gildersleeve v. The Board of Education*, 17 Abb. Pr., 201. *The City of Crawfordsville v. Hays*, 42 Ind., 208. *Eastman v. District Township*, 21 Iowa, 591.

George H. Roberts, Attorney General, and J. H. Broady, for the State.

LAKE, CH. J.

The plaintiff in error was tried and convicted in the district court, under the thirty-fourth section of the criminal code, for an alleged disturbance of a public school in district No. 21, in Lancaster county. The case was brought into the district court by an appeal from the judgment of a justice of the peace before whom the case was first tried.

I. When the case was called for trial in the district court, it was discovered that the original complaint sent up by the justice in pursuance of the statute was lost and could not be found. Thereupon, on motion of the district attorney, but against the defendant's objection, a new complaint was substituted, upon which the trial and conviction were had. And this presents the first question for our consideration.

It is contended on the part of the plaintiff in error that the district court had no authority to try him upon any other than the original complaint; that the farthest the court could rightfully go was to permit a copy of the original to be substituted. We are of opinion, however, that there is no error in this particular, but on the contrary, that the course pursued by the court was eminently proper.

The record recites that "the original complaint having been lost since the last term of this court, the district attorney has leave to file a substituted complaint, covering the offense charged in the original information, as shown by the justices' transcript." There is no pretense that the new complaint is not confined to the identical offense charged in the one certified by the justice of the peace, and it seems impossible therefore that the defendant could have been prejudiced in the least by the course taken. But we think our statute, although it

does not in direct terms provide for this particular contingency, clearly recognizes the practice here adopted. Section 325 of the criminal code provides that "the district court shall hear and determine any cause under this act, brought by appeal from a magistrate upon the original complaint, unless such complaint shall be found insufficient or defective, in which event the court, at any stage of the proceedings, shall order a new complaint to be filed therein, and the case shall proceed thereon the same in all respects as if the original complaint had not been set aside." It is evident that, under this provision, no matter how utterly deficient the complaint sent up by a magistrate may be, even if totally wanting in the essential requisites to show the offense intended to be charged, the prosecution will not be thwarted, but "the court shall order a new complaint to be filed," upon which the trial must proceed.

This section establishes a positive rule of practice by which the courts are of course bound whenever the original complaint is found to be defective. And it does more than this—it furnishes a safe guide to the courts in matters of practice whenever a contingency shall arise, which, although not within the letter, is clearly within the spirit of the statute. In the practice of the courts contingencies not unfrequently arise which the legislature has not anticipated by any suitable provision. These must be met by some general or special rule of court suited to the exigency, and which shall protect suitors in all their legal rights. It seems to us that there is quite as much necessity and reason for the substitution of a new complaint when the original is *lost* as there is when found to be merely defective in form or in substance.

It was conceded by counsel for the plaintiff in error that, under the circumstances, the substitution of an exact copy of the first complaint would have been good

practice, and justifiable. But we are unable to see how it could make any possible difference to the accused whether the complaint upon which he was tried were a copy of the original, or a new one charging the same offense and no more. There would be a distinction perhaps, but no real difference.

II. Several objections were taken to the rulings of the court upon the admission of evidence; these may all be considered together. The record shows that a great deal of testimony was offered, both by way of cross-examination of witnesses called on behalf of the state, and by the direct testimony of those called by defendant to show that certain meetings of the district school board, of which the accused was a member, had been held at which certain charges preferred against the prosecuting witness as teacher were considered; that finally on the morning of the day of the alleged disturbance, before the hour for opening the school had arrived, her discharge as teacher and the closing of the school had been decided upon at a meeting of the board held at the school-house, and that whatever the defendant said or did was in pursuance of the resolution and order of the board.

We do not see upon what ground this testimony could have been excluded. It may have been upon the theory that the district board was not vested with the authority to discharge the teacher. But even if this were so, it would still be competent evidence, under the issue, for the purpose of showing that the defendant acted under the honest belief that in what he did he was but performing an official duty which the law enjoined upon him. This testimony was clearly admissible on this ground alone.

But we think the testimony was competent, and should have been admitted upon the broader ground, that, if

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true, it would have established for the defendant a complete justification. By section 45, of the general school laws (Gen. St., 968), the members of the district board, or a majority of them, are empowered to hire "*qualified teachers*" in the name of the district. And by section 56, the board is given "*the general care of the school*, and may establish all needful regulations for the management not in conflict with the rules prescribed by the superintendent."

This language is somewhat general, but we think the authority is clearly implied for the board to discharge a teacher who, for any reason, is found to be incompetent. The authority to terminate the employment of a teacher must rest somewhere, and in the absence of an express provision on this subject it should, we think, be governed by the general rule of the common law applicable in analogous cases, and be held to reside with those whose duty it is to represent the district in making the contract, and who are also directly responsible for the successful management of the school. By the common law, if a servant neglect the duties of his employment, or is incompetent to perform them with reasonable skill, he may be discharged at once, although hired for a definite time which has not yet elapsed. And when a servant is formally discharged, even although it be without adequate cause, he cannot continue the service against the will of his employer, but must seek redress by an action for damages. But notwithstanding the persistent efforts of the prosecution, supported by the rulings of the court, to keep it from the jury, the fact appears, that the defendant, in all he did, was acting as a member of the school board, and in pursuance of a resolution previously adopted by a majority of its members. It appears also that the three members of the board were all present in the school-room on the arrival of the teacher, and that they at once informed her of the action of the

board, and that the school was closed; but she refused to submit to their decision, called the scholars to order, and went on with the school for that day. In view of these facts we see nothing in the conduct of the accused, even in its worst aspect, which would amount to a willful disturbance of the school.

III. As to the alleged errors in the matter of instructing the jury, but little need be said. It is evident that the court labored under the same misapprehension of the law of the case, as it did in the admission of evidence. The judge was evidently impressed with the idea that the district board had no power either to dismiss the teacher or to stop the school. Most of the instructions given were calculated to bring this fact prominently before the jury, and to give them to understand that the fact of Bays being a member of the school board, and that he was but carrying out its orders in what he did, could have no bearing whatever in the decision of the case. In this there was manifest error.

There were several instructions requested for the defendant, and refused, which stated the law correctly, but as they bear upon the same point, and are really but different forms of statement of the same proposition, we will notice but two of them. These were as follows:

"1st. If the jury find from the evidence that the defendant William Bays was one of the board of directors in said school district, and that said local directors had met and decided that Miss Paschal, then teaching said school, should be dismissed, and the school closed; and that the complaining witness, Olive Paschal, was teacher of said school, and the acts complained of were done honestly in his official character, as a member of said school board, and in an orderly manner, then you will find the defendant not guilty."

"2d. The jury are instructed, as a matter of law,

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that the directors of school districts have a right to discharge and dismiss a teacher of public schools, hired by them, on account of incompetency of teacher, or for any sufficient cause, at their own will and pleasure, and close the school."

It is true that the evidence in justification of the defendants' conduct was not very full or complete. But this was owing, doubtless, to the exclusion of the principal portions of it by the court. There was enough, however, to form a basis for these instructions, and it was error to refuse them. The testimony was ample to have warranted the jury, under proper instructions, in the return of a verdict of not guilty.

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

MAXWELL, J., dissenting.

I cannot concur in that portion of the opinion of the court which holds that a school board having made a contract with a teacher for three months service, may at the expiration of two months, at their mere whim or caprice, dismiss the teacher and close the school. Section forty-five of the school law (Gen. Statutes, 968) provides that: "The director, with the consent and advice of the moderator and treasurer, or one of them, or under their direction if he shall not concur, shall contract with and hire qualified teachers for and in the name of the district, which contract shall be in writing, and shall have the consent of the moderator and treasurer, or one of them, endorsed thereon, and shall specify the wages per week or month, as agreed by the parties, and a duplicate thereof shall be filed in his office; *provided*, that if the director shall refuse to make and sign such contract when so directed by the moderator and treasurer, then it may be made and signed by the moderator and treasurer."

Section forty-nine provides that : "The director shall, with the concurrence of the moderator and treasurer, or either of them, provide the necessary appendages for the school-house, and keep the same in good condition and repair during the time school shall be taught in said school-house."

Section fifty-six provides that : "The district board shall have the general care of the school, and may establish all needful regulations for the management not in conflict with rules prescribed by the superintendent."

Section eighty-one provides that: "The county superintendent shall grant certificates in such form as shall be prescribed by the state superintendent of public instruction, licensing as teachers all persons whom, on thorough and full examination, he shall deem qualified in respect to good moral character, learning, and ability to instruct and govern a school."

Section eighty-two provides that: "The county superintendent may revoke any teacher's certificate for any reason which would have justified the withholding thereof when the same was given, as for gross negligence of duty, or for incompetency or immorality."

The law authorizes the employment of such persons only as have passed a satisfactory examination and have received a certificate from the county superintendent, licensing them to teach. A person possessing such certificate may enter into a contract with a school board to teach school for a specified length of time, and unless his certificate is revoked for cause, may enforce such contract against the district.

This is admitted. But it is contended that although the district will be liable on such contract, yet the board may at any time discharge the teacher without cause, and employ another, or close the school, and that a servant, although hired for a definite period which has not elapsed, may be discharged for cause or without, and cannot con-

tinue the service against the will of the employer. It is conceded that no express authority is given by statute for the exercise of these powers, but it is claimed that it may reasonably be inferred from the authority of the board to have the general care of the school, and to establish needful rules and regulations for the management thereof. It seems to me that this power merely authorizes the school board to provide needful rules and regulations for the government of the school, and whatever is necessary to secure good order and promote the advancement of the school. Had the legislature intended to give school boards authority to discharge teachers at pleasure, it is but reasonable to suppose that such authority would have been given in express terms. The school boards are mere trustees for the school districts. They possess no powers except such as are expressly given by statute, or are necessarily implied. The district is liable for their acts only when they act within the scope of their authority, and is not liable for their torts, and ought not to be required to pay for the services of teachers discharged by them without sufficient cause. If the person employed by them as a teacher is found not to possess the necessary qualifications to teach, the remedy is by a re-examination of such teacher before the county superintendent. If on such re-examination it is found that such person has not a good moral character, or has not the necessary qualifications in respect to learning or ability to teach, his certificate should be revoked. But it is said that county superintendents neglect their duty, and that certificates are issued to unworthy persons. The answer to this statement is, that the law *presumes* that an officer will properly discharge his duty. A person licensed to teach, who has entered into a written contract to teach school in a certain district for a definite length of time, may reasonably suppose that such contract is as binding on the school dis-

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trict as on himself, and that during the existence of such contract he cannot be dismissed merely because a majority of the school board are unreasonable or unjust. In such a case where a teacher is dismissed, the mere payment of the amount due on the contract is no compensation for the injury to his reputation. But the injury is not restricted to the teacher. A school district accustomed to discharge its teachers on trivial pretexts is seldom harmonious, makes but little advancement, and not unfrequently is controlled by the ignorant or vicious. The judgment of the district court should be *affirmed*.

REVERSED AND REMANDED.

PHEBE POPE, PLAINTIFF IN ERROR. v. RICHARD HOOPER
AND WIFE, DEFENDANTS IN ERROR.

1. **Contract: Mortgage: SPECIAL STIPULATION.** When a debt is divided into several payments, to be made at different periods of time, and the parties contract that upon a failure to make any one of the payments when it becomes due, the whole amount of the debt shall become due and payable, the court is bound to give effect to their contract. Such condition of payment is not in the nature of a forfeiture.
2. **Judgment: VACATING.** In an original action in equity to vacate a judgment or decree, if the ground of complaint is not the result of fraud on the part of the plaintiff, or some circumstance beyond the control of the defendant, but is occasioned by the fault, negligence, or want of ordinary diligence on the part of the defendant, he will not be permitted to deny the correctness of the judgment or decree, or to renew the controversy.
3. **Married Woman's Act.** The common law disability of a married woman having been removed by section three of the act of June 1, 1871, she no longer comes within the protection of subdivision five of section six hundred and two of the civil code.

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ERROR to the district court for Dodge county. Tried below before Post, J., who rendered judgment in favor of the defendants in error setting aside and vacating a former decree against them in said court at the October term, 1875.

The decree thus vacated was rendered in an action begun September 14, 1875, summons in which was made returnable "by the eighteenth day of October, A.D. 1875," default taken, and decree entered October 20, 1875.

Marlow & Munger, for plaintiff in error, cited *Bank of U. S. v. Moss*, 6 How., 31. *Green v. Hamilton*, 16 Md., 317. *Stanclift v. Norton*, 11 Kan., 222. *Crane v. Ward*, Clarke's Ch., 393. *Covington Bridge v. Sargent*, 27 Ohio State, 233. *Hackworth v. Zollars*, 30 Iowa, 433. *Pierce v. Kneeland*, 9 Wis., 30. *Ætna Insurance Co. v. McCormick*, 20 Wis., 265.

Marshall & Sterrett, for defendants in error.

The summons in the foreclosure case required the answer to be filed by the eighteenth of October, 1875, the statute providing that the defendant shall answer "on or before the third Monday." We claim that the word "by" excludes the third Monday, and the preceding day being Sunday two days are in effect excluded. "By a certain day, excludes that day." 1 Burrell's Law Dic., 236. *Rankin v. Woodsworth*, 3 Penn., 48. *Crowell v. Galloway*, 3 Neb., 318.

The summons being void, the court acquired no jurisdiction over the person of the defendants. The fact that Gray & Briggs were looking at the papers in the case constituted no appearance, and none other is attempted to be shown. The fact that a default was entered shows no appearance of the defendants. The filing of the stay of execution is no waiver, because the only things that such filing waived are limited by statute to proceedings

in error or appeal. *Expressio unius est exclusio alterius*. If we are correct in these views, then it follows that the decree was irregular in that the court did not have jurisdiction over the persons of the defendants, by reason of the defective summons.

The decree was for \$100 and 150 acres of land more than was claimed in the petition, and therefore irregular, and should be vacated: 1 Tidd's Practice, 612. *Hall v. Towne*, 45 Ill., 495. *Meisse v. McCoy*, 17 Ohio State, 230. Freeman on Judgments, 69. *Mills v. Miller*, 2 Neb., 318. The cases cited by plaintiff in error as to the stipulation in the mortgage that a failure to make one payment the entire amount would become due, are, as we understand these cases, not in point. For in these cases there was no forfeiture of a large amount or any amount of unaccrued interest, as in the case at bar. 9 Mich., 350.

GANTT, J.

This action was commenced by petition in equity in the district court by defendant in error to vacate a decree of foreclosure and order of sale rendered at the October Term, 1875, of said court. The grounds alleged for vacating the decree are in substance as follows: That the decree included the entire amount of the debt secured by the notes and mortgage, though only a part of the same was then due; that the decree was taken for more than the whole amount of such debt, and for too much interest; that defendant, Elizabeth Hooper, was a married woman, and the summons was irregularly issued. The plaintiff denies the allegations of the petition, except that defendant Elizabeth Hooper was a married woman, and denies that the decree included more land than is described in the mortgage; and then sets up as new matter that the defendants employed counsel

to appear for them in the foreclosure case, who had the cause passed for several days by the court, and examined the matter before the decree was taken; that defendants entered a stay of the order of sale, and that in December, 1875, the full amount of the decree was satisfied and discharged of record.

It appeared that the summons was technically defective in form, which defect might perhaps have been taken advantage of upon motion by the defendants, but it was no such defect as bars the jurisdiction of the court over the subject matter and the defendants.

It appears by the evidence that counsel was employed by defendants in the foreclosure case, at whose request the cause was passed several days by the court, and that after the decree was taken the proper stay was entered; and the evidence further shows that the plaintiff advanced and paid other large sums of money for the defendants, and that the parties, on or about the first day of December, 1875, had a settlement of all their matters, including the amount of the decree of foreclosure at \$4,473.14, and found the sum total due plaintiff by defendant, Richard, to be \$5,400, for which amount the defendant gave plaintiff a new note, and to secure the same executed and delivered to her a mortgage, including the lands in the former mortgage and other lands; that this "new note was given to pay off the judgment and decree," and secure the amount thereof and other sums advanced and paid by plaintiff for defendants, and that "the decree was satisfied and receipted in accordance with the terms of the settlement," and discharged of record.

The mortgage on which the foreclosure was had contained a stipulation "that if any of said notes become due and remain unpaid for ninety days thereafter the whole of said notes aforesaid shall become due," and also for the payment of an attorney's fee of one hundred dollars in case of a foreclosure of said mortgage. Now

in respect to this stipulation, it is only necessary to observe that the parties, being competent to contract, could legally contract as to the time and mode of payment of the notes, and having done so, and fixed the conditions upon which the payment of the notes must be made, the court is bound to give effect to their contract according to the terms therein expressed. Such condition of payment is not in the nature of a forfeiture. The debt only as shown by the face of the notes was required to be paid, and therefore there can be no forfeiture to be relieved from. *Hall v. Gouveneur*, 4 Ed. Ch., 208. *Noyes v. Clark*, 7 Paige, 179. *Vallentine v. Wagoner*. 37 Barb., 60. *Sanclift v. Norton*, 11 Kan., 222.

In *Lieman v. Hinman*, 16 Ill., 404, referred to by counsel for defendants, the court merely decided that upon the contract involved in the case the recovery of interest from the commencement of the action was not authorized by the statute; and in *Crane v. Dwyer*, 9 Mich., 352, "the case made by the bill is a forfeiture of one of the defendants of all her rights in a contract made with complainant for the purchase of a lot of ground," and it was held that equity will not lend its aid to enforce such a forfeiture. These cases do not, either in principle or fact, apply to the case at bar.

Again, it is alleged as cause for *vacating* the decree that it included too much interest. Five notes were given by defendants to plaintiff, to secure which the mortgage was executed; and it appears that interest up to the time each note respectively became due was included as part of the principal, and that the decree was taken for the amount as appeared on the face of the several notes, without deducting therefrom the interest from that time until the time they would severally become due. And this constitutes the main subject of complaint, and presents for consideration the question whether, after permitting the decree to be so taken by

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their own negligence and disregard of the process of the court, and after several terms of the court had passed, the defendants are entitled to have the decree vacated for this cause by original petition. The gravamen of the action is to *vacate* a decree by original petition long after the term has passed at which it was rendered by the same court. In *Sibbold v. United States*, 12 Peters, 492, it is said that "no principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments for errors of facts or law after the term in which they have been rendered, unless for clerical mistakes, from which it follows that no change or modification can be made which may substantially vary or affect them in any material thing. Bills of review in cases of equity, and writs of error *coram vobis* at law are exceptions." And in *Brooks Admr. v. Love*, 3 Marsh., 7, it is said: "It is well settled as a general rule, that the chancellor (except in cases specially provided for by statute) cannot open, alter, or reverse a final decree after the expiration of the term at which it was rendered, unless upon bill of review, or bill or petition impeaching the decree for fraud." *Bramlett's heirs v. Pickett's heirs*, 2 A. K. Marsh, 11. *Davone v. Fanning*, 4 John Ch., 203. *Murray v. Murray*, 5 John Ch., 69. *Bank of Va. v. Craig*, 6 Leigh, 439. It seems that in such case, the remedy is by "bill or petition for review, writ of error, or appeal, as either may be appropriate or allowable by law, or by some other mode specially provided by statute." But, further, it appears quite clear from the evidence that the defendants had ample opportunity to make defense to the whole or part of the demand against them in the foreclosure case; and although they had counsel employed in the foreclosure case, yet they disregarded the process of the court, and manifested great negligence and indifference in respect to the matter; and in such case, has a court

of equity under the well settled rules of law, power to grant him the relief he asks?

In *Horn v. Queen*, 4 Neb., 113, 114, it is said that "equity, will grant relief in a proper case where fraud has been practiced by the successful party in obtaining the judgment, or where from accident or unavoidable circumstances, without fault on the part of the party applying therefor, a full and fair trial has not been had." And on this ground a new trial was granted in this case; but, after citing the case of *Lieby v. Heirs of Ludlow*, 4 Ohio St., 493, with approval, in which it is held that "before a court of chancery will order a cause to be reheard at law they will require the complainant to show that he used due diligence in preparing and conducting his defense at law, and that he was prevented from then making it by circumstances beyond his control," it was by the unanimous opinion of this court said that: "We think this is clearly the law that a party must have done all he could under the circumstances, that he has not been negligent, and that he must show he has a defense to the action." This is a precise statement of the rule, and is substantially reiterated in the same case, brought a second time to this court, and reported in 5 Neb., 472. And in *Green v. Hamilton*, 16 Md., 329, 331, it is held that if the defendant "absents himself he has no better standing in court afterwards than a defendant who defends his cause," for "to allow a defendant who was absent without any fault on the part of his adversary to come in after the term and have redress would be reversing the maxim, *vigilantibus et non dormientibus jura subveniunt*."

But the principle is not questioned that power to set aside judgments and decrees, upon sufficient showing by motion made during the term at which they are rendered, is a common law power incident to courts of record; and that upon motion after the term has passed

this power may be exercised to correct clerical mistakes or irregularities so as to reform a judgment, but not to vacate it, or to make any change or modification that may substantially vary or affect it in any material thing, unless by some circumstance beyond the control of the defendant, and without any negligence on his part, he was prevented from having a fair trial. Hence, if the cause of complaint is not the result of fraud on the part of the plaintiff, or of some circumstance beyond the control of the defendant, but is occasioned by the fault, negligence, or want of ordinary diligence on the part of the defendant, he will not be permitted to deny the correctness of the determination, or to renew the controversy. This seems to be the well settled rule founded on both principle and authority, and to be of universal application, and if it were not so, it is quite manifest that litigation would be fruitless and endless. *Hackworth v. Zollars*, 30 Iowa, 486. *Foster v. Wood*, 9 John. Ch., 89. *Pierce v. Kneeland*, 9 Wis., 31. *Catlin v. Robinson*, 2 Watts, 380. *Bank of U. S. v. Mass.*, 6 How., 38. 39 Cal., 303. 44 Mo., 570.

In *Huntington v. Finch & Co.*, 3 Ohio State, 447-8, it is held that the court "has control over its own orders and judgments during the term at which they are rendered, and the power to vacate or modify them in its discretion. But this discretion ends with the term, and no such discretion exists at a subsequent term of the court. And the power of the court to set aside or vacate its judgments subsequent to the judgment term is governed by settled principles, to which the action of the court must conform. It is well settled in this court that a judgment may be vacated or set aside, on motion at a term subsequent to the judgment term, for irregularity or improper conduct in procuring it to be entered; and this has become one of the accustomed and settled remedies for relief against judgments wrongfully ob-

tained, where the impropriety or irregularity has not been superinduced by the *fault or negligence* of the judgment debtor." In *Bank v. Doty*, 9 Ohio State, 509, the court say: "The record shows that the common pleas, in fact, had no jurisdiction of the persons of the defendants." In principle then, it seems the Ohio cases are in harmony with the general rule, and have not departed from it.

Again, it is to be observed that "in accordance with the terms of the settlement" made between the parties subsequent to the rendition of the decree, the new note and mortgage were executed and taken in satisfaction of the decree complained of, and that by the terms of this settlement and contract the decree was receipted and discharged. No ground is stated or prayer made in the petition to set aside this discharge of the decree, and until this is done, it is difficult to perceive how the court can vacate a decree which is discharged. It must therefore follow as a necessary sequence, that when a decree is fully satisfied and discharged it can have no more legal effect than if it never had been rendered, and hence, if there was any sufficient ground to restore the parties to the relations existing between them before the decree was rendered, should not the satisfaction and discharge of it be first removed?

Some clerical mistakes or irregularities occurred in the foreclosure case, but as this action is to *vacate* the decree, and as they could not, in any view of the case, be reformed in this kind of action, it is not necessary to express any opinion in regard to them. It is, however, urged in the argument for defendants, that as defendant, Elizabeth Hooper, is a married woman, being the wife of Richard, the other defendant, this action by original petition may be maintained under subdivisions three and five, of section six hundred and two of the civil code. Conceding that this statute may be strictly ap-

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plied to an action in equity, it must still be observed, that subdivision three seems to be merely declaratory of the common law power incident to courts of record—a power which may, in a proper case, be exercised for the correction of clerical mistakes, etc.; and section six hundred and four requires that “proceedings to correct mistakes, etc., shall be by motion;” hence the case at *bar* does not come within this subdivision. And the power to vacate or modify judgments under the provisions of subdivision five is confined to “erroneous proceedings against an infant, married woman, or persons of unsound mind;” and this provision was intended for the protection of persons subject to legal disability, but by section three of the act of June 1, 1871, it was enacted that “a married woman may, while married, sue and be sued, in the same manner as if she were unmarried.” Therefore this act of 1871 has wholly removed the common law disability of a married woman, and consequently she no longer comes within the protection of the provisions of this subdivision; nor does the case at *bar* come within any of the other provisions of section 602.

Finding no cause, either in law or fact, to justify the court in vacating the decree, and as this case is brought into this court upon error, and not by appeal, the decree rendered in the court below in the case at *bar* must be reversed, and for the reasons given in this opinion it is now ordered adjudged, and decreed that the defendant’s cause of action be dismissed with costs.

LAKE, Ch. J., concurs.

MAXWELL, J., dissenting.

This is a proceeding under subdivisions three and five of section six hundred and two of the code, to set aside the judgment and default, and permit the defendants to answer the petition.

That a great wrong has been committed against the defendants in this case there is no question. The original indebtedness was \$3,200, for which five notes secured by mortgage were given, payable in one, two, three, four, and five years, with interest at twelve per cent per annum, the interest being added into each note. The notes were dated March 12, 1874. A decree of foreclosure was rendered in October, 1875, for the entire amount of the notes, *principal and interest*, amounting to about the sum of \$4,500. While in my opinion the defendants are entitled to relief on other grounds, I will only discuss the question of estoppel.

The judgment of a court of general jurisdiction directly upon the point in issue is, as a plea in bar, or as evidence, conclusive between the same parties; but the judgment is conclusive only in the matter which was *directly in issue* in the former trial. Such a judgment is not evidence of any matter which came collaterally in question, although within the jurisdiction of the court. The matter in issue is that upon which the plaintiff predicates his action and which the defendant controverts by his *answer*. The decree in this case was for \$100 more than the amount claimed in the petition, and embraced one hundred and fifty acres of land not included in the petition. These errors could scarcely have been the result of mistake, yet we are told that the decree is final and conclusive unless fraud is shown.

The rule is well settled that a plaintiff cannot have other or greater relief than the case made by his pleading will warrant, and the decree must conform to the prayer and cannot exceed it.

In *Huntington & McIntyre v. Finch & Co.*, 3 Ohio State, 448, it was held that a judgment may be vacated or set aside on motion, at a term subsequent to the judgment term, for *irregularity* or *improper conduct* in procuring it to be entered.

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In the case of the *Bank v. Doty*, 9 Ohio State, 505, judgment was rendered against the defendants in September, 1865. At the same term L., one of the defendants, filed a motion to set aside the judgment. The hearing on the motion was continued until the second term thereafter, when the motion, by leave of court, was amended by making one T. a party thereto, and assigning five reasons for setting the judgment aside. The motion was sustained. The court say: "Such a motion prior to, as well as since the code, might be made at the term in which such judgment was rendered, or at a subsequent term." In that case L. & T., the moving parties, had paid the judgment before it was set aside. The court held that in order to make it a voluntary payment there must be a concurrence of both volition and knowledge. If paid voluntarily, but in *ignorance* of the facts affecting its validity, or if the payment was not voluntary, though the party paying was aware of the facts rendering it invalid, such payment did not preclude the judgment debtor from questioning its validity. In *Abbernathy v. Latimore*, 19 Ohio, 288, the court held, that errors of fact are corrected by the court where committed. That court has the power, and upon proper showing should set aside or vacate a judgment effected thereby, on motion, and let the defendant in to defend.

In *Horn v. Queen*, 4 Neb., 113, it was held that equity will only grant a new trial in cases of newly discovered evidence, surprise, fraud, or the like, where the party is deprived of the means of defense by circumstances beyond his control. In that case the plaintiff was sued before a justice of the peace, and a copy of the summons left at his residence during his absence. On the day of the trial he returned home, but, as alleged in the petition, "too ill to give the matter any attention, which illness continued for more than ten days." On demurrer to the petition it was held that a new trial should be granted, as the justice court could give no relief.

The rule laid down in the opinion of the majority of the court in this case is doubtless correct so far as it applies to cases where a defendant has answered and a trial has taken place on the pleadings and proof. But a different rule prevails where a decree is irregularly taken by default.

In an action of foreclosure it is not necessary to endorse the amount claimed on the summons. *Watson v. McCartney*, 1 Neb., 131. But the defendant need not appear in the action if the petition truthfully sets forth the cause of action. He may rely upon the court to see that a decree is rendered conformably to the petition. The journal entries are usually prepared by attorneys, who, being officers of the court, are amenable to it for the proper discharge of their duty. If a mistake is made in any respect the court certainly has the right to correct it at a subsequent term. Suppose a decree is taken on the last day of the term against a party in default for an amount greater than the *facts stated in the petition will warrant*, and the court immediately thereafter adjourns, is the defendant bound by such a decree unless an appeal is taken? Or, may he not apply to the same court at a subsequent term to correct the error? I think he may.

A decree for too large a sum, or embracing matters not in controversy, cannot be considered the *deliberate* judgment of the court. And when there has been an irregularity in taking the judgment, or fraud, imposition, or mistake in obtaining the same, the judgment should be set aside. And the proper remedy in such cases is by motion, as the errors frequently do not appear in the record, and therefore cannot be reviewed on error.

Here the decree was rendered for a sum not warranted by the facts set forth in the petition, and without an appearance on the part of the defendants. It is true that an attorney afterwards took a stay of the order of sale, and

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although this may be an appearance in the case, so far as the husband is concerned, it cannot be considered as waiving the right of the defendants to the full time to answer. The entry of satisfaction of the decree on the journal of the court by the attorney for the plaintiff certainly did not bind the defendants nor conclude them.

In this case it is sought to set aside the judgment and default, and allow the defendants to answer the petition of the plaintiff. The district court in furtherance of justice has found that they should be set aside and the defendants be permitted to answer, and I think that the court did not err therein. The wife at least has never appeared in the action, and the fifth subdivision of section six hundred and two of the code expressly provides that a married woman shall be entitled to the benefit of this section.

It is contended that as the statute has changed the common law rule in this state by permitting a married woman to sue and be sued, that therefore this section has no application. It is a sufficient answer to say that the law does not favor a repeal by implication, and that if the two sections are not inconsistent with each other they will be permitted to stand; and that is the rule laid down by this court in *The People v. Weston*, 3 Neb., 323. *White v. The City of Lincoln*, 5 Neb., 614.

But the husband has made no such appearance as precludes him from seeking to set aside the judgment, and a settlement made by him *in ignorance of the real facts in the case* does not, and ought not to prevent him from availing himself of the defense that the decree was taken for too large an amount, and that it included land not embraced in the petition. As to the latter, in all probability the decree is a nullity, but a party in such a case has a right to have the cloud created thereby removed.

As to the objection made by this court to the *form* of proceeding, it is sufficient to say that although verified

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like a petition and in that form, yet it brings the irregularity before the court, and as no objection has been made by the parties on that ground it is not the business of the court to do so. *Turner v. Althaus*, ante page 54. The great object of the law is to administer justice, and although it must be administered according to the rules of law it must not be sacrificed for mere forms. In this case it is evident that great injustice has been done and that the district court has applied the proper corrective. The judgment should be affirmed.

DECREE FOR PLAINTIFF IN ERROR.

HENRY T. CLARK, PLAINTIFF IN ERROR, v. WILLIAM L. DAYTON, THE BOARD OF COUNTY COMMISSIONERS OF BUFFALO COUNTY, PATRICK WALSH, J. E. CHIDESTER, AND GEORGE FLEHARTY, COMMISSIONERS THEREOF, AND JOSEPH SCOTT, COUNTY CLERK THEREOF, DEFENDANTS.

1. **Pleading: AVERMENT OF FRAUD:** An allegation in a petition that a claim presented to the county commissioners for allowance "was unjust and was audited and allowed through fraudulent and undue means," is too general for either the admission of proof, or the entry of a decree establishing fraud against any of the parties to the transaction.
2. **County Bridges: POWER OF THE COUNTY COMMISSIONERS.** Section sixteen of the road law, as construed by this court in the case of *The People v. Commissioners of Buffalo county*, 4 Neb., 150, applies to contracts for erection of bridges as well as to those for the improvement of roads, and prohibits the commissioners from entering into a contract for the expenditure of more than double the amount of money on hand to the credit of the bridge fund.
8. ———; ———: While it is true that the general road fund may be lawfully applied to the erection or reparation of permanent culverts and bridges, it is *not* true that the bridge fund raised

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from the five mills levy, under section fifteen, can be used in the general improvement of roads, but must be devoted exclusively to the object for which this levy may be made.

4. ———: ———: The contract in this case provides for the payment of the cost of the bridge, in excess of the nine thousand dollars received in county bonds, by warrants drawn on the *bridge* and road funds. The petition alleges the want of sufficient money in the *road* fund to justify the contract, but no mention whatever is made of the condition of the special *bridge* fund. *Held*, that for this omission the petition was fatally defective.
5. ———: ———: Although this contract was illegal by reason of the failure of the commissioners to advertise for proposals under a plan and specifications, still the contractor having completed the bridge, and the same having been accepted by the commissioners, he is entitled to compensation. Under such circumstances payment will not be enjoined at the suit of a taxpayer.
6. **Claims against a County: ALLOWANCE OF: REMEDY:** The building of county bridges being entirely within the control of county commissioners, and they having accepted the bridge from Clark, and allowed his claim therefor, the remedy for any person feeling himself aggrieved was by appeal to the district court. Having neglected this remedy the plaintiff cannot resort to equity for relief by an original suit.

ERROR from the district court of Buffalo county. Tried below before GASLIN, J. The action there was upon the petition of Dayton, a taxpayer, in behalf of himself and all others, taxpayers of said county, against the board of county commissioners. Clark was not made a party to the action, but in the course of the proceedings, the other defendants making default, he was admitted to defend as the real party in interest. A perpetual injunction was granted as prayed, and Clark brought the case up by petition in error.

J. R. Webster & L. C. Burr (with whom was *J. M. Woolworth*) for plaintiff in error.

I. Equity cannot be invoked in this case for several

distinct reasons. Dayton had a clear, adequate, and complete remedy at law. Gen. Stat., 138.

1. This plaintiff complains here that he was aggrieved by the action of the board in allowing the claim of Clark. He is then by his own showing within the terms of the statute.

2. The system of county government adopted by this state is taken in its general scope from the Indiana statute upon the same subject, and had received judicial construction before its adoption by this state, and it was distinctly held that a taxpayer may appeal from precisely such an order as that of which the plaintiff complains here. *State v. Buckles*, 39 Ind., 273, 274. *Harlan v. Carroll*, 13 Ind., 247. And in other states, under similar statutes, decisions are to the same effect.

3. While it may be true in some cases that a taxpayer may not have actual knowledge of the order by which he is aggrieved, it is matter of doubt in such cases whether he would not be affected with constructive notice of the proceedings of a public body and of a public record so as to deprive him of the right to complain. It could not be contended that want of knowledge by a litigant in the district court of the return of the verdict of a jury, extended the time within which he is required to file his motion for a new trial. But while it may be conceded that the taxpayer's ignorance of the order of the board would give ground for the intervention of equity, it is very clear that every circumstance from which negligence on his part may be implied should, in a petition invoking the equity powers of the court, be distinctly alleged, and if denied, clearly proven. In no other way can the force of the statute be preserved; in no other way can parties deal with counties or their agents, the board of commissioners. *Stephenson v. Wilson*, 2 Vern., 325. *Blackhall v. Coombs*, 2 P. Wms., 70. *Holworthy v. Mortlock*, 1 Cox, 141.

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Humkey v. Vernon, 2 Id., 12. *Stevens v. Praed*, 2 Ves. Jr., 529. *Baileman v. Willod*, 1 Sch. & Lef., 201. *Ware v. Horwood*, 14 Ves., 31. *Western R. R. Co. v. Babcock*, 6 Met., 346, 352. *Capetown v. Moon*, 3 Jones' Ex., 178. *Diman v. Providence, &c., Co.*, 5 R. I., 130, 135. *Vaughn v. Johnson*, 1 Stockt. N. J. Eq., 173, 177. *Gifford v. Thorn*, Id., 702.

4. But in this case it is unnecessary to resort to such inquiries. The bill itself shows that there was no ignorance on the plaintiff's part of the order of which he complains. That order was made, as he alleges in paragraph XII of his amended petition, on the fifteenth of August, 1874. The record shows, and he distinctly avers in paragraph XI of his amended petition, that the original petition was filed on the twenty-ninth of August, 1874. This shows, that within fourteen days from the entry of the order he knew of it, and he knew that he was aggrieved by it.

He then intelligently and purposely elected his remedy; he declined that which the law gave him; he sought to come into a forum whose first principles of administration close its doors against him.

5. It is submitted that the better rule is as established by the weight of authority, that a taxpayer cannot, under any circumstance, maintain a petition for injunction in a case like this. *Doolittle v. The Supervisors*, 18 N. Y., 155. *Roosevelt v. Draper*, 23 Id., 318. *Hall v. Cushman*, 6 Met., 426. *Frost v. Belmont*, 6 Allen, 152. *Craft v. Jackson County*, 5 Kan., 518. *Conklin v. Commissioners*, 13 Minn., 454. *Miller v. Grandy*, 13 Mich., 540. *Morgan v. Graham*, 1 Woods, 124.

6. But if this court shall adopt the view held in cases other than those cited, it will appear upon an examination of them that they are all, or at least nearly all of them, where a city was a party and where no

remedy was provided by statute for reviewing the action of the authorities. There is thus a very wide distinction between this case and such cases.

II. There is another distinct and decisive reason why equity should not interfere in behalf of the plaintiff below in this case. This record shows that he has negligently stood by and suffered Mr. Clark to expend his money on the faith of his contract; he has waited until he has obtained all the benefit of the expenditure, and until the body of the taxpayers have obtained all the benefit of the expenditures—drawing Mr. Clark on as far as he could to make them, and having placed him in a position from which he cannot retreat, he appeals to a court of equity to prevent him from being paid what is a fair and just return. The answer distinctly alleges in paragraph XV, that from the making of the contract down through the whole progress of the work to its completion, the plaintiff knew of all the matters and was silent, and these allegations are not denied by the reply. He was silent when he ought to have spoken; he shall not be heard now when he ought to keep silent. The question is not whether Mr. Clark has legal rights here which the ordinary courts of law will enforce; the question is whether the court of equity will, by the extraordinary process of injunction, interfere on behalf of such a plaintiff? *Wiggins v. Mayor, etc.*, 9 Paige, 24. *Tash v. Adams*, 10 Cush., 252. *Hellenkamp v. Lafayette*, 30 Ind., 192. *Kellogg v. Fly*, 15 O. St., 64. *Weber v. San Francisco*, 1 Cal., 455. *Lafayette v. Fowler*, 34 Ind., 140. *Sleeper v. Bullen*, 6 Kan., 300. *Motz v. Detroit*, 18 Mich., 495. *Sedam v. Williams*, 4 McLean, 51. *Russ v. Wilson*, 22 Me., 207. *Bigelow on Estoppel*, 508.

S. S. Savidge and *E. Wakeley*, for defendants in error.

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I. It is insisted by plaintiff in error that if a taxpayer and citizen has any remedy it is by appeal from the action of the board allowing the claim.

1. We do not concede that a taxpayer, as such, is a person "aggrieved" within the meaning of the statute. We claim that the appellant must have some direct individual interest in the matter, determined by the board. In an appeal he is the only party on one side, and the county is the party on the other. But in such an action as this he proceeds in behalf of all taxpayers of the county.

2. If a taxpayer may appeal, this is not the only remedy. Look at the consequences of such a holding. The appellant may at any time dismiss his appeal. If he does so, all power to review and annul the order of the board is gone. Other taxpayers, not having appealed, have no remedy. So that every taxpayer must take an individual appeal, or take the risk of the order becoming irreversible. If one may appeal, all may. And so there may be as many appeals as there are taxpayers in the county, all seeking the same result, to-wit: the correction of a single order of the board. Surely the statute does not contemplate such a state of things. *Reppy v. Jefferson Co.*, 47 Mo., 66. *Knowlton v. Guttenberg*, 5 Iowa, 380. *Murphy v. Commissioners*, 14 Minn., 67.

3. The order is not merely a voidable one, to be corrected by a review. It is wholly void—a point we will discuss under the next head.

II. It is further insisted that, as the board is a special tribunal empowered to audit and allow claims against the county, its decision is final unless reviewed by some direct proceeding therefor.

This principle is correct within its proper limits. But it applies only to "accounts chargeable against the

county." It is argued, however, that when a claim is presented for allowance the question submitted to the board is whether it is "chargeable against the county," and their decision on this question is final and conclusive unless reviewed. This argument proves too much. If sound, then a claim for building a railroad through the county—for erecting a mill—for a ferry boat to carry passengers and freight across the Platte—or for any other purpose, utterly foreign to the duty or power of the county, may be presented and allowed, and so become "chargeable against the county" by the mere decision of the board of commissioners that it is so. This cannot be correct.

The commissioners must keep within their jurisdiction. When they allow an account for something which the county has no power to meddle with, and which is not "chargeable to the county," they act without jurisdiction, and their action is simply void.

It will be said that this is not such a case. That counties have the power to improve roads and build bridges and contract indebtedness therefor. Wherefore the commissioners may allow claims for such work. But this case is where a contract which the statute in terms forbade the commissioners to make; a contract which was void as being in excess of the authority of of the commissioners. The claim allowed was for the performance of this contract. What is the practical difference between allowing an account for a work which the county has no authority to construct, and allowing an account for a work which it might construct at a cost not exceeding so much money, when the account so allowed exceeds many times the amount authorized by law? *Stetson v. Kempton*, 13 Mass., 273. *Parsons v. Goshen*, 11 Pick., 396. *Vincent v. Nantucket*, 12 Cush., 503. *Claflin v. Inhabitants*, 4 Gray, 502. *Superrisors v. Ellis*, 59 N. Y. 620. *People v. Lawrence*, 6 Hill, 244.

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1 Dill Mun. Corp., 412. *Ohio v. Latman*, 22 Ohio State, 546. *City v. Rankin*, 2 Kan., 357. Cooley Cons. Lim., 195. *Hooper v. Ely*, 46 Mo., 505. *Richards v. Warren Co.*, 31 Iowa, 381.

III. It may be said that, although the contract was void, yet Clarke had built a bridge and presented a claim for it, and the commissioners could allow the claim without reference to the legality of the contract.

That is, they are forbidden by the statute to make a contract for road work or bridges requiring the expenditure of more than twice the amount of road money in the treasury, or without letting to the lowest bidder. But if they make no contract as to amount, or make an illegal one, they may "allow" any amount whatever for the work when done, and mortgage the revenues of the county for an indefinite time to come to pay for it. They have no power to make the contract, but, with or without a contract, they can do precisely what they are forbidden by law to agree to do.

Can an express statute, for protecting taxpayers and restricting the power of taxation, be thus frittered away and successfully evaded?

We say that when the commissioners thus allowed the amount due on a contract which they had no jurisdiction to make—thus performed, on their part, the conditions of a void contract—they exceeded their jurisdiction, and their action was simply void. Or, laying out of view the matter of performing a void contract—when they allowed for the work in question an amount largely exceeding the limit of expense expressly imposed by statute for such work—the action was as plainly void as if it purported to be the performance of a void contract.

It is the settled practice in Nebraska, in both the state and United States courts, that tax-payers and citizens may enjoin public officers from doing a wrong which

will affect their pecuniary rights. All suits to enjoin the issue of bonds illegally voted are sustained on this principle. There is no other adequate remedy. There is no public officer whose duty it is to enjoin the commissioners from paying out public moneys contrary to law. It is doubtful if the district attorney could institute a suit for the county for that purpose.

There is some conflict of authority on the question, but the better reason and decided weight of authority is in favor of the practice in this state.

There is the same reason for a private citizen being allowed to enjoin public officers from violating official duty as for permitting him to compel them by mandamus to perform official duties. Dillon on Municipal Corp., § 731, *et seq.* High on Injunctions, § 804. *Drake v. Phillips*, 40 Ill., 388. *Cumberland Co. v. Webster*, 53 Ill., 141. *New London v. Brainard*, 22 Conn., 553. *Scofield v. School District*, 27 Conn., 499. *Merrill v. Plainfield*, 45 N. H., 126. *Danville v. Montpelier*, 43 Vt., 144. *Baltimore v. Gill*, 31 Md., 375. *Foster v. Coleman*, 10 Cal., 278. *Hooper v. Ely*, 46 Mo., 505. *Harney v. R. R. Co.*, 32 Ind., 244. *Galloway v. R. R. Co.*, 63 N. C., 147. *Rice v. Smith*, 9 Iowa, 570. *Hartwell v. Armstrong*, 19 Barb., 166. *Williams v. Peinney*, 25 Iowa, 436.

LAKE, Ch. J.

The action in the court below was brought to restrain the board of commissioners of Buffalo county from paying Clark, the plaintiff in error, for building a bridge across the Platte River, in pursuance of a contract entered into between said Clark and the two boards of commissioners of the counties of Buffalo and Kearney. The case was determined upon the pleadings alone, no testimony having been offered by either party.

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It is not claimed that the contract in question was in any respect fraudulent on the part of either of the parties to it. Indeed, the only suggestion of fraud which the petition contains, is respecting the final allowance of Clark's bill by the commissioners, of which it is merely said that it "was unjust, and was audited and allowed through fraudulent and undue means." But by what particular means, in what respect they were fraudulent, or by whom they were resorted to, does not appear. This averment of fraud is altogether too general for either the admission of proof, or the entry of a decree establishing fraud against any of the parties. Wherefore, in the consideration of the case, we must look upon all that was done as being entirely uninfluenced by any fraudulent or unjust motives, and in the honest belief that it was within both the letter and the spirit of the law. This being the attitude of these parties, I will notice the reasons urged on behalf of the defendants in error why the judgment of the district court ought to be affirmed.

I. The first point made is: that the contract for the erection of the bridge, so far as it concerned Buffalo county, was absolutely void for two reasons: 1st, because it was in excess of the authority of the commissioners as limited by the statute, and 2d, for the reason that the commissioners did not advertise for bids and let the contract to the lowest bidder, under a plan and specifications previously agreed upon. This want of authority on the part of the commissioners is based upon the fact alleged in the petition, and which seems to have been conceded, that, at the time the contract was made, there was not sufficient money on hand belonging to the *road* fund to warrant so large an expenditure. On this point the petition alleges, "that at the time of the letting of the said contract, the total amount of money on hand in

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the county road fund of Buffalo county, was only \$62.12, and the amount of such fund did not at any time thereafter, until the completion of said bridge, exceed the sum of \$400.00."

This allegation is evidently based upon section sixteen of the road law, as construed by this court in the case of *The People v. Commissioners of Buffalo County*, 4 Neb., 150. This section provides that: "The county commissioners may let contracts to the lowest competent bidder for the improvement of such roads as may be of general necessity, and pay for the same by orders on the county treasury, payable out of the county road fund; but no contract shall be entered into for a greater sum than double the amount of money on hand in the county road fund." But while under the rule established by a majority of the court in that case, this provision is applicable, and must govern in the expenditure of funds realized from the five mill levy for bridge purposes, it most certainly does not wholly destroy the distinctive character which this fund possesses. The tax, when levied, is a bridge tax, and when collected, the money constitutes a special *bridge* fund—nothing more and nothing less. And it can be lawfully expended only in "building or repairing permanent and substantial culverts and bridges, under the direction of the county commissioners." While it is doubtless true, that the ordinary road fund may be used in the building and reparation of bridges, it is *not* true that this particular bridge fund can be expended in the general improvements of roads.

Now the contract between Clark and the county commissioners provides that, for the payment of the cost of the bridge in excess of the nine thousand dollars in county bonds, he was to receive warrants on the "*bridge and road funds*," not upon the road fund alone. And while the petition by distinct averment shows the al-

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most total want of money in the treasury to the credit of the road fund proper, no mention whatever is made of the condition of this special bridge fund at that time. I am of the opinion that, in this particular, the petition is fatally defective, and fails to show that the commissioners exceeded their authority in making the contract.

As to the objection that the contract was let without due notice, and with no plan or specifications previously agreed upon by the commissioners, it may be answered that, even conceding these preliminary steps to be necessary to the validity of the contract, as was held by a majority of the court in *The People v. Commissioners of Buffalo County*, before cited, it by no means follows that equity will enjoin the payment of Clark's claim. I am of the opinion that the objection came too late. Clark was permitted to go on under the contract, on the supposition at least that the law had been fully complied with, and expend a very large sum of money in the erection of this bridge, which is now accepted by the proper local authorities, and thrown open to public travel. If there be any inflexible rule of equity which, under the circumstances surrounding this case, requires this court, at the instance of a taxpayer of the county, to enjoin payment by the commissioners of the amount justly due for the work, I am not aware of it. The aid of equity cannot be successfully invoked for any such purpose.

II. But there is still another objection equally fatal to this proceeding. Even if it were conceded that the allowance of Clark's claim by the commissioners, in the absence of fraud or other undue means, was reviewable in the courts at the instance of a taxpayer, the plaintiff had a plain and adequate remedy by appeal to the district court. *Brown v. Otoe County*, ante page 111. Having neglected this remedy by which any wrong done to him, and of which he had the right to com-

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plain, could have been redressed, he cannot resort to equity for redress by an original suit. For these reasons the decree of the district court must be reversed and one entered in favor of the plaintiff in error.

JUDGMENT ACCORDINGLY.

GEORGE D. FOLLMER, APPELLANT, v. BOARD OF COUNTY
COMMISSIONERS OF NUCKOLLS COUNTY, APPELLEE.

1. **Construction of Statutes:** The several parts of an act are to be construed together in order to ascertain the intention of the legislature.
2. ———: As a primary rule the intention of the legislature is to be collected from the words; if the words are not explicit it may be gathered from the occasion and necessity of the law. Words are to be interpreted with reference to the general object and scope of the statute.
3. ———: **ROADS AND BRIDGES.** Section 16 of the road law requires all contracts for the improvement of roads to be let to the lowest competent bidder, and this includes contracts for the erection and repair of permanent bridges and culverts.
4. ———: ———: **POWER OF COUNTY COMMISSIONERS.** County commissioners have no authority either personally or by agent to engage in the business of erecting public bridges on the credit of the county. The law defines their power and points out the mode of its exercise, and that mode is exclusive.
5. ———: ———: ———. The words "permanent" and "substantial" are used in section 15 of the act in a descriptive sense, and apply only to such structures as are of a permanent and substantial character, and do not include merely temporary structures or ordinary repairs.

THIS action was brought in the district court of Nuckolls county, upon a petition of the plaintiff, to restrain the defendants from building bridges in that county

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without letting the contract for the building of the same to the lowest responsible bidder, and also to enjoin the board from auditing and paying a large number of accounts already accrued in the hiring of hands, and for the purchase of material for the erection of bridges, except where the contract for the same was let to the lowest responsible bidder. A temporary injunction was allowed. By stipulation of the parties the cause was heard before Hon. S. B. POUND, judge of the second judicial district at Lincoln, by whose decree the temporary order of injunction was modified so as to allow the defendants to audit the claims set forth in the petition which had already accrued, and made perpetual to the extent of prohibiting the defendants from building bridges in the future without first advertising for bids and letting the contract to build the same to the lowest responsible bidder. It was also decreed that each party pay one-half of the costs of the action. Plaintiff appeals, and by a further stipulation the cause was heard here upon the original pleadings and proofs.

Brown, England & Brown and H. A. Day. for appellant.

A board of county commissioners have no authority to incur an obligation on the part of the county, except when they are expressly authorized by law to do so; and when acting under such authority they must act strictly on the conditions under which the authority is conferred. *The Sioux City, &c., R. R. Co. v. Washington Co.*, 3 Neb., 42. Therefore, when the law provides that in building bridges they shall let the contract for erecting the same to the lowest responsible bidder, this is a limitation on their power to contract, and a bridge built by them in disregard of this provision creates no liability against the county. In other words, a contract made or

liability incurred by the board of county commissioners, in any other manner than that in which they are authorized by law to make or incur it, has no binding force or validity on the county, and is absolutely void. *Zottman v. San Francisco*, 20 Cal., 96. *Murphy v. Napa Co.*, 20 Cal., 497. *Richard v. Warren Co.*, 31 Iowa, 381. *Brady v. The Mayor, &c., of N. Y.*, 16 How. Pr., 432. *Id.*, 20 N. Y., 212. *Ohio, ex rel. Bain v. Yeatman*, 22 O. S., 546. *Kneeland v. The City of Milwaukee*, 18 Wis., 411. *Willis v. Burnham*, 20 Wis., 119. *McEwen v. Gilker*, 38 Ind., 233. *Stewart v. Otoe County*, 2 Neb., 177. *Dillon Mnn. Corp.*, Sec. 373. Same, Sec. 381 and note 2. *Angel & Ames on Corps.*, Sec. 253. *Butler v. City of Charleston*, 7 Gray, 12. *Marsh v. Fulton Co.*, 10 Wall., 676. *Thomas v. City of Richmond*, 12 Wall., 349.

It being admitted as a matter of fact, that the accounts, the auditing of which is sought to be enjoined in this action, were incurred by the county commissioners for the erection of bridges without letting the contract at all—it would seem to follow as an irresistible conclusion that these pretended claims ought not be allowed by the board and charged to the county; and that if the board are threatening and intending to audit and allow them, as they admit they are, then certainly this plaintiff ought to have some remedy of which he may avail himself, to prevent his property being made subject to the payment of these unlawful demands. The foregoing proposition is so plainly just that even the defendants will hardly seek to dispute it. But it may be argued by the defendants' counsel, as it was in the court below, that the taxpayers of the county, and the public generally, are using these bridges, and that by using them they have accepted them, and converted them to the use of the public, and that because they have accepted and used them, there is an *implied* obligation on the part of

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the county to pay what the bridges are reasonably worth. In reply to this we say: These bridges are in the highway where the public have a right to travel; that the parties who placed them there acted without authority of the law, and were trespassers. To say that a county under such circumstances is liable for the value of these bridges is to hold that a person may place a bridge in the highway, without any authority whatever, and the first time that a person traveling along the highway shall pass over it, the county, however unwillingly, has incurred an obligation for the value of the bridge, which the person placing it there may enforce by an action at law. If this be law, it is within the power of any person to compel the county to assume obligations of this character or abandon the highway. The law never implies an obligation to do that which the party has no power to agree to do. And the commissioners having no authority to build bridges, except in the manner pointed out by law, there can be no implied obligation on the county to pay for bridges built in any other manner; neither can the county commissioners ratify the acts of the parties in erecting these bridges. We have shown that the board have no authority to build bridges as these were built, and it requires no argument to prove that the board cannot ratify what it has no power to authorize.

H. S. Kaley, for appellee.

The plaintiff has clear, adequate, and complete remedy at law. The statute gives to any person who shall be aggrieved by the decision of the board of county commissioners, the right of appeal to the district court. If the plaintiff is in a situation to be aggrieved by the allowance of these claims, he is within the clear letter and spirit of the statute, and may have his right of appeal.

This is not only apparent from the very language of the statute, but the courts of sister states having similar provisions in their statutes, and from which ours is borrowed, have repeatedly held that a taxpayer may appeal, not only to determine the amount due, but also to test the legality of the claim. *Harlan v. Carroll*, 13 Ind., 247. *Graham v. Commissioners*, 25 Ind., 233. *State v. Buckels*, 39 Ind., 273-4. *Arthur v. Adams*, 49 Miss., 410. The right to appeal from an inferior tribunal cannot be taken away unless the intention of the legislature to this effect is expressed with unequivocal clearness. *Dillon on Mun. Corp.*, §§ 368, 476. For a court of equity to assume jurisdiction and to summarily dispose of vital questions of law in the face of a statute containing such ample provision for the adjustment of these questions in a common law court, is simply to nullify clear legislative enactments, rob law courts of conceded jurisdiction, and become, by mere assumption, a law unto itself. The pleadings and proofs clearly show that bridges have been constructed, valuable materials furnished, and labor and toil honestly expended by various parties, the plaintiff, in common with other citizens of the county, now enjoying their use and advantages; and yet, with all these just and equitable claims pressing for adjustment before the board of commissioners (and their willingness) to pay, the plaintiff, as the voluntary champion of justice, in behalf of the taxpayers of the county (all of which, according to the proof, silently acquiesced in the construction of these bridges) comes into a court of equity, not for an equitable adjustment of claims, but appealing to the conscience of the chancellor, boldly asks that all compensation be denied these parties because of a supposed mistaken construction of a vague and indefinite statute. A proposition so unconscionable has neither the sanction of reason nor the approval of the courts. 14 Penn. State, 83. 47 Ind., 407. 24 Wis., 39.

MAXWELL, J.

In 1866 the legislature amended section fifteen of the road law so as to permit county commissioners to levy an additional cash tax for bridge purposes, not to exceed five mills on the dollar of the assessed valuation of all taxable property, to be levied and collected as other taxes, which special tax when so collected shall be exclusively applied to building and repairing permanent and substantial bridges and culverts, under the direction of the county commissioners.

Section sixteen provides that: "The county commissioners may let contracts to the lowest competent bidders for the improvement of such roads as may be of general necessity, and pay for the same by orders on the county treasury, payable out of the county road fund; but no contract shall be entered into for a greater sum than double the amount of money on hand in the county road fund; and every bidder before entering upon any work pursuant to contract, shall give bond to the county, with at least two good and sufficient sureties, in any sum double the amount of the contract; which bond shall be approved by the county commissioners, conditioned for the faithful execution of the contract." General Statutes. 954.

These sections are part of the same act and are to be construed together in order to ascertain the intention of the legislature. "In the exposition of a statute the intention of the legislature may be discovered from different signs. As a primary rule it is to be collected from the words; when the words are not explicit it is to be gathered from the occasion and necessity of the law, the defect in the former law and the designed remedy being the causes which moved the legislature to enact it." Potter's Dwaris on Statutes, 184.

Statutes should be construed according to the natural

and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. *Waller v. Harris*. 20 Wend., 561-2.

Ambiguous words are to be interpreted by comparing therewith the context of the whole statute, and by considering its reason, spirit, and cause. *State v. Judge*, 12 La. Ann., 777. Sedgwick on Statutory and Constitutional Law, 225.

Words are to be interpreted with reference to the general object and scope of the statute. *State v. Button*, 25 Wis., 109. In the amendment of statutes the intention to change an existing law should clearly appear. *Lee v. Forman*, 3 Metc. (Ky.), 114.

Statutes having similar objects are to be construed alike. Thus the same principles applied in the construction of bankrupt laws are to govern in the case of a statute to prevent frauds by incorporated companies having a similar object in view, namely, an equal distribution of assets among creditors. *People's Bank v. Paterson Savings Bank*, 2 Stockt., 13.

The rule is well settled that the word *may*, where the statute directs the doing of a thing for the sake of justice or the public good is the same as *shall*, and must be so construed. Let us apply these principles to the case at bar. What was the occasion and necessity of the law? Undoubtedly the object was to protect the interests of the public by opening to competition all contracts for the improvement of roads. It is urged with great earnestness that at the most this competition only applies to such portions of roads as require grading, and has no application whatever to contracts for the erection and repair of bridges and culverts. The word "road," as a generic term, includes highway, street, and lane. Public roads and streets are for the use of the public at large, although ordinarily the public acquire only the

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use, the fee remaining in the original proprietor or abutter.

The character of the soil of this state and the general absence of obstructions of every kind from its surface are matters of public history. Except in rare instances but little expenditure is necessary for grading in opening new roads. Nearly the entire amount to be expended for the improvement of roads is required for bridges and culverts. Will it be supposed that the legislature intended these lesser contracts for grading to be let to the lowest bidder, while contracts for the erection of bridges and culverts, involving almost the entire expenditure of money at the disposal of the county commissioners for road purposes, may be expended as the commissioners see fit? I think not. At the time the amendment of section fifteen of the road law herein referred to took effect, the statutes provided for a land road tax not to exceed \$4.00 on each quarter section of land, one third of which if paid in money was placed at the disposal of the county commissioners. This tax (now repealed) might have been paid in work on the roads, under the direction of the supervisor of the proper road district, in which case no portion of the tax was placed at the disposal of the commissioners. The bridge tax provided for in section fifteen is to be paid in *cash*, and is to be expended exclusively in the construction and repair of permanent bridges and culverts. It is reasonable to suppose that at the time of the passage of this amendment the road taxes paid in work were sufficient to secure the necessary grading for the opening and repair of new roads, no additional taxes being deemed necessary at that time for that purpose, and therefore no contracts for grading were required to be let.

Prior to the passage of the amendment to section fifteen, above referred to, if the entire amount of land road tax in any county was paid in work, then one-

third of said road taxes, which, if paid in money, would have been placed at the disposal of the county commissioners, would not be available for the purpose of erecting permanent bridges and culverts; therefore the necessity for the tax for bridge purposes to be paid in cash. Now how shall this money, collected for the purpose of erecting and repairing permanent bridges and culverts, be expended? Section sixteen provides that the commissioners may let contracts for the improvement of roads to the lowest competent bidder. Does this provision apply to all contracts for the improvement of roads of whatever character? We think it does.

Public bridges are portions of public roads, and there being no restriction in the statute, all contracts of that kind, including those for the erection and repair of permanent bridges and culverts, must be let to the lowest responsible bidder. The commissioners have authority, on the presentation of the proper petition, to take the necessary steps to locate and open new roads. But they have no authority, either personally or by an agent, to engage in the business of erecting public bridges on the credit of the county. The law defines their power and points out the mode of its exercise, and that mode is exclusive. They have no authority whatever to purchase material and employ workmen by the day or week to construct permanent and substantial bridges and culverts.

The words *permanent* and *substantial* are here used in a *descriptive* sense, and apply only to such structures as are of a permanent and substantial character, and do not include merely temporary structures or ordinary repairs. It is persistently urged that, as a matter of economy, county commissioners can erect bridges and culverts for a sum much less than it is necessary to pay contractors where contracts are let to the lowest bidder. The proposition amounts to this, that county commissioners who

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ordinarily know but little about bridge building, can erect such structures for a less sum than those who understand the business—a proposition that need only be stated to show its absurdity.

The principle is well settled in this court that county commissioners can only exercise such powers as are especially granted or are incidentally necessary for the purpose of carrying into effect the powers granted. And in the exercise of these powers they must follow the mode of procedure pointed out by the law. If they fail to do so a court of equity has authority to grant an injunction to restrain them from proceeding illegally under a claim of right. And the court having obtained jurisdiction of the subject matter and the parties may retain the cause to administer complete justice between the parties. The plaintiff could not be presumed to know that the commissioners were about to purchase a large quantity of material for the purpose of erecting bridges, and is not therefore estopped from denying their authority to purchase such material on the credit of the county. The case differs in many respects from the case of *Clark v. Dayton*, ante page 192, where the court held substantially that a taxpayer having, without objection, permitted a contractor to expend, his money and labor in the erection of a public bridge, could not, after the completion of the same and its acceptance by the county commissioners, maintain an action to restrain the collection of a tax to pay therefor.

The injunction will be dissolved as to all bridges erected by the county commissioners prior to the commencement of this suit, and as to all other matters prayed for in said petition will be made perpetual; the costs of this court to be taxed to defendant.

DECREE ACCORDINGLY.

GANTT, J., concurs.

LAKE, Ch. J., dissented.

The State, ex rel. A. & N. R. R., v. Lancaster County.

THE STATE, EX REL. A. & N. R. R., v. COUNTY COMMISSIONERS OF LANCASTER COUNTY.

1. **Precinct Bonds:** The limitation in section two, Art. XII, of the constitution, prohibiting counties, except on a two-thirds vote, from issuing its bonds in excess of ten per cent of the valuation, does not prohibit a precinct from issuing its bonds in addition to the amount which may be issued by a county.
2. ———: Capitol precinct, at an election held on the sixteenth day of October, 1875, voted bonds to the A. & N. R. R. Co., to aid in an extension of its line. The bonds were to be placed in the hands of a trustee until the company had so far completed its road as to be entitled to them. The company immediately made a preliminary survey of its line, and the same was completed prior to November 1, 1875. *Held*, That the right of the company to the bonds in question had become vested, at the time the constitution of 1875 took effect, to such an extent that the company could require the bonds to be issued as provided in the proposition, and placed in the hands of the trustee to await the final action of the company.

THIS was an application for a mandamus to compel the commissioners of Lancaster county to issue \$20,000 in the bonds of Capitol precinct, and to place the same in the hands of a trustee to be delivered to the relator upon compliance with the terms upon which the bonds were issued.

S. B. Galey, R. E. Knight and James E. Philpott,
for the relator.

Brown, England & Brown, for the defendants.

MAXWELL, J.

On the sixteenth of October, 1875, an election was held in Capitol precinct, Lancaster county, to determine whether the precinct would issue its bonds in the sum of \$20,000.00 to the A. & N. R. R. Co., to aid in an ex-

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tension of its road. A majority of the votes cast at the election were in favor of the proposition, and the county commissioners of said county, after a canvass of the same, declared the proposition carried. By the terms of the proposition the bonds were to be issued and placed in the hands of a trustee, to be delivered to the company when a certain portion of the proposed extension was completed. The company immediately after the result of the vote was declared made a preliminary survey of the proposed line, and had the same completed prior to the first day of November, 1875. It is conceded that Lancaster county has issued nearly the entire amount of bonds authorized by statute. But two questions are presented for our consideration:

First. Can a precinct issue its bonds in excess of the limitation of ten per cent to which a county is restricted?

Second. Had the company by its acts so far performed the conditions of the proposition on its part as to have a vested interest in the bonds in question at the time the constitution of 1875 took effect?

Section two, Art. XII, of the constitution of 1875 provides, that "no city, county, town, precinct, municipality, or other subdivision of the state, shall ever make donations to any railroad or other work of internal improvement unless a proposition to do so shall have been first submitted to the qualified voters 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 county," etc.

Whatever the effect of the restriction upon a county, it is clear that it does not restrict the subdivisions named from issuing their bonds in the excess of the limit fixed for the county. The commissioners therefore have authority to issue the bonds of the precinct for the desired improvement, if the relator, on a full compliance

with the terms of the proposition, is entitled to receive the same.

The company having accepted the conditions of the proposition, and having commenced work on the proposed extension on the faith of the bonds before the constitution of 1875 took effect, their right to the bonds in question had become vested to such an extent at that time, that if they complete the proposed extension within the time, and in conformity to the conditions of the proposition, they will be entitled to the bonds. Such being the case the company has a right to insist that the bonds shall be placed in the hands of a trustee to be delivered to them in case of full performance. But in case of the failure of the company to perform the conditions of the proposition the bonds to be surrendered to the county commissioners.

JUDGMENT ACCORDINGLY.

DANIEL B. WILLIAMS, PLAINTIFF IN ERROR, v. ISAIAH D. EVANS, DEFENDANT IN ERROR.

1. **Pleading:** **REPLY.** A reply must be made to all the material allegations of new matter contained in an answer, or they will be taken as true.
2. ———: ———. **EVIDENCE.** When new matter set up in an answer is denied by the reply, the burden of proof is on the party alleging the same as a defense.
3. **Chattel Mortgage:** A mortgage of goods and chattels with possession and *power of sale* in the mortgagor, is void against the creditors of such mortgagor.
4. ———: If the instrument on its face is one the law will not sanction as against creditors, it is the duty of the court to pronounce it fraudulent as to them.

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5. ———: WHEN FRAUDULENT INTENT A QUESTION FOR THE JURY.

Where an instrument is not void upon its face the question of fraudulent intent is a question of fact which should be submitted to the jury.

ERROR from the district court of Kearney county. Tried before GASLIN, J. The facts are sufficiently stated in the opinion.

Hamer & Conner, for plaintiff in error.

No brief on file.

MAXWELL, J.

This is an action of replevin. The defendant in his answer denies the special ownership of the property in question in the plaintiff, or that he is entitled to the possession thereof, or that the defendant wrongfully retains possession of the same. The defendant further alleges that the plaintiff claims title under a chattel mortgage made by one Brown on the fourth day of August, 1873, and that said mortgage is void. The defendant further alleges that on the first day of September, 1873, proceedings in bankruptcy were commenced against said Brown in the United States district court, and that the court thereupon issued a warrant directed to the United States marshal as messenger, requiring him to take possession of all the estate, real and personal, of said Brown, and that on the second day of September, 1873, said marshal did take possession of said estate of said Brown, and on the tenth day of September, 1873, the defendant was duly appointed assignee of Brown's estate, and as such took possession of said goods and chattels, and held the same as such assignee. The plaintiff in his reply admits that the defendant is the assignee of the estate of D. J. Brown, but denies specifically that Brown was adjudged a bankrupt on the

second day of September, 1873, or that the United States district court issued a warrant in bankruptcy to the marshal as messenger, and alleged that the mortgage of August 4, 1873, executed and delivered by Brown to the plaintiff, was executed and delivered in lieu of one executed on the sixteenth day of June, 1873, by said Brown to the plaintiff. By a written stipulation of the parties it was agreed that the allegations of the plaintiff's reply "as to the execution of the notes and mortgage are true." The defendant moved for judgment on the pleadings and on the written stipulation above referred to, which motion was sustained by the court, and judgment rendered in favor of the defendant, to reverse which the cause is brought into this court by petition in error.

Section one hundred and thirty-four of the code of civil procedure provides that: "Every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true, but the allegation of new matter in the answer, or of new matter in the reply shall be deemed to be controverted by the adverse party as upon a direct denial or avoidance. Allegations of value or of amount of damage, shall not be considered as true by failure to controvert them."

This court in construing this section in *Dillon v. Russell and Holmes*, 5 Neb., 488, say: "Under the rules of pleading, as they stood prior to the code amendments of February 26, 1873, no reply was necessary to an answer, except to allegations constituting a counter claim or set-off. *McCann v. McLennan*, 2 Neb., 286. By these amendments, however, a reply must be made to all the material allegations of new matter contained in the answer, or they will be taken as admitted."

The answer of the defendant denies the plaintiff's interest in the property, alleges that proceedings in bank-

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ruptcy were had against Brown, and that the defendant holds the property as assignee, and also sets up the mortgage of August 4, 1873. The plaintiff denies in his reply that proceedings in bankruptcy have been commenced against Brown, and by stipulation it is admitted that the allegations of the reply as to the chattel mortgage are true. This being admitted, and there being no proof that proceedings in bankruptcy had been commenced against Brown, and that the property is held by the assignee under such proceedings, the defendant, so far as appears from the issue, has no interest whatever in the property in question.

Where new matter set up in the answer is denied by the reply, the burden of proof is on the party alleging the same as a defense.

But it is claimed that the chattel mortgage is void upon its face. In *Tullon v. Ellison*, 3 Neb., 75, this court held that a mortgage of goods and chattels, with possession and *power of sale* in the mortgagor, was void as against his creditors. Such a mortgage is void upon its face; but this mortgage contains no power of sale. It provides that the mortgagor may retain the use; but this cannot be tortured into a power of sale. The rule in such case is, that if the instrument on its face is one the law will not sanction as against creditors it is the duty of the court to pronounce it fraudulent as to them, but the court cannot look at matter *dehors*, the record for that purpose. *Monteith v. Bax*, 4 Neb., 171.

In cases where an instrument not fraudulent on its face is claimed to be fraudulent as to creditors, the question of fraudulent intent is a question of fact which must be submitted to the jury.

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

REVERSED AND REMANDED.

THOMAS H. PERKINS AND JAMES D. HARFORD, PLAINTIFF
IN ERROR, v. EDWIN F. LOUGEE, DEFENDANT IN ERROR.

1. **Fraud:** Fraud cannot be predicated on a promise not performed. To be available there must be a false assertion in regard to some *existing* matter by which a party is induced to part with his money or property.
2. ———: **RESCISSION OF CONTRACT.** In morals the failure to perform a promise may be without excuse or justification; but in law false representations to authorize the rescission of a contract must be made in regard to *existing facts*.

ERROR from the district court for Buffalo county. The facts are sufficiently stated in the opinion.

Groff & Switzer and *E. C. Calkins*, for plaintiff in error.

The facts stated in defendant's answer do not constitute a defense. 1. False representations to constitute fraud must be made concerning an existing fact. 2. False representations promissory in their nature are not sufficient to found an action for fraud. 3. The false statement of an opinion is insufficient, and the expression of intention to act in future is neither more nor less than an opinion. *Long v. Woodman*, 58 Me., 49. *Hazard v. Irwin*, 18 Pick., 95. *Pedrick v. Porter*, 5 Allen, 324. *Hemmer v. Cooper*, 8 Allen, 334. *Ranney v. The People*, 22 N. Y., 413. *Glacken v. Commonwealth*, 3 Met. (Ky.), 232. *State v. Magee*, 11 Ind., 154. *Fisher v. New York*, 18 Wend., 608. *Com. v. Brennerman*, 1 Rawle, 314. *Grove v. Hodges*, 55 Penn. State, 504. *Somer v. Richards*, 46 Vt., 170. *Hutchinson v. Brown*, Clark's Ch., 408. 4. The answer admits payment long after the discovery of the alleged fraud, and such payment is an affirmation of the contract. *Hammond v. Pennock*, 61 N. Y., 145. *Mas-*

son v. Bovet, 1 Denio., 69. *Woodruff v. Garner*, 39 Ind., 246. 1 Wash. on Real Prop., 302.

Hamer & Conner, for defendant in error, reviewed the cases cited by plaintiff in error at length, quoting from the opinions to show that none of them were in point in the case at bar, and cited *contra*. *Wilcox v. Iowa University*, 32 Iowa, 367. 1 Story Eq. Jur., Sec. 193. *Smith v. Richards*, 13 Pet., 26. *Shaeffer v. Sleade*, 7 Blackf., 178. *Gatling v. Newell*, 9 Ind., 577, and cases there cited.

The question was fairly submitted to the jury as to whether the plaintiffs at the time the contract was made intended the fraud, and the jury found in the affirmative. It is preposterous to suppose that they were not at liberty to do this from the testimony. What witness could be expected to swear that he knew of his own knowledge that plaintiffs intended fraud? Witnesses can only be produced in any case who will swear to the *acts* of other men, not their *intentions*. The question of intention is to be inferred from the parties' acts, and this question was exclusively for the jury. They have passed upon it, and found that fraud was intended, and this court is asked to invade their province and to find the facts differently. If there is any testimony going to show fraud it is sufficient. The question is not whether this court, had it tried the cause, might have found differently. *Haight v. Hagt*, 19 N. Y., 465. *Erwin v. Voorhees*, 26 Barb., 127. This court is asked to legalize an *admitted* fraud. Plaintiffs admit that the act complained of was a fraud in morals, but not in law. At least they ask that the act be now legalized if it has not been heretofore. The fact that the fraudulent representations were made in regard to improvements to be put upon *other* lots, and so were made in reference to a matter extrinsic to the subject of the contract, can make no difference.

The true questions are, were the representations made, were they false, were they relied upon, and were they material? *Smith v. Countryman*, 30 N. Y., 655. *Medbury v. Watson*, 6 Met., 246. *Hill v. Bush*, 19 Ark., 522.

MAXWELL, J.

The plaintiff on the twenty-eighth day of February, 1873, sold to the defendant lot twenty in Perkins and Harford's second addition to the town of Kearney Junction, for the sum of \$300; \$100 of which sum was paid at the time of entering into said contract for the sale of said lot; \$100 with interest was to be paid in one year from that date, and \$100 with interest to be paid in two years from date. The defendant afterwards paid thereon the sum of \$25. This is an action for the unpaid purchase money. The defendant answered: "That immediately prior to the execution and delivery of the said contract the said plaintiffs, to induce the said defendant to purchase said lot, did then falsely and fraudulently, and with the intent to cheat and defraud the defendant, represent to him that said lot was of great value, to-wit, of the value of \$300, by reason of being situate in the immediate vicinity, to-wit, within eighty feet of the south-east corner of lots eleven, twelve, thirteen and fourteen, upon which lots the said plaintiffs falsely and fraudulently represented to defendant that they were about to erect a large brick hotel of the value of several thousand dollars. That plaintiffs, for the purpose of inducing the defendant to purchase said lot at a price far exceeding its true value, and for the purpose of cheating and defrauding defendant out of the difference between the true value of said lot and the price mentioned in said contract, to-wit: out of the sum of \$270, did then falsely and fraudulently state to the said defendant, well know-

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ing the same to be false at the time of said statement, and having no intention to carry out the promise then made, stated that in a few days they would commence the erection of said hotel," etc.

The cause was tried to a jury who found in favor of the defendant. A motion for a new trial was overruled and judgment rendered on the verdict. The cause is brought into this court by petition in error.

It appears from the testimony that the defendant went upon and examined the lot in controversy before purchasing. The only question therefore to be considered is the sufficiency of the answer.

Can fraud be predicated on a promise not performed for the purpose of avoiding a written instrument or a bargain of any kind? I think not. To be available there must be a false assertion as to some *existing* matter by which the victim is induced to part with his money or property. If it is said that there was no intention on the part of the plaintiffs to perform on their part by the erection of the hotel, and that the defendant was induced to purchase the lot in question by the promise of the plaintiffs to erect a hotel, it may be answered that the defendant was content to take the plaintiff's promise, and fraud cannot be based on a failure to perform the same. In morals the failure to perform such a promise may be without excuse or justification, but in law false representations to authorize a rescission must be made in regard to *existing facts*. *Ranney v. People*, 22 N. Y., 417. *State v. Magee*, 11 Ind., 154. *Ex parte Fisher*, 18 Wend., 608. *Long v. Woodman*, 58 Me., 49. *Groves v. Hedges*, 58 Penn State, 504. The answer therefore does not state facts sufficient to constitute a defense.

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

REVERSED AND REMANDED.

JOHN BLACK, PLAINTIFF IN ERROR, v. WILLIAM WINTERSTEIN, DEFENDANT IN ERROR.

1. **Practice:** EXCEPTION TO CHARGE TO JURY. In order to obtain a review in this court of instructions given to a jury in the court below, in civil cases especially, it is necessary that they be excepted to at the time when given. And the rule is the same when a proper instruction tendered by a party is rejected by the court.
2. ———: TO FINAL JUDGMENT EXCEPTION NOT NECESSARY. It is not necessary that exception be taken to a final judgment to entitle a party to have it reviewed.
3. **Replevin:** JUDGMENT FOR DAMAGES. The judgment for damages in favor of the defendant in an action of replevin must conform in amount to the finding of the jury, and when the verdict is silent on this point judgment cannot be rendered for any amount whatever.
4. ———: While the value of property replevied is, in some cases, the just measure of damages to which a party is entitled, still a formal assessment of damages should never be omitted when proper to be allowed.
5. ———: MEASURE OF DAMAGES: Where the defendant in replevin lawfully held the property by virtue of a levy for the satisfaction of taxes which he was required to collect, the measure of damages, within the value of the property, was the amount of the taxes and legal costs and charges in making the collection.

Error from the district court for Cass county. The facts appear in the opinion.

Cobb, Marquett & Moore, for plaintiff in error.

Chapman & Sprague, for defendant in error.

LAKE, CH. J.

Although the instructions given to the jury by the court upon its own motion were in some respects clearly erroneous, and probably led to the return of an insufficient verdict, yet as no exception was taken at the time they will not now be considered.

In civil actions especially, in order to obtain a review in this court of instructions given to a jury upon the trial in the court below, it is absolutely necessary that they be excepted to when given. And the rule is the same when a proper instruction is tendered by a party and erroneously rejected by the court. The only one of the alleged errors which we can notice, therefore, is that which relates to the final judgment rendered upon the verdict of the jury. As to this no exception is necessary to entitle a party to a review. *Commercial Bank of Cincinnati v. Buckingham*, 12 Ohio State, 402.

The action in the court below was in replevin, and was brought for the recovery of the possession of a horse of which the plaintiff claimed to be the owner. Upon issue joined, the property having been delivered to the plaintiff, the jury simply found "*the right of possession*" in the defendant, and thereupon assessed "the value of the property at one hundred and ninety dollars." There was an entire omission to assess any "*damages*" whatever in favor of the defendant, and yet the court proceeded to render judgment in his favor for one hundred and thirty-five dollars, a *remititur* having been entered upon the valuation by the jury of all over that amount.

Section one hundred and ninety-one of the code of civil procedure requires that, "in all cases, when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper, for which, with costs of suit, the court shall render judgment for the defendant."

It is apparent from this, that the damages adjudged in favor of the defendant must conform in amount precisely to the finding of the jury, and when the verdict

is silent on this subject there is no authority for the court to render judgment for any amount whatever.

It is quite probable that the court regarded the valuation of the property as equivalent to an assessment of damages, and so treated it. But this was a mistake. The valuation of property is one thing, and the assessment of damages quite another. It is true that in some cases, but by no means in all, the value of property replevied is the just measure of damages to which a party is entitled, but still they should never be confounded either in the instructions given to the jury or in the verdict rendered. If the jury had found the right of property, as well as the right of possession, in the defendant, then the true measure of damages would have been its fair market value. But on the question of ownership the jury found against the defendant, and for aught that appears they found him entitled to the mere naked possession of the horse, which would only have entitled him to nominal damages. If, however, as there is some testimony to show, the defendant had levied upon the horse, and had him legally in his possession for the satisfaction of taxes which he was required by law to collect, then the true measure of his damages, within the value of the horse, was the amount of the taxes, and legal costs and charges in making the collection.

For the reason, therefore, that the judgment was not warranted by the verdict of the jury it must be reversed and a new trial awarded.

REVERSED AND REMANDED.

Hamlin v. Meadville.

M. M. HAMLIN, TREASURER OF OTOE COUNTY, PLAINTIFF IN ERROR, v. THOMAS C. MEADVILLE, DEFENDANT IN ERROR.

1. **Powers of County Commissioners:** County commissioners possess no powers except such as are expressly granted, or are incidentally necessary to carry such powers into effect.
2. **County Bonds:** Counties have no authority at common law to issue bonds. They are *quasi* corporations, mere governing agencies, charged with certain objects of necessary local administration.
3. ———: The power to issue commercial paper must be conferred by statute. And such power must be exercised in the manner prescribed; but if the authority to issue the bonds existed at the time of their issuance, a mere irregularity in its exercise will not invalidate the bonds.
4. ———: **SUBMISSION TO A VOTE OF THE PEOPLE.** Where the question of issuing bonds to *any* railroad company was submitted to the people of a county, but without accompanying the same by a proposition to levy a tax to meet the liability incurred; *Held*, that bonds issued in pursuance of such vote were void.
5. ———: ———: Where a vote of the people of a county authorized the county commissioners to *subscribe* for stock in a railroad company. *Held*, that such authority did not empower the commissioners to *donate* the bonds of the county to a railroad company.

ERROR from the district court of Otoe county. The cause was tried in that court in 1873, before MASON, CH. J., and a decree, enjoining the collection of a tax levied on the property of Meadville for the payment of certain bonds, entered. It was brought here by the treasurer of the county upon petition in error. GANTT, J., having been of counsel below, did not sit in the case.

E. F. Warren, for plaintiff in error.

G. B. Scofield, for defendant in error, argued the cause, upon a brief prepared by Judge Gantt, before his election as a judge of the supreme court.

I. Under the constitution of our state among the powers delegated are those of levying taxes to defray the expenses of the government—and this includes all departments of the government, whether state or municipal; providing for the organizing and disciplining the militia, regulating the jurisdiction of the courts, and for the protection of the citizen in his life, liberty, reputation and property. And to secure these objects and carry into effect and maintain the essential police affairs and regulations of the government, taxation is not only a delegated power, but it is an element of sovereignty. This is ordinary taxation which the citizen pays in return for the protection secured and guaranteed to him by law; but extraordinary taxation is a materially different thing, and the power to levy such tax under the constitution which reserves to the people "*all powers not herein delegated*," cannot be exercised unless expressly granted.

Is such extraordinary power granted? We find it is authorized to repel invasion, suppress insurrection, or to defend the state in time of war, and to defray extraordinary expenses the state may contract, not exceeding in the aggregate fifty thousand dollars.

Under the well settled principles of law, in support of which I need not cite authority, these express enumerated grants of extraordinary powers, for the execution of which taxation is an essential attribute, exclude the idea of the exercise of any other such powers, and they must be taken as a significant fact that no other such extraordinary taxation was granted or intended to be granted. And nowhere in the constitution is found the grant of power authorizing the legislature to provide by law for a county to loan its credit, to make *donation* of the property of a citizen, or levy any tax for such extraordinary purpose. Hence, I submit that there being no such delegated power, it essentially follows that all legislative

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acts authorizing such tax must be without authority and void. If such law can be upheld as a rightful exercise of legislative power, then indeed the reserved rights of the citizen, as well as the guarantees of the constitution are all a myth. *May v. Cincinnati*, 1 Ohio State, 273.

II. The bonds issued and the tax sought to be taken in the case at bar, are without compensation—a pure *gift* or *donation*. Can private property be taken without compensation for public use? Can it be taken from one citizen without his consent and *donated* to another, or to any public use? I think that every fundamental principle of justice forbids such taking of property, and that the functions of government, as applied in every age of civil government, are directly opposed to such system of legal robbery.

In an historical examination of the functions of government we find in the philosophy of government the first fundamental natural right is the right of life which commences before we are born, and that it is protected both by the natural and civil law; the second natural right is to hold and enjoy the fruits of our bodily and mental labor, and this natural right to own the fruits of our labor includes all the honest acquisitions of property. It has been truly said by most profound jurists, that what a man obtains by the exertion of his own mind, or his own hand, or both combined, should be his *own*; and this historical examination discovers to us that man in the rudest state of nature was not without some notion of exclusive property. It seems to me that this natural right of property was not only inherent, but was demanded by all the circumstances surrounding the enjoyment and protection of life, for without it no man could have claimed as his own the fruits of his labor. The fruit plucked by him from the tree might have been snatched from him ere he had tasted it, and the bed he

had prepared to rest upon might have been taken from him ere he had laid his body upon it. Hence, the inevitable wants and common necessities of man in all ages demanded the enjoyment and protection of this natural right. 2 Kent Commentaries, 318. *Sweet v. Hurlburt*, 51 Barb., 318. And we find in our own constitution not only a recognition but also the positive declaration of these inherent rights of property, etc., and also of the necessity of an essential adherence to justice and the frequent recurrence to fundamental principles. These rules of government are only declaratory of the natural rights which have always existed as fundamental principles of law, and to the maintenance of which we find the functions of government have always been applied. These rules of the social union of mankind I think are not only sustained by an historical examination of the proper functions of government but are also supported by reason and the soundest philosophical principles.

But it is said that the right of eminent domain contravenes this natural right of property. It will not be doubted that in all well organized and established governments, from the earliest period of civil government, by reason of the necessities of mankind this right of eminent domain existed. No one will controvert the fact that the establishment of civil government and the progress to higher civilization required some modification in the use and enjoyment of property under this natural right. It became essential to the well-being of the social compact that property should not be used to the injury of others; that good order in the community demanded police regulations and the enforcement of municipal law, and therefore it became just and equitable that all members of the community should aid in the maintenance and execution of the rules of society—and hence it is not difficult to discover the origin of the

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power of taxation for the support of government. But I presume a fair interpretation of the history of government shows that, until within a recent period, this power was only exerted for the general benefit of the whole state, and only as far as was necessary in the general police regulations of the government for the protection and common advantage of all persons in their social, commercial, agricultural and political relations. And in applying the functions of government to these objects, it is assumed that the tenure of property is derived from the governing power. But from the best historical light on this subject, it seems evident that this tenure was originally derived from occupancy or universal consent that man by virtue of his natural right should enjoy the fruit of his own labor. But however this may be in the more recent history of governments the political theory seems to be adopted that this tenure is derived from the governing power. *West River Bridge v. Dix*, 6 How., 532. *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend., 27. *Sharpless v. The Mayor of Philadelphia*, 21 Penn. State, 147.

MAXWELL, J.

On the sixteenth day of March, 1866, a special election was held in the county of Otoe for the purpose of determining whether Otoe county should issue its bonds in an amount not exceeding \$200,000 for the purpose of securing an eastern railroad connection for Nebraska City. On a canvass of the votes it was found that 1362 were in favor of the proposition and 201 against it. At a meeting of the board of county commissioners of said county in November, 1866, it was ordered that \$40,000 of the bonds voted in the preceding March be *donated* to the C. B. & St. Joseph R. R. Co., provided they would locate their road within one and a half miles

of the ferry landing at Nebraska City. In pursuance of this order \$40,000 of the bonds of the county were delivered to the company. On the eighteenth day of February, 1871, the defendant in error instituted proceedings in the district court of Otoe county to enjoin the collection of taxes for the payment of interest on the bonds in question, and praying that said bonds may be declared null and void. Judgment was rendered in his favor in the court below, to reverse which the case is brought into this court by petition in error.

On the sixth day of January, 1860, the territorial legislature passed an act authorizing the board of county commissioners of Otoe county to submit to the people of that county the question whether Otoe county should *subscribe* for stock in an amount not exceeding \$75,000 in any railroad company then or thereafter located in Fremont county, Iowa. The act provided that in case a majority of the legal voters of said county voted in favor of the proposition, the board of county commissioners of said county should issue the bonds of said county for whatever amount of stock it may have been decided upon by such vote.

On the eleventh day of January, 1861, an act was passed by the legislature authorizing county commissioners to submit to the people of their respective counties the question whether the county will aid or construct public buildings, the question whether the county will aid or construct any road or bridge, or submit to the people of the county any question involving an extraordinary outlay of money by the county. The act provided that the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof in addition to the usual taxes, and no vote adopting the question proposed shall be valid unless it likewise adopt the amount of tax to be levied to meet the liability incurred.

The only question necessary to be considered is that of the *power* of the county commissioners to issue the bonds in question. The question whether the *territorial* legislature, under the organic act, had authority to authorize a county to issue its bonds for the purpose here indicated, has not been raised *directly*, either by the pleadings or argument, and will not be discussed.

The rule is well settled in this court that county commissioners can exercise only such powers as are expressly granted, or are incidentally necessary to carry into effect the powers granted. *The S. C. & P. R. R. Co. v. Washington Co.*, 3 Neb., 42. *Stewart v. Otoe Co.*, 2 Neb., 177. *The People v. Com'rs. Buffalo Co.*, 4 Neb., 150.

Whatever may be the rule as to municipal corporations, counties have no authority at common law to issue bonds. They are *quasi* corporations—mere governing agencies, charged with certain objects of necessary local administration. The power to issue commercial paper must be conferred by statute, and such power must be exercised in the manner prescribed, although it seems to be well settled that where the authority to issue the bonds existed a mere irregularity in its exercise will not invalidate the bonds in the hands of innocent purchasers for value. The authority, if any, given to the county commissioners by the vote of the people was to *subscribe* for stock in a railroad company. Under such authority can they make a *donation* of the bonds of the county to a railroad company?

The supreme court of the United States, in the case of the *C. B. & Q. R. R. Co. v. Otoe County*, 16 Wall., 667, held that there is no solid ground of distinction between a subscription to stock and a donation. In that case much stress is laid on an act of the legislature, approved February 15, 1869, section one of which provides “that said commissioners

(of Otoe county) be and they are hereby authorized to issue one hundred and fifty thousand dollars of the bonds aforesaid to the Burlington & Missouri River Railroad Company, or any other railroad company that will secure to Nebraska City a direct eastern railroad connection, as a donation to said railroad company, on such terms and conditions as may be imposed by said county commissioners."

The title of the act referred to is as follows: "An act to authorize the county commissioners of the county of Otoe to issue the bonds of said county, to the amount of one hundred and fifty thousand dollars, to the Burlington and Missouri River Railroad, or any other railroad running east from Nebraska City." The second section of the act provides that "said bonds, when so issued, are hereby declared to be *binding obligations on said county*, and to be governed by the terms and conditions of an act entitled 'an act to enable counties, cities, and precincts to borrow money or to issue bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such purpose. Approved February, A.D. 1869.'"

The power of the legislature to legalize a *void* proceeding like this may be fairly questioned, but it was not the purpose of the act to legalize the bonds.

Section nineteen, article II, of the constitution of 1867, provided that no bill should contain more than one subject, which should be clearly expressed in the title. In *White v. The City of Lincoln*, 5 Neb., 516, it was held that it would be sufficient if the law had but *one general object*. The only purpose of this act as expressed in the title was to authorize the issue of the bonds. Under such a title the legislature could not (even if it had the power to do so) constitutionally legalize these bonds.

The supreme court of the United States has gone to a

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great length in sustaining municipal bonds, and there is apparently danger that the court will (if it has not already done so) overlook the fact that the taxpayers have rights. In *Marcy v. Township of Oswego*, 92 U. S. (2 Otto) Sup. Court, 637, it was held that bonds issued by a township in excess of the limit fixed by the statute were valid.

Where a *quasi* corporation, in pursuance of express authority, deliberately assumes a burden, by issuing its bonds for public purposes, good faith requires their payment. But bonds issued without authority, or in excess of the limit fixed by statute, are no more the bonds of the corporation than if they were forgeries. In the case at bar, so far as the record discloses, there was no submission to the people of the question of taxation for the payment of either the principal or interest of the bonds, as required by statute. The entire proceedings therefore were entirely void, and are not aided by the act of 1869. But if the authority to issue the bonds had existed, the commissioners had no authority under the vote of the people of the county to make a *donation* thereof to the railroad company. There is no presumption that the stock of a railroad company is of no value; but even if not very valuable the stockholder, to the extent of his stock, has a voice in the election of officers of the company and in the control of its affairs that may be of more value to his locality than the mere market value of the stock. As we see no error in the record, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

**ANNIE MORRILL, PLAINTIFF IN ERROR, v. RICHARD W.
TAYLOR, DEFENDANT IN ERROR.**

1. **Taxes: ASSESSMENT.** A valid assessment is an essential prerequisite to any exercise of the taxing power by the board of county commissioners.
2. ———: **OATH OF ASSESSOR.** The requirement of the law prescribing the oath to be taken and subscribed by the assessor, certified by the officer administering it and attached to the assessment roll, must be substantially complied with; and without such compliance with the law no jurisdiction can be conferred on the board of commissioners in the matter of the taxation of property.
3. **Practice in Supreme Court: SETTING ASIDE JUDGMENT.** An accident or mistake in respect of a fact occurring on the trial of a cause in the district court, which is not incorporated in a bill of exceptions and made a part of the record, is not sufficient ground to set aside the judgment of the supreme court and to grant a new trial.
4. ———: **REHEARING OF A CAUSE.** A petition for the rehearing of a cause upon such ground is somewhat in the nature of a writ of error in fact, and lies only to the same court in which the judgment was given to examine its own record and rectify the error, if any exist.
5. ———: **PROCEEDINGS IN ERROR.** Under the constitution and statute relating to proceedings in error the supreme court can only reverse, vacate, or modify a judgment rendered by the district court *for errors appearing on the record.*
6. ———: **REHEARING; AFFIDAVITS INADMISSIBLE.** Upon an application for a rehearing the court cannot receive any affidavits in respect of matters entirely foreign to the record.

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

C. C. Burr, for plaintiff in error.

The defendant in error claims that by virtue of section one hundred and four of the revenue law, his deeds are

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prima facie evidence of the facts set forth in that section. But the record shows that a substantial pre-requisite of the statute had not been complied with, viz: the taking of the oath by the assessor. What then is the condition of defendant in error? The instant it is shown by the party claiming adversely to the deed that any pre-requisite of the statute has not been complied with the *prima facie* character of the deed is destroyed, all of its presumptions overthrown, the deed becomes mere waste paper, and the grantee in the tax deed, or those claiming under him, must prove by satisfactory evidence the regularity of the proceedings, and the *onus probandi* is shifted to the party claiming under the tax deed. Blackwell on Tax Titles, p. 363. *Sibley v. Smith*, 2 Mich., 497. *Elliott v. Elmore*, 16 Ohio, 24. *Wright v. Dunham*, 13 Mich., 414. *Warren v. Grand Haven*, 30 Mich., 24. *People v. S. F. Savings Union*, 31 Cal., 132. *Rayburn v. Kuhl*, 10 Iowa, 92. *Biddleman v. Brooks*, 28 Cal., 74. The omission of the assessors to comply with the requirements of the statute in making the affidavit to the assessment roll is a jurisdictional question. *Cases cited above*. This defect in the assessment roll is not cured by section six of the act of June 6, 1871. Gen. Stat., 936. A statute which cures irregularities cannot cure this defect of jurisdiction; curative laws may heal irregularities in action, but they cannot cure a want of authority to act at all; whatever the legislature could not have authorized originally it cannot confirm. *McRynolds v. Longenberger*, 57 Pa. St., 13. *McCready v. Sexton*, 29 Iowa, 356. *Parker v. Same*, 29 Iowa, 421. *Denny v. Mattoon*, 2 Allen, 361. *Nelson v. Rountree*, 23 Wis., 397. *McDaniel v. Correll*, 19 Ill., 226. *Richards v. Rote*, 68 Penn. St., 248. *State v. Doherty*, 60 Maine, 504. *Griffin's Executors v. Cunningham*, 20 Grat., 31, 109.

Y. H. Sessions. for defendant in error.

From aught that appears in the case, the oath of the assessor required by the statute might have been made, and in the office of the clerk, and the presumption is that it was so made, and in the office, until the contrary appears, and if that is true the fact that the same was not attached to the assessment roll can have no possible effect whatever to invalidate the same. Again, the oath is only one of the many things directed to be done by the assessor to secure a fair, just, and impartial assessment of all property required to be assessed as the basis of taxation, and when that is obtained the spirit and object of the law is satisfied. That an assessment of this kind was made in this case is not denied. Then why should not the defendant's title upon the sale of 1870 be sustained? *Van Rensselaer v. Witbeck*, 7 Barb., 133. *Parish v. Golden*, 35 N. Y., 462. This case is fully endorsed by the U. S. circuit court in Southern District of Ohio. *Pullace v. Kinsinger*, 9 A. L. R., 562. If the value of the property be rightfully fixed by the assessor, the assessment is valid, though that value was arrived at in a way different from that pointed out by the statute. *Hart v. Plum*, 14 Cal., 149. In *People v. Canal Co.*, 48 Cal., 143, the court held that "a tax is not void because the record of the board of supervisors in levying it is not signed by the chairman and clerk of the board."

Section six provides that "irregularities in making assessments, and in making the returns thereof, in the equalization of property as now provided by law, and in the mode and manner of advertising the sale of real estate, shall not invalidate the sale of any real estate when advertised and sold by the county treasurer for delinquent taxes due thereon." Gen. Stat., 936.

This law is constitutional, and the legislature has power to declare that if the land is liable to the tax levied upon it, and the owner will not pay the tax before sale, nor redeem the land as required in the appointed time,

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that no omission or irregularity which may occur in the proceedings of the officers charged with the execution of the revenue laws shall thereby render the tax deed void. Blackwell on Tax Titles, 100, 112, and authorities cited. That the defects complained of are mere irregularities and cured by this statute, is fully established by the following authorities: *Smith v. Cleveland*, 17 Wis., 556. *Gulf Railroad Co. v. Morris*, 7 Kan., 210. The omission of the oath can only be regarded as an irregularity in the making of the assessment, which by no means renders the same void. *Thompson v. Breckenridge*, 14 S. & R., 346. *Montgomery v. Meredith*, 16 Penn. State, 42. *Gwynne v. Niswanger*, 20 Ohio, 558. *Eldridge v. Kuehl*, 27 Iowa, 161. *People v. McCreery*, 34 Cal., 432. *State v. C. P. R. R. Co.*, 10 Nev., 50.

GANTT, J.

This action was brought in the usual form to recover the possession of real property. The defendant admits that he is in possession of the property, but denies the ownership of the plaintiff, and avers title in himself; and by supplemental answer, he says that since the filing of his answer the treasurer of Lancaster county has executed and delivered to him two tax deeds for the property in controversy "for the non-payment of taxes upon the land" for the years 1870 and 1871. The plaintiff denies all the new matter set up in the defendant's answer, and in reply to the defendant's supplemental answer he denies that the two deeds were in due form of law, "whereby said premises described in plaintiff's petition were duly and legally conveyed to said defendant for non-payment of taxes upon the land." A jury was waived and a trial had to the court. By stipulation between the parties it is agreed that the bill of exceptions contains all the evidence and

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facts in the case; and according to these facts it appears that by a chain of conveyances running back to and including the patent from the United States, the legal title to the land was in the plaintiff; and that the defendant was in the possession of the land under three several deeds, conveying the land to him by the treasurer of Lancaster county on sale for the taxes for the years 1869, 1870, and 1871. It further appears that the plaintiff introduced in evidence the assessment rolls for the years 1869, 1870, and 1871, which include the land in question and from which "it appears that on none of them was there any oath of any assessors attached as the statute provides," and further that the notice of sale of 1871 for taxes of 1870 was advertised to commence on the first Tuesday instead of the first Monday in September, and that the notice of sale for taxes of 1871 fixed the place of sale at the front door of the treasurer's office, whereas the deed recites that it actually took place at the door of the court house. The tax deeds are not preserved in the bill of exceptions. The record also shows the court below found that the tax deeds were valid on their face and were *prima facie* evidence of title to the land in defendant under the statute; that from the evidence introduced on the trial, the assessment rolls for 1869, 1870, and 1871 did not have the oath of the assessor attached thereto, and for this defect the tax deeds were void; and that the tax deeds on the sales for the taxes of 1870 and 1871 were also void by reason of defects in the notices of the sales; and also found the several amounts of taxes paid by the defendant. The only judgment rendered by the court below was against the plaintiff and in favor of the defendant for the several amounts of taxes paid by him and the interest thereon. The plaintiff now complains that the court erred in rendering this judgment; that it is not sustained by the evidence and is contrary to law.

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The important and perhaps controlling question raised by the pleadings and facts as admitted in the bill of exceptions is, whether the oath of the assessor, certified by the officer administering it, and attached to the assessment roll, is an essential pre-requisite to the exercise of any power or to any proceeding in the taxation of property.

It is an unquestionable principle of law that certain jurisdictional facts must exist as conditions precedent to be performed before there can be any exercise of the taxing power by municipal officers, and it is an inflexible rule that the listing and assessment of property is one of the essential pre-requisites to confer jurisdiction upon the board of county commissioners over the subject matter. In *McCready v. Sexton*, 29 Iowa, 390, it is justly said that such previous acts are essential and jurisdictional facts. "The legislature may prescribe the time and manner in which these essential and jurisdictional acts shall be done, but it cannot either constitutionally, or in the nature of things, provide for passing title to property for the non-payment of taxes without them." Therefore the first essential step which constitutes the basis of all subsequent proceedings is a valid assessment of the taxable property. The assessor must do this, and he completes his work by preparing and delivering into the office of the county clerk the assessment roll with his oath attached, certified by the officer administering it, in form substantially as prescribed by the statute. It is this report or document which vests the board of commissioners with authority to act in the matter; and if the assessor fails to comply with the essential and mandatory requirements of the law, his report or assessment roll confers on the board of commissioners no jurisdiction over the subject matter. The assessment is the official estimate of the value of property subject to taxation, and constitutes the basis of apportionment;

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hence, without it no apportionment can be made, and without it all subsequent proceedings to subject the property of the citizen to taxation can have no support and must be treated as mere nullities. It is said that "the law never assumes the existence of jurisdictional facts"; they must, however, exist before any subsequent step can be taken in the taxation of property. In *Abbott v. Lindenbower*, 42 Mo., 163, it is said that "a valid assessment is an essential pre-requisite to the lawful exercise of the power of taxation." *Thatcher v. Powell*, 6 Wheat., 125, 127. *M'Call v. Lorimer*, 4 Watts, 353, 357. *Marsh v. Chesnut*, 14 Ill., 225. *Morrill v. Swartz*, 39 Ill., 110.

Our revenue statutes require all property, personal and real, to be listed each year, and to be assessed at its actual value at the place of listing, and require the assessor to prepare and deliver into the office of the county clerk, by the second Monday in April, his assessment roll; and section 12 provides that "the assessor *shall* take and subscribe an oath, to be certified by the officer administering it, and attached to the assessment roll," which oath shall be substantially in form as prescribed in this section. The rule will not be questioned that where the particular provisions of a statute relate to some immaterial matter, not of the essence of the thing to be done, or where compliance is a matter of convenience rather than of substance, or where the directions of the statute are "designed for the information of the officers, and intended to promote method, system, and uniformity in the modes of proceeding," and are not accompanied by negative words, imputing that the acts required shall not be done in any other way, such provisions may generally be regarded as directory. But it is observed that in the enactment of tax laws, the legislature is unrestrained in its authority over the subject, and the presumption is that the law contains just what the

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legislature intended it should embrace; and therefore in the construction of such laws, the first duty of the court is to ascertain the real intent of the law. It is not for the court to say, in its opinion, whether the law is or is not wise, just, and politic in its requirements and directions, for it is the province of the legislature alone to decide these questions, and it is the duty of the court to give effect to the intent of the law, provided it is not subversive of the constitution. If, however, the terms employed in the statute are plainly imperative, then there is no room for construction, because the intent is clear and the requirement of the law is mandatory. *Supervisors v. The People*, 8 Hill, 511. Sedg. on Stat. and Con., 325. And it is said in *Western Ry. v. Nolan, et al.*, 48 N. Y., 518, that "the assessors are quasi judicial officers when acting within the sphere of their jurisdiction, and their assessments when made become judgments to be enforced by a warrant, in the nature of a special execution to be issued by the supervisors of the county"; and the supreme court of our own state has held that in respect to municipal officers, "the grant of powers to such officers must be strictly construed, because when acting under such special authority they must act strictly on the conditions under which their authority is given," and when the "statute shows the legislature intended a compliance with its provisions to be essential to the validity of the act or proceeding, or where some antecedent or prerequisite condition must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory." *S. C. & P. Ry. v. Washington Co.*, 3 Neb., 41. *Hurford v. City of Omaha*, 4 Neb., 351. *Corp. of Washington v. Pratt*, 8 Wheat., 663. *Easton v. Callender*, 11 Wend., 94.

In section twelve above referred to affirmative words are employed, and in *District Township v. City of Du-*

buque, 7 Iowa, 275, it is held that "affirmative words may, and often do, imply a negative of what is affirmed as strongly as if expressed. So, also, if by the language used a thing is limited to be done in a particular form or manner it includes a negative that it shall not be done otherwise." Now the requirement of the statute in respect to the oath of the assessor is as plainly imperative as that in respect to the return of the assessment roll, and no one will pretend that there can be any taxation, or jurisdiction in the commissioners over the subject matter without an assessment. The oath is the only security of the citizen for an equality of taxation and an impartial and just estimate of the value of property; and it is said that an assessment "is not only indispensable, but in making it the provisions of the statute under which it is to be made must be observed with particularity. If this were not compulsory—if the officers were to be at liberty to disregard important provisions of the statute in this initiatory step, the chief protection which the law has intended for individuals in tax cases would be removed." Cooley on Taxation, 259, 260. *Smith v. Davis*, 30 Cal., 536. *Whitney v. Thomas*, 23 N. Y., 285. *Thurston v. Little*, 3 Mass., 429. *Thayer v. Stearns*, 1 Pick., 482. *McReynolds v. Longenberger*, 57 Penn. St., 13. *Lane v. Bommelman*, 21 Ill., 147. 23 Ill., 523. 27 Cal., 51.

In the state of New York the duties of the board of supervisors in respect to taxation of property are the same as those of our board of county commissioners. The statute of that state required a certificate in a certain form to be annexed to the assessment; and in *Van Rensselaer v. Whitbeck*, 7 N. Y., 521, it is held that "the certificate was intended to prevent favoritism and partiality by compelling the assessors solemnly to affirm that they have estimated each taxpayer's property at its full value. If this rule is complied with, equality in

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taxation will be secured, and in no other way. The proceedings therefore would be fatally defective if no certificate had been annexed to the assessment," and in conclusion the court says: "that the assessment roll was not complete and in a condition to be delivered to the board of supervisors until a certificate was made, containing substantially the matter specified in the statute; that the assessment roll thus certified to, is necessary to confer jurisdiction upon the board of supervisors, and that the warrant and roll constitute a process in the nature of an execution and must be construed together, and that the defect of jurisdiction in this case being apparent on the face of the instrument it was no protection to the collector." And in *Westfall v. Preston*, 49 N. Y., 349, it was again held that "a substantial compliance with the terms of the statute prescribing the verification is necessary to give the board of supervisors authority to impose a tax and issue their warrant to the collector for its collection." *In Re Petition of Cameron*, 50 N. Y., 502. *Alger v. Curry*, 38 Verm., 382. *Robson v. Osborn*, 13 Texas, 299. 23 Texas, 36. *Davis v. Farnes*, 26 Texas, 296-7.

It seems to us very clear, upon both principle and authority, that a substantial compliance with the requirements of the statute prescribing the oath to be taken and subscribed by the assessor, is an essential pre-requisite—a jurisdictional fact that must exist before the board of commissioners can exercise any power in the taxation of property, and that without such oath there is in law no assessment. We are aware that there is much disregard of the plain mandates of the law by officers in the administration of municipal government; but however much we may desire to avoid the consequences of the inexcusable conduct of such officers, yet, as a court, we must take the law as we find it, and give effect to its real intent in respect to the powers of municipal officers

In the case under consideration, the consequence is that all the acts of the officers in relation to the supposed taxation of the plaintiff's land for the years 1869, 1870, and 1871, are simply void; and in *Elliott v. Peirsal*, 1 Peters, 340, it is said that if a court "act without authority its judgments and orders are regarded as nullities. * * * * They constitute no justification, and all persons in executing such judgments and sentences are considered in law as trespassers." Bouvier states the rule with precision as follows: "It is a rule of law that whatsoever is absolutely null produces no effect whatever." This doctrine applies to all tribunals, boards, and officers, who exercise judicial functions. If they act without authority—without jurisdiction—their proceedings are "not voidable, but simply void" and "produce no effect whatever." *Stanton v. Ellis*, 12 N. Y., 577. *Borden v. Fitch*, 15 John., 141. *Wise v. Withers*, 3 Cranch, 331. *Barrett v. Crane*, 16 Verm., 250, and cases cited. *Robinson v. Mathwick*, 5 Neb., 255.

It was, however, earnestly contended that all defects in the proceedings of the officers, in this case, were cured by force of section six of the act of June 6, 1871. It provides as follows: "Irregularities in making assessments and in making returns thereof, and in the mode and manner of advertising the sale of real estate, shall not invalidate the sale of any real estate when advertised and sold by the county treasurer for delinquent taxes due thereon." It will be observed at first glance that this act cures irregularities only and not jurisdictional defects. The jurisdictional fact must exist before an irregularity can occur, for without the existence of such fact there is in law no assessment, and all subsequent acts of the officers are mere nullities, and it will not be urged that the legislature can transform nullities into valid acts, or create something out of nothing. It is said in *McReady v. Saxton*, *supra*, the legislature can-

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not annul or change the jurisdictional facts,—“it cannot excuse the non-performance of them, and of course cannot make the doing of any other thing a substitute for them, or conclusive evidence of their being done.” The act is intended to cure irregularities, not the want of jurisdiction. *Tallman v. White*, 2 Comst., 69. *Robson v. Osborn*, 13 Texas, 307.

It was also urged in the argument that in order to defeat the title under a sale for delinquent taxes, some one or more of certain things enumerated in the statute must be proved; and one of these is this: “That the land had never been assessed for taxation.” This fact at least has been established, for, as already shown there was in law no assessment by reason of the failure of the assessor to perform an essential pre-requisite required by the law.

Again, it was contended that under section 104 of the act of 1869 the claimant of the land is required to pay over to the county treasurer for the use of the purchaser the amount necessary to redeem at the same rate as in cases of land redeemed within two years from the sale before any judgment can be rendered against the purchaser, and that this payment is a condition precedent which the plaintiff must perform before she can have judgment against the defendant or any relief in the premises. But this section as amended by the act of February 18, 1875, is materially changed, and provides as follows: “No person shall be permitted to question the title acquired by a treasurer’s deed without first showing that he or she, or the person under whom he or she claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the land have been paid by such person or the person under whom he or she claims title as aforesaid.”

This act as amended contemplates a title acquired by

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a treasurer's deed, and although it may be invalid by reason of some default in the proceedings after jurisdiction had attached, yet that there must be some sort of a title is very clearly indicated by the law. But the proposition will hardly be questioned that if the proceedings are wholly without any jurisdiction in the board of commissioners over the subject matter there is in law no assessment, no taxes due, and no title acquired. Hence, according to the authorities referred to, all persons engaged in the execution of any order or warrant under such proceedings "are considered in law as trespassers."

Again, section seven of the act of June 6, 1871, is referred to in support of a title in the defendant. This section provides that "whenever the *title* acquired by a purchaser at a treasurer's sale shall fail," the purchaser shall have a lien upon the land for the amount of purchase money and taxes paid by him together with interest thereon, and he may enforce such lien in the manner described for foreclosing mortgages. If this section can stand with section 104 as amended, then it will be observed that two elements must exist to give it force and effect, that is, there must be a tax assessed and a title acquired at a treasurer's sale; but without jurisdiction in the board of commissioners to act in the matter neither one of these elements can exist in law—and in law there is no title to fail.

We think the want of jurisdiction in the board of commissioners is decisive of this case, and therefore it is unnecessary to examine several other questions discussed in the argument. The judgment of the court below is reversed, and as the parties by stipulation in the record agree that we shall render a final decision in the case, therefore, upon the pleadings and facts in the record, the finding and judgment must be for the plaintiff.

JUDGMENT ACCORDINGLY.

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After the rendition of the foregoing decision, the defendant in error filed an application for a re-hearing of the cause, on the ground that upon the trial of the cause in the court below, it being necessary that said Annie Morrill should prove that there was no assessment of the land in controversy for the years 1869, 1870, and 1871, the assessment rolls for those years were introduced in evidence, from which it appeared that on none of them was there the oath required to be taken by the assessor; that the county clerk testified that he had searched through the records of the office, and could not find said oaths or any of them; that relying upon this testimony as being true in fact, he entered into the stipulation hereinbefore referred to, which stood in place of the bill of exceptions, upon which the cause was reviewed in this court; but that since the decision of this cause by this court, he had caused diligent search to be made and had found the original oaths of said assessors among the records of said county clerk's office, though not attached to the assessment rolls. This application was supported by affidavits.

Upon the application, *M. H. Sessions*, and *Brown, England & Brown* for Taylor, said: "The maxim, *Ignorantia neminem excusate*, is one that we abide by, and any agreement or stipulations that we have made in ignorance of the law we do not ask to be relieved from. That maxim, however, has no application where the agreement or stipulation was made under a mistaken apprehension of the facts or of the law and facts combined. *Becker v. Lamont*, 13 How. Pr., 23. *Sharp v. The Mayor*, 19 How. Pr., 193. That the mistake complained of in the stipulation in this case is one of fact and not of law is conclusively shown by the record, and that the same was not made by any carelessness or negligence of the defendant or his counsel is also as conclusively shown by the record.

C. C. Burr for plaintiff in error.

No re-hearing can be allowed. The stipulation concludes the parties to the record. *McCann v. McLennan*, 3 Neb., 35. The defendant in error has had from April, 1871, to the date of signing the stipulation in 1877, to examine the records and files in the clerk's office to find these assessors' oaths that he now claims to have discovered, and if they were in the clerk's office all these years, and not attached to the assessment roll, and defendant in error would not find them, he is guilty of gross negligence, and ought not now to be relieved from his stipulation. The setting aside of the stipulation and vacation of this judgment would be a dangerous precedent which would lead to infinite confusion. No judgment will be final. The power to vacate a judgment is discretionary, but when this discretion of the court is spoken of a sound legal discretion is meant, and courts will act with great caution, and rarely exercise their authority by the vacation of a judgment. *McCann v. McLennan*, *supra*. Suppose a re-hearing is granted in this case, of what avail will it be to the defendant in error? Can he introduce proof in this court that such oaths as he claims to have discovered are in existence? Is not the record now in this court the only source from which this court can draw its knowledge of the facts in this case? Even in a criminal case, suppose a person convicted of a penitentiary offense, the conviction sustained by the supreme court, and it should then be ascertained beyond all question that the man was innocent from conclusive evidence discovered after the conviction had been sustained, could the supreme court grant a re-hearing which would avail anything, or send the case back for a new trial? We think the only relief that could be granted would be a pardon. I know of no

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reason or authority for the granting of a new trial, or a re-hearing, in the supreme court, on the ground of newly discovered evidence. We think the application for a re-hearing should be denied.

GANTT, J.

After the hearing of this cause and the entry of judgment therein, the defendant filed a petition praying the court to set aside said judgment and also to set aside a stipulation or part thereof made by the counsel of respective parties, containing "a statement of facts which were agreed upon as being all the evidence in the case, and the decisions and rulings of the court below and exceptions thereto," and also for a rehearing of the case. The statement agreed to is made the bill of exceptions in the case, and was by the court allowed, and ordered to be made a part of the record of the case, and was signed by the judge as the bill of exceptions, and is certified to this court as a part of the record. Affidavits are filed with the petition; and the application is based on the ground that "accident or mistake" in respect of certain facts occurred upon the trial of the cause in the district court without fault of the defendant.

As shown by the petition, this court is not asked to rehear the cause upon the record brought here upon petition in error, but to hear it upon the petition and affidavits *delors* the record, and set aside a part of that record on the sole ground of accident or mistake in respect of facts occurring on the trial of the cause in the court below.

Now, whether the bill of exceptions be considered as a stipulation that it contains all the evidence in the case, or whether it be viewed as an ordinary bill of exceptions allowed by the judge, and by order of the court made part of the record, is not material, because the present

proceeding is somewhat in the nature of a writ of error in fact, and not an application for a rehearing of the cause upon the record. Has the supreme court jurisdiction to hear and determine such question of error?

It is well understood that in legal proceedings, "error of law is where, on the face of the record, it appears that the judgment was given on insufficient grounds;" and that error in fact must be substantiated by affidavits, and lies only to the same court in which the judgment was given to examine its own record and rectify the error, if any exist. Broom & Had. Com., 270, 271. Therefore it seems clear according to the common law rule of procedure, that in a cause brought here upon petition in error this court has no jurisdiction in such case, and cannot, in proceedings and matters of complaint *dehors* the record, examine such alleged errors of fact.

Again, under our constitution, this court has original jurisdiction only in cases relating to revenue, civil actions in which the state is a party, *quo warranto* and *habeas corpus*, and only "such appellate jurisdiction as may be prescribed by law;" and by section five hundred and eighty-two of the civil code, title XVI, entitled "Errors in Civil Cases," the statute provides that "a judgment rendered or final order made by the district court may be reversed, vacated, or modified by the supreme court, *for errors appearing on the record.*" Hence, the powers of this court are limited to *errors appearing on the record*; but the question raised by defendant's petition and presented for determination by this court is in respect of a matter entirely foreign to the record, and therefore the conclusion seems inevitable that the subject matter of complaint does not come within the jurisdiction of this court, under the powers conferred upon it, by either the constitution or the statute. But again the bill of exceptions is regularly allowed and signed by the judge, and by order of the

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court is made part of the record, and is so certified to this court, and *this* record is the only subject matter of examination in cases here on error.

In *Smith v. Wilson*, 26 Ill., 187, the court said: "We may observe here, that this court has repeatedly held that affidavits and other papers not intrinsically parts of the record, are not made so by the fact that the clerk has incorporated them into the record. They are extrinsic *dehors* the record, and can only be made part of the record by bill of exceptions;" and in *Boynton v. Champ-
lin*, 40 Ill., 64, it is held that "upon an application for a re-hearing we cannot entertain a suggestion of a diminution of record, nor can we receive affidavits." If such a practice were to obtain, it would not only be an infringement of the constitution and of the statute relative to cases in error, but it would open the door to the granting of rehearings generally upon new matter *dehors* the record, and would prolong litigation and in many cases delay justice. Indeed, its tendency would be to make litigation endless, whereas the whole policy of the law is, that actions must cease when all litigation must come to an end, and this is not only the doctrine of the common law, but it is incorporated into and established by the constitution and statutes of our state. *McPherson v. Nelson*, 44 Ill., 128.

But suppose a rehearing should be allowed in disregard of the foregoing principles of law, then in order to render it availing to the defendant leave would have to be granted to him to introduce evidence in this court not produced on the trial of the cause in the court below; but such practice would, in legal effect, essentially be a hearing for a new trial on the ground of newly discovered evidence. Surely it will not for a moment be contended that this court has jurisdiction in such cases. The statute provides when and where such application must be made. It will be observed and understood that

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our decision of this case does not in any respect rest upon a stipulation signed by the counsel of the respective parties. We think the settled rules of practice in proceedings in error, as well as the want of jurisdiction in this court over the subject matter of complaint, are decisive of the case; and therefore we do not express any opinion as to the power of the court to set aside, on the ground of mistake in fact, a stipulation made by the parties or their counsel during the trial of a cause. The petition must be dismissed and a rehearing denied.

JUDGMENT ACCORDINGLY.

CLARA GEISLER, BY HER HUSBAND AND NEXT FRIEND, FREDERICK GEISLER, PLAINTIFF IN ERROR, V. WILLIAM A. BROWN, DEFENDANT IN ERROR.

1. **Libel:** A libel is a malicious publication against a person, tending to blacken his reputation, or to expose him to public hatred, contempt, or ridicule.
2. ———: **PLEADING.** But it is not every false charge against a person which is sufficient to sustain an action for damages. The plaintiff must aver in his petition and prove on the trial that he has sustained some special damages from the publication of the alleged libel, unless the words are actionable *per se*.
3. ———: ———. Where the words are not actionable *per se* the plaintiff must set forth in his petition facts showing wherein he has sustained damages.
4. ———: ———. When the terms of an alleged libel are general or indefinite, the petition must contain averments that the alleged libel was published *of and concerning the plaintiff*.
5. ———: ———. The mere statement in a petition that the plaintiff has sustained damages by loss of friends, etc., where there is no statement *of facts* from which it is apparent that the defendant is liable for damages, will not sustain the action.

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THIS was an action for libel brought in the district court of Otoe county. The petition was as follows:

“Now comes the said plaintiff Clara Geisler by her husband and next friend Frederick Geisler, and says that she is a married woman and that Frederick Geisler is her husband, and that they now are, and were, and had been for a long time living happily together as man and wife at and before the grievances hereinafter mentioned, and the said plaintiff says that she is a good, true and honest, kind and upright woman, and as such has always behaved and conducted herself as hereinafter mentioned and until the committal of the several grievances by the said defendant as hereinafter mentioned was always reputed esteemed and accepted by and among all her neighbors, and other good and worthy citizens to whom she was in any way known to be a person of good name, fame, and credit, and had never been suspected or charged with the offenses or misdemeanors charged and imputed to her by the said defendant or of other offenses or misconduct. That on the twelfth day of July, A.D. 1873, the said defendant, William A. Brown, was the publisher and owner of a newspaper published at Nebraska City, Nebraska, commonly known and called *The Daily Nebraska Press*, which said newspaper was and is of general circulation in said Nebraska City and Otoe county; that on the said twelfth day of July, A.D. 1873, at said Nebraska City and Otoe county and State of Nebraska aforesaid, the said defendant, William A. Brown, published and caused to be printed and circulated in his said paper aforesaid the following willful, false, scandalous, and malicious libel of and concerning her in her capacity of step-mother to the children of the said Frederick Geisler, she, the said plaintiff, then and now being the second wife of the said Frederick, and the said step-mother of the said children of said Frederick by his first wife, that is to say:

"An Inhuman Step-mother—She Beats Her Child Over the Head with a Club—Is it not Time that Something was Done With that Girl ?

"The case of kidnapping and pistol shooting has gone quite far enough in our opinion. This case of the little girl had better be lawfully settled before any more bloodshed is caused, and we shall insist upon the proper officers taking this matter in hand and settling it. Peace can never be obtained the way things are carried on now, and men are in danger of losing their lives and the offenders being constantly in 'limbo.'

"Last night Mrs. Geisler beat her little step-daughter most unmercifully with a club as large as a man's wrist, striking her over the head and making the blood flow freely. The little girl ran away from her as soon as she could free herself, and went to marshal Thomas' house weeping bitterly, her clothes saturated with blood and the wounds on her head still bleeding profusely. The marshal was not at home, so she went to the store of C. H. Mickelson, and from there over to judge Dickey's drug store. The judge told sheriff Moore to take the girl to Mickelson's house and keep her there until called for. This Mickelson will probably do if Geisler does not get her away.

"It is time that Geisler and his brutal wife were put under bonds not to whip that girl, and it is time some one took care of the little girl, who is not over nine years of age. There has been trouble enough over her, and we hope the authorities will put a stop to it."

Which publication is and was false, slanderous, and malicious; this plaintiff says that Frederick Geisler did have a daughter by his first wife, whose name was and is Louise; that she is about eight years of age; that the plaintiff always and at all times treated her kindly and in an affectionate and motherly manner, and never struck her, punished her, or abused her in any manner; that by

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said false, malicious, and scandalous libel, so published by said defendant willfully and maliciously, this plaintiff has been greatly damaged by being brought into public ridicule, hatred, and contempt, and in a great degree banished and shunned by her former friends and associates, and her feelings, and the grief occasioned by said false and malicious publication offended her, been injured in her health, and good name and fame in the sum of sixty thousand dollars." The defendant demurred to the petition, and upon argument before GANTT, J., sitting in the district court, the demurrer was sustained and judgment rendered against the plaintiff. The cause came here by proceedings in error, and was heard and decided at the January term, 1875. The papers having been mislaid, an opinion was not filed until the present term. Maxwell's Digest, 295.

Mason & Whedon, for plaintiff in error.

Words when written or printed are actionable, which would not be if spoken. In a complaint seeking to recover damages for the publication of a libel, extrinsic averments are not necessary when the words used, giving them their natural construction, tend to injure the reputation of the complainant and expose him to hatred, contempt, or ridicule. *Moore v. Bennett*, 48 N. Y., 472. *Chenery v. Goodrich*, 98 Mass., 224. A libel is defined to be a malicious defamation expressed in printing or writing, or by signs, pictures, etc., tending to injure the reputation of another, and thereby expose such person to public hatred, contempt, or ridicule. 2 *Selw.*, N. P., 1061. Townsend on Slander and Libel, Sec. 176 and cases cited. A publication, to be libelous, must tend to injure the plaintiff's reputation, and expose him to public hatred, contempt, or ridicule. A publication may be libelous without imputing a crime *per se*. *Armentrout*

v. Moranda, 8 Blackf., 426. *Johnson v. Stebbins*, 5 Ind., 364. This publication contains a charge of inhumanity; calls the plaintiff *an inhuman step-mother*; charges her with beating her child over the head with a club until its clothes were saturated with blood. Surely here is a charge of gross inhumanity, depravity, and cruelty, and misconduct, as a step-mother, which could not fail to injure the plaintiff's reputation and good name. It is clearly agreed that not only written or printed scandal comes within the notion of libel, but it may be applied to any defamation whatsoever, expressed either by signs or pictures, and this species of defamation is termed written scandal, and thereby receives an aggravation in that it is presumed to have been entered upon with coolness and deliberation, and to continue longer and propagate wider and further than scandal uttered by words.

C. W. Seymour and Calhoun & Croxton for defendant in error.

The gist of an action for libel is pecuniary loss, not for injury to reputation, and if the language published has not occasioned the plaintiff pecuniary loss, then no action can be maintained. *Townshend* 101, 106, 107. *Maitland v. Goldney*, 2 East, 426. When the language brings a party into public hatred, disgrace, or degrades him, exposes him to ridicule, contempt, or tends to vilify him or injure his character, or diminish his reputation, the party must show "special damages" and these "special damages" must be set out in the petition. *Stone v. Cooper*, 2 Denio, 299. 1 Starkie on Slander, 2. *Woodbury v. Thompson*, 3 N. H., 194. *Terwilliger v. Wands*, 17 N. Y., 54. Malice must be stated and proven. *Townshend*, 607. *Fowles v. Bowen*, 30 N. Y., 26. *Commonwealth v. Clap*, 4 Mass., 163.

MAXWELL, J.

The charge in the petition is that the defendant published an article relating to the plaintiff entitled "AN INHUMAN STEP-MOTHER." "*She beats her child over the head with a club.*"

In *Cooper v. Stone*, 24 Wendell, 434, Cowen, J., defines a libel to be any malicious publication against a person, "tending to blacken his reputation, or expose him to public hatred, contempt, or ridicule." But it is not every false charge against an individual which is sufficient to sustain an action for damages. In order to authorize a recovery the plaintiff must aver in his petition, and prove on the trial, that he has sustained some special damages from the publication of the alleged libel, unless the nature of the charge is such that the words are actionable *per se*. And where the words are not actionable *per se* it is not sufficient to simply allege that the party has sustained damages, but a party must state in his petition *wherein* he has sustained damages. A writing charged to be a libel may be expressed in such clear and unambiguous terms, that the court wants no circumstances to make it clearer than it is of itself. But if the terms of the alleged libel are general, or indefinite, there must be necessary averments in the petition showing that the libel was published *of and concerning the plaintiff*. The petition in this case is defective in that regard, and there is no allegation therein that the defendant charged the plaintiff with *willfully* beating the child. The petition entirely fails to show *how* the plaintiff was injured by the alleged libel, and the mere statement that she has sustained damages by the loss of friends, etc., where there is no statement of facts from which it is apparent that the defendant is liable for damages, will not sustain the action. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

AULTMAN, TAYLOR & CO., APPELLANTS, v. WILLIAM OBERMEYER AND WIFE APPELLEES.

1. **Husband and wife: DEED.** In the year 1870, a husband and wife owning lands in severalty, in the state of Wisconsin, sold the same, the husband receiving the money therefor, which, on removing to this state in the spring of that year, he deposited in his own name in a bank in the city of Lincoln. Afterwards, with the knowledge and consent of his wife, he purchased certain lands and paid for the same with the money in question, and took the deed in his own name. In the year 1875 the husband made a deed to his wife for the lands in controversy. *Held*, that the deed was absolutely null and void at law.
2. ———: ———. When it is apparent that such a deed has been made in pursuance of a valid antenuptial agreement, or upon a sufficient consideration, it may be sustained in equity.
3. ———: ———. By the common law neither husband nor wife could convey lands to each other. And our law still regards them, in relation to each other, as one person, notwithstanding the statutes enlarging the rights of the wife.
4. ———: **TRANSACTIONS BETWEEN THEM.** Transactions between husband and wife in relation to the transfer of property from one to the other, by reason of which creditors are prevented from collecting their just dues, will be scrutinized very closely, and the *bona fides* of such transactions will have to be established beyond question in order to be sustained by a court of equity.
5. ———: **COMMON LAW IN FORCE.** The common law in respect to the rights of husband and wife is in force in this state, except so far as it has been modified by statute.

APPEAL from the district court of York county.

The plaintiffs Aultman, Taylor & Co., recovered judgment against the defendants in the probate court of York county for the sum of \$438.79, and caused a transcript thereof to be entered in the district court. Execution issued, and after a levy and sale of some property there remained a balance due of \$384.77. Alias

execution issued and levy made upon the north-west quarter of section fourteen in township ten north, of range one west, and returned "not sold for want of bidders." Plaintiffs then commenced this action in the district court, alleging that the land so levied upon was in the name of defendant's wife, having been conveyed to her by her husband William, during the pendency of the action against him in the probate court, with the intent to hinder, delay, and defraud his creditors, whereby the said plaintiff was unable to sell the same to satisfy the balance remaining due on his said judgment. Plaintiffs prayed that said deed should be canceled, set aside, etc. Upon a trial before GASLIN, J., sitting in the district court for York county, Mrs. Obermeyer testified that in 1852 she received a legacy of \$400 from her mother, and that about ten years ago she received a legacy of \$600 from her mother-in-law; that part of this money she allowed her husband to use in a store; that she invested a portion of this money in wild lands in Wisconsin; that her husband also owned forty acres of land in Wisconsin; that in 1870 they sold such lands and all of their property in the state of Wisconsin and deposited the proceeds in the State National Bank of Lincoln, Nebraska, to the amount of \$7,000, such deposit being made in William's name; that the real estate in controversy was bought with her own funds; and that the conveyance to her by her husband was a payment of the money she allowed him to use.

Plaintiffs introduced one witness who testified that he was present at the time of the execution of the deed by William's grantor; that Mrs. Obermeyer was present and saw said land deeded directly to her husband. One John Allen, a justice of the peace, testified that defendant William, while Mrs. Obermeyer was present, for the purpose of testifying as her bondsman in an appeal case from the decision of said Allen, stated on oath in

the presence of his wife that he was the owner of the land in controversy.

A decree was rendered below in favor of defendants, and plaintiffs appeal.

Edward Bates, for appellants.

The Obermeyers' testimony shows that they came to Nebraska and became residents of this state in the year 1870, and at that time they had sold all their property in Wisconsin, and deposited the proceeds in the State National Bank at Lincoln, Nebraska, in the name of the husband. This was an appropriation and reduction by the husband, of the wife's separate property to his own use (if, from their own testimony, she ever had any such property). The husband reduced this property to his possession in this state under the common law rule, as the Married Woman's Act did not take effect until June 1st, 1871. [Laws of 1871, Page 78.] It would be "impairing the obligation of a contract," to divest the husband of this property now. *Westervelt v. Gregg*, 12 N. Y., 202.

The statutes of June 1st, 1861 [Laws 1871, Page 68], and the Act approved Feb. 25th [Laws of 1875, Page 88], do not abrogate the common law rule so that a husband can convey real estate directly to his wife, especially in any case where it is against the interest of the creditors of the husband. *Fletcher v. Mansur*, 5 Ind., 267. *White v. Wager*, 25 N. Y., 328. [The case of *White v. Wager* is decided upon a statute similar to ours.] *Farrell v. Patterson*, 43 Ill., 52. *Thomas v. Chicago*, 55 Ill., 403.

The conveyance of the land in question from the husband to the wife, as shown by the testimony, is voluntary and without consideration. The recitals in the deed are conclusive of this. Bump on Fraudulent Con-

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veyances, 317 and 318. *Lyne v. Bank*, 5 J. J. Marsh, 545. *Hurdt v. Courtenay*, 4 Met. (Ky.) 139. *Farmers Bank v. Long*, 7 Bush., 337. *Winter v. Walter*, 37 Penn. State, 155

R. E. Knight, for appellees.

MAXWELL, J.

Section one of the act "respecting the rights of married women," approved March 1, 1871, provides that: "The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property which came to her by descent, devise, or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts."

In 1875 this section was amended by adding after the word "husband," in the sixth line, the words "or she shall acquire by purchase or otherwise."

At common law those chattels which formerly belonged to the wife are by act of law vested in the husband, with the same degree of property and with the same powers as the wife, when sole, had over them." This depends entirely on the notion of a unity of person between the husband and wife, it being held that they are one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife before marriage is by marriage absolutely vested in the husband. In a real estate, he only gains a title to the rents and profits during the coverture; for that, depending upon feudal prin-

ciples, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him, unless, by the birth of a child, he becomes tenant for life by the curtesy. But in *chattel interests* the sole and absolute property vests in the husband, to 'be disposed of at his pleasure, if he chooses to take possession of them; for unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined." 2 Black. Com., 433.

The common law in respect to the rights of husband and wife is in force in this state, except so far as it has been changed by statute. The second section of the act "respecting the rights of married women" provides that: "A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent, and with like effect, as a married man may in relation to his real and personal property."

By the common law neither the husband nor wife could convey lands to each other. And our law still regards them in relation to each other as one person, notwithstanding the statute enlarging the rights of the wife. *Fowler v. Trebein*, 16 O. S., 498. *White v. Wager*, 25 N. Y., 328. *Winans v. Peebles*. 32 N. Y., 423.

The conveyance which Obermeyer attempted to make directly to his wife in law was absolutely void. Where it is apparent that such a deed has been made, in pursuance of a valid ante-nuptial agreement or upon a sufficient consideration, it might be sustained in equity. But in this case, if we take the most favorable view of the evidence possible for the defendants, that the money in question was derived from the sale of lands owned by the wife, still it is clearly shown that in the year 1870 the

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husband had reduced this money to his possession, and had retained possession thereof until the time he purchased the land in controversy. But in our opinion the proof fails to establish the fact that the money with which this land was purchased was derived from the sale of lands belonging to the wife. Transactions between husband and wife in relation to the transfer of property from one to another, by reason of which creditors are prevented from collecting their just dues, will be scrutinized very closely, and the *bona fides* of such transaction will have to be established beyond question, in order to be sustained by a court of equity. The judgment of the district court is reversed, and a decree rendered in favor of the plaintiff.

DECREE ACCORDINGLY.

HARLAN EDMINSTER, AND OTHERS, PLAINTIFFS IN ERROR, V.
JONATHAN HIGGINS, DEFENDANT IN ERROR.

1. **Vendor's Lien.** A vendor of real estate, upon an absolute conveyance thereof by deed, has no lien on the land so conveyed for such portion of the purchase money as remains unpaid.
2. ———: ——— The policy of our law is to discourage secret liens, and to require all instruments affecting the title of real estate to be entered of record.
3. ———: ——— The doctrine that a vendor has a lien on the land conveyed for the purchase money remaining unpaid, is repugnant to our statutes in relation to real estate, and is no part of the law of this state.
4. **Conveyance: REGISTRATION.** The proper registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property; and such notice given by the record is as effectual in law as personal notice.

ERROR from the district court of Nemaha county.

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The petition of the plaintiff in the court below, Higgins, states that on January 1, 1871, he sold and absolutely conveyed with full warranties, the premises described in the petition to William Adams, and took two promissory notes for the unpaid purchase money. That on April 17, 1873, said William Adams died, leaving the defendants, except Edminster, his heirs, and that said Edminster was duly appointed administrator. That no proceedings had ever been had to collect the notes, and prays a vendor's lien and sale of the premises.

Defendants demurred generally. The court overruled the demurrer, and the defendants below, as plaintiffs in error, bring this petition in error to reverse such judgment.

J. H. Broady, for plaintiff in error.

Although the doctrine of vendors' liens was established in England for a reason now obsolete, yet it has always been repudiated by many of the foremost states of the Union, and the tendency of the later decisions of this country is to repudiate it altogether as incompatible with our states policy and jurisprudence and the business world of to-day. Gen. Stat., p. 881, sec. 50. *Simpson v. Munde*, 3 Kan., 173. *Kauffelt v. Bower*, 7 Serg. & Raw. (Pa.), 64. *Semple v. Burd*, Id., 286. *Cameron v. Mason*, 7 Ired., Eq., 180. *Philbrook v. Delano*, 29 Maine, 410. *Bayley v. Greenleaf*, 7 Wheat., 47. *Gilman v. Brown*, 1 Mason, 192.

W. T. Rogers, for defendant in error.

MAXWELL, J.

The doctrine of a vendor's lien appears to have had its origin in the civil law, from which it was borrowed and became a part of the equity jurisprudence of England. *Mackreth v. Symons*, 15 Vesey, 327. By the

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civil law the vendor of property sold had a privilege, or right of priority of payment, in the nature of a lien on the property for the price for which it was sold, not only against the vendee and his representatives, but against his creditors, and also against subsequent purchasers from him. For although the title and dominion to the thing sold passed, yet there was an implied condition that the vendee should not be master of the thing sold unless he had paid the price, or had otherwise satisfied the vendor in respect thereof. Story's Eq. Juris., Sec. 1221. Dig., Lib. 18, title 1, sec. 19. And the rule was equally applied to the sale of movable and immovable property, and equally applied whether there had been a delivery of possession or not. Id.

The principle upon which the lien is sustained is, that where a person has obtained the estate of another he ought not in conscience, as between them, be allowed to hold it without paying the full consideration therefor. *Mackreth v. Symons*, 15 Vesey, 340. Story's Eq. Juris., 1219. The doctrine that the vendor, upon an absolute conveyance of land, where no security has been taken, has a lien upon the land sold for the unpaid purchase money is well established in England. And the decisions of her courts on that question have been followed in the supreme court of the United States, and in the courts of last resort of many of the states of the Union. The question is now presented to this court for the first time. It is our duty therefore to examine the grounds on which it rests, and the reasons assigned for its support, and see how far they are applicable to this state, under our laws.

Blackstone, after describing the principal kinds of deeds by which real estate might be conveyed in England, says: "These are the principal species of deeds or matters *in pais* by which estates may be conveyed or at least affected. Among which the conveyances to uses

are by much the most frequent of any; though in these there is certainly one palpable defect—the want of sufficient notoriety, so that purchasers or creditors cannot know with any absolute certainty what the estate and the title to it in reality are, upon which they are to lay-out or lend their money. In the ancient feudal method of conveyance (by giving corporal seisin of the lands) this notoriety was in some measure answered; but all the advantages resulting from thence are now totally defeated by the introduction of death-bed devises and secret conveyances; and there has never yet been any sufficient guard provided against fraudulent charges and incumbrances since the disuse of the old Saxon custom of transacting all conveyances at the county court, and entering a memorial of them in the chartalary or ledger book of some adjacent monastery, and the failure of the general register established by King Richard the First, for the starrs or mortgages made to Jews in the capitula de judaeis, of which Hovenden has preserved a copy.” 2 Blacks. Com., 342: “Conveyance by *bargain and sale* in order to pass a freehold, under the provisions of 27 Henry VIII, was required to be made by indenture and enrolled within six months in one of the courts of Westminster Hall or with the *custos rotulorum* of the county, but registration is entirely distinct from that.” 3 Wash. on Real Property, 313. It is well settled in England that the mere registration of a conveyance will not be deemed constructive notice to subsequent purchasers. *Wyatt v. Barwell*, 19 Ves., 435. *Jollard v. Stambridge*, 3 Ves., 477. Story’s Eq. Juris., Sec. 402. In this state, however, the proper registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable in the same property.

Section sixteen, chapter 61, Genl. Statutes, 875, provides that: “All deeds, mortgages, and other instruments of writing, which are required to be recorded.

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shall take effect and be in force from and after the time of delivering the same to the clerk for record, and not before, as to creditors and subsequent purchasers in good faith without notice. And all such deeds, mortgages, and other instruments shall be adjudged void as to all creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments shall be first recorded; *Provided*, That such deeds, mortgages, and other instruments shall be valid between the parties."

Section fifty, Genl. Stat. 881, provides that: "Every conveyance of real estate shall pass *all the interest of the grantor therein*, unless a contrary intent can be reasonably inferred from the terms used."

The obvious intention of the registry acts is to give notice to all persons who may have occasion to ascertain whether there has been any prior incumbrance or conveyance of any real estate. And the notice given by the record is as effectual in law as personal notice to the party to be affected by it. The policy of our law is to discourage secret liens, and to require all instruments affecting the title of real estate to be entered of record. The law thus places the means within the reach of every one desiring to purchase real estate of ascertaining the condition of its title.

What is a vendor's lien? We are told that it is an equitable mortgage for the amount of purchase money of real estate remaining unpaid. But an equitable mortgage grows out of an agreement that a lien shall be created, while a vendor's lien in a case like the one at bar arises, if at all, without a contract, and against the express terms of the deed. Neither is it in the nature of a trust. There is no agreement of any kind that the land shall be held as security for the payment of the purchase money. This is a case where credit was deliberately given, trusting to the solvency of the debtor, and notes, payable in the future, were received by the

vendor for that portion of the purchase money on which credit was given. It is difficult to perceive how the land can be charged with a lien not contemplated by the parties. The case would be entirely different if the sale had been for cash, and the deed had been delivered before payment of the consideration. Then the vendee becomes a trustee for the purchase money, and the estate purchased is charged with the trust in the hands of any one except an innocent purchaser without notice.

In *Gilman v. Brown*, 1 Mason, 192, Story, J., says: "The lien of a vendor for the purchase money is the mere creature of a court of equity, which it moulds and fashions according to its own purposes. It is, in short, a right which has no existence until it is established by the decree of a court in the particular case, and is then made subservient to all the other equities between the parties."

Blackstone says: "Hard is the common law still subsisting, that land derived or descending to the heir shall not be liable for simple contract debts of the ancestor or deviser, although the money was laid out in *purchasing the very land*." Blackstone Com., Book III, 430.

This provision of the common law doubtless had great influence in leading the court of Chancery of England to adopt the doctrine of vendor's lien from the civil law to prevent a failure of justice. But this doctrine can have no application in this state, where debts are a charge upon the lands of decedents, and where the estate descends or is devised subject to such debts.

We are clearly of opinion that the doctrine of a vendor's lien in a case like the one at bar is repugnant to our statutes in relation to real estate, and is therefore no part of our law. It follows from these views that the judgment of the district court must be reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

Haggard v. Wallen.

DAVID G. HAGGARD, PLAINTIFF IN ERROR, v. MATTHIAS S. WALLEN, ADMINISTRATOR OF A. C. JOHNSON, DEFENDANT IN ERROR.

1. **Replevin: PLEADING.** A petition in replevin should state that the plaintiff is the owner of the goods sought to be recovered (or has a special property therein stating its nature), that he is entitled to the immediate possession of such goods, and that the defendant wrongfully detains the same. The gist of the action is the unlawful detention of the property.
2. **Pleading. PETITION.** Where a petition is defective for want of a material averment, and such averment is supplied by the answer, the defects in the petition will thereby be cured.
3. **Herd Law.** It is the duty of a party taking up stock, under the provisions of an act for a general herd law to protect cultivated lands from trespass by stock, to give notice to the owner of such stock within a reasonable time after taking up the same. As to what is a reasonable time must be determined by the circumstances of each case.
4. ———: **ARBITRATION.** The object of the provision for arbitration is to afford a speedy and inexpensive mode of ascertaining the damages sustained by trespass of stock upon cultivated lands. Courts construe proceedings of this kind with great liberality in all matters except as to the jurisdiction.

ERROR to the district court of Saunders county. It was an action of replevin tried below before Post, J., who rendered judgment for defendant in the sum of one dollar damages and costs of suit.

W. A. Marlow, for plaintiff in error.

W. H. Munger, for defendant in error.

MAXWELL, J.

It is claimed by the defendant that the petition does not state facts sufficient to constitute a cause of action.

The following is a copy of the petition:

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"That on or about the seventh day of November 1875, in Marietta precinct in Saunders county, Nebraska, the defendant wrongfully detained and still detains in his possession the following described goods and chattels of the plaintiff, to-wit: One black and white spotted sow pig, being of the value of fifteen dollars, to the damage of the plaintiff in the sum of ten dollars. This action is brought in replevin to recover the possession of said personal property, to-wit: One black and white spotted sow pig, and the plaintiff asks judgment accordingly and for ten dollars damages."

A petition in replevin should state that the plaintiff is the owner of the goods sought to be recovered (or has a special property therein, stating its nature), that he is entitled to the immediate possession thereof, and that the defendant wrongfully detains the same. The gist of the action is the unlawful detention of the property.

The action can be maintained only in cases where the plaintiff is entitled to the immediate possession of the property. The petition therefore is defective in not stating that the plaintiff is entitled to the immediate possession of the property. *Williams v. West*, 2 Ohio State, 85.

In cases where the petition is defective for want of a material averment, and such averment is supplied by the answer and is not inconsistent with the averments in the petition the defects in the petition will thereby be cured, at least after verdict and judgment thereon. *Erwin v. Shaffer*, 9 Ohio State, 44. *Insurance Company v. Kelly*, 24 Ohio State, 365.

The defendant, in his answer, claims to be entitled to the possession of the property under the provisions of an act for a general herd law to protect cultivated lands from trespass by stock.

On the tenth day of November, 1874, the defendant served the following notice on the plaintiff:

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“Mr. HAGGARD:

“This is to notify you that I did, on Saturday, November 7, 1874, take up one hog belonging to you on section 4, east $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of said section. I am damaged to the amount of \$3.00. I do hereby appoint E. B. Smith and A. M. Smith as arbitrators to appraise said damages if you do not see fit to pay the same with costs.

“A. C. JOHNSON.”

The notice was served on the plaintiff on the tenth day of November, 1874. On the ninth of that month the plaintiff commenced an action in replevin for the recovery of the property. The summons and order of delivery were served on the defendant on the twelfth day of the month and the property delivered to the plaintiff.

It is the duty of a party taking up stock under the provisions of the act in question to notify the owner, if known, within a reasonable time after taking up the stock. As to what is a reasonable time must depend to a great extent upon the circumstances attending each case. The notice certainly was sufficient to give the defendant a lien on the property. Courts construe proceedings of this kind with great liberality in all matters except as to the jurisdiction. *Harding v. Trustees*, 3 Ohio, 232. *Austin v. Hayden*, 6 Ohio, 388.

The object of the law is to afford a speedy and inexpensive mode of ascertaining the damages sustained by trespass of stock upon cultivated lands. If either party is aggrieved by the award he has a right to appeal.

Substantial justice between the parties appears to have been done in the case. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

WILLIAM H. GARRISON, PLAINTIFF IN ERROR, v. THE PEOPLE OF THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Courts: POWER OF DISTRICT COURT.** In the year 1875, G. was indicted for rape. The court fixed the amount of bail required of the accused, and the cause was continued until the next term. In 1876 the cause, on motion of the accused, was continued until the next term. At the next term of the court, held in 1877, the accused filed a plea in abatement, alleging that there was no record of the finding of the indictment against him. The judge who held court at the time the indictment was found had ceased to be judge of the district court, and had failed to sign the journal of the court. The presiding judge of said court in the year 1877 ordered an entry conforming to the facts to be made on the journal of the court, showing that an indictment had been found against the accused. *Held*, That the court had authority to make such entry.
2. ———: ———. The entire purpose of entering orders or judgments as of a prior date is to supply matters of evidence. Where it is clear that an order or judgment was in fact rendered, but through the inadvertance or negligence of the clerk was not entered upon the journal, the court has authority to order it to be supplied.
3. ———: ———. **NUNC PRO TUNC ORDER.** But the failure of the court to act does not authorize the entry of a *nunc pro tunc* order or judgment. If no order or judgment was in fact rendered, the court cannot treat such defect as a clerical error.
4. ———: ———. **AMENDMENT OF RECORDS.** Courts retain authority over their records after the entry of judgment, and possess authority to supply a record which has been lost or destroyed, and in doing so must be governed by the rules of evidence. A court may amend its record to correspond with the facts, and this may be done from the judge's notes, or any other satisfactory evidence.
5. **Rape: DEFINITION OF.** Rape is defined to be the unlawful carnal knowledge by a man of a woman *forcibly* and *against* her will.
6. ———: **ASSAULT WITH INTENT TO COMMIT RAPE.** To constitute an assault with intent to commit a rape there must have been an intent to commit a rape, and that intent must have been mani-

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fested by an assault for that purpose upon the person intended to be ravished. Both of these ingredients are necessary to constitute the offense.

7. ———: WITNESS. The injured party is a competent witness, but her credibility must be submitted to the jury. Where the jury are satisfied beyond a reasonable doubt from the testimony of the prosecutrix alone of the guilt of the accused, they will be justified in returning a verdict of guilty.
8. Practice: EXCEPTIONS TO INSTRUCTIONS. Exceptions to instructions to be available must be taken at the time the instructions claimed to be erroneous are given; exceptions cannot be taken before.
9. ———: JOINDER OF COUNTS IN AN INDICTMENT. It is proper in an indictment to join a count for an assault to commit a rape with a count for rape itself.
10. ———: EVIDENCE. Where evidence of good character is before the jury it is their duty to give it such weight as they think it is entitled to. It is the province of the jury to weigh the evidence and determine the facts, and they should be left as free and untrammelled to give such weight to the evidence of good character as they are in relation to other facts.
11. ———: ———. In the absence of evidence to the contrary the law presumes every one innocent. And this legal presumption of innocence is a matter of evidence to the benefit of which the party accused is entitled.

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

James Laird and *C. Maxam Northrup*, for plaintiff in error.

I. It was error on the part of the district court to overrule the plea in abatement.

1. The court can amend an irregularity, but cannot amend to confer jurisdiction. *Hallett v. Richters*, 13 Howard Pr., 43, 46.

2. All records of judgments should show jurisdiction of the person on their face. Nothing can be intended

in their favor on the question of jurisdiction. *Thacker v. Powell*, 6 Wheaton, 127. *Smith v. Fowle*, 12 Wend., 11. *Borden v. Fitch*, 15 Johnson, 141. *Bigelow v. Stearns*, 19 Johnson, 39.

3. It is well settled that the record cannot be amended after the term on parol proof of what was done. There must be something in the record to amend by. *Moody v. Grant*, 41 Miss., 565. *Russell v. McDougall*, 3 S. and M. (Miss.), 247.

4. Clerical errors and no others can be amended by order of court. The statute of amendments does not apply to criminal cases, hence the common law rule prevails. *Young v. State*, 6 Ohio, 439. *Hunt v. Yeatman*, 3 Ohio, 16. *Torbet v. Coffin*, 6 Ohio, 34. *Moore v. Brown*, 10 Ohio, 197.

5. The doctrine is that in no case can the proceedings of a former term be amended unless there is something in the record to amend. Clerical errors cannot be corrected at a subsequent term from the memory of the judge, or from evidence filed in the cause; they can be corrected only by proceedings of record. "It is apparent in this case that the endorsement by the court was not a record, but merely a memorandum." *Boon v. Boon*, 8 S. and M. (Miss.), 318. *Burney v. Boyett*, 1 Howard (Miss.), 41. *Russell v. McDougall*, 3 S. and M., 234.

6. The power of the court to amend a record after the term extends only to mere clerical errors. *DeCastro v. Richardson*, 25 Cal., 49. *Bodine v. Swisher*, 66 Ill., 536.

II. Refusal of the court to charge twentieth instruction as requested by defendant, and charging the same as changed is error. To commit an assault with intent to commit a rape the defendant must intend to consummate the offense by force, and not to tempt the prosecutrix to consent. *Regina v. Hallet*, 9 C. and P., 748-9.

State v. Murphy, 6 Ala., 765. *Pleasant v. State*, 8 English (Ark.), 360. *Smith v. State*, 12 O. St., 470. Russell on Crimes, 7 Ed., 693 to 697.

III. Refusal of the court to charge the fourth and ninth instructions, as requested by defendant, is error. "Carnal knowledge" is equal in meaning with "sexual intercourse." Penetration and emission are both necessary to constitute rape. *Blackburn v. State*, 22 Ohio State., 110. *Williams v. State*, 14 Ohio, 222.

IV. It would be dangerous to convict in any case, as a general rule, on the testimony of the prosecutrix without corroboration. *Johnston v. State*, 17 Ohio, 593. *Laughlin v. State*, 18 Ohio, 99. Gen. Stat., sec. 475, Criminal Code.

George H. Roberts, Attorney General (with whom was *W. H. Morris*), for the State.

I. It is competent for courts, where things have been done by the court, that can only be evidenced by the record, and where, by the omission of the clerk, the entry has not been made, to supply proof by a *nunc pro tunc* entry. *Bradford v. Watts*, Wrights R., 496. *Moore v. Brown*, 10 Ohio, 199. *Young v. Ohio*, 6 Ohio, 437. Powell on Appellate Proceedings, note 4 in appendix. The court may direct a record to be made by the clerk from the minutes and files where no record exists, and the court may amend the record in criminal cases. *Mahan v. Ohio*, 10 Ohio, 234. Strange, 842. 2 Hawkins's Pleas, 25, § 129, page 278. More especially is this the case if there is anything in the records or proceedings to amend by. The fact that the clerk did not perform his entire duty in making up the record cannot deprive parties of their rights, even although he should entirely fail

to make up a record; such neglect would not affect those interested in the matter decided if sufficient could be found upon the files and books of the court to show what had been done. *Newnam's Lessee v. City of Cincinnati*, 18 Ohio, 331. Powell on Appellate Pro., § 72, p. 174.

Every court of record has ample power, even after a suit is determined, to amend its own record—that is, the journal or memorial of its own proceedings kept by the court or its clerk—by inserting what has been omitted, or striking out what may have been erroneously entered; for every court of record is entrusted with the very responsible duty of keeping it faithfully, and making it *speak the truth*, as it imports absolute verity, and cannot be collaterally called in question, and the record so amended stands as if it never had been defective. *Phillips v. Higdon*, Busbee, 382. *Galloway v. McKeithen*, 5 Ire. (Law), 12.

II. But one question raised by plaintiff in error is of importance to the public, *i. e.*, whether in a prosecution for rape it is necessary to prove emission the same as other facts. If the fact were not presumed, penetration being proved, it would seem impossible of proof, since if the female could testify to the fact, it would disprove the crime, and in case of a child the victim could know nothing of such a thing, and it is difficult to know of any other witness who could testify to that fact. The essence of the crime is not the fact of intercourse, but the injury and outrage to the modesty and feeling of the female by means of the carnal knowledge effected by force, and it seems the injury and outrage to the female would not be lessened, nor public safety and morals preserved, because a man failed fully to accomplish his design. As far as the female is concerned, the outrage is complete, whether emission takes place or not. *Cross-*

well v. People, 13 Mich., 433. 2 Bish. C. L., § 944. Green. Ev., § 210. *People v. McDonald*, 9 Mich., 150. *People v. Barton*, 1 Wheeler C. C., 379.

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At the June term, 1875, of the district court for Filmore county, an indictment for rape was found against the plaintiff. The indictment contained three counts: *First*, Charging that the plaintiff did carnally know and abuse one Charlotte A. Simmons, a female child under the age of ten years, with her consent. *Second*, That William H. Garrison on the first day of May, 1874, in and upon one Charlotte A. Simmons, did unlawfully, etc., ravish and carnally know her, she being a female child other than the daughter or sister of him, etc. *Third*, That William H. Garrison on the first day of April, 1875, upon one Charlotte A. Simmons did unlawfully, etc., make an assault, etc., with an intent to ravish and carnally know her.

The plaintiff was acquitted on the first and second counts of the indictment, but was convicted on the third count thereof, and was sentenced to five years imprisonment in the penitentiary.

At the June term, 1875, of said court, the presiding judge endorsed upon the indictment the amount of bail to be given by the plaintiff, and the indictment was filed; *but the journal failed to show that an indictment had been found*. At the next term of court held in June, 1876, the plaintiff was arraigned and plead not guilty, and on his motion the cause was continued. At the June term, 1877, the defect in the record was discovered, at which time the judge presiding at the time the indictment was found had ceased to be judge of the district court. The journal of the court not having been corrected in open court and signed by him, the court,

in June, 1877, ordered the following entry to be made in the journal: "And now on this twentieth day of May, 1875, the grand jury heretofore duly chosen, selected, empaneled, and sworn, came into open court in charge of a sworn officer, and being called in open court each answered to his name, and the jury all being present returned into open court, and by their foreman, as a true bill, did present an indictment by the people of the state of Nebraska against William H. Garrison, charging said William H. Garrison with the crime of rape; also with the crime of an assault with intent to commit rape. And afterwards, to-wit, on the twentieth day of May, 1875, there was filed in the office of said clerk an indictment in the words and figures following, and endorsed as appears in the following, to-wit," etc.

This amendment of the record is assigned for error.

In *Bradley v. Smith*, 6 Ohio, 497, the court say: "The docket kept by the presiding judge contains his original minutes of the doings of the court. We see no impropriety in that court in correcting the mistakes of the clerk in transcribing these minutes."

In *Mahan v. The State*, 10 Ohio, 234, the court say: "Clerical omissions, in criminal cases, are amendable at common law, and the same rule prevails in civil cases."

In *Hollister v. Judges of the District Court*, 8 Ohio State, 202, it was alleged that the judge of the court of common pleas, who presided at the term of the district court held in April, 1855, had improperly stricken out of a bill of exceptions, outside of the court room, after the final adjournment of the court, certain material words. In a proceeding to compel the judges to amend the bill of exceptions by inserting therein the words so stricken out, the defendants answered that the official terms of two of the judges who held said terms of court had expired, and that the judges then holding the district court knew nothing about the facts in relation to

said alteration. The court held this no legal excuse for not correcting the record. That the personal knowledge of the court is not essential to the correction of a clerical error, as he has power to inquire into the matter and inform himself by competent evidence, and act upon that as he acts upon proofs given in court in the performance of other judicial acts. In *Mayo v. Whitson*, 2 Jones' Law Rep., 231, where it was objected, upon a motion to amend a record, that it was not a motion to amend but to make a record, and that there was nothing in the record to amend by, the court held: "This idea is founded in mistake. The petition is not to amend the record of the order (which was wholly omitted in the record) but to amend the record of the court of that term, by now causing to be put upon it that which was at the time ordered by the court but omitted by the clerk."

The entire purpose of entering orders or judgments as of some prior date, is to supply matters of evidence. The failure of a court to act does not authorize the entry of a *nunc pro tunc* order or judgment. If no order or judgment was in fact rendered, the court cannot treat such defect as a clerical error. But when it is clear that an order or judgment was in fact rendered, but was not entered upon the journal through the inadvertance or negligence of the clerk, the court has authority to order it to be supplied. In such a case the record is merely amended by inserting in the memorial of the proceedings of the court that which has been omitted therefrom. Courts retain authority over their records after the entry of the judgment. They possess authority to supply a record which has been lost or destroyed, and in doing so must be governed by the rules of evidence. This power authorizes the court to amend its record to correspond with the *facts*, and this may be done upon the judges' notes or any other satisfactory evidence. Amendment of the record has been more frequently exercised in civil

than in criminal cases, but no good reason exists why it should not apply to both classes alike. The court therefore did not err in permitting the entry to be made.

As the jury acquitted the plaintiff on the first and second counts of the indictment it is unnecessary to review the instructions upon those counts. The court instructed the jury that before they could find the plaintiff guilty as he stands charged in the third count of the indictment they "must be satisfied beyond a reasonable doubt that the defendant (plaintiff in error) intended to consummate the offense by force and not to tempt the prosecutrix to consent." This is assigned for error.

Section fourteen, chapter IV, of the criminal code, provides that: "If any person shall assault another with intent to commit a murder, rape, or robbery upon the person so assaulted, every person so offending shall be imprisoned in the penitentiary not more than fifteen nor less than two years." Rape is defined to be the unlawful carnal knowledge by a man of a woman, *forcibly* and *against* her will. 1 East P. C., 434. 1 Bishop C. L. Sec. 1,113. *Smith v. The State*, 12 Ohio State, 470.

The general rule is well settled that the woman must oppose the act, and that if she in any manner favor it the party accused cannot be convicted of rape. The exceptions to the rule are where the woman is *non compos*, or has been reduced to a state of insensibility and violated while in that condition, and cases where consent has been induced by fears of personal violence.

To constitute the crime charged in the third count of the indictment there must have been an intent to commit a rape, and that intent must have been manifested by an assault for that purpose upon the person of the prosecutrix. Both of these ingredients are necessary to constitute the offense. An assault in such a case may imply force upon one side and a want of assent upon the other. *Smith v. The State*, 12 Ohio State, 473.

The court further instructed the jury that in order to convict the prisoner they must be satisfied beyond a reasonable doubt that he did use force, and that against the will of the prosecutrix, in an attempt to have sexual intercourse with her. Taking the instructions upon this branch of the case together they state the law fully and correctly.

The plaintiff asked the court to instruct the jury that they could not convict him of the crime charged, upon the unsupported testimony of the prosecutrix, which was refused. This is assigned for error. The injured party in such case is a competent witness, but her credibility must be left to the jury. If, however, the jury are satisfied beyond a reasonable doubt from the testimony of the prosecutrix alone of the guilt of the accused they will be justified in returning a verdict of guilty. Indeed, in many if not in most cases it would be impossible to convict except upon such testimony. But it is well to remember the observation of Lord Hale, that the accusation is easily made, hard to be proved, and still harder to be defended by one ever so innocent. 1 Hale Pl. Cr., 635. 3 Greenleaf, Ev., sec. 212.

Ordinarily there are circumstances connected with such cases, where the party claiming to be injured appears as a witness for the prosecution, which tend to establish or disprove the charge, and thereby strengthen or diminish the credit to be given by the jury to such testimony.

It is objected that the several paragraphs of the instructions were not numbered as required by the statute. This objection is purely technical, particularly in this case, where the instructions were properly prepared in paragraphs and filed with the clerk before being read to the jury. The exceptions written on the margin of the first paragraph are as follows: "Excepted to by defendant *before given* as not being numbered," "and excepted to

by defendant before given." The exceptions to other paragraphs are in the following words: "Excepted to by defendant before given," "and excepted to before given because not numbered." How long before the instructions were given the exceptions were taken does not appear. The rule is well settled that exceptions to be available, must be taken *at the time* the erroneous instructions are given. In any event they cannot be taken before. The object of the law in requiring objections to be made at the time the instructions are given is to enable the court to correct an erroneous expression, or to explain or qualify it in such a manner as to make it wholly unobjectionable. *Ex parte Crane*, 5 Peters, 197. *Kline v. Wynne*, 10 Ohio State, 230. In this case, had the objection been made at the proper time undoubtedly the court would have numbered the instructions as required by the statute, but the objection must be considered as waived.

Objection is made that the court overruled the motion of the plaintiff to require the prosecuting attorney to elect upon which count in the indictment he would prosecute the action. It is a sufficient answer to this objection to say that it is proper to join a count for assault with an intent to commit a rape with a count for rape itself. *Harman v. Com.*, 12 Serg., & Rawle, 69. *Buck v. The State*, 2 Har., & John, 426. *State v. Coleman*, 5 Porter, 52. *State v. Gaffney*, Rice, 431. *Stevens v. State*, 11 Geo., 227. 2 Whart., Cr. Law, section 1153.

Upon the question of character the court instructed the jury as follows: "The accused has called witnesses to prove his good character for morality and virtue or chastity; the same is before you pertinent and proper. And the evidence that the prisoner possessed a good character for virtue may be relied on to raise a doubt of his guilt sufficient to acquit him, which, without such

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proof, would not have existed." Whatever may have been the rule heretofore, it is now well settled that in a direct prosecution for a crime, the party accused is allowed to give in evidence his general character upon the particular trait which is in issue. The object of laying it before the jury is to induce them to believe it improbable that a person of good character would have conducted himself as charged. 3 Greenleaf Ev., section 25.

Judge Cooley, in the case of *The People v. Garbutt*, 17 Mich., 9, 7 Am. Law Reg., 563, says: "Good character is an important fact with every man, and never more so than when he is put on trial, charged with an offense which is rendered improbable in the last degree by an uniform course of life wholly inconsistent with any such crime. There are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character." Where evidence of good character is before the jury, it is their duty to give it such weight as they think it is entitled to. It is the province of the jury to weigh the evidence and determine the facts, and they should be left as free and untrammelled to give such weight to the evidence of good character as they are in relation to other facts.

The court further instructed the jury: "And if after you shall have carefully examined the evidence in this case, you shall be able to *reconcile it with the innocence of the prisoner*, it will be your duty, as no doubt it will be your pleasure, to acquit him." In the absence of evidence to the contrary the law presumes every one innocent. And this legal presumption of innocence is a matter of evidence, to the benefit of which the party accused is entitled. Where the accused sets up no defense of distinct and independent facts, but relies upon the plea of not guilty, the burden of proof is on the

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state to satisfy the jury of his guilt. The instruction complained of fully recognizes this rule, and the language in which it is couched is supported by the authorities. *The People v. Videto*, 1 Parker Cr. Reports, 610.

For these reasons the judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

THE STATE, EX REL. FRANCIS DAVIS, COMMISSIONER OF PUBLIC LANDS AND BUILDINGS, BRUNO TZSCHUCK, SECRETARY OF STATE, GEORGE H. ROBERTS, ATTORNEY GENERAL, AND J. C. McBRIDE, STATE TREASURER, v. SAMUEL BACON.

1. **Board of public lands and buildings.** The state board of public lands and buildings have not, under the provisions of the constitution, or the act of February 13, 1877, authority to appoint and remove officers of state institutions.
2. **Mandamus.** Action by mandamus will lie to compel an officer to deliver up property of the state, held by him without any right or authority at law.
3. **Institution for the Blind.** The institution for the blind is not, within the meaning of section 19, Art. V, of the constitution, an educational institution, and therefore is within the control of the board of public lands and buildings. GANTT, J., *dissenting*

ORIGINAL application for mandamus.

George H. Roberts, Attorney General, J. U. Watson and Frank P. Ireland, for plaintiffs.

Covell & Ransom and M. L. Hayward for respondent.

GANTT, J.

An institution for the education of blind persons in this state was established by act of February 19, 1875. The provisions of this act placed the institution under the general supervision of a board of trustees, who are authorized and empowered to adopt rules for the government thereof, provide teachers and assistant officers, and to perform all necessary acts to carry out the purposes of the institution. Under the provisions of this act, the legislature selected trustees, who appointed the defendant principal of the institution, which has been conducted according to the design of the establishment. By act of February 13, 1877, the legislature defined the powers and duties of the board of public lands and buildings of the state, created by section nineteen, article five of the constitution. The plaintiffs in this action constitute such board, and have assumed the supervision and control of the institution in question, and claim that they are "custodians of the buildings and premises," and have the legal right to the "general supervision and control of such institution;" and allege that they have removed the defendant from the office of principal thereof, and that he refuses to turn over to them the buildings, grounds, and all records, books, papers, and furniture appertaining to said institution, and therefore pray for a writ of mandamus compelling him to forthwith deliver up to them all said property. Under the pleadings and evidence two questions are presented for the consideration of the court: *First*, has the state board of public lands and buildings the power to appoint and remove officers of state institutions properly under their supervision and control? and *Second*, does the institution for education of blind persons come within the exception of section nineteen, article five of the constitution?

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In the consideration of these questions it may be observed in the first place, that, in the construction of a constitution the rule is, "its terms must be taken in the ordinary and common acceptation, because they are supposed to have been so understood by the framers and by the people who adopted it. This is unquestionably the correct rule of interpretation. It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judged it by the meaning apparent on its face according to the general use of the words employed, when they do not appear to have been used in a legal or technical sense." Sedg. stat. and const. law 413. It is, then, according to this rule of interpretation that the right of the plaintiffs to exercise the power they claim must be determined. They claim authority primarily under section nineteen, article five of the constitution, which provides that "the commissioner of public lands and buildings, the secretary of state, treasurer, and attorney general, shall form a board, which shall have general supervision and control of all the buildings, grounds, and lands of the state, state prison, asylums, and all other institutions thereof, except those for educational purposes; and shall perform such duties and be subject to such rules and regulations as may be prescribed by law." Now this section must be judged by the meaning apparent on its face according to the general use of the words employed; and it is plain that the words employed do not vest the board with power to appoint and remove any officer of a state institution. It is in this respect wholly silent, and certainly the court cannot invest the board with such power. To do so the court must arrogate to itself the authority to frame and adopt constitutional provisions for the people, while, on the contrary, a constitution owes its whole force and authority to its ratification by the people. Hence, we are of opinion that the authority to appoint and remove

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officers of state institutions cannot be derived from the constitution. It is, however, quite clear that under the latter clause of the section, the legislature may define the duties of the board and prescribe the rules and regulations by which they shall be governed.

Then does the act of February 13, 1877, relative to the duties of the board, confer on them the authority now claimed? It provides that the board "shall have general custody and charge of all buildings and institutions and the grounds thereto, coming under the provisions of this act, to direct the general management of all said institutions * * * and shall have reviewing power over the acts of the officers of such institutions;" and then by section seven it provides that "it shall be the duty of the board to take cognizance of all charges and complaints made against said public officers, and at a regular meeting to give an impartial hearing to such charges, and the defense against the same, if any, and report the charges, evidence, and their conclusions in the matter to the governor within six days after the determination of such investigation." This is the extent of the power given to the board over the officers of such institutions, and it certainly falls far short of vesting them with power to appoint and remove officers of such institutions; and such power cannot be implied from the language of the act—on the contrary, such implication of power is indeed clearly repelled by section seven, which requires the board, after such investigation, to report the charge against such officers, together with the evidence taken and their conclusion in the matter, to the governor. It is also repelled by laws enacted prior to the creation of the board, still in force, and not repugnant to any of the provisions of the act of February 13, 1877. By these former statutes the governor alone is authorized to appoint and remove the warden of the penitentiary, and also the superintendent and assistant

physician of the hospital for the insane. The legislature has not deemed it proper to take from the governor the appointment and removal of these officers. It therefore seems clear that under our laws, as they now exist, the board has not the power to appoint or remove officers of state institutions.

The second question is: Does the institution for the education of blind persons come within the exception of section nineteen, article V, of the constitution? This section gives to the board the supervision and control of the "buildings, grounds, and lands of the state, state prison, asylums, and all other institutions thereof, *except those for educational purposes.*" The first section of the act of February 13, 1877, is substantially the same in effect. Now if the institution in question is merely an asylum and not designed for educational purposes, then according to the provision of the constitution it must come under the supervision of the board of public lands and buildings; but if it is designed for educational purposes then it comes within the exception, and is excluded from the supervision of the board.

It is, however, contended that the institute is an asylum; but what is an asylum? It is defined to be a place where persons flee for protection. Under the Mosaic Dispensation cities of refuge were set apart to which the slayer might flee so that innocent blood should not be shed, in case the person was not worthy of death—that is, in case the act was accidental and not malicious. But among the ancients, outside of the Jews, it seems that temples, statues to the gods, and altars particularly consecrated for such purposes, constituted such places of refuge for persons generally, and it was deemed an act of impiety to remove forcibly one who had fled to such an asylum for protection. However, Tiberius abolished all asylums except the temples of Juno and Æsculapius. These asylums finally passed over to the Christian world,

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and under Constantine the Great, all Christian Churches were made asylums for all those who were pursued by officers of justice or the violence of their enemies, and the younger Theodosius, in the year 431, extended these privileges to all courts, gardens, walks, and houses belonging to the church. In the year 631 the Synod of Toledo extended the limits of asylums thirty paces from every church, and this privilege afterwards prevailed in Catholic countries; and it is said to have been a strong armor of defense against the wild spirit of the middle ages, and not without good consequences at the time when force often prevailed against justice. But in later periods of time as other and better systems of procedure in the administration of justice became adopted, asylums were abolished in most countries.

Such then seems to have been the origin, nature, and object of asylums, and such the common acceptation of the term; but more recently, in some countries, the name has been given to institutions for the protection and care of the poor, blind, deaf and dumb, and lunatics who are incapable of taking care of themselves. 1 Encyclopædia Americana, 439. Hence the word asylum having always had a common and well understood signification, our best lexicographers define it to mean "a sanctuary or place of refuge and protection where criminals and debtors found shelter, and from which they could not be taken without sacrilege; an institution for the protection and relief of unfortunates, as asylums for the poor, for the deaf and dumb, or for the insane."

Now is the institution in question, in its nature, object, and purpose an asylum according to the plain meaning and common acceptation of the term? The act which establishes it provides for a principal, who shall report to the governor prior to each session of the legislature the number of *pupils*, their names, age and sex, the *studies* and trades taught, and also provides for

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teachers. The term *principal* as here used, and those of *teachers* and *pupils* are those which peculiarly signify and designate instructors and students in a school established for the purpose of educating persons of suitable age and capacity in the sciences. But section seventeen seems clearly to define this institution as one for "educational purposes." It provides that "all blind persons within the state, of suitable age and capacity, shall be entitled to an *education* in the institution at the expense of the state," and further provides that "each county superintendent of common schools shall report to the principal of the institution on the first day of April of each year the number, age, residence and post-office address of every blind person, and every person blind to such extent as to be unable to acquire an *education* in the common schools" in his county. The act also appropriates two thousand dollars annually, or so much thereof as may be necessary to meet the ordinary expenses of the institution, and that the current expenses "shall be drawn by warrants upon the temporary school fund of the state." Now if the words employed are to be taken according to their ordinary and common acceptance, and effect is to be given to the act according to the plain import of its provisions, it is quite clear that the institution was designed to constitute a distinct department of our grand system of general, free education, which, with its magnificent school fund, is the pride of the state.

The primary and sole object of the institution then, is to furnish blind persons of suitable age and capacity with a thorough practical education, and in doing this the state has only done tardy justice by placing this class of persons upon an equality in advantages of education with those who are taught in the other educational institutions of the state. And the imposition of duties upon each county superintendent in connec-

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tion with the institution, the provision for the selection of a principal and teachers, and the admission of pupils of suitable age and capacity to receive an education, and the payment of current expenses by warrants drawn upon the temporary school fund, certainly make it a part of the public educational system of our state. The current expenses of instruction in our common schools, in the normal school, and state university are paid by the state, but no one will contend that for this reason they become mere asylums for the protection and care of unfortunate persons; and it would be as much a perversion of the import of language and the ordinary and common acceptance of terms to say that the school for the education of blind persons is such an asylum. This institution is not in any sense a place for the protection and care of blind persons generally; on the contrary only those who are of suitable age and capacity to receive an education are admitted; and upon this principle all other public schools and educational institutions of the state are conducted.

It was, however, contended that because an appropriation is made to meet the ordinary expenses of the institution, including furniture, books, maps and instruction in some manual arts, whereby the pupils may be taught trades, and thus afforded the means of supporting themselves in after life, it is a charitable institution. and should therefore be adjudged an asylum.

But if for this reason it must be adjudged an asylum, then for a like reason our state university and normal school must be adjudged mere asylums; for the act establishing the university provides for a department of agriculture in which the student is taught the science and manual art of practical farming at the expense of the state, and there is also a department in which the fine arts and the principles of painting and sculpture are taught; and the act to locate, establish, and endow

the state normal school provides for "instruction in the mechanic arts and in the arts of husbandry," and appropriates money of the state to purchase apparatus and to put the school in operation. And certainly it cannot be maintained that practical instruction in the manual art of some trade is any more a *départure* from an educational institution than instruction in the art of farming, husbandry, painting, and sculpture; nor will it be seriously contended that because the law provides for instruction in such arts it deprives these institutions of their educational character and purpose. Therefore the correct interpretation of these laws, establishing these departments of instruction, is, that they are designed merely to extend the curriculum of these educational institutions, and not to change or affect their nature and purpose as such schools. All these institutions—as well the one for the education of the blind as the others—being essentially for educational purposes, and designed as parts of the general free system of education of our state, are by the clear, express provision of section nineteen, Art. V, of the constitution, excepted from the supervision and control of the board of public lands and buildings.

The proposition—whether the institution in question is or is not for educational purposes—must be determined in the affirmative or negative, for the answer to it cannot be evaded. If answered in the affirmative (and that it must be so determined will hardly be questioned) then it comes within the constitutional exception, by whatever name it may be called, for the constitution without any reserve or limitation excepts "those for educational purposes" from the supervision of the board. And if the court can take any one educational institution out of this exception, it certainly can by an exercise of the same power do likewise in respect to any other or all the other educational institutions of the state;

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but to do so it seems to me would be a direct subversion of the constitution.

The law seems well settled that an action by mandamus will lie to compel an officer to deliver up property of the state held by him without right or authority of law; but for the reasons given in this opinion, I think, the writ of mandamus must be denied in the case at bar.

MAXWELL, J.

I concur in the opinion prepared by my brother Gantt, so far as it holds that the board of public lands and buildings have no power to appoint and remove the principal. It is also admitted that the word "asylum" in its original signification has no application to the institution for the blind, if indeed it applies to any institution in the state. It will also be conceded that in the institution in question the inmates are instructed in various branches of learning adapted to the blind. Section 13 of the act approved February 19, 1875, "to erect and maintain an institution for the blind," provides that, "for the purpose of meeting current expenses, there is appropriated out of the state treasury so much as is necessary, not to exceed forty dollars per quarter to each pupil in said institution, *provided* that such amounts shall be drawn by warrants on the temporary school fund of the state." Section 17 provides that all blind persons resident of the state, of suitable age and capacity, shall be entitled to an education in this institution, at the expense of the state.

Do these provisions make this an institution for merely educational purposes? I think not. It is properly a charitable institution, where an unfortunate class of individuals are received, maintained, and educated (if need be) at the expense of the state. If not an asylum in the primary meaning of that word it is at least an in-

stitution for the relief of a class of the unfortunate. Section 19, article V, of the constitution provides that "the commissioner of public lands and buildings, secretary of state, treasurer, and attorney general, shall form a board, which shall have general supervision and control of all the builings, grounds and lands of the state, the state prison, asylums, *and all other institutions thereof*, except those for educational purposes." As in my view this is not an educational institution within the meaning of the constitution, it follows that the board of public lands and buildings have the general custody and control of the institution, but as the constitution has vested the power to appoint and remove the principal in the governor, the writ must be denied.

LAKE, CH. J.

I was absent during the argument of the respective counsel and therefore am not in possession of the points on which they severally relied, and but for the disagreement of my brother judges on one of the principal questions would have remained silent.

The court are agreed however that the writ of mandamus must be denied, on the ground that the attempted removal of the respondent from his office of principal was in excess of the power granted to the board of public lands and buildings, and therefore a void act. We are also agreed that this power, as well as that of filling a vacancy in that office, is vested alone in the governor.

As to the particular class of the institutions mentioned in section 19, article V of the constitution to which the institution for the blind properly belongs, I entertain no doubt whatever that it falls within the one denominated, "asylums." It is very clear that it is an institution intended to relieve, protect, and support if need be, for a time an unfortunate class of our people,

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and is decidedly charitable in all its aims and purposes. And one of the meanings given to this word in its modern use by lexicographers is: "An institution for the protection and relief of unfortunates, as an asylum for the poor, for the deaf and dumb or for the insane." And this is the sense in which it has come to be generally used and understood by the people. Nor can it be reasonably doubted that it was so understood by the convention that framed this section of the constitution, and by the people when they adopted it. If the question were propounded to the people of the state, "What asylums have we?" who can doubt that the universal response would be, "the deaf and dumb, the blind, and the insane."

The constitution was made by the people, and for the people. The words and terms employed were used with reference to existing facts, and in their ordinary and popular sense, and it is in this sense that they should be used by the courts in construing the several provisions of that instrument.

Two members of the court agreeing that this is not an educational institution, it follows that it is within the control of the board of public lands and buildings. The peremptory writ must be denied.

WRIT DENIED.

JOSEPH D. COX, PLAINTIFF IN ERROR, v. JOHN TYLER,
DEFENDANT IN ERROR.

1. **Practice in county courts: NEW TRIAL IN:** The jurisdiction of the county courts, in the granting of new trials, is the same, and no greater, than that given to justices of the peace, and is derived from the same statute.

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2. ———: ———. It is only when the judge is satisfied that the verdict was obtained by *fraud, partiality, or undue means*, that a new trial can be granted in these courts.

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

The cause was begun in the county court of that county and a default entered; Dec. 4, 1876, trial was had, the plaintiff in error appearing and cross examining the witnesses, and judgment was entered for defendant in error for \$500.00 and costs. On the sixth of December, the defendant in error filed a transcript of the judgment in the office of the clerk of the district court for the purpose of acquiring a lien upon the real estate of the plaintiff in error. On the seventh of December the plaintiff in error filed a motion to vacate the judgment, and on the sixteenth of December the county court sustained that motion and vacated the judgment, to which exceptions were duly noted, and the defendant in error here took the cause upon the ruling of the county court upon the motion to vacate the judgment to the district court, by petition in error, and at the March term, 1877, of said district court, the ruling of the county court upon the motion to vacate the judgment was reversed, and from this judgment of reversal the cause was brought here.

Isham Reavis, A. R. Scott, and A. L. Rich, for plaintiff in error.

From the provisions of the constitution (sections 15, 16, Art. VI) it is clear, that while the county court is made the successor of the probate court, it is one of enlarged power and radically different in its principal characteristics. It is made not only a "court of record," but it is one of original jurisdiction within certain lim-

its. The theory of the defendant in error is, that the justices' code governs the procedure of the county court, and that unless it is plainly provided in that statute that a judgment may be vacated on motion, no such power exists. This cannot be true, or the court must hold that the words "court of record" used in the constitution are wholly without meaning. The framers of that instrument evidently used those words for a particular purpose, and with reference to some recognized understanding of their meaning in that connection. The descriptive words, "of record," when applied to courts, are evidently used in contradistinction to courts "not of record;" and the idea conveyed is, that there exists a legal as well as a fundamental difference between such courts. Freeman on Judgments, sec. 517. There is then this recognized distinction between the county courts established by the new constitution, and justices of the peace; they are in this state, in the fullest sense, courts of record; they belong to that class whose records import absolute verity, that are competent to decide on their own jurisdiction and exercise it; to find judgment without setting forth the facts and evidence on which it is rendered; while justices of the peace have none of these peculiar attributes and powers, nor are they aided by any legal presumptions. The county courts of this state come within the rule laid down by Mr. Freeman in his work referred to. *Supra.* sec. 122. *Bartling v. Jamison*, 44 Mo., 141.

The act of 1873, sec. 11, provides that in actions where the sum claimed exceeds one hundred dollars the rules of pleading and process in the district court shall apply, so far as may be, to pleadings and process in the probate courts. Gen. Stat., 263. Under this provision a default improperly entered may be set aside, and if that may be done, why may not a judgment be set aside for the same reason? There is no limitation, in express

words, in the statute upon the power, and if it may be exercised in the furtherance of justice in one particular, why may it not in all? If the justices' act is to be the measure of power in the county court (which we deny), then we contend that in the absence of any express limitation in the act of 1873, sec. 1085 of the justices' act relieves us of any difficulty in the premises. That section provides that "the provisions of this code (meaning the code that governs procedure in the district court), which are in their nature applicable, and in respect to which no special provision is made by statute, shall apply to proceedings before justices of the peace." Substitute "county court" for "justices of the peace" in that section, and its legitimate operation extends to that court the code of civil procedure with reference to the vacation of judgments. But we submit that, independent of the statute, a court of record possesses absolute control of its judgments and acts, and unless the power is expressly denied by the law of its creation, may vacate its judgment in a proper cause; and in that particular its acts are not reviewable by an appellate court except for gross abuse of discretion. Indeed, it is difficult to understand how a court of that kind could proceed if it is true that it has no other powers than those expressly enumerated in the statute. The rule, as stated by Lord Coke, "that when the law granteth to any one anything, he has that without which the thing itself could not be," has peculiar application to the matter in hand. A court of record which does not have, as such and inherently, the power to do a very plain act of justice, or undo a very plain act of injustice occurring in proceedings of its own, is one of the curiosities of legal science. That provision of the code of civil procedure with reference to the granting of new trials, is not a grant, but rather a limitation upon power inherently possessed by courts of record. Courts of original jurisdiction and

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courts of record, proceeding according to the course of the common law, have power (and power is jurisdiction) to vacate their own judgments on a proper showing.

Geo. P. Uhl, for defendant in error.

The act creating the probate court, of which the county court is the successor, provides that: "The provisions of the code of civil procedure relative to justices of the peace shall, where no special provision is made by this subdivision, apply to proceedings in all civil actions prosecuted before said probate judge." From this provision we claim that unless the act creating the probate court provides a power to vacate a judgment and the mode of doing it, the justices' code must be complied with. The justices code, on page 682, section 982, and page 685, section 1001, Gen. Stat., provides when and in what cases the justice may vacate a judgment, and how it may be done. It cannot be claimed that the reason for vacating this judgment was one of those mentioned in those provisions of the statute, nor was there a compliance with the requirements of those provisions, as will appear from the record; so that if the county court had the power to vacate that judgment it must be found outside of the statute, and we deny that such a power exists.

LAKE, Ch. J.

This is a petition in error to reverse the judgment of the district court for Richardson county, by which an order of the county court vacating its former judgment and granting a new trial was set aside, and the original judgment in favor of the defendant in error fully restored.

It is contended on behalf of the plaintiff in error that the county court, being a court of record, has the same power and authority over its judgments, in the granting

of new trials, as is exercised by the district courts. But this position cannot be sustained. It is true that county courts are by the constitution made courts of record, but it by no means follows from this, that they are invested with the extensive jurisdiction here contended for.

By provision of our new constitution the statutes in force at its adoption, and not in conflict therewith, defining and regulating the jurisdiction of our former probate courts, were made applicable to their successors, the county courts. By section two of "An act concerning the organization, powers, and jurisdiction of probate courts," passed March 3, 1873, it is provided that: "Probate judges, in their respective counties, shall have and exercise the ordinary powers and jurisdiction of a justice of the peace, and shall have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding five hundred dollars, exclusive of costs, and in actions of replevin where the appraised value of the property does not exceed that sum; *and the provisions of the code of civil procedure relative to justices of the peace shall, where no special provision is made by this subdivision, apply to the proceedings in all civil actions prosecuted before said probate judges.*"

It will be noticed that this section extends not alone to cases in which a justice of the peace would have jurisdiction, but to "*all civil actions prosecuted before said probate judges,*" and consequently, as no provision is made "in this subdivision" respecting the conducting of a trial, nor as to the powers of the judge over the judgment after it is once entered, we must resort to "the code of civil procedure relative to justices of the peace," for direction in this matter.

Some reliance seemed to be placed by counsel on section eleven of the act first referred to, as authorizing a resort to the rules of practice established for the district

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courts in similar cases. But this section expressly limits the use of these rules to the "pleading and process" of the county courts. They furnish no guide whatever in the practice now under consideration.

By section nine hundred and eighty-three, chapter seven, title thirty of the code of civil procedure, it is provided upon what grounds and within what time after the rendition of a judgment, a justice of the peace may grant a new trial. This section is in these words: "It shall be lawful for a justice, before whom a cause has been tried, on motion, and being satisfied that the verdict was obtained by fraud, partiality, or undue means, at any time within four days after the entering of judgment to grant a new trial," etc. This section being by express provision of statute made applicable to county courts, must be held to fix the extent of their power over their judgments in the granting of new trials; and it is only when the judge is "satisfied that the verdict was obtained by fraud, partiality, or undue means," that he is authorized to vacate a judgment when once duly entered. Here the grounds upon which the court assumed to act were simply that the judgment was not supported by the evidence, and was contrary to the law of the case.

We are of the opinion that the judgment of the district court is correct, and it must be affirmed.

JUDGMENT ACCORDINGLY.

EMMA OADES, PLAINTIFF IN ERROR, v. J. OADES,
DEFENDANT IN ERROR.

1. **Judgment non obstante veridicto.** When a plea or replication is good in form only, but is bad in substance, and constitutes neither a bar or answer, and issue is taken on it, and the verdict finds it true, such verdict leaves the cause of action or bar unanswered and confessed, and judgment *non obstante* should be entered for him, whose cause of action or bar is confessed; and the rule applies to equity cases, when the issue of fact raised by the pleadings is submitted to the consideration of a jury, but in either case such judgment or decree can only be rendered in a very clear case.
2. **Pleading: DENIAL OF ADULTERY.** A general denial is a good plea to an allegation of adultery, and the verdict of the jury finding the defendant not guilty is conclusive, unless upon proper grounds shown it is set aside and vacated.

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

H. H. Blodgett, for plaintiff in error, cited 8 Cowen, 600. 6 Bosw., 668. 6 Johns., 502. 19 La. Ann., 180. 22 Texas, 650. 10 Minn., 216.

C. C. Burr, for defendant in error, cited *Van Vleet v. Olin*, 4 Nevada, 98. *James v. Brooks*, 6 Heisk. (Tenn.), 150. *Austin v. Bainter*, 50 Ill., 308. *Lowe v. Traynor*, 6 Coldw., 633. *Field v. Holland*, 6 Cranch, 8. *Orgain v. Ramsey*, 3 Humph., 580. *Blair Ad'mr. v. Dockery*, 24 Wis., 502. *Gray v. Eaton*, 5 Cal., 448.

GANTT, J.

The defendant in error brought action in the district court for divorce, upon the alleged ground of adultery

committed by plaintiff in error with one James Pollard. The plaintiff in error admitted the marriage of the parties and that they cohabited together, and had no children, but she "denies each and every other allegation set forth in the petition." This is a general denial of the allegation of adultery, which is the only issuable fact raised by the pleadings. This issue was submitted to the consideration of a jury, who by their verdict find that the plaintiff is not guilty of adultery.

The record shows that on the — day of May, 1876, the defendant in error moved to set aside the verdict and for a new trial, which motion the court, after argument by counsel, overruled; that on the sixth day of September, "the court find, notwithstanding said verdict, all the issues in favor of plaintiff" (now defendant in error), and rendered a decree of divorce *a vinculo matrimonii*. The cause is brought into this court upon petition in error. The decree was, perhaps, rendered according to the principle upon which a judgment *non obstante* is entered in an action in law. A judgment *non obstante veridicto* is given upon motion when it appears to the court that the defendant in the cause has admitted himself to be in the wrong, and when the issue, though decided in his favor by the jury, is upon a point which does not at all better his case. Smith, Action, 161. It is therefore called a judgment upon confession, because it is bad in law, and being bad in law, the verdict which merely finds the issue true in point of fact, cannot avail the defendant, for the plea involves a confession of the plaintiff's allegation and shows he is entitled to maintain his action. Therefore, the rule is, that when the plea or replication may be good in form but is bad in substance, and constitutes neither a bar or answer, and issue is taken upon it, and the verdict finds it true, such verdict still leaves the cause of action or bar unanswered and confessed, and in such case, judgment *non obstante*

veridicto should be entered for him whose cause of action or bar is confessed. The fact pleaded and found true is of itself no answer or bar. *Sullenberger v. Gest*, 14 Ohio, 206. *Pemberton v. Van Rensselaer*, 1 Wend., 308. *Clears v. Stevens*, 8 Taunt., 415. *State v. Commercial Bank*, 6 S. & M., 218. Freeman on Judgments, § 6. And in *Bellows v. Shannon*, 2 Hill, 89, it is held that such judgment can never be granted but in a very clear case, and "that when the defendant pleads an ill plea, but the matter, if well pleaded, might have amounted to a good bar or justification, a judgment can never be given *as by confession*."

In an action for divorce, though an equitable proceeding, the court may submit issues of fact raised by the pleadings to the consideration of a jury, and "on final hearing of the cause the court may look into the whole case, and disregard so much of the finding of the jury as is plainly *without the issue*, because the finding of a fact not in the issue cannot constitute a basis of a decree." Such finding can have no legal effect. *Lewis v. Lewis*, 9 Ind., 107.

Now in the case at bar the defendant in error alleged that the plaintiff committed adultery, and in her answer the plaintiff pleads a general denial to this allegation, and this is the only issuable fact raised by the pleadings and submitted to the jury. It will not be questioned that a general denial pleaded to a material allegation is a good answer; it is a complete answer to the cause of action, and therefore the verdict was within the issue and determines the entire issue of fact in favor of the plaintiff (*Eisemann v. Swan*, 6 Bosw., 671); and under the settled maxim of the law it seems clear that the verdict is conclusive, unless for good grounds shown it is set aside and vacated. The decree of the court is reversed, and according to the finding of the issue in favor of the plaintiff in error by the jury, it is ordered, ad-

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judged, and decreed by this court that the cause of action of defendant in error be dismissed with costs.

DEGREE ACCORDINGLY.

JOHN SPURGEON, PLAINTIFF IN ERROR, v. CARRIE G.
CLEMMONS, DEFENDANT IN ERROR.

1. **New Trial.** If a verdict is clearly against the weight of the evidence a new trial should be granted.
2. ———: ——— Where on the trial of a defendant under the bastardy act an *alibi* was established by the testimony of two credible witnesses in addition to that of the accused, as against the unsupported testimony of the mother of the child—*Held*, That the verdict should be set aside as being against the evidence.
8. **Bastardy Judgment.** In an action for bastardy, on a verdict of guilty, it is the duty of the court to adjudge the defendant to be the reputed father of the bastard child, and a failure to do so will render the orders of the court for the support of the child erroneous

ERROR from the district court of Cass county.

Chapman & Sprague, for defendant in error, cited *Lessee of Muhlenburg's Heirs v. Florence*, 5 Ohio, 248. *State v. Tomlinson*, 11 Iowa, 401. *McCoy v. The People*, 65 Ill., 439. *Speiger v. The State*, 32 Wis., 400.

George S. Smith and *J. H. Broady*, for defendant in error.

LAKE, Ch. J.

The case in the court below was a prosecution under the bastardy act of 1875, and the principal point in dis-

pute was the paternity of the child which was born before the proceedings were instituted. In establishing the guilt of the plaintiff in error the prosecution depended solely upon the unsupported testimony of Carrie G. Clemmons, the complaining witness. The substance of her testimony, as shown by the record, was that Spurgeon commenced his visits at her father's house, in Rock Bluffs, about the first of November, 1874, and after about two or three weeks, under a promise of marriage, commenced having sexual intercourse with her, which resulted in the birth of a bastard child on the fourteenth of August, 1875. In addition to this she swore positively that she had sexual intercourse with no one but John Spurgeon, the accused.

On the other hand, we have the testimony of Spurgeon himself, in which he denies that he had connection with the prosecuting witness at the time charged, or during the months of September, October, November, or December of that year. And on this point he is supported by the uncontradicted testimony of two witnesses, W. L. Ollier, and Carrie Ollier his wife, that during the months of October, November, and December, 1874, Spurgeon lived with them in Mills county, Iowa, some thirty miles from Rock Bluffs, where the alleged intercourse took place, and that from the fifteenth of September to the twenty-fourth of December he was not absent from that place at all. If this testimony be worthy of belief—if these two witnesses are credible, and there is nothing in the record to impeach them—it would seem to establish a complete and perfect defense, of which the accused should have the benefit.

If Spurgeon were not in fact at work for Ollier in Iowa at the time, or if he visited Miss Clemmons in Rock Bluffs as frequently as he must have done if her story is true, it does not seem to us that it would be at all difficult to bring some disinterested testimony to establish

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it. But the prosecution having failed to produce a syllable of rebutting evidence upon this point, or anything to discredit Ollier and his wife, their testimony cannot be disregarded, but must be given some weight in the decision of the case.

By the testimony, as preserved in the bill of exceptions, an *alibi* was clearly proven, and a new trial on this ground should have been granted.

The only remaining point which we care to notice is the failure of the court to adjudge the accused to be the reputed father of the bastard child, as required by section six of the act in question, upon a verdict of guilty being returned. This section provides that: "In case the jury find the defendant guilty, or such accused person before the trial shall confess in court that the accusation is true, *he shall be judged the reputed father of such child,*" etc. A failure to observe this requirement of the statute would of itself render the judgment erroneous and fatally defective.

The judgment and order of the district court are reversed, the verdict set aside, and a new trial awarded.

REVERSED AND REMANDED.

EX PARTE JACOB FISHER.

1. Judgment in Criminal Cases: A judgment of an inferior court in a criminal action is conclusive, unless appealed from, or reversed on proceedings in error.
2. —: *Habeas corpus* is not a proper proceeding to review such judgment; nor will the court, upon such writ, look beyond the judgment and re-examine the charges on which it was rendered, or the decisions upon questions of law raised on the trial of such case.

GANTT, J.

Jacob Fisher was brought before this court upon a writ of *habeas corpus*, for the purpose of inquiring into the legality of his imprisonment. He is detained in prison under a judgment rendered by a justice of the peace, in a criminal action against him for selling malt, spirituous, and vinous liquors without first having obtained a license therefor. Under the statute relative to the "License and sale of liquors," a justice of the peace has jurisdiction in all cases where the penalty or damages does not exceed one hundred dollars; and in this case the prisoner was tried before a justice's court and adjudged to pay a fine, and in default thereof that he be committed to jail until the fine and costs are paid or secured, or he be discharged according to law. Now, it is said that a judgment, in its nature, concludes the subject on which it was rendered; it pronounces the law of the case, and therefore puts an end to inquiry concerning the facts. Hence the judgment must remain in full force until it is legally vacated or reversed by a superior court, having appellate jurisdiction of the case. It is, however, contended that the license law is unconstitutional, and on this ground the prisoner should be discharged. But after judgment and commitment in a criminal action by an inferior court having jurisdiction of the offense charged, we think that *habeas corpus* is not the proper mode of procedure to bring the cause into this court for review upon alleged errors of law; for it seems to us, that when the validity of a statute is controverted, the controversy raises a legal question which, like all other legal questions raised on the trial of a cause in an inferior court, can be reviewed only by the mode prescribed by law.

To entertain jurisdiction in such case upon a writ of

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habeas corpus, it would be necessary to look beyond the judgment and re-examine the charges upon which it was rendered, as well as to review the questions of law raised on the trial and decided by the inferior court. If such practice were to obtain, then indeed every conviction for a criminal offense might be brought here for review on a writ of *habeas corpus*.

We think it is not within the province of this court to open the door to such a system of practice. And we are not prepared to say that, upon a writ of *habeas corpus*, we can look beyond the judgment and re-examine the charges on which it was rendered, or to pronounce the judgment an absolute nullity on the ground that the constitutionality of the statute relative to the license law is controverted. If the validity of a statute is brought in question in an inferior court on the trial of a cause, that question must finally be determined in the same mode as other legal questions arising on the trial of causes in such court—that is, by proceedings in error or appeal, as may be most appropriate and allowable by law.

The rule is correctly stated in *Bassmore Williamson's Case*, 26 Pa. St., 17, wherein it is held that “a *habeas corpus* is not a writ of error. It cannot bring a case before us in such a manner that we can exercise any kind of appellate jurisdiction in it. On *habeas corpus* the judgment of even a subordinate state court cannot be disregarded, reversed, or set aside, however clearly we may perceive it to be erroneous, and however plain it may be that we ought to reverse it if it were brought before us on appeal or writ of error. We can only look at the record to see whether a judgment exists, and have no power to say whether it is right or wrong. It is conclusively presumed to be right until it is regularly brought up for revision.” *Commonwealth v. Deacon*, 8 S. and R., 72. *Ex parte Toney*, 11 Mo., 666.

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The cause is dismissed and the prisoner remanded to custody.

JUDGMENT ACCORDINGLY.

Mason & Whedon, for Fisher.

Lamb, Billingsley & Lambertson, contra.

J. W. MATTHEWSON AND WIFE, PLAINTIFFS IN ERROR,
v. A. D. BURR, DEFENDANT IN ERROR.

1. **Practice: NEW TRIAL.** When the evidence is palpably insufficient to sustain the verdict it should be set aside, and a new trial granted.
2. **Evidence: IMPEACHMENT OF WITNESS.** A witness may be impeached by bringing other witnesses to swear that his reputation for truth is bad. In this mode of impeachment, however, it is not competent to show what two or three persons only may think or say concerning him, but the inquiry should be confined to the general estimation in which he is held by his neighbors and acquaintances.
3. **Practice: INSTRUCTIONS; NOT TO BE REFUSED WHEN.** When an instruction is requested which states the law correctly in any possible view of the evidence it ought not to be refused.
4. ———: ———. **SHOULD BE CLEAR AND DEFINITE.** If an instruction containing several distinct propositions is so confused and indefinite, as to some of them, as to convey no clear idea of what is intended, the whole instruction may be properly rejected.
5. ———: ———. **SHOULD NOT TEND TO PREJUDICE.** If an instruction be given not called for by the evidence, and which had a direct tendency to prejudice the party complaining, a new trial will be granted.

ERROR from the district court of Lancaster county. Burr, the defendant in error, brought suit for the foreclosure of a mortgage, executed by plaintiffs in error, November 1, 1871, to W. F. Chapin upon certain real

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estate to secure a note of J. W. Matthewson for \$250, due sixty days from date. The petition alleged the loss of the note and the assignment of the debt and mortgage to Burr. Matthewson and wife pleaded payment of the note in full to Chapin, the payee, in March, 1872, and denied the assignment to and ownership of plaintiff of the cause of action. There was a trial before POUND, J., and a jury. Verdict in favor of Burr. Judgment for \$402.66. Matthewson and wife bring the cause here by petition in error. The evidence upon the trial below, which was very conflicting, is too voluminous for insertion here. Sufficient appears in the opinion for an understanding of the points decided by the court.

E. F. Runyan, N. S. Scott, and H. H. Blodgett, for plaintiffs in error.

The amount paid by Matthewson to Chapin—a horse valued at \$90 and afterwards \$150 in cash, the law would appropriate to the payment of the note sued on, there being no other debts due. *Baker v. Stackpoole*, 9 Cow., 435. It cannot be holden as a deposit. Application cannot be made on a debt not due. *Id.* *Worthley v. Emerson*, 116 Mass., 374. *Allen v. Brown*, 39 Iowa, 330. *Bank of Muskingum v. Carpenter*, 7 Ohio, 21.

The evidence of J. W. Matthewson and P. E. Matthewson, and W. F. Chapin each state facts, which constitute payment in full of the note, and as there is no other evidence in the case, there is no evidence to support the verdict of the jury—and a verdict clearly and manifestly against the weight of evidence should be set aside—7 Mass., 261. 13 Mass., 507. 4 Conn., 102. 12 Conn., 487, 329. 3 Blackf., 305. And if substantial justice has not been done, the verdict will be set aside. 12 N. H., 171. 16 Maine, 200. It is almost unnecessary to comment upon the instructions which the court refused to

give, and which were offered by plaintiffs in error. The court certainly erred in refusing to give them to the jury. See authorities above cited.

Webster & Burr, for defendant in error.

The case to the jury turned upon the credibility of conflicting evidence; and the testimony of the defendants as to time and place could not possibly have been true; also, Matthewson's truth and veracity were impeached by his neighbors Sudduth, Jennings, and Denham; and in such case the verdict will not be set aside, even though the preponderance seems to be against the verdict. *McGatrick v. Wason*, 4 Ohio St., 566. *Rudman v. Rudman*, 5 Ind., 63. *Roberts v. Nodwift*, 8 Ind., 339. *Keuhn v. Wilson*, 13 Wis., 104. *Breese v. State*, 12 Ohio St., 146. *Blackburn v. Ostrander*, 5 Neb., 219.

The sale of the horse was not payment. Matthewson does not so claim it nor did Chapin so receive it. It was to be so applied if the balance of the note was paid; and when it was necessary for Matthewson to use Chapin's credit as a means of raising money at the bank, he agreed to give a new mortgage for his indemnity, but finally said the old note and mortgage might stand in force till the new note was paid.

The result was (as Chapin had that note to pay, and had received but \$90 by the horse, and \$150 of the new note) that he was a loser of \$60 by that transaction, and counsel would have the court treat this as payment.

But for the last argument the value of the horse might properly be availed of as a set-off. The law imposes upon parties no inflexible rule of application of payments. It presumes the earliest payment is to liquidate the oldest or the more onerous obligation. But the debtor may direct appropriation. In case he does not, the creditor may; and doubtless parties may agree that

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an account or money shall be held as a deposit or security collateral to indemnify a surety. It was an agreement between parties competent to contract, and is valid. The instructions refused, assignments one and two, assumed the contrary.

It is to be specially noted that there is no other creditor whose rights are in question. Most cases cited by plaintiffs in error specially depend upon the rights of other creditors. Clearly, by Matthewson's own admissions, the value of the horse was not appropriated toward the payment of the mortgage note. He says the mortgage note was paid in money. The jury found otherwise. Chapin says it was agreed that the amounts should only apply upon the mortgage note when Matthewson paid off the discounted note. There was no appropriation to the mortgage note, as the jury found. Then, even admitting there was no appropriation to the discounted note, yet the law would appropriate it according to its notions of justice. *U. S. v. Kirkpatrick*, 9 Wheat., 737.

LAKE, CH. J.

I. The first of the several errors alleged in the assignment to which I will direct my attention is that which charges the verdict to be against the weight of the evidence. And the well-established rule by which we must be governed in the determination of this question is, that the evidence must be palpably insufficient to sustain the verdict or it will not be disturbed. It is not enough that the court would have found differently, but the finding of the jury must be clearly wrong. *Seymour v. Street*, 5 Neb., 85. *The A. & N. R. R. Co., v. Washburn, et al.*, Id. 117. With this rule in view how stands the case?

In considering this point it may be best at the outset

to refer to the attempted impeachment of the witness J. W. Matthewson in order to determine what weight, if any, should be given to his testimony. The mode of impeachment resorted to was by bringing witnesses to swear that his reputation for truth was bad. The first witness called upon this point was Patrick H. Sudduth, who testified that he knew Matthewson some five or six years before when he lived for a short time in his neighborhood, and at that time his reputation "was not very good in the neighborhood, we did not think him a very truthful or honorable man."

But on his cross examination it was shown very clearly that he was a prejudiced witness, and that he based his conclusion that Matthewson's reputation was not good chiefly on the ground that he had borrowed some sacks, "and promised to return them, but he never did."

The next witness was J. W. Denham who had had a difficulty with Matthewson about a wagon which he had borrowed only for a single day, but "did not bring it back for a week." It was on this ground, mainly, that he had formed an unfavorable opinion as to Matthewson's truthfulness.

The only other impeaching witness called was H. S. Jennings, who testified that he "thought" he knew Matthewson's reputation, and that it was bad. His judgment was formed, so far as could be ascertained by a pretty vigorous cross-examination, on the statement of one or two persons who had been engaged in some sort of controversy or litigation with Matthewson and who were at enmity with him. This is the whole of the impeaching testimony, and when taken in connection with the conceded fact that Matthewson had lived in the city of Lincoln from some time in 1869 until 1874, and was quite extensively known, must be considered as very meagre indeed, and falls far short of showing what his *general* reputation actually was in the community where he lived.

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In this mode of impeachment it is not competent to show what two or three persons only may think or say concerning the witness, but the inquiry must be confined to the general estimation in which he is held by his neighbors and acquaintances. Nothing short of this will answer.

But, in addition to the valueless character of this testimony, an equal number of witnesses were called on the other side who knew Matthewson well, two of whom testified that his reputation for truth was good; and the other that he had never heard it called in question, which is evidence that it was good. *State v. See*, 22 Minn., 407. Under this condition of the testimony we must hold that the attempted impeachment of Matthewson was a failure, and that his deposition must be considered, and given due weight in the decision of the case.

The main subject of controversy was as to the alleged payment of the note on which the action was brought. This note was executed and delivered to W. F. Chapin, the payee, on the first of November, 1871, payable in sixty days, and, together with the mortgage given to secure it, was assigned to the defendant in error on the thirteenth day of December, 1875. It is declared upon as a lost note, and Chapin testifies that he did not know what had become of it—that he had not seen it since he deposited it in the bank about the time of its date.

As a defense, Matthewson answered that he had paid the note in full to Chapin in March, 1872; and in support of this defense, he testified that on or about the fourth of March, 1872, he paid "W. F. Chapin, the full amount of the note." He further testified that Chapin then told him "that he would release the security, and give him the note as soon as convenient." That some time afterwards Chapin did surrender the note, and his impression was that he "then and there destroyed it."

Phebe E. Matthewson, the wife of J. W. Matthewson, testified that Chapin stated in her presence "that he had received in all \$250 and interest, in full satisfaction of the \$250.00 note, and that it was then fully paid." That Chapin at this time produced the note, "and gave it to Mr. Matthewson, and he destroyed it." That Chapin then promised her "to release the mortgage security as soon as he could go to the records and do so." This witness also detailed with much particularity another conversation with Chapin which she thought "took place on the same day that Mr. Matthewson paid Mr. Chapin the two hundred and fifty dollars and interest. It was either on that day or the following one. It took place at our rooms on the corner of N and 11th streets, Lincoln, Nebraska. Mr. Chapin came there and enquired for Mr. Matthewson. I told him he was out but would return soon. Mr. Chapin walked in and waited until Mr. Matthewson came back. Mr. Chapin said he wanted to see Mr. Matthewson to rectify a mistake which he said had been made in calculating interest on the \$250.00. I asked him if Mr. Matthewson had not settled the note in full, and Mr. Chapin repeated that Mr. Matthewson had settled the \$250.00 all up."

Of this testimony of Matthewson himself there is no direct contradiction, but only a possible inference that as to the fact of payment it may not be strictly true. But as to the statements of both Matthewson and his wife that Chapin acknowledged the note was paid in full, that it was delivered up, and that he agreed to cancel the mortgage, there is not the least particle of conflicting testimony. The only effort made to counteract the effect of the positive testimony of these two witnesses as to the surrender of the note by Chapin was to prove that at the time of the alleged surrender Chapin was not in the occupancy of the land office, the place where they testified it took place. However, if what these two witnesses

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stated took place at the land office did not take place at all, it would have been very easy for Mr. Chapin to have said so when on the witness stand, and the fact that he did not, must be regarded as an admission that it all actually occurred. Besides, it is not improbable that Matthewson and his wife may have been mistaken as to the particular room in which the alleged conversation was had, for the witness Tucker, the successor of Chapin in the land office, who was called to prove that Chapin was not occupying the office at the time fixed upon by the Matthewsons, says that Chapin "*remained in the building, but not in the office,*" after he took possession. A very careful examination leads us to the conclusion that the verdict is very clearly against the weight of the evidence and should be set aside. This is clear according to Chapin's own testimony, for he says Matthewson let him have a horse about the first of March, 1872, at the agreed price of \$90.00, to apply on the \$250.00 note, and that on or about the eighteenth of the following June \$150.00 more was paid him from money obtained by Matthewson from the Lancaster county bank. Aside from the interest that had accrued after the maturity of the note these two credits would leave due to Chapin at the time of the last payment only ten dollars, while by the verdict rendered no credit whatever was allowed.

II. As before stated the single issue made by the pleadings is as to whether the note, upon which the action was brought, was paid. The testimony as to the amount paid on this note and the mode of payment is conflicting, Matthewson claiming in his testimony that on the fourth day of March, 1872, he borrowed three hundred dollars from the Lancaster County Bank, out of which he paid the two hundred and fifty dollar note in full, and that the price of the horse, and the one hun-

dred and fifty dollars paid Chapin in June, 1872, were to be credited on the \$300 bank note, on which Chapin was surety, and which he had assumed to pay by having it transferred to his individual account at the bank. On the other hand Chapin swears, as before shown, that the price of the horse and the one hundred and fifty dollars were to be credited on the first note, and that he had received nothing on account of his liability and payment of the three hundred dollar note. This being the condition of the case the plaintiff in error requested the court to instruct the jury "that it is not material in this case whether the defendant Matthewson paid to the witness Chapin the note for three hundred dollars made to the Lancaster County Bank or not; that if that note in fact is not paid it is a cause of action by and of itself, and that indebtedness cannot be substituted for or made to sustain the action now on trial."

We think this instruction stated the law applicable to this case correctly and ought to have been given to the jury. If there were anything due to Chapin by reason of his having paid the three hundred dollar note, that was a matter of no concern to the assignee of the two hundred and fifty dollar note and mortgage. His right to maintain this action depends upon this particular note not having been paid. The transactions concerning the three hundred dollar note properly figured in the case only as they tended to prove or disprove the alleged payment of the particular note in controversy in this action. The assignment to Burr covered only the two hundred and fifty dollar note and mortgage. It was not even pretended that any right growing out of the three hundred dollar note was included. If Chapin ever had any such right he still retained it and could enforce it at his pleasure.

As to the second instruction, which the court refused to give, it may be said, that by it two distinct proposi-

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tions were evidently intended to be stated. The first of these propositions stated the law applicable to the testimony correctly, while the second is so confused and indefinite as to convey no clear idea of what was intended. In such case it is not error to reject the entire instruction.

It is complained also that the court erred in giving this instruction, viz: "If you believe from the evidence that the agreement between Chapin and Matthewson at the time of the execution of said note to the Lancaster County Bank was that the note and mortgage sued on were to remain in full force, unless said Matthewson should pay said note executed to said bank, and that Matthewson failed to pay the same, and Chapin himself paid it, then you are instructed that the note sued on was not paid by the receipt by Chapin of the one hundred and fifty dollars."

Under the issue and the testimony this instruction was not warranted, and had a direct tendency to prejudice the plaintiffs in error. Chapin, the sole witness on whom the defendant in error relied, testified that: "It was understood at the time I bought the horse it was going to be applied on the two hundred and fifty dollar note, when the balance was paid, and I got hold of the note myself." And again, when he received the one hundred and fifty dollars, that he "would let the old mortgage and note stand; and when he took up this three hundred dollar note that would square up all the transactions." Now, conceding all this to be strictly true, it does not follow necessarily that the price of the horse was not to go as a credit on the two hundred and fifty dollar note when he got possession of it, he having, as it appeared, deposited it in the bank as a collateral security for the payment of a note of his own. There is nothing in Chapin's testimony from which it can be inferred that either the price of the horse or the one hundred

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and fifty dollars was to be applied to anything else than this particular note. There was no agreement that the mortgage was to stand as a security for anything except the two hundred and fifty dollar note therein described.

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

REVERSED AND REMANDED.

C. H. PARMALEE, ET AL., PLAINTIFFS IN ERROR, v. E. A. WIGGENHORN, ET AL., DEFENDANTS IN ERROR.

1. **Partnership: LIABILITY OF INCOMING PARTNER.** An incoming partner is not liable for the debts incurred or contracts made before he entered the partnership, unless such liability is created by express contract based on good consideration.
2. ——— : ——— There must be a novation before the new firm is liable; and the new contract must receive the consent of all the parties, and must have the effect to extinguish the old contract, and create a new liability of debtor and creditor, or of contractors, between the creditor or contractor and the new firm, and such new contract must be based on some consideration.
3. ——— : ——— The mere receipt of money by the new firm is not sufficient to raise a presumption that the incoming partner made a parol contract, binding him to fulfill the terms and conditions of such former contract, or to make him liable for a breach of the same.

ERROR from the district court of Saunders county. Tried before Post, J. Judgment below was given in favor of Wiggenhorn and Green against Parmalee and Johnson, who brought the cause here by petition in error. Further facts appear in the opinion.

Chapman and Sprague, for plaintiffs in error.

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The court erred in excluding the testimony offered by defendants showing the contract between the parties, and the partial delivery and payment and performance by defendants under the contract with O. M. Carter and Wiggenhorn. Plaintiffs themselves set forth in their petition that Green is the assignee of Carter's interest in the account sued on. "In the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defense now allowed." Civil Code, Sec. 31. *Bush v. Lathrop*, 22 New York, 535. *Allen v. Miller*, 11 Ohio State, 374. All cases under the code agree with these authorities.

M. H. Sessions, for defendant in error.

The only ground or theory upon which Parmalee and Johnson could recover of Wiggenhorn and Green their pretended claim against Carter is that of *novation*. To constitute a novation when Green bought out Carter's interest in the mill, and became the owner thereof with Wiggenhorn, and they formed their copartnership in that business, Wiggenhorn and Green must have then and there agreed, not only with Carter, to assume and carry out his—Carter's—contract with Parmalee and Johnson, but it was equally necessary for Parmalee and Johnson to there and then agree to take Wiggenhorn and Green as their sole debtor for the same, and to have entirely released said Carter from any and all liability or obligation upon the said contract, or in other words, Carter's original and *all* liability upon said contracts must have been extinguished. *Poindexter v. Waddy*, 6 Munf. (Va.), 418. 1 Parsons on Contracts, 217 to 220 inclusive, 5th edition. *Thomas v. Shillibeer*, 1 M. & W., 123. *Curson v. Chadley*, 3 B. & C., 591. *Wharton v. Walker*, 4 B. & C., 163. *McKinney v. Alvis*, 14 Ill., 34. *Wise v. Coply*, 36 Ga., 508. *Fagan v. Long*,

30 Mo., 222. *Bewly v. Tams*, 17 Pa. St., 485. Story on Partnership, § 146, note 3. 3 U. S. Digest, pp. 499 and 500, § 1,932, § 1,933.

The whole theory of the claim of Parmalee and Johnson against Wiggenhorn and Green, as shown by this answer, is at war with the foregoing doctrine. They in their answer expressly claim, that by the terms of the contract Carter was not released from his original liability upon said contract, but that he is liable upon the same with Wiggenhorn and Green; in other words, that Carter was not released from any and all liability upon said contract, but simply that Wiggenhorn and Green agreed to become responsible to them for the same with Carter. The entire claim of Parmalee and Johnson against Wiggenhorn and Green, as stated in their pleadings, is void by the statute of frauds, for the reason that all that can be extracted from the same amounts to no more than the special promise of Wiggenhorn and Green to answer for the debts of Carter, which is void. Gen. Stats., 393, § 8. *Ayrault v. Chamberlain*, 26 Barb., 83. *Stenburg v. Callanan*, 14 Iowa, 251. *Eddy v. Roberts*, 17 Ill., 505. *Ellison v. Jackson*, 12 Cal., 542.

GANTT, J.

In the court below the defendants in error brought action against the plaintiffs in error and one O. M. Carter, to recover on an account for feed sold and delivered to them—alleging that from the first to the thirtieth day of March, 1875, the defendant Wiggenhorn and said Carter were partners doing business, and during that time they sold the feed to plaintiffs, and that on the first day of April, O. M. Carter sold and transferred his interest in said account to defendant Green. O. M. Carter pleaded a denial, and afterwards, by leave of the court, withdrew the same, and filed a general demurrer, which the court

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sustained and dismissed the action as to him. Plaintiffs in error filed a joint answer, admitting the account, and set up as a defense an alleged contract whereby O. M. Carter agreed to sell and deliver to them, from time to time for one year, all the feed, bran, shorts and screenings made at the Leola flouring mills, then owned by him; that on the first day of December, 1874, he sold one-half interest in the property to Wiggenhorn; that Carter and Wiggenhorn formed a partnership under the name of O. M. Carter & Co., and continued to deliver to them a part of said feed, but not all; that on the first day of March, 1875, O. M. Carter sold this remaining one-half interest of the property to defendant Green, and that he and Wiggenhorn were partners under the name of Wiggenhorn & Green, and alleging further that Green knew of the contract, and "took the benefits of it and assumed all the responsibilities of the same," and that defendants in error "agreed to deliver to them all the feed made at the mill." And they aver that "O. M. Carter, Carter & Wiggenhorn, the defendants in error, and Green" pretended to deliver the feed up till April 1, 1875, and after that time refused to do so; and allege that they were damnified by the breach of the contract, and ask judgment therefor against defendants and O. M. Carter for the same. Defendants pleaded a denial to this answer. It, however, appears that defendant Green purchased Carter's remaining one-half interest in the property on the first day of March, 1875, as alleged in the answer, and that the date mentioned in the petition was a mistake.

It will be observed that in effect the new matter set up in the answer is in the nature of an action for a breach of the contract alleged to have been originally made between plaintiffs in error and O. M. Carter; and the question for consideration is, does this pleading state facts sufficient to constitute a cause of action against the

defendants in error? They do not aver a rescission or an extinguishment of the contract with O. M. Carter, nor do they aver any express contract between themselves and the defendants, or either of them. On the contrary, they show by their answer, that their contract with Carter was not rescinded, by averring that "O. M. Carter, Carter & Wiggenhorn, the defendants in error, and Green," refused to deliver to them the feed, and by asking judgment against the defendants and O. M. Carter for the damages alleged to have been sustained by them by reason of the breach of the contract—deducting therefrom the amount of the account stated in the petition. The plaintiff Johnson testified that "Wiggenhorn never agreed with him that he would fulfill the contract;" and the testimony offered by plaintiffs and rejected by the court does not set forth any facts tending to show a rescission of the original contract between them and Carter, or any contract between them and Wiggenhorn and Green, or either of them. Hence, upon the showing made by the record, I think there is no cause of action set forth in the answer against the defendants in error, nor does the evidence given in the case, or that offered and rejected, tend to show any such cause of action.

The doctrine is well established that an incoming partner is not liable for the debts incurred, nor upon contracts made before he entered the partnership, unless such liability is created by express contract, based upon a good consideration; and before the new firm can be made liable in any such case there must be a novation, and the new contract must receive the consent of all the parties, and must have the effect to rescind and extinguish the original debt or contract, and create a new liability of debtor and creditor, or of contractors between the creditor or contractor and the new firm, and such new contract must be founded on some good consideration moving to the new firm. Nor is the mere receipt of money by the new

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firm sufficient to raise a presumption that the incoming partner made a parol contract binding himself to fulfill the covenants and conditions of the original contract, or to make him liable for a breach of contract, because the liability must rest on a novation, and a new contract receiving the express consent of all the parties, and which effects a rescission and extinguishment of the original contract. These general principles are supported by the whole current of authority. In *Bewley v. Tams*, 17 Pa. St., 489, 490, it is said that, "it never has been thought that a man who buys himself into another's business subjects himself to the liabilities which that other may have incurred previously; nor that a new firm is bound to pay the debts or comply with the contracts of an old one composed partly of the same members;" and therefore unless the former agreement "was rescinded and a new parol contract to the same effect was made by defendants jointly, upon sufficient consideration moving to them, then this action is incurably wrong, and the trial ought to have been stopped as soon as it began."

In *Kirwan v. Kirwan*, 2 Cr. & M., 617, A. had an account with B. & Co. During the time A. dealt with the firm, all the partners retired except C., who formed a partnership with K. A's account was transferred from the books of the old to those of the new firm, and the balance was struck annually as before. A's administrator brought suit against the *quondam* partners and C. to recover the balance, and the *quondam* partners contended that the responsibility had shifted to C. & K., and the payments made by the new firm amounted to evidence that K. intended to take the debt on him. *Held*, That no inference of that sort could be drawn in the absence of proof of A.'s assent to the substitution of K. as his debtor for the original partners; and there was nothing to show that K. undertook to answer for the debts of the old firm, and the probabilities were that he would not

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incur such responsibility. *Thomas v. Shillaber*, 1 M. & W., 123. *Cuxon v. Chadley*, 3 B. & C., 591. *Butterfield v. Hartshorn*, 7 N. H., 347. *McKinney v. Alvis*, 14 Ill., 34. *Hart v. Tomlinson*, 2 Vern., 100. *Poin-dexter v. Wadley*, 6 Munf. Va., 420. *Fayon v. Long*, 30 Mo., 324. *Steinburg v. Callaman*, 14 Iowa, 258. *Kilburn v. Pacific Bank*, 11 Wis., 230.

The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

JAMES H. ROBISON AND FRED. K. MAUS, PLAINTIFFS IN
ERROR, v. GEORGE P. UHL, DEFENDANT IN ERROR.

1. **Statute of Frauds.** Under our statute of frauds the delivery of possession of goods sold is not necessary to protect the purchaser as against the creditors of the seller, provided the purchase was made in good faith.
2. —: By our statute the retention of possession by the seller is, at most, only *prima facie* evidence of fraud, which may be rebutted by proof.
3. —: **FRAUD A QUESTION OF FACT.** In all cases arising under our statute, the question of fraud in a sale is one of *fact* and not of law.

ERROR from the district court of Richardson county. It was an action of replevin brought by the plaintiffs in error against the defendant in error for the recovery of a threshing machine which had been purchased by Uhl at an execution sale. Plaintiffs in error claimed title by virtue of a purchase from the defendant in execution prior to the levy. Judgment below by WEAVER, J., in favor of Uhl, and Robison and Maus brought the cause up by petition in error.

Clarence Gillespie and E. W. Thomas, for plaintiffs in error.

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Between these parties, Brayley and Robison & Maus, there can be no question but that the title to said property had passed from Brayley to Robison & Maus before the levy on the machine by said G. P. Uhl, defendant in error, and that his levy was not made for some time after the sale to Robison & Maus. *Barret v. Turner*, 2 Neb., 172. *Dows v. Green*, 32 Barb., 493. *Fairfield v. Baldwin*, 12 Pick., 387. Smith Ld'g Cases, 1081-2. *Sweeney v. Ownsley*, 14 B. Mon., 413.

The rule that obtained in the days of Buller and Mansfield, that possession of chattels by the seller gave rise to an inference of fraud has been greatly modified, and the question of fraud in all such cases is a question of fact, and this question is thus taken from the courts, who could consider and infer it from a single fact, and left to a jury who should consider all the facts and determine from the evidence whether such possession is consistent with an honest purpose. Gen. Stat. of Neb., 393, 395. *Smith v. Acker*, 23 Wend., 653. *Collins v. Myers*, 16, Ohio, 547. *Babcock v. Eckler*, 24 N. Y., 623. *Monteith v. Bax*, 4 Neb., 166. 1st Parson's Contract, 529. It was not necessary that the possession should have been delivered, as they were already in possession as general agents. *Lake v. Morris*, 30 Conn., 201. *Warden v. Marshall*, 99 Mass., 305. Hilliard on Sales, pp. 101, 102, sections 16, 17, 18. 2d Kent, 12 Ed., page 492, and note.

George P. Uhl, pro se.

The plaintiffs in error acquired no title to the property claimed, if it should be considered as true that they bought the property from their principal, for the reason that there was no delivery, and the defendant in error knew nothing of the transaction, if any such transaction as claimed by plaintiffs ever took place. *Lan-*

fear v. Sumner, 17 Mass., 110. *Rourke v. Bulleus*, 8 Gray, 549. *Parr v. Parker*, 24 Iowa, 26. *McKibbin v. Martin*, 64 Penn. State, 352. 1 Smith's Leading Cases, 33. There must be a delivery and change of possession or the sale will be void as to the creditors. 1 Parson's Contract, 529. 2 Kent's Com., 312, 513, 518, 521, 522, *et seq.* *Sumner v. Hicks*, 2 Black, 532. *Warner v. Norton*, 20 How., 448.

LAKE, CH. J.

The action in the court below was for the recovery of the possession of a threshing machine.

On the fifteenth of July, 1876, James Brayley, of Buffalo, N. Y., became the owner of this machine by a purchase at judicial sale from the United States marshal for the district of Nebraska, under a judgment recovered by him against one Charles Zeller.

The legal proceedings resulting in this sale were in charge of the plaintiffs, who were the general agents of Brayley in this part of the west, for the sale of this sort of machines. Before the sale came off, it had been arranged between Brayley and the plaintiffs that if it should be struck off to him, they were to take it off his hands at the price bid. As to the amount to be bid in his name Brayley instructed them by letter, dated June 6th, 1876, as follows: "Don't bid in the machine for any more than you would be willing to give for it to sell again," and they accordingly bid \$350.00.

Soon after this sale was made Brayley on being advised of the purchase in his name sent a bill of the machine to the plaintiffs, in these words:

"BUFFALO, N. Y., July 21st, 1876.

Messrs Robison & Maus, St. Joseph, Mo.

Bought of James Brayley, machine sold on Zeller judgment, bought by you, \$350.00.

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At the same time he advised them that: "I understand that you bid this machine for your own account, and therefore charge it up to you; and as you wrote me that you had authorized your attorney to bid as high as \$350.00, I make the bill for that amount. Trusting this will be satisfactory to you. I remain yours truly,

JAMES BRAYLEY.

P. S. Please credit my account above amount, and advise me that you have done so.

J. B.

Brayley's account was accordingly credited the \$350.00 on or about the twenty-sixth of July, 1876, of which he was at once advised.

After the sale by the marshal the machine was left in the care of Zeller, who had no knowledge or information of the transfer of the ownership to the plaintiffs until about the time of the commencement of the replevin suit, on the fourteenth of August following.

In the meantime, and while the machine was still in the hands of Zeller for safe keeping, the defendant, having recovered a judgment against Brayley, caused an execution to be levied upon it as the property of Brayley.

This execution was levied on the twenty-ninth of July, and the sale under it took place on the twelfth of the following month, at which the defendant became the purchaser of the machine without any knowledge or information that the plaintiffs had or claimed any interest therein.

These being substantially the facts upon which the jury were to act, the plaintiffs requested the court to charge the jury: "1. That when the terms of a sale are agreed upon and the bargain is struck, and everything which the seller has to do about the property is complete, the contract of sale is then perfect—the ownership of the property vests at once in the buyer, and this he takes at once; the property, and all the risks of acci-

dent to the property is upon the buyer, who is the owner thereof."

"2. All that is necessary to pass property is that the buyer and seller agree. If one who has a long course of dealing with another have a correspondence in regard to certain specific property nearer to the purchaser than the seller, and more properly by reason of their business relations in the control of the purchaser, and they agree, one to buy and the other to sell, the sale is complete just so soon as they agree, and the seller charges the buyer, and the buyer credits their respective books with the price of the property."

"6. If you believe that this was an honest purchase on the part of the plaintiffs, bought in good faith, then you should find for the plaintiffs. The statute of frauds does not apply if this is a complete trade (and perfected before the levy) between the agents and principal in perfect good faith, and the transfer was completed by the entering of the respective charges and credits on their respective books, the property already being in the custody of the plaintiffs as the agents having the general control of all Brayley's business."

There were several other instructions of similar import to these requested by the plaintiffs, to which however it is unnecessary to refer as these will answer our purpose. The plaintiffs' requests were all refused and exceptions duly taken.

It is quite evident that the court regarded the strict rule of the common law, which requires the delivery of possession of goods sold as necessary to protect the purchaser as against the creditors of the seller, as applicable here. In this we think there was error.

By section 11, chapter 25, Gen. Statutes, it is enacted that: "Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels by way of mortgage or

security upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers."

Under the operation of this section it will be seen that the decisions of the courts of those states where the rule of the common law prevails cannot be followed. Under our statute the retention of possession by the seller is, at most, only *prima facie* evidence of fraud, which may be entirely rebutted by the circumstances attending the transaction.

A careful examination of the testimony leaves no room to doubt that as between Brayley and the plaintiffs the sale was completed about the twenty-sixth or twenty-seventh of July, and several days before the defendant's execution was levied upon the property. If this sale were *bona fide* a complete title vested at once in the plaintiffs, leaving nothing on which the execution could operate. That this sale was made in good faith there was considerable testimony to prove, but whether it were sufficient was for the jury, under proper instructions, to find.

But even if the rule as to the possession by the seller were as claimed by the defendant it would by no means necessarily follow that it would have been applicable to the facts of this case. It was shown very conclusively that the plaintiffs were the agents of Brayley, who resided in a distant state; that as such agents they had a gen-

eral supervision of his business in this part of the country, and had attended to the litigation which had terminated in the transfer of the ownership of the machine in question from Zeller to him, but with the understanding they were to take it off his hands at an agreed price. This being the situation of the parties with respect to this property we think the formalities of a delivery of possession would have been of no significance, as it was to all intents and purposes in their control at the time.

We are of the opinion that the foregoing instructions, requested on behalf of the plaintiffs, embody sound propositions of law and were applicable to the evidence upon which the jury were to pass, and that for the refusal to give them a new trial should be awarded.

REVERSED AND REMANDED.

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

1. **Practice. CONTINUANCE.** On motion for a continuance it is not good practice to permit counter affidavits as to what an absent witness would testify.
2. ———: ———: **AFFIDAVIT.** An affidavit of the prisoner to the effect that he had been *informed* that a person absent from the state would swear to certain material facts is not sufficient to warrant a continuance. If the information came from the proposed witness, it should be so stated, but, if from a third party who knows he would so testify, then the affidavit of that person should be procured.
3. **Criminal Law: IMPLIED MALICE.** On a trial for murder, where the prosecution establishes against the prisoner an intentional homicide, and nothing explanatory is shown, the implication of malice at once arises, which it is incumbent upon the prisoner to remove.

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4. ———: CHARGE TO THE JURY. Instructions given to a jury should be applicable to the case as made by the testimony, and if they are not, and have a tendency to mislead, the judgment will be reversed.
5. ———: VERDICT. The jury returned a written verdict in these words: "We the jury in this case, being duly impaneled and sworn, do find and say that ——— is guilty of manslaughter." This was held to be void, for wholly omitting in any manner to designate the defendant as the guilty party.
6. ———: ———: Under an indictment charging murder in the *first* degree where the jury finds the defendant guilty of manslaughter merely, the failure to specifically negative the fact that the crime was of a higher grade than that found is no ground for a reversal of the judgment.

ERROR from the district court of Buffalo county. The plaintiff in error was indicted for murder at the March term, 1876, of the district court for Kearney county. The cause was taken on change of venue to Buffalo county, where the prisoner was tried at the March term, 1876, of that county, found guilty of manslaughter, and sentenced to imprisonment in the penitentiary for the term of ten years. On the trial of the cause before GASLIN, J., the following, among other instructions, were given to the jury:

3. "Should you find from the evidence in the case that the accused did the shooting as charged, you have a right to presume from this that he intended to do it, and that malice was implied therefrom, as it is a legal presumption that the defendant intended to do what he actually did. In law a gun loaded with powder and ball or shot and used in its ordinary legitimate way, is a deadly weapon, and should you find from the evidence that the prisoner committed the crime as alleged with the gun, it is a legal presumption that he did it with malice; and if you so find it is then incumbent upon the accused, by way of justification, or excuse, or otherwise, to remove this legal presumption."

7. "Should the evidence in this case satisfy you that the killing was unlawfully done by the defendant, but without malice either intentional or unintentional upon a sudden quarrel, when the mind of the prisoner had been wrought up to that pitch by rage or passion that reason was wholly or partially dethroned, or it was unintentionally done while the accused was in the commission of some unlawful act you will be warranted in finding him guilty of manslaughter."

9. "If you find the accused was in imminent or apparent danger of receiving great bodily harm from the deceased at the time of the homicide, or that the deceased was about to commit a felonious assault upon the defendant, was in the situation, had the implements and weapons, and possessed the animus, ability, and was in a position to do so at the time of the killing, or that the deceased was about to take the life of the prisoner, and there was no other way for him to save it than to commit the homicide; or that he had a just and well grounded apprehension that deceased was about to kill him or to do him great bodily harm, and that there was no other way to save himself from the impending danger of life, limb, or great bodily injury than to commit the homicide, you would be warranted therefrom in acquitting the accused, if you are satisfied that he was fully excused or justified under the circumstances in taking the life of the deceased."

James Laird and F. G. Hamer, for the plaintiff in error.

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

LAKE, CH. J.

In this case no less than twenty-six errors are formally assigned, many of which, however, are but repetitions.

in slightly different language of a single complaint to the ruling of the court. Therefore we shall notice only those objections which seemed to be relied on in argument, or which possess at least the shadow of merit.

I. Taken in the order of occurrence, the first objection to be noticed was taken to the overruling of the defendant's motion for a continuance of the case on account of the absence from the state of one George Hicks, who it was claimed was then in Iowa, and who, if present, would testify to certain facts material to the defense. This motion was supported by the affidavit of the prisoner, in which he swore substantially that Hicks would testify that on the night before the alleged homicide he staid at the house of David Vroman, the father of the deceased, and that both the deceased and his father "threatened to kill the defendant, and were actually making arrangements to attack him that night. That, to prevent the same, witness remained there all night, and slept in front of the door to prevent them going out. That during the evening the said deceased, Thomas R. Vroman, was absent from the house, and, as witness believes, had taken away the horse of affiant and stated that they would watch for affiant in the morning. That both of deceased said, on the morning of the day of the alleged homicide, that if defendant attempted to get his horse that they would certainly kill him, and made unqualified threats to kill this affiant."

On motion of the district attorney the court permitted the counter affidavit of the mother of the deceased to be interposed, in which she swore that she was present at the time stated, and that no such threats against the defendant were made. Thereupon the motion to continue was overruled.

As a matter of practice we see no propriety in permitting the use of counter-affidavits on a motion for a

continuance. We do not think a side issue of this sort should be raised, or the truthfulness of the affidavit in support of the motion be determined in this unsatisfactory manner. And if the affidavit in support of the motion in this case were such as to show that the ends of justice required a continuance of the case to enable the accused to obtain material testimony known to exist, we should feel bound to reverse the judgment on this ground alone, regardless of the affidavit of Mrs. Vroman, even if no other error were committed. But in our opinion the affidavit of the prisoner was not sufficient to warrant a continuance. It is exceedingly meagre, and altogether too indefinite in respect to the source of the affiant's information that Hicks would testify as claimed. The prisoner states that he obtained the information the day before he made the affidavit, but from whom it came, or whether it was probably reliable, does not appear. If the information came from Hicks himself he should have so stated in the affidavit, but if from some one else who knew he would so testify, then the affidavit of that person ought to have been procured. Throwing the counter affidavits therefore entirely out of view as being improperly in the case, and considering only that of the defendant, we see no error in refusing a continuance of the case.

II. The record shows that the defendant excepted to each of the several instructions given by the court to the jury upon its own motion, and also to those given on behalf of the prosecution. It was not claimed in argument, however, that these exceptions were *all* well taken, it being conceded that many of the instructions laid down the law of the case correctly; therefore we shall notice those only wherein it seems to be thought that error prejudicial to the prisoner was committed.

Considerable fault was found with the *third* instruction, wherein the court charged as to the presumption of

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malice arising from the deliberate use of a deadly weapon upon the person of another. This instruction was in substance, that if the jury found "from the evidence in the case that the accused did the shooting as charged," they had a right to presume from this that he did it maliciously. And further, that if they so found, it was "then incumbent on the accused by way of justification, or excuse, or otherwise, to remove this legal presumption."

As the case stood before the jury under the testimony this was a correct statement of the law applicable thereto. The prosecution, in making out its case, had merely produced certain facts which showed very conclusively that the deceased was shot to death by the prisoner, but none of the circumstances immediately attendant upon the transaction were brought to light until the testimony for the defense was introduced. But the theory of the defense was not a denial of the fact that the prisoner shot the deceased, for this was admitted; it was a complete justification on the ground of absolute necessity in the protection of his own person from death or great bodily harm at the hands of the deceased and his father, by whom he was violently assaulted. The prosecution having established the fact of intentional homicide, the implication of malice at once arose, and it devolved upon the defendant to remove this presumption by satisfying the jury that it was not felonious, but that it was committed, as claimed, in the necessary defense of his own person from an impending death, or great bodily harm. *Com. v. York*, 9 Met., 93. *Com. v. Webster*, 5 Cush. *Prewitt v. The People*, 5 Neb., 377. As to the right of the defendant thus to have defended himself against such threatened personal violence the jury were fully and fairly advised by the ninth instruction, which stated the law applicable to this branch of the case correctly.

But as to the seventh instruction the court was less fortunate. By this the jury were told, among other things, that if the killing "was intentionally done while the accused was in the commission of some unlawful act," they "would be warranted in finding him guilty of manslaughter." This was clearly erroneous. There was no claim made nor was there any testimony to show that the prisoner was engaged at the time in the commission of any unlawful act which resulted in the unintentional killing of the deceased. It was the theory of the prosecution that the homicide was intentional, malicious, and premeditated; that of the defense that it was intentional, but in necessary self-defense; and the testimony on both sides was calculated to support these respective claims. The legitimate effect of this instruction was to give the jury to understand that they would be warranted in finding the prisoner guilty of manslaughter, because of an unintentional killing resulting from the commission of some other unlawful act in which he was engaged. This was calculated to mislead the jury, and is good ground for a reversal of the judgment. *Curry v. The State*, 4 Neb., 545. With this exception we perceive nothing in the instructions of which the defendant can justly complain.

III. It is also assigned for error that the evidence was insufficient to justify a conviction, but as this point was not urged upon the argument, and a careful reading of the testimony fully satisfying us that there was no error in this respect, we will dismiss it without further comment.

IV. Another objection is that no valid verdict was returned—in other words, that it was a mere nullity and not sufficient to support a judgment. It was in these words :

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"We, the jury in this case, being duly impaneled and sworn, do find and say that ——— is guilty of manslaughter.

(Signed)

"H. H. ACHEY, *Foreman.*"

It was conceded by the attorney general that the omission to designate the prisoner in some manner as the person found to be guilty, was a fatal defect. That it is so there can be no doubt whatever. We may have an abiding conviction that the prisoner was the one upon whom they intended to fix the guilt—that it could have been no one else—but this is not enough. The verdict of the jury is a step in the conviction of an individual for a felony that cannot be left to conjecture, but it must speak for itself as to every material fact, sensibly, without ambiguity, and with certainty, or it should be set aside. We regard this as a void verdict, and of no legal force or effect whatever. This, too, is an error that calls for a reversal of the judgment.

V. Another objection to this verdict deserving of notice is the omission of the jury to declare specifically their finding as to the prisoner's guilt of the two higher grades of homicides, viz: murder in the *first* and *second* degrees, for either of which a conviction might have been had under the indictment.

Section four hundred and eighty-seven of the criminal code provides that: "Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto," &c. This section is undoubtedly applicable to the case now under consideration, and its language would seem to imply that the legislature contemplated at least a specific finding as to the highest degree of criminality charged in the indictment.

While it might be profitable to the prosecution to require this course to be pursued in practice, it is a fact with-

in our knowledge that it is seldom done. Nor do we see how the failure of the jury to observe this formality could possibly work the least prejudice to the defendant. When the jury on trial for murder in the first degree return a verdict of "guilty of manslaughter," the presumption is that they have done their whole duty under their oaths, and that they failed to find, from the evidence, some fact necessary to constitute a higher grade of crime. In considering this question it is well to bear in mind that the section from which we have just quoted does not declare what the verdict shall contain; it simply authorizes the jury to find an inferior offense whose elements are all included in a higher crime which the indictment charges, but which they find the proofs do not sustain.

But section four hundred and eighty-nine, which also has a direct bearing upon this question, declares: "That in all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter," etc.

In Ohio, from whence our code was principally borrowed, it is held that in all cases of homicide where the charge is of a higher degree than manslaughter, it is absolutely essential to the validity of the verdict that it formally express the degree of crime found. *Dick v. The State*, 3 Ohio State, 89, and *Parks v. The State*, Id., 101. It is true that these decisions were made by a divided court, and that they are in direct conflict with those of Pennsylvania, where this particular provision seems to have originated. *White v. The Commonwealth*, 6 Binn., 182. Nevertheless we feel bound to follow the Ohio cases, not alone from the fact that in view of our legislation they are entitled to special consideration, but because they adhere more closely to the letter of the statute and tend to greater certainty in fixing the grade of the offense.

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But while we hold that the failure of the jury to formally negative the fact that the crime in this case was of a higher degree than manslaughter is no ground for a reversal of the judgment, yet this rule can have no application where there are distinct offenses charged in different counts of the indictment. In such case the jury must either return a general verdict or respond specially to each charge in their finding. *Wilson v. The State*, 20 Ohio, 26.

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

REVERSED AND REMANDED.

WARREN CLOUGH, PLAINTIFF IN ERROR, v. CLAUS. BUCK,
DEFENDANT IN ERROR.

1. **Practice: GARNISHMENT AFTER JUDGMENT.** The process of garnishment under section 244 of the civil code is authorized only when there is a judgment rendered, upon which execution has been issued and returned unsatisfied for want of property whereof to levy and collect the debt.
2. ———: ———. If in such case after process of garnishment the judgment is set aside the garnishment becomes dissolved and the garnishee discharged.
3. **Attachment of Negotiable Note.** The general rule is that a negotiable note or bill is not, before maturity, subject to attachment; but an exception to the rule is, that if such note or bill is transferred before maturity, voluntarily or fraudulently, for the purpose of protecting the debt from the creditors of the payee, it may be attached or garnished while the same remains in the hands of such indorsee.

ERROR from the district court of Seward county. The facts are stated in the opinion.

C. L. Lewis, for plaintiff in error.

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The note sued on is a negotiable instrument and assigned before due to Thomas, who held the note when the defendant Buck was garnished. The note was due November 11th, and sold and transferred to Thomas, November 1st, and affidavit of garnishment sworn out November 9th, so that the law of negotiable paper, that it cannot be made liable to garnishment, is applicable in this case, as the note was transferred before due. The order of garnishment was issued before due, and the note never afterward came into the possession of the payee, John P. Luft. The maker cannot be charged as garnishee on a note unless it is in the possession of the defendant. *Commissioners v. Fox*, 1 Morr., Iowa, 48. *Gregory v. Higgins*, 10 Cal., 339. *Greer v. Powell*, 1 Bush., 489.

The second ground is that no one can plead fraud except he is the party defrauded. It is admitted by the answer that Buck, who is the maker of the note, was liable upon it at the time of the transfer to Thomas, but they claim that the fraudulent transfer is a good defense for Buck. If Luft disposed of his property to defraud his creditors, can his debtors plead the fraudulent transfer when sued? If so, the fraudulent disposal of property will cancel all debts due him.

"A fraudulent grantee, has a legal title which he may enforce in an action at law, for the debtor and those claiming under him cannot set up the fraud to avoid the transfer. Bump on Fraudulent Conveyances, 450. *Anderson v. Dunn*, 19 Ark., 650. *Murphy v. Hubert*, 16 Penn. State, 50. *Gifford v. Ford*, 5 Vt., 532. *Jackson v. Garnsey*, 16 Johns., 189.

The answer of the defendant is not good. 1. Because on the twenty-fifth day of January, 1876, there was due on the note \$108.75, principal and interest, as shown by the pleadings. If the plea was good as a defense to any extent it could not be pleaded for a greater sum than was

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paid, for that would make payment of part a payment of all.

Supposing the \$100 payment to be good; when the judgment was reversed the balance due on the note over and above the \$100 belonged to this plaintiff. If the defendant had ever paid the balance of the note, he should have alleged it in his answer, as neither he, the county judge, nor Rinehart, Ballard & Co., had a right to pay or receive a less amount than the whole of the principal and interest due. 2. Because in this action the payment of the \$100 upon the order of garnishment was a *voluntary* payment, and cannot be pleaded in bar even for that amount. "The order of the court was not a *judgment* and could not be enforced by process, and any payment made is voluntary," under such an order. *Board of Education v. Scoville*, 13 Kan., 17. *Rice v. Whitney*, 12 Ohio State, 358. Drake on Attachments, section 691.

J. E. Philpott (with whom was *McKillip & Page*),
for defendant in error.

Section five hundred and forty-one of the civil code authorizes the county judge to order the amount due the judgment debtor to be applied toward the satisfaction of the judgment. Under this order the money may be paid voluntarily by the garnishee, or it may be collected from him by an ordinary action. *Edgerton v. Hanna*, 11 Ohio St., 323. *Board of Education v. Scoville*, 13 Kan., 17. What reason can be given why the party garnished should, in order to protect himself, wait until an action is brought against him, and be mulcted in costs? In *B. & C. R. R. v. May*, 25 Ohio St., 347, an answer setting up such an order was held good. See also 43 Ind., 180.

The question of the garnishment of negotiable paper

does not arise in this case. The note in suit, long after becoming due, and long after the service of the garnishee process, remained under the control of Luft, was treated by Thomas, in whose hands it was placed under the circumstances detailed in the answer, as the property of Luft, and in fact was his property. As to the effect of a fraudulent attempt by defendant to defeat the payment of his debts, and to prevent his effects from being reached by garnished process—See Drake on Attachment, §§ 598, 599, and cases cited. *Doggett v. St. Louis Ins. Co.*, 19 Mo., 201.

GANTT, J.

This action was commenced in the county court to recover the amount of a negotiable note, dated March 8, 1875, executed by defendant to one John P. Luft for the payment of one hundred dollars, with ten per cent. interest from date. The note was indorsed to J. C. Thomas, and by him was indorsed to Ellsworth & Lewis, and by them to the plaintiff. The first transfer was made before the note became due. In the county court judgment was rendered for the plaintiff, and the defendant appealed from that judgment to the district court. New pleadings were filed, and the defendant in his answer admitted the execution of the note by him to Luft, but set up as new matter of defense, that on the first day of January, 1875, Rinehart, Ballard & Co. recovered in the county court a judgment against the said John P. Luft for the sum of \$184.21; that an execution was issued thereon and returned "no goods on which to levy"; that thereupon an affidavit was filed in the case, and "an order was made and served on the defendant requiring him to appear before said court; that he appeared and made answer to said order, and was ordered by said court to pay the amount of the note to be applied on the judg-

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ment of Rinehart, Ballard & Co. against John P. Luft, and on the twenty-fifth day of January, 1875, he paid upon said order one hundred dollars." It is further averred that on the fifth day of January, 1876, John P. Luft filed in the district court his petition in error in the case of Rinehart, Ballard & Co. against him, and that said judgment was afterwards wholly reversed; that John P. Luft was wholly insolvent, and transferred the note to J. C. Thomas before due, without consideration and to defraud his creditors, and that Ellsworth & Lewis and the plaintiff, before receiving the note, severally had full knowledge that the same was garnished in the hands of defendant. To this answer the plaintiff interposed a general demurrer, which was overruled, and judgment was rendered in favor of defendant.

It is quite clear from the facts stated in the answer that the process of garnishment was commenced under section 244 of the civil code, Chap. III., entitled, "Attachment." This law provides for garnishment in aid of "execution issued upon any judgment of a court of record, or a justice of the peace," when such execution is by the officer, in whose hands it was placed, returned "unsatisfied for want of sufficient property whereof to levy and collect the same." This process of garnishment is authorized only when there is a judgment, upon which an execution has been issued and return unsatisfied for want of property whereof to levy and collect the debt, and therefore the whole proceeding must be supported by a judgment *in esse*. And if after such process has been had the judgment is reversed, set aside, or vacated, the execution falls with it, and the garnishment becomes wholly dissolved, for there is nothing left to support either the one or the other. Hence, as it appears from the facts stated in the answer, that after the payment of the one hundred dollars into the county court by defendant the judgment of Rinehart,

Ballard & Co. against Luft was reversed and set aside upon error to the district court, and nothing further was done in that case, the process of garnishment was dissolved and the garnishee was discharged. Now what is the position of the parties in the case at bar? It seems to be a general rule that a negotiable note or bill is not, before maturity, subject to attachment. The reason of the rule is well stated in *Gregory v. Higgins*, 10 Cal., 340. It is said that "from the very nature of a promissory note, it is evident that before its maturity the indebtedness of the maker cannot be the subject of attachment. His obligation is not to the payee named in the note, but to the holder whoever he may be. From its negotiability it may often pass into the possession of parties entire strangers to the maker, and even if held by the defendant at the time of garnishment it does not follow that it would be in his hands at maturity, and if transferred before maturity to a *bona fide* holder it could be enforced, even if paid upon the attachment." *Greer v. Powell & Co.*, 1 Bush, 497; 14 La., 452. But an exception to the rule is, that if such note or bill is transferred before maturity to an indorsee voluntarily or fraudulently for the purpose of protecting the debt from the creditors of the payee, it may be attached or garnished while it is in the hands of such indorsee, because he is not a *bona fide* holder. *Glanton v. Griggs*, 5 Geo., 434.

Now in the application of the rule as above stated to the facts as admitted in this case, we think that the payment of the one hundred dollars by defendant to Rinehart, Ballard & Co., upon their garnishee process is a good defense *pro tanto* in this action, because it was paid while that proceeding was in full force and effect; but as the judgment in that case was afterwards vacated, and the garnishment dissolved, the unpaid balance of the note is payable to the plaintiff, the indorsee and holder of it.

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And this unpaid balance we find at this time, with interest thereon, to be the sum of ten dollars and thirty-seven cents. Therefore the judgment of the court below is reversed, and for the balance found due on the note, judgment will now be rendered in this court with costs, in favor of plaintiff in error and against defendant in error.

JUDGMENT ACCORDINGLY.

EDWARD HEALY, PLAINTIFF IN ERROR, v. C. AULTMAN & Co., DEFENDANTS IN ERROR.

1. **Practice:** EXCEPTIONS. An order of court, in making up the pleadings, to which no exception is taken, will not be reviewed on error.
2. ———. JURISDICTION OVER DEFENDANTS. An *alias* summons is not made necessary by the filing of an amended petition. Jurisdiction over the person of the defendant, once acquired, will continue, and can be lost only by an actual dismissal of the action.

THIS was an action brought by the defendants in error in the county court of Lancaster county. The action was to recover \$172 principal and interest, and \$17.20 attorney's fees, on a promissory note for \$150, executed August 5, 1875, by the plaintiff in error, payable to the order of defendants in error. On the first day of February, 1877, the defendant in error filed his petition in the said county court to recover the said sums of money. A summons was duly issued thereon, and served on the plaintiff in error. On the third day of April, 1877, Healy, plaintiff in error, filed his motion to strike the said petition from the files, because it was not duly verified. At the April term of said county court the motion came on to be heard, and was sustained. Healy

made no further appearance in the case in the county court. Leave was given to file amended petition. On the fourth day of April, at said term of court, C. Aultman & Co. filed their amended petition. On the seventh day of April the case came on for trial on the amended petition; C. Aultman & Co. appeared; default was entered against Healy; trial was then had, and judgment for \$180.10 debt rendered against Healy, and the further sum of \$18 as attorney's fees and cost of suit. To reverse said judgment, on the eighteenth day of April, 1877, Healy filed his petition in error in the district court within and for Lancaster county, but the district court, POUND, J., presiding found that there was no error apparent in the record, and affirmed the judgment. Healy brings the case up by petition in error.

James E. Philpott, for plaintiff in error, cited Civil Code, sec. 61. Nash Pleading, 99. 1 Id., 275. *Stevens v. White*, 1 West. Law Monthly, 394. Seney's Ohio Code, 152.

Montgomery & Son, for defendants in error.

The defect in the verification was not jurisdictional. "A verification of a petition is not necessary in order to vest jurisdiction. If defective, it may be amended, or if wanting, may be supplied." The jurisdiction of the county court attached to the defendant below on March 15, 1877, the date of the service of summons, without regard to the defects contained in the bill of particulars. The amendment was properly allowed by the court. The motion to set aside the defective pleading and the application for leave to amend, and the motion for security for costs, were determined by one ruling of the court in the following language: "The same was sustained, with leave to file amended petition, and give se-

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curity for costs instanter." *Johnson v. Jones*, 2 Neb., 126. *Cropsey v. Wigenhorn*, 3 Id., 108. 2 Western Law Monthly, 312-548. 3 Id., 604. Seney's Ohio Code, 195-196.

Even had there been a jurisdictional defect in the proceedings, it was waived by the general appearance of plaintiff in error. *Porter v. Chic. N. W. R. R. Co.*, 1 Neb., 14. *Kane v. The People*, 4 Neb., 509. 3 Western Law Monthly, 604. Seney's Ohio Code, 196, N. 11. *Blackwood v. Jones*, 27 Wis., 498.

LAKE, CH. J.

We think the assignment of errors sufficient to enable us to review the questions presented to the district court by the petition in error filed therein.

The first of the errors complained of was in permitting an amended petition to be filed after the original had been stricken from the file, on motion of the plaintiff in error, on account of a defective verification. There was certainly no error in this; and even if there were, it could not now be taken advantage of, inasmuch as no exception was taken to the order.

The principal question, however, appears to relate to the jurisdiction of the county court over the person of the then defendant. And this point seems to be based upon the idea that, after the amended petition was filed, the service of a new summons was necessary before the case could be proceeded with. But no new summons was requisite, as that by which jurisdiction was first acquired was still on the files of the court, with its efficiency wholly unchallenged. The defendant therefore was still before the court, and bound by all orders made in the further progress of the case, unless reversed on exceptions duly taken. Besides, by moving for an order upon the plaintiffs to give security for costs, he admit-

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ted the jurisdiction of the court over him, and which could be lost only by an actual dismissal of the action.

We see no error in the record, and the judgment of the court below is therefore affirmed.

JUDGMENT AFFIRMED.

ARTEMAS ROBERTS, PLAINTIFF IN ERROR, v. THE CITY OF
LINCOLN, DEFENDANT IN ERROR.

1. **Cities of the Second Class: SALARY OF OFFICERS.** In April, 1874, R. was elected city engineer of the city of Lincoln. In May following the mayor and council of said city passed an ordinance repealing the salary of said officer and providing that thereafter he should be paid \$5.00 per day for services actually rendered. In November following an ordinance was passed providing for the payment of a salary of \$5.00 per day to said officer. *Held:* That after such ordinance took effect the plaintiff was entitled to a salary of \$5.00 per day.
2. **Evidence.** Where evidence is before the court which is unimpeached, the court cannot disregard it. If improper it should have been excluded; if properly admitted it must be considered and given due weight.
3. ———: **FINDINGS OF THE COURT.** Where the finding of the court is clearly against the weight of evidence, the judgment will be set aside.

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

Tuttle, Harwood & Ames, for plaintiff in error.

The revised ordinances are sufficiently authenticated. *Dillon Mun. Corp.*, 287. *Block v. Jacksonville*, 36 Ill., 301. And there being no ambiguity, they will be strictly construed. *McCluskey v. Cromwell*, 11 New York, 601.

Benton v. Wickwire, 54 Id., 226. The ordinance expressly gives the plaintiff a salary, and not wages as the defendant contends. The salary of a public officer is incidental to his title only, and has no relation to his duties or services. *City of Philadelphia v. Given*, 60 Penn. State, 136. *People v. Miller*, 24 Mich., 458. *Carroll v. Siebenthaler*, 37 Cal., 193. *Dorsey v. Smyth*, 28 Cal., 21. *Meagher v. The County of Storey*, 5 Nevada, 244. *The Auditors v. Benoit*, 20 Mich., 176. *The United States v. Dickson*, 15 Peters, 158.

T. M. Marquett, for defendant in error.

In this country a hiring by the day, and payment by the day, has a definite meaning. It means that the day's work must be done before the party is entitled to the wages. The plaintiff in error was entitled to his pay at the end of his day's work, and was not entitled to the \$5.00 until he did the day's work. 2 Parsons on Contracts, 32.

The agreement amounts to this and no more, that when the city did require the plaintiff to work, they were to give him \$5.00 per day for every day he worked. 2 Parsons on Contracts, 44, note f; 539, note h.

The facts stated in the petition show that plaintiff was employed by the day—not on a salary. But it does not allege that he did a single day's work. "A salary," Webster defines to be, the recompense or consideration stipulated to be paid to a person for services, usually a fixed sum, to be paid by the year, as to governors, magistrates, settled clergymen, instructors of seminaries, or other officers, civil or ecclesiastical. When wages are stated or stipulated by the month, week, or day, we do not call the compensation *salary*, but pay, or wages, as in the case of military men and laborers. The theory of plaintiff's case rests upon the ground that he was entitled to

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a *salary*. The \$5.00 per day not being a *salary*, his whole case falls. There is no foundation to it.

MAXWELL, J.

The plaintiff was elected engineer of the city of Lincoln in April, 1874. In May following an ordinance was passed by the proper authorities of the city, abolishing the *salary* of the city engineer, and providing that he should receive five dollars per day for all the labor performed by him for the city. This action is brought by him to recover a salary as such engineer during the period he held that position. The court below rendered judgment for the defendant, to reverse which the cause is brought into this court by petition in error.

On the trial of the cause in the court below the plaintiff, to maintain the issue on his part, offered in evidence a printed book of revised ordinances of the city of Lincoln, dated November 6, 1874. This was introduced under the objection of the defendant that it was not the best evidence. The record recites "said book being the revised ordinances of the city of Lincoln, Nebraska, approved November 6, 1874." Article III of said book, provides as follows:

SALARIES OF OFFICERS.

SECTION 1. That the city officers of the city of Lincoln be paid respectively the following sums annually in city warrants at par for their services as such officers, to wit:

Mayor, three hundred and sixty dollars, payable quarter yearly.

Councilmen, each, two hundred and twenty-five dollars, payable quarter yearly.

Policemen, each, seven hundred and fifty dollars, payable monthly.

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Chief engineer of the fire department, three hundred dollars, payable monthly.

Engineer of the steam fire engine, seven hundred and fifty dollars, payable monthly.

Street commissioner and fire warden, seven hundred and fifty dollars, payable monthly.

City engineer, five dollars per day, payable monthly.

City clerk, one thousand dollars for all services, payable monthly.

Marshal, one thousand dollars for all services, payable monthly.

City treasurer, four per cent. on all collections.

There is nothing in the record to show that this book containing the revised ordinances was not the original record. Such being the case section one, of Article III of the revised ordinances, approved November 6, 1874, superseded the ordinance abolishing the salary of the city engineer, approved in May, 1874. This evidence being before the court, and no attempt being made to impeach it in any manner, the court could not disregard it. If the evidence was improper, it should have been excluded; if properly admitted it must be considered, and given due weight. The ordinance in question provides for the payment of a salary to the city engineer, and the fact that he presented certain accounts to the city council for services does not estop him from recovering the amount due. As the finding is clearly contrary to the evidence, the judgment is set aside and a new trial awarded.

REMANDED FOR TRIAL DE NOVO.

JOHN S. GREGORY AND WIFE, PLAINTIFFS IN ERROR, v.
JOSEPH W. HARTLEY, DEFENDANT IN ERROR.

1. **Action: CONTRACT AND PROMISES.** Where a condition or promise is only to indemnify and save harmless a party from some consequence, no action can be maintained until actual damages have been sustained by the plaintiff.
2. ———: **RIGHTS OF A VENDOR OF REAL ESTATE.** If a purchaser of real estate agrees to assume and pay certain outstanding indebtedness against the vendor and to save him harmless from the same, if he fails to do so it is not necessary, in order to give the vendor a right of action against him, that he should have first paid the debt himself.
3. **Foreclosing Mortgage: PLEADING.** In an action to foreclose a mortgage the petition must state whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt or any part thereof has been collected and paid.
4. ———: ———. If an action has been commenced on the note the petition must show either that the action has not proceeded to judgment, or if a judgment has been obtained, then that an execution against the property of the defendant (other than the mortgaged premises) has been returned unsatisfied, in whole or in part, and that the plaintiff's remedy is exhausted.
5. **Decree: INTEREST.** A decree can draw interest at the rate of twelve per cent. only in cases where the debt upon which it was predicated was drawing interest at that rate.

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

Harwood & Ames, for plaintiffs in error.

Pratt, the assignor of Hartley, defendant in error, could have had no interest in the payment of the Cullen mortgage, or been damnified by its non-payment, unless he had *assumed* and *agreed* to pay it himself when the premises were conveyed to him, and had actually done

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so. This would have placed Pratt in relation of surety to the Gregorys, who would have stood as principals. No such facts were alleged or proved. *Lathrop v. Atwood*, 21 Conn., 117. *Wilson v. Stilwell*, 9 Ohio State, 467.

The allegations in the petition of the defendants in error (which were sustained by the judgment of the court) were that the premises did not exceed in value the Cullen mortgage; hence there was no consideration for the covenant on which this action was based, except on the hypothesis that Pratt was bound to Cullen on a similar covenant.

The defendant in error fails to produce these notes or to explain their absence, although in the first petition he alleges that he has said notes, and offers to bring them into court and have them cancelled. These circumstances show that the plaintiffs in error could not have intended to buy more than the equity of redemption. The property being worth only \$1,100 or \$1,200, as the defendant in error alleges, and as the court finds, there could have been no consideration for the covenant sued on. The property being worth but \$1,100, how could the plaintiffs in error have given or intended to have given these notes of \$1,100, and agreed besides to take up \$1,400 of other indebtedness except in the sense to save Pratt harmless? The district court gave judgment against plaintiffs in error for \$1,228, a greater sum than the amount of the notes signed by them, and assessed interest thereon at 12 percent., when the notes only bore 10 per cent. interest. If the defendant in error was damaged by breach of the covenant in the mortgage, how could he have been damaged to a greater sum than the debt and the legal interest therein contracted? Suppose the equity of redemption had sold for \$1,000, and a mortgage had been given back on the premises to secure that sum in which it is covenanted to take up a ten thousand dollar mortgage, can it be pretended that the mort-

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gagee who *had* but a thousand dollars interest in the premises is damaged *ten thousand dollars* by the breach of the covenant? It is not pretended that Pratt or his assignee is liable upon or has been damaged by the Cullen mortgage. Upon such a covenant actual damages only can be recovered. *Redfield v. Haight*, 27 Conn., 31. *Thomas v. Allen*, 1 Hill, 145. Sedgwick Damages, 305. *Pool v. Jackson*, 17 Johns., 239. *Aberdeen v. Blackmar*, 6 Hill, 324.

Lamb, Billingsley & Lambertson, for defendant in error.

There is a clear distinction between a covenant of indemnity or to hold harmless, and a covenant to do a certain thing. Rawle on Covenants, 153, and cases cited. *Post v. Jackson*, 17 Johns., 239. *Ex parte Negus*, 7 Wend., 499. *Lathrop v. Atwood*, 21 Conn., 116.

Stout v. Folger, 34 Iowa, 61, is a case where a purchaser of property agrees to assume and save the vendor harmless from certain outstanding indebtedness against him. The court held it was not necessary, in order to give plaintiff a right of action against the purchaser on his contract, that he should himself have first paid the debt which the purchaser assumed and agreed to pay. And that plaintiff was entitled to recover the full amount of the debt, the payment of which defendant assumed. *Churchill v. Hunt*, 3 Den., 321. *Barry v. Mandell*, 10 Johns., 563. *Manahan v. Smith*, 19 Ohio State, 384.

All the principal authorities we have cited fully and clearly hold that the measure of damages on such a covenant would be the amount that was agreed to be paid by the obligor and was not. If language has any meaning, if covenant has any force, if parties are bound by their agreements, then Hartley could recover on the covenant. Plaintiffs in error urge that it is a covenant of indemnity

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only, to save the mortgagee harmless. But the mortgage has both the covenants *to save harmless, and to pay the deed of trust when due*, or as Rawle puts it—a covenant to do a certain thing at a certain time. By the pleadings it is admitted that the property covered by the deed of trust and mortgage is not more than sufficient to satisfy the deed of trust, leaving no security on the property for the mortgage. So Hartley, to save himself, had either to sue on the notes which the Gregorys had agreed to indorse (and did not), or sue on the covenant mentioned in the mortgage.

MAXWELL, J.

On the first day of January, 1874, the plaintiffs in error purchased of one Silas Pratt lot ten, in block thirty-six, in the city of Lincoln, the deed being made to E. Mary Gregory, the wife of John S. Gregory. The consideration stated in the deed was \$1,200, to secure the payment of which the plaintiffs in error assigned to said Pratt a note for the sum of \$1,100, secured by a mortgage on real estate, said note being due and payable November 20, 1876, and drawing interest at the rate of seven per cent., payable semi-annually. To secure the payment of this note and mortgage the plaintiffs executed a mortgage to Pratt on the premises in question. The mortgage contained this among other provisions: "If all of said conditions, agreements, and covenants are fully kept and fulfilled then this mortgage shall be void, but any failure of any of the terms and conditions for thirty days then at the option of said party of the second part this mortgage may be declared due for the sum of \$1,100, with ten per cent. interest thereon from this date, and proceed at once to foreclose the same in court." The mortgage also contained this covenant: "It is hereby stipulated and agreed that said

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parties of the first part shall pay all liens and incumbrances on said premises when the same fall due, and hold said party of the second part harmless from the same, particular reference being made to a deed of trust or mortgage, now a lien on said premises, executed by Catherine E. Cullen to the Mechanics' loan and saving association, to secure the sum of fourteen hundred dollars." The notes and mortgages were assigned to the defendant Hartley. A decree was rendered in the court below for the defendant in error, the decree to draw interest at the rate of twelve per cent. The case is brought into this court by petition in error.

In *Steele v. Russell*, 5 Neb., 211, a case somewhat similar to this, the mortgage contained a provision that: "If the said William A. Albright *shall pay or cause to be paid* the said sum of money, with the interest thereon, according to the tenor and effect of said promissory note, then these presents shall be void." The condition of the mortgage in this case is as follows: "This grant is intended as a mortgage to secure the payment of a note secured by mortgage of eleven hundred dollars, executed by Hector Gawley and Andrew Stevenson and secured by said mortgage on property at Newport, Monroe county, Michigan, and due and payable November 20, 1876. said \$1,100 note drawing seven per cent. interest, payable semi-annually. Said parties of the first part agree to make up the rate of interest on said note to ten per cent. per annum, payable to said Pratt semi-annually. This is also given to secure the payment of one hundred dollars, to be paid February 1, 1874, with interest at ten per cent. Said \$1,100 is payable to Mary E. Gregory, or order, which said note for \$1,100 said parties of the first part shall indorse over to said Pratt on or before January 13, 1874. If all of said conditions, agreements, and covenants are fully kept and fulfilled then this mortgage shall be void. But any failure of any of the terms and con-

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ditions herein for thirty days, then at the option of the said party of the second part this mortgage may be declared due for the sum of \$1,100 with ten per cent. interest thereon from this date, and proceed at once to foreclose the same in court," etc.

The mortgage introduced in evidence was evidently drawn by some one not familiar with the business of conveyancing, and many of its terms are vague and indefinite, but this much is clear, that it was given to secure the payment of the Gawley and Stevenson note alone; and this is the construction put upon the contract by the parties themselves, as the plaintiffs in the court below prayed for a decree for \$1,100, with interest thereon.

The rule is well settled that if a condition or promise be only to indemnify and save harmless a party from some consequence, no action can be maintained until actual damage has been sustained by the plaintiff. But if the promise is to perform some act for the plaintiff's benefit, the neglect to perform the act is a breach of the contract, and will give an immediate right of action. *Stout v. Folger*, 34 Iowa, 74. *Lathrop v. Atwood*, 21 Conn., 117. *In re Negus*, 7 Wend., 499. *Thomas v. Allen*, 1 Hill, 145. *Churchill v. Hunt*, 3 Denio, 321. *Wilson v. Stilwell*, 9 O. S., 467.

The rule of law will not be questioned, that when a purchaser of real estate agrees to assume and pay certain outstanding indebtedness against the vendor, and save him harmless from the same, if he fail to do so, it is not necessary, in order to give the vendor a right of action against him, that he should himself have first paid the debt which the purchaser assumed and agreed to pay.

The contract in this case, although it contains a promise to pay off a certain incumbrance, is in the nature of a contract of indemnity that the security held by

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Pratt should not be impaired or destroyed by the plaintiffs permitting said lien to remain on the property.

It nowhere appears, nor is claimed, that Pratt or Hartley were in any manner *liable* on the Cullen mortgage, or that they would be injured in the least degree from the failure of the plaintiffs to pay the same, except so far as it impaired their lien. There appears to have been an absolute assignment of the Gawley and Stevenson note to Pratt. This is the note to secure the payment of which the plaintiffs gave the mortgage in question. It does not appear in either the pleadings or proof what has been done with this note. The plaintiffs in the court below introduced the mortgage in evidence on the trial, and evidence of the assignment to Hartley, and rested.

The authorities are uniform that the note is the debt, the mortgage a mere incident that passes with the debt. Foreclosure in this state is regulated by statute. At common law, the mortgagee might exercise all his rights at the same time, and pursue his remedy in equity, on the mortgage, and at law upon the evidence of debt, or covenant. 4 Kent's Com., 183, and cases cited. But the statute has changed this rule in this state. Section 850 of the code of civil procedure provides that upon filing a petition for the foreclosure or satisfaction of a mortgage, the complaint *shall state therein whether any proceedings have been had at law* for the recovery of the debt secured thereby, or any part thereof, and whether such debt or any part thereof has been collected and paid. This is an essential allegation in all actions for the foreclosure of mortgages. If an action has been commenced on the note, the petition must show either that the action has not proceeded to judgment, or if a judgment has been obtained, then that an execution against the property of the defendant (other than the mortgaged premises) has been returned unsatisfied in

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whole or in part, and the plaintiff's remedy is exhausted. 2 Van Santvoords, Eq., 84.

The petition is clearly defective in this regard, and it may be questioned if it is not faulty in other particulars. The contract in this case was one made by the wife in relation to her own property, and she is bound by her contracts. *Webb v. Hoselton*, 4 Neb., 308. *Davis v. First National Bank*, 5 Neb., 242.

The court has authority under the statute to render a decree drawing twelve per cent. interest only in cases where the debt upon which the decree is predicated was drawing that rate of interest. For the errors herein referred to the judgment of the district court is reversed and a new trial awarded.

REVERSED AND REMANDED.

SAMUEL STALNAKER, PLAINTIFF IN ERROR, v. JOHN MORRISON, DEFENDANT IN ERROR.

1. **Public lands of the United States.** The even numbered sections along the line of the Union Pacific R. R. and its branches may be settled upon and entered under the provisions of the pre-emption and homestead laws, but are not subject to private entry.
2. ———. **U. P. R. R.: B. & M. R. R.** The B. & M. R. R. extension is one of the branches of the Union Pacific R. R. and the lands within the limits of the grant to that corporation are not subject to private entry.
3. ———: **PRE-EMPTION.** It is only in cases where lands are subject to private entry *at the date of settlement* that a pre-emptor must make proof and payment within a year from the date of settlement.
4. ———: ———. When lands have been offered at public sale, and thereby become subject to private entry, if they are afterwards included within the boundaries of a grant to a railroad company,

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and are thereby withdrawn from private entry, and subject to settlement and entry under the pre-emption and homestead laws exclusively, they are to be treated in all respects like unoffered lands.

5. ———: ———. A party pre-empting any portion of such lands has thirty months after the date of filing his declaratory statement, in which to make final proof and pay for the same.
6. ———: ———. The object of the guards thrown around the privilege of pre-emption by the law, is to secure on the public lands actual permanent settlers.
7. **Equity jurisdiction.** The jurisdiction of a court of equity to determine the rights of parties in case of conflicting claims to a tract of land is undoubted.
8. **Ejectment.** DEFENSES. Under the code, an equitable defense may be set up in an action of ejectment.

ERROR from the district court of Lancaster county, to which the cause was taken by change of venue from Cass county. Tried below before POUND, J. The facts are stated in the opinion.

Cobb, Marquett & Moore, for plaintiff in error, cited Sec. 15, Statutes at Large, 39, Chap. XX. Rev. Stat., U. S., 418. Sec's. 2,264—2,267. *Johnson v. Towsley*, 13 Wall., 72. *Shepley v. Cowan*, 91 U. S. 330.

Lamb, Billingsley & Lambertson, for defendant in error, cited *Lester's Land Laws* vol. 1, pages 34, 48 234, 278. Act July 7, 1870, U. S. Statutes at Large, 188.

MAXWELL, J.

On the eighteenth day of January, 1871, the plaintiff in error settled upon a tract of land in Cass county, belonging to the United States, and on the sixteenth day of February following filed with the register of the proper land office his declaratory statement of his intention to pre-empt the same. The tract of land in question

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was within the grant of land from the United States to the B. & M. R. R. Co., and had been offered at public sale prior to the passage of the act making the grant aforesaid, but at the date of said settlement and of filing the declaratory statement it was not subject to private entry. The plaintiff, from the time of settlement until now, has resided upon and cultivated said land, and has made valuable improvements thereon. It appears from the record that the plaintiff did not make the proof required as to qualification, settlement, and cultivation, until about the first day of June, 1872, at which time he appeared at the proper land office with his witnesses and offered to prove all the facts necessary to entitle him to enter said land, and offered to pay the sum of money required to enter the same, but the register and receiver refused to permit him to enter said land, holding that by reason of his failure to prove up within one year from the date of settlement he had forfeited the same. The defendant in error now holds the legal title to the land, and in an action of ejectment recovered judgment against the plaintiff in error for the possession thereof, to reverse which the plaintiff brings the case into this court by petition in error.

Section 2264 of the Revised Statutes of the United States provides that: "When any person settles or improves a tract of land, *subject at the time of settlement to private entry*, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement describing the land settled upon, and declaring his intention to claim the same under the pre-emption laws; and he shall moreover within twelve months after the date of such settlement make the proof, affidavit, and payment herein before required."

Sections 2265 and 2266 require the claimant to file

his application within three months from the date of settlement.

Section 2267 provides that: "All claimants of pre-emption rights under the two preceding sections shall, when no shorter period is prescribed by law, make the proper proof and payment for the land claimed within thirty months after the date prescribed therein respectively for filing their declaratory notices has expired."

On the sixth day of March, 1868, Congress passed an act providing that "nothing in the act approved July 1, 1862, entitled, 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure the government the use of the same for postal, military, and other purposes,' and the acts amendatory thereof, shall be held to authorize the withdrawal or exclusion from settlement and entry, *under the provisions of the pre-emption or homestead laws*, the even-numbered sections along the routes of the several roads therein mentioned which have been or may be hereafter located; *provided*, That such sections shall be rated at two dollars and fifty cents per acre, *and subject only to entry under those laws*; and the secretary of the interior be, and he is hereby authorized and directed to restore to homestead settlement, pre-emption, or entry, according to existing laws, all the even-numbered sections of land belonging to the government, and now withdrawn from market, on both sides of the Pacific Railroad and branches, wherever said road and branches have been definitely located."

The B. & M. R. R. extension is one of the branches referred to in the above act, and the lands within the limits of the grant belonging to the United States are not subject to private entry, and were not at the time the plaintiff settled upon the land in dispute. It is only in cases where lands are subject to private entry *at the date of settlement* that payment must be made within a year.

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This provision was incorporated into the pre-emption law of September 4, 1841, and although section ten of that act provided that no sections of land reserved to the United States alternate to any other sections granted to any of the states for the construction of any canal, railroad, or other public improvement, should be liable to entry under the provisions of that act, yet afterwards, when this restriction was removed, and lands within the grant were thrown open to settlement under the pre-emption laws, but were not subject to private entry, they are to be treated in the same manner as unoffered lands, and a party pre-empting any portion of the same has thirty months after the date of filing his declaratory statement in which to make final proof and pay for the land.

In *Towsley v. Johnson*, 1 Neb., 95, this court say: "The object of the guards thrown around the privilege of pre-emption by the law is to secure on the public lands actual, permanent settlers." The plaintiff in this case is shown to be an actual, permanent settler, who went upon the land in question for the purpose of cultivating the same and making his home thereon. Can the same be said of the defendant? Has there ever been an actual *bona fide* attempt even, by him, to make an actual settlement on the lands in question? If so, the record fails to disclose it.

The claim of danger, in a peaceable law abiding community, evidently afforded a convenient pretext for not residing on the land, but is not entitled to much consideration. The equities of the case are clearly with the plaintiff. The jurisdiction of a court of equity is undoubted to determine the rights of the parties. *Johnson v. Towsley*, 13 Wall, 73. 1 Neb., 95. And under the code, an equitable defense may be set up in an action of ejectment.

The judgment of the district court is reversed,

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and judgment is entered in favor of the plaintiff—the plaintiff to pay to the clerk of this court for the defendant, within ninety days, the amount paid by him for entering said land; with interest to the date of payment, and that thereupon the defendant shall convey the legal title to the plaintiff.

JUDGMENT ACCORDINGLY.

J. H. McMURTRY, PLAINTIFF IN ERROR, v. MARY W.
BROWN, AND OTHERS, DEFENDANTS IN ERROR.

1. **Principal and Agent.** The character of a power under which an agent may execute a deed for another depends upon the presence or absence of the principal.
2. ———: **EXECUTION OF DEED BY AGENT.** If the deed is signed in his presence, by his direction, an oral request is all that is required. But when the deed is to be made in his absence the authority must be given by an instrument under the hand of the principal and duly acknowledged.
3. **Deed.** A deed at common law is defined to be a written instrument under seal, containing a contract or agreement, which has been delivered by the party to be bound and accepted by the obligee or covenantee.
4. ———: **POWER TO CONVEY.** A mere power to convey is not regarded in law as a contract, therefore, it is not necessary that the donee of a power should be capable of contracting.
5. **Married Woman's Act.** Under the statute of 1871, a husband may act as the agent of his wife, and she may authorize him by power of attorney to convey her lands, although they cannot convey to each other, being generally deemed but one person in law; yet this does not preclude the husband from acting as agent of his wife.
6. **Estoppel.** The receipt of purchase money with the knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience and binds the rights of the parties as effectually in a void as a voidable proceed-

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ing; and the same principle applies when a party retains the benefits derived from an agency and has ratified the acts of the agent. He is thereby precluded from denying the authority of the agent.

7. **Practice:** EXCEPTIONS TO REPORT OF REFEREE. Where no exceptions are filed to the report of a referee his finding of the facts will be conclusive.

ERROR from the district court of Gage county. Tried below before Weaver, J. The facts necessary to an understanding of the case are stated in the opinion.

Lamb, Billingsley & Lambertson and John H. Ames,
for plaintiff in error.

It is entirely unnecessary, in the view we take of the case, to discuss the matter as to whether the power of attorney in question in 1870 was void or not, and if it were section forty-seven of our statutes, title Real Estate, gives to a married woman power to manage, control, lease, devise, or convey her lands as if she were single. This clearly implies the power to appoint an agent or attorney, and to convey by power of attorney when convenient. Wharton says: "Wherever she has, either by statute or by settlement, business powers, she may execute such powers through an agent." Wharton on Agency, Sec. 11 and note.

The exchange in this case took place, however, in 1873, since the passage of our married woman's act, and in settling the rights of the parties that act must be kept in view, and we suggest that the fact of Merrill's agency, at the time of the exchange, to make this sale and exchange may be proved by any competent testimony, although the authority under which he conveyed these premises was this power of attorney. *Columbia D. B. Co. v. Geisse*, 38 N. J. Law, 39. And by reference to the seventeenth finding of fact it clearly appears H.

W. Merrill's agency was general and his authority unrestricted, and that this was the only power of attorney that was ever executed to him. So that keeping in view the situation of the parties and the surrounding circumstances, this power of attorney was sufficient to authorize H. W. Merrill to execute the conveyances in question. *Sullivan v. Davis*, 4 Cal., 293. *De Rutte v. Muldrow*, 16 Id., 505. *Maynard v. Merce*, 10 Nev., 33. *Hartford Ins. Co. v. Wilcox*, 57 Ill., 184. *Fay v. Sears*, 111 Mass., 57.

Whether H. W. Merrill, at the time of this exchange, had any authority or not, and whether the power of attorney, and every act of H. W. Merrill, done in the name of Louise Merrill, was at the time void or not, can now make no difference. She has ratified and adopted all that he did, so that it cannot now be undone. 1. The seventeenth finding of fact finds that he was her general agent. 2. The face of the papers show that he acted in that capacity. 3. The sixth finding of fact finds "that the execution of each of said notes, deeds, and trust deeds, and the surrendering and cancelling of said old notes and chattel mortgage, were each and all parts of one and the same transaction, and in pursuance of the said agreement as an entirety."

The plaintiff, Brown, in her petition, alleges that Louise M. Merrill, by her attorney in fact, duly authorized thereto, executed the notes and mortgages sued on, and she, in her answer, admits that she executed them "in manner and form," as set forth in the petition, etc., and that there was due, etc. She is estopped by the record. Sec. 31, Code Civil Proc. *Guthrie v. Howard*, 32 Iowa, 54. *Gambetta v. Brock*, 41 Cal., 78. *Van Meter v. Wolf*, 27 Iowa, 34. The decree itself in the case is based upon her ratification or adoption of a part only of this entire transaction; it attempts to carry out a part only, and to absolve the principal from ratifying

inseparable portions of the same matter. This cannot be done.

M. H. Sessions, for defendants in error.

It may be contended that our statute authorizing married women to sell, dispose of, devise, and convey real estate, as though single, would give them the right to dispose of the same by power of attorney. Grant this for the sake of argument; would that necessarily give her the right and power to appoint her husband her agent and attorney, to sell and convey her lands? Notwithstanding the statute has given her this power without limit, nevertheless she cannot convey the same direct to her husband, and if she should, such conveyance would be a nullity. *White v. Wager*, 25 N. Y., 328. *Aultman v. Obermeyer*, ante p. 260.

One of the reasons assigned by Judge Denio, why the wife could not convey direct to the husband, was expressed in the following terse and explicit language: "We should not expect to find in a law, passed professedly to shield the property of married women from the control of her husband, a provision making it more easy for the latter to acquire such control. Beyond all doubt the greatest point to which the separate estate of the wife is exposed is her disposition to acquiesce in placing the *title to it in the hands of her husband*." Now if this is a good and cogent reason why the wife cannot convey direct to the husband, it is equally good to prevent her from having the power to appoint him as her agent and attorney to sell and convey the same, for in the obtaining of the letters of attorney from her, he has obtained the absolute power and control of the sale and disposition of the same, the very thing that the policy of the law inhibits. Section forty-two, Gen. Stat., 880, gives to a married woman all the power and author-

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ity to dispose or deed her real property away that she gets by the subsequent acts of the legislature. Section forty-six defines what the term deed shall embrace or include. Section forty-seven exempts from what would be included in such definition of "deed," a letter of attorney to convey lands—so that the statute has given the wife no authority to thus dispose of her lands by attorney, but on the contrary, taking all the sections together, inhibits her doing it. *McFarland v. Goodman*, 13 A. L. R., 700. *Holiday v. Daily*, 19 Wall., 609.

The power of attorney gave H. W. Merrill no power to sell and convey lands, or to encumber the same by mortgage, or to execute notes for and in behalf of Louise M. Merrill. *Gee v. Bolton*, 17 Wis., 604. *Lord v. Sherman*, 2 Cal., 498. *Greenwood v. Spring*, 54 Barb., 375. *Clark v. Graham*, 6 Wheat., 577.

MAXWELL, J.

On the twenty-eighth day of July, 1870, Louise M. Merrill, a married woman, residing with her husband in Lancaster county, and owning a considerable tract of land therein, executed and delivered to her husband a power of attorney authorizing him in her place, name, and stead, to execute and acknowledge for her and in her name, all and every instrument in writing, deed, or mortgage, giving and granting unto Herman W. Merrill, her said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as she might or could do if personally present, etc. There was an incumbrance on the lands owned by her in Lancaster county. In December, 1873, Merrill, under the above power of attorney, exchanged the lands owned by his wife in Lancaster county for lands owned by A. S.

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Edgerly in Gage and Colfax counties, and executed a mortgage in his wife's name on the Gage county lands to F. W. Hohmann to secure the payment of the sum of about \$800.00. He also executed a mortgage on said lands in his wife's name to A. S. Edgerly to secure the payment of the sum of \$572.00; likewise a mortgage on said lands in his wife's name to J. H. McMurtry, to secure the payment of the sum of \$700.00. Hohmann assigned his mortgage to Mary W. Brown who brought an action to foreclose the same, and made Merrill and wife, A. S. Edgerly, and J. H. McMurtry parties defendant. Louise M. Merrill answered the petition, stating among other things "that she admits that on the twenty-sixth day of December, 1873, she executed and delivered, together with her husband, the said notes and mortgage to the said F. W. Hohmann, in manner and form as set forth in said plaintiff's petition," etc. She denied the authority of her husband to execute the mortgages to Edgerly and McMurtry. The case was referred to S. B. Pound, who made a report, to the finding of facts of which no exceptions were filed by either party. The report was confirmed by the court and a decree entered in conformity therewith. While the action was pending in the district court, Louise M. Merrill and her husband executed and delivered a deed to A. S. Edgerly for the lands in Lancaster county given in exchange for the Gage county lands, the consideration therefor being the sum of \$50.00 in money and the assignment by Edgerly to M. H. Sessions of the mortgage on the Gage county lands for the sum of \$472.00.

The decree in the court below was in favor of Mary W. Brown for the amount claimed in the petition and against McMurtry, the court holding that the mortgage given to him, executed by Merrill in his wife's name, was void. McMurtry brings the case into this court by petition in error.

The referee finds that on the twenty-fourth day of December, 1873, Edgerly held a note, secured by chattel mortgage, against Louise M. and Herman W. Merrill for a considerable amount, and that Mrs. Merrill held in her own right a farm or tract of land in Lancaster county on which was a mortgage lien; that Edgerly owned the tract of land in Gage county described in the petition, and that on that day Edgerly, and Herman W. Merrill, for himself and wife, entered into an agreement whereby they were to convey to Edgerly the tract of land in Lancaster county, subject to the mortgage lien thereon, and Edgerly was to convey to Louise M. Merrill the tract of land in Gage county described in the petition, and also an interest in certain lands in Colfax county; and the Merrills were to advance and pay Edgerly the sum of \$234 on the note and chattel mortgage, which were to be surrendered and cancelled, and the balance due, being the sum of \$572, was to be secured by a trust deed, to be executed by the Merrills on the Gage county lands. The referee also finds that McMurtry assisted Merrill in effecting and bringing about this agreement, concerning which there had been considerable previous negotiations, and that he had agreed to advance and pay Edgerly the said sum of \$234, on account of the Merrills, in order to consummate the agreement. That on that day and in pursuance of the agreement Edgerly conveyed to Mrs. Merrill the lands lying in Gage county and an interest in the Colfax county lands, and Herman W. Merrill, in his own name and in the name of his wife, conveyed to Edgerly the Lancaster county lands, subject to the lien of the mortgage. And that afterward, to-wit: on the twenty-seventh day of December, 1873, Herman W. Merrill, in his own and his wife's name, executed a note for the sum of \$472 to Edgerly, secured by a mortgage on the Gage county lands, and thereupon the old note and chattel

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mortgage were surrendered and cancelled; that at that time McMurtry advanced to the Merrills and paid to Edgerly for them the sum of \$234 for the purpose of consummating the agreement. The referee also finds *that the execution of each of said notes, deeds, and trust deed, and the surrendering and cancelling of the old note and chattel mortgage, were each and all parts of the same transaction, and in pursuance of said agreement as an entirety.* The referee also finds that the consideration of the note and mortgage to McMurtry was the said sum of \$234 and \$16 in money and three promissory notes amounting in the aggregate to \$200, all of which was paid and delivered to Herman W. Merrill at the time of the execution of the mortgage to McMurtry, and the further sum of \$250 being commissions charged by McMurtry for his services in effecting the transactions between Edgerly and the Merrills. The referee also finds that Herman W. Merrill has acted as the general agent of his wife for many years prior to the giving of said power of attorney, and down to and since giving the notes, trust deed, and mortgages in controversy, and has had authority to act at his pleasure in reference to her business. That Herman W. Merrill received the avails of the note and mortgage to McMurtry as the agent of his wife in the manner heretofore set forth, and *used the same for her benefit.*

The character of a power under which an agent may execute a deed for another depends upon the presence or absence of the principal. If it is signed in his presence, by his direction, an oral request to do the act is all that is required. But when the deed is to be made in his absence the authority must be given by an instrument under the hand of the principal and duly acknowledged. The statute of 1871 removed the disability of the wife, so far as her separate property is concerned, and she is now capable of acting in respect thereto, not only for

herself, but by an agent. This court has already held in the case of the *Aultman Taylor Manf. Co. v. Obermeyer*, ante p. 260, that the statute does not enable the husband to convey land directly to the wife, but it does not follow that the husband is thereby precluded from acting as the agent for his wife. There is a difference between a mere power to convey and a conveyance itself. *Weisbrod v. The C. & W. R. W. Co.*, 18 Wis., 35. A conveyance is to be regarded as a contract. A deed at common law is defined to be: "A written instrument under seal, containing a contract or agreement which has been delivered by the party to be bound, and accepted by the obligee or covenantee." Coke Litt., 171. 2 Blackstone Com., 295. Shep. Touchstone, 56. 1 Bouvier Dict., 444. It must be between competent parties, and must have been made without restraint. But a mere power to convey is not regarded in law as a contract, therefore it is not necessary for a person to be capable of contracting in order to qualify him to act for others. And it has been held at common law that a wife may be an attorney of another to make livery to her husband upon a feoffment, and a husband may make such livery to his wife, although they are generally deemed but one person in law. Story on Agency, 8. *Emerson v. Blonden*, 1 Esp., 142. *Prestwick v. Marshall*, 7 Bing., 565. *Palethorp v. Furnish*, 2 Esp., 511. *Hopkins v. Mollineux*, 4 Wend., 465. *Weisbrod v. C. & W. R. W. Co.*, 18 Wis., 35. The objection that by such an appointment the husband is entitled to the entire control of the wife's property is not entitled to any weight. The statute authorizes her to bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner, and to the same extent, and with the like effect as a married man may in relation to his real and personal property. By statute this property is not subject to disposal by her husband,

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nor liable for his debts, and she is left free to select whom she pleases to act as her agent in managing or disposing of the same. But there is nothing to prevent her from appointing her husband as her agent if she see fit to do so; and if she do so, she will be bound by his acts within the scope of his authority.

But in the view we take of the law, Mrs. Merrill is bound by the acts of her husband in this transaction so far at least as her estate has been benefitted, no matter whether her husband was legally authorized to execute the note and mortgage in question or not. The finding of the referee that the execution of said notes, deeds, and trust deed, and the surrendering and cancelling of said notes and chattel mortgage were each and all parts of one and the same transaction and in pursuance of the agreement as an entirety, is conclusive on that point.

It is clearly shown that she has ratified the exchange of lands, that she has ratified the note and mortgage made to Hohmann, and she has ratified the note and mortgage made to Edgerly, and required their assignment to Sessions. The referee finds that \$450 of this claim of the plaintiff was used for the benefit of the estate. This sum she is in justice bound to pay. She accepted the release of the chattel mortgage which was effected by the money loaned by the plaintiff, and must have known how the money was obtained.

In *Wamsley v. Crook*, 3 Neb., 352, this court say: "The receipt of the purchase money with the knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience, and binds the rights of the parties as effectually in a *void* as in a *voidable* sale." The same principle applies in this case. The money to release the chattel mortgage was obtained by the execution of the note and mortgage in question. She has ratified other portions of the transaction, why not this? She

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proposes to retain the fruits of the agency, and deny the authority of the agent. This she cannot do. To the extent therefore of \$450 and interest thereon, the plaintiff's claim is a lien upon her estate. As it does not appear that the plaintiff rendered the services in question, for which he claims \$250 as commissions, under her authority or at her request, that portion of his demand must be disallowed. Objections are made to certain findings of the referee, but as no exceptions were filed to his report his finding of facts is conclusive.

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

JUDGMENT ACCORDINGLY.

J. W. HOSFORD, PLAINTIFF IN ERROR, V. STONE AND
EASLEY, DEFENDANTS IN ERROR.

1. **Practice: JUDGMENT ON REPORT OF REFEREE.** Where an action *at law* has been referred to a referee, who has made his report, on which judgment has been rendered, such judgment can only be reviewed *on error*.
2. ———: **FAILURE TO TAKE EXCEPTIONS.** When no exceptions are taken in the court below, in an action at law, where a trial on the merits has been had, the case cannot be reviewed in the supreme court.
3. ———: **MOTION FOR NEW TRIAL.** In an action at law, it is not sufficient merely to take exceptions to the ruling of the court confirming the report of the referee, but the alleged errors must be brought before the court by a motion for a new trial.
4. ———: **REFERRING LEGAL ACTION.** A purely legal action cannot be referred except by consent of parties; but the court will presume that consent was given when the record fails to show that objections were made to a reference.
5. **Promissory Note** A promissory note, drawn for a sum certain and made payable to any person "or order," "or assigns,"

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"or bearer," is negotiable; but if it is payable to a certain person without words making it payable "to order," "or assigns," "or bearer," it is not a negotiable instrument.

6. ———: ———. Any words in a promissory note from which it appears that the person making it intended it to be negotiable will give it a transferable quality; but the words "negotiable and payable without defalcation or discount," do not of themselves make an instrument, otherwise non-negotiable, negotiable.

THIS was an action upon a promissory note, purchased by Stone and Easley, from the payee, Tercelte Kencler. Judgment below was given by WEAVER, J., against Hosford, the maker of the note, to reverse which he brings the case into this court by petition in error.

Clarence Gillespie, for plaintiff in error.

There are but three words of negotiability in promissory notes, etc., known to our law. They are "Order," "Bearer," and "Assigns;" without these words they are not negotiable commercial paper. Gen. Stat. of Neb., Sec. 1, page 426. 3 Kent, 77-78. Story on Bills, 75. Story on Promissory Notes, 3. 1 American Ld'g. Cases, 317. This note therefore, was opened up to all the equities that the plaintiff in error could bring against it, and these defendants by purchase of said note, could not claim to be good faith holders of the same, and discharged of the equities existing against said note. *Hedges v. Sealey*, 9 Barbour, 214. *Ayer v. Hutchins*, 4 Mass., 370. *Tousey v. Shook*, 3 Blackf., 267. *Kernodle v. Hunt*, 4 Blackf., 57. Chitty on Bills, 73.

T. C. Hoyt and *E. W. Thomas*, for defendant in error.

Defendants in error purchased this note June 19, 1872, paying \$350 cash, and notified plaintiff of their purchase on same day, and this note, if not negotiable, would not be opened up to any equities that plaintiff in

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error could bring against it after that date. 2 Parsons on Bills and Notes, 46. *Thompson v. Emery*, 7 Foster, 269. *Goodrich v. Stanley*, 23 Conn., 79. *King v. Fowler*, 16 Mass., 397.

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The defendants in error brought an action in the district court of Richardson county against the plaintiff in error upon a promissory note, of which the following is a copy :

"\$373.00.

"RULO, NEB., May 31, 1872.

"Thirty days after date I promise to pay Tercelte Kencler three hundred and seventy-three dollars, for value received, negotiable and payable without defalcation or discount.

"J. W. HOSFORD."

Hosford answered the petition, setting up various defenses, to which the defendants in error filed a reply. The case was then referred to J. F. Gardiner to take the proofs and report his findings to the court. The referee took the testimony in the case without objection and made his report thereon to the court. The referee found that the defendants in error purchased the note in question from the payee on the nineteenth day of June, 1872, and paid \$350.00 for the same, and that said note was due on the thirtieth day of June, 1872, and that Stone and Easley had no notice of any equities connected with the transaction except what appears on the face of the note. The court rendered judgment for the defendants in error for the full amount claimed, to reverse which Hosford brings the cause into this court by petition in error.

This is an action at law, and in order to authorize a review of any question determined by the

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court below, a motion for a new trial must have been made in that court, in which should be presented all objections to the ruling of the court. *The Midland Pacific v. McCartney*, 1 Neb., 404. *Mills v. Miller*, 2 Neb., 317. *Cropsey v. Wiggenhorn*, 3 Neb., 117. *Wells, Fargo & Co., v. Preston*, 3 Neb., 440. *Horbach v. Miller*, 4 Neb., 43. *Gibson v. Arnold*, 5 Neb., 186.

When an action at law has been referred to a referee who has made his report, and judgment has been rendered thereon, such judgment can only be reviewed on error. In *Robertson v. Hall*, 2 Neb., 17, this court say: "No exceptions were taken in the court below. No such proceeding as an appeal for trial *de novo* in an action at law from the district to the supreme court is known to our law." And it is not sufficient merely to take exceptions to the ruling of the court in confirming the report of the referee in an action of this kind, but the alleged errors must be brought before the court by a motion for a new trial. This would dispose of the case, but we have thought best to look into the record and examine the findings.

It is claimed that the note in question is not negotiable because the words "to the order of" were stricken out of the printed blank. The statute provides that: "All bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order or to any person or assigns, shall be negotiable by endorsement thereon," etc. It is also provided that those drawn, "payable to bearer, shall be transferable by delivery without endorsement thereon."

If a promissory note is payable to a certain person, without words making it payable "to order," "or assigns," "or bearer," it is not a negotiable instrument. In 1 Parsons on Notes and Bills, 15, it is said: "If A promises to pay B, no one but A and

B are parties to this contract. * * But if the note is payable to order it is a very different instrument. Then A promises not merely to pay B, but either B, or at B's election, such other person as B may order A to pay the note to; therefore, when B orders A to pay the note to C, it follows that C may claim payment as if the note had been originally payable to himself; or, in other words, C stands fully in the place of B. And if B orders A to pay the note to C, or his order, then C has the same power of substituting another that B originally had, and this substitute may have the same power, and thus indefinitely. No particular form of words is necessary to make a note negotiable; 'order,' 'assigns,' or 'bearer,' are convenient and expressive, but are not the only words which will communicate the quality of negotiability. Any words in a bill from whence it appears that the person making it intended it to be negotiable, will give it a transferable quality." *Raymond v. Middleton*, 29 Penn. St., 530. *Chitty on Bills*, 218. *United States v. White*, 2 Hill, 62. *Gibson v. Maist*, 1 H. Blacks, 569.

But the words "negotiable and payable without defalcation or discount," do not of themselves make an instrument, otherwise non-negotiable, negotiable.

It is objected that this being an action at law, therefore the court erred in referring it. It is well settled that a purely legal action cannot be referred except by consent of the parties. *Mills v. Miller*, 3 Neb., 94. *Lamaster v. Schofield*, 5 Neb., 148.

But consent will be presumed where the record fails, as in this case, to show that objections were made to a reference. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

Yorgensen v. Yorgensen.

NEILS YORGENSEN, PLAINTIFF IN ERROR, v. LARS
YORGENSEN, DEFENDANT IN ERROR.

1. **Trespass.** In order to maintain an action of trespass *quare clausum fregit* by one not holding the legal title to lands, he must show an *actual possession* in himself at the time the alleged trespass was committed.
2. ———: **POSSESSION.** It is not necessary that the party in possession should actually reside on the land; his possession may be obtained by cultivation, fencing, or otherwise improving the land.
3. ———: ———. When land is unimproved, and unoccupied, the person holding the legal title is deemed to be in possession thereof.

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

C. L. Lewis and Norval Brothers, for plaintiff in error, *inter alia*, contended that it was not necessary for plaintiff to have been in possession when the action was commenced, to entitle him to recover for the annual value of the use of the land. It was only necessary for the plaintiff to re-enter after the trespass was committed, to entitle him to recover. *Rowland v. Rowland*, 8 Ohio, 40, 41. It was not necessary for the jury to find that the defendant forcibly entered and ousted the plaintiff to entitle the plaintiff to recover. For an unlawful entry, even if no force had been used, the plaintiff was entitled to nominal damages. *Sedgwick on Damages*, 148. *Field on Damages*, 67. *Sanderlin v. Shaw*, 6 Jones' Law, 225. *Smiles v. Hastings*, 24 Barb., 44. *Mitchell v. Billingsley*, 17 Ala., 391. *Ellsworth v. Potter*, 41 Verm., 685. *Perkins v. Towle*, 43 New Hamp., 20.

McKillip & Page, for defendant in error, cited *Smith*

v. Gage, 41 Barb., 61. *Hagenbuck v. Reed*, 3 Neb., 22. 2 Blacks. Com., 210. *Holmes v. Seeley*, 19 Wend., 507. *Wohler v. Buffalo R. R. Co.*, 46 N. Y., 686. *Massie v. Stratford*, 17 Ohio State, 596.

MAXWELL, J.

On the eleventh day of October, 1875, the plaintiff commenced an action against the defendant in the probate court of Seward county to recover the sum of \$475 damages, for the forcible entry upon, and use and occupation of the south-west quarter of section twenty-one, town twelve north, of range two east of sixth principal meridian, in Seward county, from the first day of March 1875 to the time of bringing suit. The petition alleges that at the time of defendant's entry upon said lands and ever since, he (the plaintiff) has had the right to the possession of said premises, and that he was at that time and is now the owner thereof, and that the defendant is a settler thereon without title or the consent of the plaintiff. The defendant answered the petition of the plaintiff denying all the facts stated therein. The plaintiff recovered judgment against the defendant in the probate court for the sum of \$300 and costs. The cause was taken by petition in error to the district court, where the judgment was reversed and the case dismissed. To reverse the judgment dismissing the case, the plaintiff brings the case into this court by petition in error.

It appears from the testimony in the case that the plaintiff claims title to the lands in controversy as the assignee of a contract for the purchase thereof from the B. & M. R. R. company. It also appears that the defendant claims an interest in the lands under said contract, and that he has exclusive possession of the premises and had at the time of the alleged trespass. The only question that arises in the case is the right of the

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plaintiff to bring and maintain an action of trespass, without showing an actual possession in himself at the time the alleged trespass was committed.

In *Boggs v. Thompson*, 2 Ohio, 105, the court held that the plaintiff must show an actual possession in himself at the time the trespass complained of was committed. In *Miller v. Fulton*, 4 Ohio, 434, it was held that a tenant in actual possession might maintain an action for a wrong done by a stranger.

In *Rowland v. Rowland*, 8 Ohio, 41, the court say: "In order to maintain an action of trespass *quare clausum fragit*, it is well settled that the plaintiff must be in the actual or constructive possession of the premises upon which the trespass is committed at the time of trespass."

In *Wilson v. Chalfant*, 15 Ohio, 248, the court held that the plaintiff must have a right of possession in order to maintain the action.

It is not necessary that the party in possession should actually reside on the land; his possession may be obtained by cultivation, fencing or otherwise improving the same. Where land is unimproved and unoccupied the person holding the legal title is deemed to be in possession thereof. As it is apparent from the pleadings and proof in this case that the plaintiff was not in the actual possession of the lands in controversy at the time of the alleged trespass, he cannot maintain the action.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

WILLIAM HURLEY, PLAINTIFF IN ERROR, v. BENJAMIN ESTES, AND OTHERS, DEFENDANTS IN ERROR.

1. **Mortgage:** At common law the legal ownership of mortgaged real estate is vested in the mortgagee. In equity, however, a mortgage is a mere security for the debt, and is a mere chattel in terest.
2. ———: In this state, a mortgage of real estate is a mere pledge, or collateral security, creating a lien upon the mortgaged property, but conveying no title or vesting no estate, either before or after condition broken.
3. ———: **TRUST DEED.** A deed of trust is a mortgage, and only differs from a mortgage with a power of sale, in its being executed to a third person, instead of a creditor.
4. ———: When an instrument is given *as security* for the payment of money, or the performance of some collateral act, it is a mortgage whatever may be its form.
5. ———: **FORECLOSURE.** An action to foreclose a mortgage is a proceeding *in rem* so far as it is sought to subject the mortgaged property to the payment of the mortgage debt.
6. ———: **STATUTE OF LIMITATIONS:** Where the debt is barred by the statute of limitations, no action can be maintained on the mortgage.

ERROR from the district court of Burt county. The facts appear in the opinion.

Monk & Selleck and Carrigan & Osborn, for plaintiff in error.

"The authorities are uniform that a deed of trust, such as those of which we have been treating, places the legal title in the trustee." 2 American Law Register, 755. *Anderson v. Holloman*, 1 Jones' Law, 169. *Thornhill v. Gilmer*, 4 Smedes & Marshall, 153. *Sargent v. Howe*, 21 Ill., 148. *Hannah v. Carrington*, 18 Ark., 85. *Cook v. Dillon*, 9 Iowa, 407. *Taylor v. King*, 6 Munf., 358. *Newman v. Jackson*, 12 Wheat., 570. *De-*

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vin v. Hendershott, 32 Iowa, 192. This distinction between mortgages and technical deeds of trust, it will be seen, is recognized by all the modern decisions. While, in some cases, the facts do not require the distinction to be kept in view, and they are treated as identical, whenever the question has arisen the courts have held that the deed of trust passes the legal title to the trustee. The plaintiff insists that the deed to Test created one of those technical and continuing trusts which are not at all cognizable at law, but fall within the exclusive jurisdiction of courts of equity, and are not affected by the statute of limitations, until some act is done by one of the parties to it in disaffirmance of the trust. It could not run as against the trustee until some act was done by the trustor hostile to his title, nor in favor of the trustee as against the *cestui que* trust until he had done some act disclaiming the trust and asserting a claim to the property in his own right. *Gibbs v. Cunningham*, 4 Md. Ch., 334. *Hickers Appeal*, 24 Penn. State, 482.

Jesse T. Davis and *John D. Howe*, for defendants in error.

The trust deed did not convey the legal title to Test. If the operative words in such a deed are compared with those in a mortgage we see that the natural force of them is to place the legal title in the trustee or mortgagee, but the statutes (General Statutes, 881, § 55; session laws, 1855, 166, § 30) which provide that the mortgagor retains the legal title and right of possession, could not have been intended to cover mortgages and not deeds of trust. The diligence of counsel must convince us that the difference between a mortgage and a deed of trust is hard to distinguish; we cannot conclude that the legislature intended the word "mortgagor" to have the strict and narrow meaning contended for. It is

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the substance of things that was intended to be provided for. A mortgage is a pledge of lands as security; a deed of trust, like the one in question, is that and nothing more. The interest created is in the nature of personality. "The statute of limitations was made to apply to the substance of the action, not the mere form." 4 Neb., 28. The intention of the legislature was to make the statute of limitations, applicable to mortgages, applicable to deeds of trust of this sort. Laws, 1855, 166. Laws, 1858, 111. Laws 1861, 53, § 6. Revision of 1866, 395, §§ 10, 16. *Kyger v. Riley*, 2 Neb., 20. *Webb v. Hoselton*, 4 Neb., 308, and citations. *Peters v. Dunnells*, 5 Neb., 460. 8 Ohio State, 215. This being then a mortgage not conveying the legal title (4 Neb., 318) it was barred at the end of the time when a suit on the note would have been barred.

MAXWELL, J.

On the twenty-third day of August, 1858, Benjamin Estes executed and delivered to the plaintiff his promissory note for the sum of \$280.00, due in one year from that date, and to draw interest at the rate of five per cent per month from maturity. To secure the payment of said note, the defendant, Estes, executed and delivered to James D. Test a trust deed of the south-west quarter of the north-east quarter, and the south-east quarter of the north-west quarter, and the north-west quarter of the south-east quarter of section one in township twenty north, of range eleven east of the sixth principal meridian. Said deed had a condition therein written, providing "that if the said Benjamin Estes should pay to the plaintiff the amount of said note, interest and costs, the said deed of trust given to said James D. Test should be void." Default was made in the payment of the principal and interest of said note, and on the nineteenth

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day of October, 1872, the plaintiff filed his petition in the district court of Burt county, to foreclose said deed of trust, and set forth in his petition the facts above stated, and also that James D. Test had departed this life without executing the trust in favor of plaintiff, and praying for the appointment of a trustee to execute the trust, and that an account may be taken of the amount due on the note and trust deed, and that the land may be sold to satisfy the same. The defendants demurred to the petition of the plaintiff on the ground that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was sustained by the court, and the cause dismissed. To reverse this judgment the plaintiff brings the cause into this court by petition in error.

A mortgage at common law is defined to be a conveyance of an estate, by way of pledge for the security of a debt, and to become void on payment of it. The *legal* ownership is vested in the creditor; but in equity, the mortgagor remains the actual owner until he is debarred by his own default, or by judicial decree. 4 Kent's Com., 136. This author also refers to instruments containing a power of sale as mortgages. *Id.*, 146.

In equity, a mortgage is a mere security for the debt, and is only a chattel interest, and until a decree of foreclosure, the mortgagor continues the real owner of the fee. The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law; and it is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed precisely as if it were an absolute estate of inheritance at law. 4 Kent's Com., 160.

It is urged with much earnestness that the deed of trust conveyed the entire legal title of the lands in controversy to Test, and therefore a trust deed like the one at bar, although resembling a mortgage, is not in fact a

mortgage, but an instrument conveying the entire legal estate to the trustee, and not a mere mortgage lien.

At common law, such an instrument would convey the entire legal title to the trustee, subject to the right of the debtor to defeat the estate upon performance of the condition. It is, however, merely a mortgage.

In *Flagg v. Foster*, 2 Sumner, 533, Judge Story says: "If a transaction resolve itself into a security, *whatever may be its form*, and whatever name the parties may choose to give it, it is in equity a mortgage." In *Page v. Foster*, 7 N. H., 394, the court say: "If it was intended as a security, it is a mortgage." In *Dougherty v. McColgan*, 6 Gill. & Johns., 281, the court say: "Whenever the intention is to take security for a subsisting debt, or for money lent, and to avoid or restrict the equity of redemption, chancery, seeking to protect the debtor against the rapacity of the creditor, and to do full and exact justice between the parties, will defeat such intention by treating the transaction as a mortgage." And in *Cottrell v. Long*, 20 Ohio, 464, it was held that, *if a contract for the conveyance of land* be intended as security for a debt, it is a mortgage whatever may be its form or the name given to it by the parties. Story says: "The particular form or words of the conveyance are unimportant; and it may be laid down as a general rule, subject to few exceptions, that whenever a conveyance, assignment, or other instrument, transferring an estate, is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appear from the same instrument or any other, it is always considered in equity as a mortgage." Story's Eq., section 1018.

In *Eaton v. Whiting*, 3 Pick., 484, the court held that a power to sell, superadded to an instrument intended as a security, did not deprive it of the attributes of a mortgage.

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In *Woodruff v. Robb*, 19 Ohio, 212, where Robb, being indebted to Woodruff in the sum of \$1,017, and to Birdseye in the sum of \$1,275, conveyed a tract of land to one Henry Starr to secure the payment of such indebtedness, the court held: "The deed in question contained all the substantial qualities of a mortgage, and nothing more." It was a mere security for a debt.

In *Sargent v. Howe*, 21 Ill., 149, Walker, J., says: "This deed of trust was given to secure these notes, and in that respect it is the same as a mortgage, and it only differs from a mortgage with a power of sale in its being executed to a third person instead of the creditor."

In *Webb v. Hoselton*, 4 Neb., 318, this court say: "The fact that the mortgage in this instance is in the form of a deed of trust does not change its character from a mere security for the payment of money, nor does it convey the legal title."

In *Kyger v. Ryley*, 2 Neb., 28, this court, in construing the statutes of this state relating to mortgages, say: "The mortgage is a mere pledge, or collateral security, creating a lien upon the mortgaged property, *but conveying no title*, or vesting no estate, either before or after condition broken."

Where an instrument is given *as security* for the payment of money, or the performance of some collateral act, it is a mortgage whatever may be its form, and as such it comes within the rule laid down in *Kyger v. Ryley*, *supra*, that when the debt is barred by the statute of limitations, no recovery can be had upon the mortgage. We adhere to that decision.

In *Peters v. Dunnels*, 5 Neb., 465, it was held, that a proceeding to foreclose a mortgage, so far as it sought to subject the mortgaged property to the payment of the mortgage debt, was a proceeding *in rem*, and that under the provisions of section seventeen of the code of civil procedure, which took effect September 1, 1866,

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absence from the state, death, or other disability of a non-resident, save the cases mentioned in the section, should not operate to extend the time within which actions *in rem* should be commenced by or against such non-resident or his representatives.

As the statute of limitations has run against the claim, and that fact appears upon the face of the petition, the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

JONAS HEDMAN, PLAINTIFF IN ERROR, v. LAFAYETTE
ANDERSON, DEFENDANT IN ERROR.

1. **Chattel Mortgage.** A mortgage of goods and chattels with possession and *power of sale in the mortgagor*, is void as against his creditors.
2. ———. In such case, the illegality of the transaction appears on the face of the instrument, and it is the duty of the court to pronounce it fraudulent as to creditors, it being presumed that the transaction was not entered into in good faith as *security* for the payment of a debt, but as a mode of covering up property, in order to hinder, delay, or defraud creditors.
3. ———: **FRAUD.** To render a conveyance which is not fraudulent on its face, void as to creditors, the fraudulent purpose must be shared by both the grantor and grantee. If the mortgagee has no notice of the fraudulent intent of the mortgagor, and the instrument was made to secure a *bona fide* debt, the mortgage will be valid.
4. ———: **FRAUDULENT INTENT.** The question of fraudulent intent, is generally determined from the existence of other facts which tend to establish it. The questions as to the existence of facts showing a fraudulent intent are alone for the jury to determine, and not for the court.
5. **Witnesses.** The question of the credibility of witnesses rests entirely with the jury.

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6. **Fraud.** If certain facts tending to establish fraud *are conceded to exist*, the question of their sufficiency to establish a fraudulent intent is a question of law, to be decided by the court.
7. ———: **CHATTEL MORTGAGE.** The words: "It shall and may be lawful for him (the mortgagor) to retain the possession of the said goods and chattels, and to use and enjoy the same" until default, do not render the instrument void on its face.
8. ———: ———. When a mortgage is not void upon its face, the question of fraudulent intent must be submitted to the jury.
9. **Practice: SETTING ASIDE VERDICT.** The verdict of a jury will not be set aside unless it is clearly against the weight of evidence. A mere difference of opinion between the court and jury will not authorize the court to set aside a verdict. *Seymour v. Street*, 5 Neb., 89. *Blackburn v. Ostrander*, 5 Neb., 219, adhered to.

ERROR from the district court of Platte county. Tried below before Post, J. A statement of the case appears in the opinion.

Millet & Son (with whom was *J. M. Woolworth*) for plaintiff in error.

This mortgage had the marks of fraud because it was general, without exception of his apparel or anything of necessity, and the mortgagor was to continue in possession and use such articles as his own, and the transaction was inconsistent with the conveyance. 1 Smith's Leading Cases, 2d Ed., pages 34, and from 40 to 51 inclusive.

A sale of chattels, absolute or contingent, with an agreement in or out of the deed that the vendor may keep possession, or, if the vendor keep possession without any agreement, except in *special* cases, and for *special* reasons to be shown and approved by the court, is fraudulent and void as against creditors. *Jennings v. Carter and Wilcox*, 2 Wend., 446. *Dirver v. McLaughlin*, Id., 596. *Sturtevant v. Ballard*, 9 Johns., 343. 1 Esp., 305. 1 Campb., 332.

The mortgage, by its very terms, contemplates the sale of the property by the mortgagor; the stipulation that until default be made by the mortgagor that he is to retain the possession of the goods and chattels named in said mortgage and to use and enjoy the same is equivalent to the power of disposition of them; and if there is any doubt in thus construing it, the parties themselves, by their acts, put that construction upon it. Platt sold the property mortgaged. Anderson saw the sales being made, and made no objections. Platt could have sold all of the property contained in the mortgage and have conveyed a good title thereto, and thus revoke the mortgage.

All the cases concur in the position, that if the power of disposition appear upon the face of the mortgage, or is fairly inferred from its provisions, it is the duty of the court to so declare it without submitting the matter to the jury as a question of fact, and such understanding may be shown by parol evidence or by the conduct of the parties in relation to the subject matter of the mortgage and other circumstances as in other cases, and that in either case, where the fact is made to appear, the mortgage is fraudulent in law, *irrespective* of the intention of the parties. *Freeman v. Rawson*, 5 Ohio State, 12. *Collins v. Myers*, 16 Ohio, 547. *Steinart v. Deuster*, 23 Wis., 136. *Coburn v. Pickering*, 3 New Hamp., 415. 17 Id., 298. 42 Id., 510. *Olen v. Woods*, 5 Sergt. & Rawle, 275. *McKibbin v. Martin*, 64 Penn. State, 352. *Harmon v. Abbey*, 7 Ohio State, 218. *Chophard v. Bayard*, 4 Minn., 533. *Horton v. Williams*, 21 Minn., 187. *Bishop v. Warner*, 19 Conn., 460. *Lodge v. Samuels*, 50 Mo., 204. *Robinson v. Elliot*, 22 Wall., 513.

E. Wakeley and Gerrard and Whitmoyer for defendant in error.

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The cases cited to show that possession is indispensable were nearly all decided under the common law, or in states where registration was not provided for. One or two in New York decided under a statute similar to ours, and, seeming to hold that recording did not do away with the necessity of possession, have been overruled; and it is now the settled doctrine that continued possession by the mortgagor is only *prima facie* evidence of fraud. To hold that there must be both change of possession and recording would make our statute utterly absurd. It would make it say substantially that a mortgage not followed by change of possession shall be absolutely void *unless* recorded, and be absolutely void *if* recorded. If it means that, why did it not say that the mortgage shall be void unless followed by change of possession *and* recorded? This consideration disposes of very many cases on our opponent's brief. *Pyle v. Warren*, 2 Neb., 241. *Smith v. Acker*, 23 Wend., 653. *Butler v. Van Wyck*, 1 Hill, 428. *Collins v. Myers*, 17 Ohio, 547. *Ford v. Williams*, 24 N. Y., 359. *Miller v. Lockwood*, 32 N. Y., 293. *Hughes v. Cory*, 20 Iowa, 399. *Feurt v. Rowell*, 62 Mo., 524.

The authorities are in conflict as to whether an agreement in the mortgage, or outside of it, permitting the mortgagor to sell and dispose of the mortgaged property, renders it necessarily void as to creditors. Opposed to it are many cases in courts of the highest authority. Among them are: *Jones v. Huggefords*, 3 Met., 515. *Codman v. Freeman*, 3 Cush., 306. *Gay v. Bidwell*, 1 Mich., 519. *Hughes v. Cory*, 20 Iowa, 399. *Barnett v. Timberlake*, 57 Mo., 499. *Kleine v. Katzenberger*, 20 Ohio St., 110.

The substance of the alleged error in the rulings of the district court is this: That the mere fact that the mortgagor disposed of some part of the property for his

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own use, with the knowledge and without the dissent of the mortgagor, did not of itself render the mortgage void as to the plaintiff, provided there was no agreement in or out of the mortgage that the property might be so disposed of. This was not error. The cases do not say so; and the proposition that such an acquiescence by the mortgagor necessarily renders his mortgage void, that it nullifies and makes worthless a security valid and unassailable down to the moment of such permission, is untenable upon grounds of reason. To what results would that doctrine lead? A mortgage is given for money loaned. There is no intent to defraud. It contains no power of sale or disposition by the mortgagor. It even says in terms that he shall not sell, or dispose of, or remove it, and if he does so, or attempts to do so, the mortgagee may take possession and foreclose. It covers one thousand barrels of flour; but the mortgagor takes one, or ten, and uses them in his family, with the acquiescence or affirmative permission of the mortgagee. It covers a stock of goods. But the mortgagee sees the mortgagor sell a few articles to customers, or take a pound of tea for his own use, or cut off a shroud to bury his child in, and makes no objection. Down to this time his mortgage has been honest and valid, and unimpeachable by creditors or others; but by this act of silent acquiescence, or positive consent, he forfeits all rights under it. His security is blown away with the suddenness and effectiveness of a dynamite explosion. Yet the position of plaintiff in error leads exactly to that conclusion. It rejects every test of an intent to defraud; all inquiry as to an agreement for a power of disposal; all investigation as to whether any wrong is being done to creditors, and makes the fact of any sale, any disposal, any use of the mortgaged property by the mortgagor, operate *per se* to nullify and invalidate a security not either void, or voidable, at its inception.

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Freeman v. Rawson, 5 Ohio St., 1. *Collins v. Myers*, 16 Ohio, 547. *Gardner v. McEwen*, 19 N. Y., 123. *Ford v. Williams*, 13 N. Y., 577. *Rus v. Winne*, 37 N. Y., 591. *Horton v. Williams*, 21 Minn., 187. *Herman on Chattel Mortgages*, 241.

MAXWELL, J.

On the eighteenth day of September, 1875, Lester W. Platt executed and delivered to the defendant in error a chattel mortgage on all his personal property to secure the payment on demand of the sum of \$2,203.00. The mortgage was filed for record on the day of its execution. Platt died in a few days after the execution of the mortgage in question, leaving a will wherein Elvira G. Platt and the defendant in error were named as executors. On or about the fourth day of January, 1876, the defendant in error took possession of the property described in the mortgage and advertised the same for sale as required by the statute. On or about the nineteenth day of January, 1876, the treasurer of Platt county by his deputy levied upon certain mules and horses conveyed to defendant in said mortgage to satisfy taxes due and delinquent from Platt for the years 1873, 1874 and 1875. The property so seized was placed in the custody of the plaintiff in error, as bailee. The defendant in error, Anderson, brought an action of replevin, and on the trial of the cause in the court below recovered a judgment for the possession of the property, to reverse which Hedman brings the cause into this court by a petition in error.

The mortgage contained the following provision: "That until default be made by the said mortgagor in the performance of the condition aforesaid it shall and may be lawful for him to retain possession of the said goods and chattels and to use and enjoy the same." The property

mortgaged consisted of mules, horses, colts, ponies, oxen, cows, young cattle, sheep, swine, farming utensils, the crops on the farm, an undivided half of certain buffalo robes, household goods, and the stock of goods in the store. The stock of goods was worth from \$300 to \$500, a portion of which was Indian goods. One Keller was the clerk of the mortgagor at the time of the execution of the mortgage, and remained in the store and continued to sell goods as before the execution of the mortgage, until the defendant in error took possession of the same. There is no testimony showing the amount of sales, but no part of the proceeds were applied on the mortgage debt. The Indian goods were in the meantime exchanged for other goods which were more salable and which are still undisposed of. During the time mentioned, the defendant in error resided at Platt's late residence, and was occasionally in the store, and knew of the sales aforesaid, and made no objection. Other property included in the mortgage was used in Platt's family or sold to pay debts against the estate; but it appears that sufficient property remained at the time the defendant in error took possession to satisfy the mortgage. It also appears from the evidence that the defendant in error had loaned Platt about \$2,000 in money on or about the first day of October, 1874, and that the mortgage in question was given to secure the payment of the same.

On the trial of the case the court instructed the jury that: "If from all the evidence you find that a contract was entered into by and between the said Lester W. Platt and Anderson, by which the said Platt was to, and did, reserve to himself the right to sell and dispose of the property included in such mortgage, such contract would render the mortgage inoperative and void as to creditors. It is not necessary that such contract be included in the mortgage or even in writing; proof that such contract was made in parol is sufficient."

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“In considering the question of fraud you may take into consideration the fact that after the execution of the mortgage, the mortgagor Platt by his agent continued to keep possession of the stock of goods in such mortgage mentioned, and continued to sell and dispose of the same with the knowledge and without objections on the part of said Anderson, not that such sale would of itself raise a conclusive presumption of fraud, but it is a circumstance for you to consider in determining the question of a prior contemporary agreement for the sale of such goods by the mortgagor Platt.”

“The fact that the plaintiff being the mortgagee stood by and allowed the mortgagor to sell a part of the property mentioned in the mortgage would not of itself, unaccompanied by other facts, make the mortgage void. It would do no more than discharge the lien which he holds on the goods which he allowed to be sold, but if you find from the evidence that it was the agreement and intention of the parties that Platt should sell the goods in the store and appropriate the proceeds to his own use then you should find for the defendant” (plaintiff in error).

The last instruction and that preceding it were excepted to by the plaintiff in error, who requested a number of instructions to the effect that the mortgage was fraudulent and void as to creditors, which were refused by the court, to which the plaintiff excepted.

In *Tallon v. Ellison and Sons*, 3 Neb., 75, this court held that a mortgage of goods and chattels, with possession and *power of sale in the mortgagor*, was void as against the creditor of the mortgagor. In such a case the illegality of the transaction appears on the face of the instrument, and it is the duty of the court to pronounce it fraudulent as to creditors, *Monteith v. Bax*, 4 Neb., 171; it being presumed, where the mortgagor is permitted by the

terms of the instrument to dispose of the property in all respects as his own, that the transaction was not entered into in good faith as *security* for the payment of a debt, but as a mode of covering up property in order to hinder, delay, or defraud creditors. But to render a conveyance of property, not fraudulent on its face, void as to creditors, the fraudulent purpose must be shared by both the grantor and grantee. If a mortgage is made to secure a *bona fide* debt, and the mortgagee has no notice of a fraudulent intent on the part of the mortgagor, such mortgage will be held to be valid. And when a mortgage contains no unlawful provisions, it can only be declared void by proof of fraud in fact, which under our statutes is a question for a jury to find.

The question of fraudulent intent is generally determined from the existence of other facts which tend to show it. In but few instances can it be shown by direct testimony, and must therefore be established by circumstantial evidence; but the questions as to the existence of facts showing a fraudulent intent are alone for the jury to determine, and not for the court. If, however, certain facts are *conceded* to exist, the question of their sufficiency to indicate a fraudulent intent becomes a question of law, which the court must determine. But the question of the credibility of witnesses rests entirely with the jury. In the case at bar, the testimony of the witnesses is not embodied in the record. We are merely told what the parties *proved*.

The so-called proof is very vague and indefinite. We are told that the store was kept open "until about forty days after Platt's death. The amount of sales does not appear, but no part of the proceeds of said sales was applied to the satisfaction of said mortgage." As to the groceries, we are told that a part were sold, a part were used in Platt's family, and the rest remained undisposed of. When we remember that it is shown that

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the entire stock was only of the value of from \$300 to \$500, it is apparent that the sales were inconsiderable, and they may have been of the most trifling character and be consistent with the so-called proof in the record.

The mortgage not being fraudulent on its face, the question of fraudulent intent was properly submitted to the jury, who found in favor of the defendant in error. It is well settled in this court, that the verdict of a jury will not be set aside unless clearly against the weight of evidence; but a mere difference of opinion between the court and jury will not authorize the court to set aside a verdict. *Seymour v. Street*, 5 Neb., 79. *Blackburn v. Ostrander*, 5 Neb., 219.

As it does not affirmatively appear that the verdict is erroneous the judgment must be affirmed.

JUDGMENT AFFIRMED.

THOMAS N. JOHNSON, APPELLANT, v. GEORGE PHIFER AND
ELIZABETH PHIFER, APPELLEES.

1. **Deeds: EXECUTION.** Mere imbecility or weakness of mind will not avoid a contract or deed. There must be a total want of reason or understanding.
2. **Persons Non Compos Mentis.** There are four different classes of persons who are deemed in law *non compotes mentis*. *First.* An idiot or fool natural. *Second.* He who was of a good sound memory but by the act of God has lost it. *Third.* A lunatic who is sometimes of a good sound mind and memory and sometimes *non compos mentis*. *Fourth.* One who is *non compos mentis* by his own act, as a drunkard.
3. **Jurisdiction of Court of Equity.** A court of equity will relieve a party against contracts made by him while temporarily insane from the use of intoxicating liquor, where such contracts have been procured by the fraud or imposition of the other party.

4. —: SETTING ASIDE CONTRACTS ON GROUND OF DRUNKENNESS. In order to set aside a contract on the ground of drunkenness it is not sufficient that the party was under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where a party is utterly deprived of his reason and understanding.

APPEAL from the district court of Jefferson county. Tried below before WEAVER, J. The case is stated in the opinion.

John Saxon, for appellant.

Plaintiff claims that the proofs show that he was intoxicated and drunken when the deed in question was *executed*. That he was still more so when the defendant, George Phifer, obtained possession of the paper. That there was no *delivery* of the deed to defendants, and that defendants fraudulently gained possession of the same and placed it on record. We think equity will relieve against the acts of a party (less than crime) or contracts entered into by him while intoxicated. Fonblanque's Equity, chapter 2, section 3. Adam's Equity, section 410 and notes. Story's Equity Juris., section 230, 231, 232, and 233. 2 Kent's Com., page 451 and notes. A comparison of these authorities with the latest rulings of the courts will show a modification of the rule, which was that "the party seeking relief must be shown to have been not only intoxicated, but thoroughly and completely so." The rule as it now obtains is essentially different in our courts of equity. Our courts—the courts of our time—do not stop to weigh or measure the *degree* of intoxication, but simply regard the *fact*, and when it is shown to have existed they do not hesitate to relieve. *French v. French*, 8 Ohio, 214. 2 Kent's Com., page 451. Through all the authorities upon this question, both early and late, runs this line of distinction. The *degree* of intoxication is *never* regarded when it is

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shown that the other party has *led* the complainant into drink, or in *any manner contrived* or *contributed* to bring about such condition. It is in itself fraud to deal with one who is intoxicated, if known. Fonblanque's Equity, Sec. 3. Adam's Equity, Sec. 410. 1 Story's Equity, 230. 2 Kent's Com., 481. Chitty on Contracts, 131. Parsons on Contracts, 384, 385, and notes. *Jones v. Perkins*, 5 B. Mon., 225.

We believe no case can be found where a court has refused relief in such a case, let the degree of intoxication be what it may, if the other party has contributed to bring it about, and has taken advantage of it to gain some profit. And we believe that no court has ever refused relief where one, even innocent of the cause, has yet taken an unfair advantage of the condition, knowing it to exist.

Brown, England & Brown, for appellees, contended that the evidence showed conclusively that the case did not come within the well-established rules of law which the plaintiffs counsel cited. *Wood v. Pindall*, Wright, 509. *Davis v. Culver*, 13 How., Pr., 62.

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On the sixteenth day of June, 1873, the plaintiff made final proof of settlement, and entered as a homestead, under the United States homestead law, the north-east quarter of section twenty-two in town three north, of range two east of the sixth principal meridian; and on the same day conveyed the same by deed to Elizabeth Phifer, one of the defendants herein. The action is brought to have said deed vacated and cancelled, and for such other and further relief as the nature of his case in equity may require. The petition alleges that, "after having made proof of his right as aforesaid, the said de-

fendant, George Phifer, well knowing that this plaintiff was a person in the habit of becoming intoxicated, and wrongfully and unlawfully conspiring to wrong and injure him, said plaintiff, in respect to the said lands and real estate aforesaid, did cause and procure him, the said plaintiff, to be and become intoxicated and drunken, so that he, the said plaintiff, was then and there deprived of his reason and mental faculties," in which condition the plaintiff claimed he executed the deed in question.

The amended answer of Elizabeth Phifer, which by stipulation is to be considered as evidence, alleges among other things that "the consideration which the plaintiff was to and did receive, for homesteading said land and conveying the same to the defendants, was his board, lodging, and washing, which was to be and was furnished by these defendants for a period of two and a fourth years, *and these defendants were to give plaintiff a home with them during his lifetime.*"

On the trial of the cause in the court below, the court found all the issues in favor of the defendants, and dismissed the cause. The case is brought into this court by appeal.

In *Mulloy v. Ingalls*, 4 Neb., 117, it was held that mere imbecility, or weakness of mind, however great, will not avoid a deed or contract, unless there be evidence to show a total want of reason or understanding.

Coke has enumerated four different classes of persons who are deemed in law to be *non compos mentis*. *First*. An idiot, or fool natural. *Second*. He who was of good and sound mind and memory, but by the act of God has lost it. *Third*. A lunatic, *lunaticus qui gaudet lucidis intervallis*, who sometimes is of a good sound mind and memory, and sometimes *non compos mentis*. *Fourth*. One who is *non compos mentis* by his own act, as a drunkard. Co. Litt., 247 a. *Beverly's Case*, 4 Co., 124. Story's Eq., Sec. 230.

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A court of equity will relieve a party against contracts made by him while temporarily insane from the use of intoxicating liquor, where such contracts have been procured by the fraud or imposition of the other party. Story's Eq., Sec. 230. But to set aside a contract on the ground of drunkenness it is not sufficient that the party was under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where a party is utterly deprived of his reason and understanding. Story's Eq., section 231, and cases cited.

The proof in this case fails to show that the plaintiff was sufficiently under the influence of liquor, at the time of the execution of the deed, to avoid the same, and the testimony upon that point being conflicting, the finding of the court thereon will not be set aside.

It is apparent from the record that the consideration for the land in question was the agreement of the defendants to provide the plaintiff with a home during the period of his natural life, and that the defendants were to execute a mortgage on the land in question to secure the performance of the conditions of such agreement. The plaintiff is shown to be nearly seventy years of age, and somewhat addicted to the use of intoxicating liquors, and at times to require extra care and attention. The defendants claim that the consideration for the land in question was the board, clothing, and lodging of the plaintiff for two and one-fourth years, which was to be continued during the period of his natural life. They do not claim to have paid any money for the land, nor to have paid for the same except as herein stated. The consideration named in the deed from the plaintiff to the defendants for the lands in controversy is \$800. This it is clearly shown has not been paid, and as the defendants have removed from the land in question, thereby disabling themselves from complying with the contract on their part, the plaintiff, upon the facts stated

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in the petition, and under the general prayer for relief, is entitled to judgment for the amount of the real consideration for said land, less what he has already received; and as there is testimony tending to show that the unpaid consideration was to be a lien upon the land in question, the cause is remanded to the district court with instructions to take additional testimony in regard to the real consideration for the lands and the character of the lien, and render a decree in conformity with such testimony.

DECREE ACCORDINGLY.

**JAMES B. MERCER, PLAINTIFF IN ERROR, v. ROBERT JAMES,
DEFENDANT IN ERROR.**

1. **Justice of the Peace: JURISDICTION OF.** A justice of the peace, with the assent of the plaintiff, may render judgment on the personal confession of a defendant made orally in open court.
2. ———: **PLAINTIFF'S ASSENT PRESUMED.** In such case the plaintiff's assent, although not affirmatively shown by the transcript, will be presumed from the fact that he procured a satisfaction of the judgment by an execution, levy, and sale of the defendant's property.
3. ———: **JUDGMENT MAY BE VOID AS TO ONE DEFENDANT, BUT GOOD AS TO ANOTHER.** W, the maker of a promissory note, signed also by B as surety, appeared and confessed his indebtedness thereon, and requested judgment to be entered. Thereupon the justice rendered judgment against both principal and surety. *Held*, that the judgment, although void as to B, was valid as to W.
4. **Replevin: VERDICT IN.** In replevin the gist of the action is the alleged unlawful detention of the property at the commencement of the suit, and the verdict should, technically, be so framed as to speak unequivocally on this point. But notwithstanding the verdict is in the present tense, and finds that the defendant "*does not unlawfully detain*," and that "the right of

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property and the right of possession thereof *is* in the defendant," if there be nothing in the record showing a possible prejudice to the plaintiff by reason of the defect, the verdict will not be disturbed.

5. **Error Without Prejudice.** An error resulting in no prejudice to the party complaining, is not sufficient to reverse a judgment.

ERROR from the district court of York county. It was an action of replevin for a pair of mules, in which the defendant's title was derived by purchase at a sale under execution issued upon two judgments in two actions tried before a justice of the peace, in which one Lock was plaintiff, and Wood and Button were defendants. Upon the trial below, before GASLIN, J., sitting in the district court for York county, and a jury, the court charged the jury as follows:

"*Third.* The defendant claims in his answer that the property at the time of the taking thereof, was his, having acquired title to the same by virtue of a sheriff's sale. The judgments upon which the executions issued in the cases under which the property was sold you are not to take into consideration, as I charge you that the judgments and executions under which the sale took place, as far as the purchaser in this collateral proceeding is concerned, are legal and binding on the parties herein."

The jury returned a verdict in favor of the defendant, upon which, after the overruling of a motion for a new trial, judgment was rendered. Plaintiff excepted and brought the cause here by petition in error.

McKillip & Page (with whom was *Geo. B. France*), for plaintiff in error.

The verdict is insufficient to support the judgment, because the jury did not find "that defendant did not unlawfully detain the property *at the commencement of*

the action." And the jury did not find "the right of property or right of possession to be in the defendant *at the time of the commencement of the action.*" Gen. Stat., 574, 693. *Crouch v. Martin*, 3 Blkf., 256. *Wolf v. Meyer*, 12 Ohio State, 432. *Rogers v. Chandler*, 3 Munf., 65. *United States v. White*, 5 Cranch Circuit Court, 38.

Judgment of an inferior court may be *collaterally* impeached by a stranger to the record in case all the facts necessary to give jurisdiction are not spread upon the record, or proved to exist. Bigelow Estoppel, 129. *Rowley v. Howard*, 23 Cal., 402. *Clark v. Bryan*, 16 Md., 171. *Simons v. Debare*, 4 Bosw., 547. *Steen v. Steen*, 25 Miss., 513. *Gray v. McNeal*, 12 Ga., 424. *Crawford v. Howard*, 30 Me., 422. *Harris v. Willis*, 15 Com. B., 709.

The judgments under which defendant in error claims title to the property in controversy are void for the following reasons:

1. Being judgments of an inferior court, sufficient facts are not in the record to give jurisdiction, *and they will not be presumed.* *Reeves v. Clark*, 5 Ark., 27. *Jolley v. Foltz*, 34 Cal., 321. *Straughan v. Inge*, 5 Ind., 157. *State v. Hartwell*, 35 Me., 129. *Lane v. Crosby*, 42 Me., 327. *State v. Hall*, 49 Me., 412. *Bridge v. Ford*, 4 Mass., 641.

2. Said judgments affirmatively show a want of jurisdiction in this, viz: Justices of the peace can only exercise jurisdiction in the mode and within the limits prescribed by statute, and there is no statute authorizing judgment by "confession" before a justice of the peace, except as provided in section 1004 Gen. Stat., 685, where, after suit is regularly brought, an offer is made in "writing" and *accepted* by the plaintiff, judgment may be rendered on such "written offer and acceptance." Compare sections 908, 971, and 1004 Gen.

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Stat., pages 666, 680, and 685. *McCleary v. McLain*, 2 O. S., 368.

3. Neither can these judgments be sustained under the provisions of sections 433—437 of the civil code because:

First. Said sections only authorize judgments by confession in courts of record.

Second. Said judgments do not show that they were rendered with the "*assent of the creditor.*"

Third. Nor do said judgments contain a "statement of the cause of action."

Fourth. Said judgments cannot be upheld as "an appearance and *agreement* of the parties without summons," under section 908 code of civil procedure, relative to justices of the peace, because said section only provides for a "waiver of summons" and nothing more. The action otherwise proceeds as an action in which summons has been issued, served, and returned, and hence it requires the "agreement" of plaintiff as to the amount of the judgment by his filing a bill of particulars, etc. Gen. Stat., 680.

By said judgment it does not appear that the parties "agreed" to commence action without summons.

William T. Scott, for defendant in error.

LAKE, CH. J.

This was an action in replevin to recover possession of a span of mules, and there are really but two questions presented for our consideration.

The first question relates to the admission of certain testimony bearing upon the question of ownership, wherein, if the court did not err, it will follow that the instruction complained of, although not of the most harmonious phraseology, yet, as probably understood and acted upon by the jury, was substantially right.

It appears that after the plaintiff had introduced his testimony tending to prove ownership in himself, the defendant, to establish his own title, produced the transcripts of two judgments and executions, under which the property had been seized and sold to his grantor before the plaintiff's pretended interest was acquired. If this were a valid sale, as to the defendant in execution, then there is no question that the defendant here was the rightful owner and entitled to a verdict in his favor.

These transcripts show that the notes on which the judgments were rendered by the justice were signed by Samuel F. Woods as principal and by D. C. Button as his surety. It does not appear that any summons was issued in either of the cases, but Woods, the principal, appeared voluntarily in open court and acknowledged his indebtedness to the plaintiff, J. Lock, in the amounts appearing to be due upon the notes respectively; whereupon judgments were rendered against Woods as principal and Button as surety, for the amounts so confessed and costs.

It is urged in behalf of the plaintiff in error that these judgments were absolutely void, and consequently that the sales under them conveyed no title whatever to the purchaser. As to the surety, who was neither served nor made voluntary appearance, this is doubtless true, but we cannot accede to the proposition that they were likewise void as to the principal, who had personally appeared, confessed his indebtedness, and, as the transcripts also show, actually requested judgments to be rendered for the amounts so confessed.

It is true, as claimed, that justices of the peace can only exercise jurisdiction within the limits and in the mode prescribed by statute. This proposition is elementary, and no authorities were necessary in its support. But even under this rule we think it clear that in these cases the only error committed by the justice was in

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rendering judgment against the surety. As to the principal, every step taken was fully authorized by the statute, as will be seen by reference to the following sections of the code of civil procedure.

“Sec. 908. Actions before justices of the peace are commenced by summons, or by the appearance and agreement of the parties without summons. In the former the action is deemed commenced upon delivery of the writ to the constable to be served; and he shall note thereon the time of receiving the same. In the latter case the action shall be deemed commenced at the time of docketing the case.”

By force of this provision, when the plaintiff in those actions and Woods appeared before the justice of the peace and had the cases docketed, they were duly commenced, and the justice was thereupon as fully authorized to proceed with them to final judgment as if the defendant had been brought in by the regular service of a summons.

It was contended in argument, however, that it did not affirmatively appear that the plaintiff was actually present at the time and agreeing that the cases should so proceed. But we think that his assent is abundantly proven by the fact that executions were afterwards sued out, property levied on, and the judgments satisfied by its sale. Besides, if the absence of an express affirmative showing upon this point were fatal to the validity of the judgments, the objection could not be taken in this collateral proceeding, but would be available only to the plaintiff in those suits.

Again, section nine hundred and seventy-one of the code provides that: “Where parties agree to enter without process before a justice any action of which such justice has cognizance, such justice shall enter the same on his docket, and proceed to trial, judgment, and execution, in all respects in the same manner as if sum-

mons had been issued, served, and returned." All of the steps required by this section, so far at least as was necessary, were taken. As to the formality of trials, that was rendered wholly unnecessary by reason of the personal acknowledgment of the maker of the notes of his liability thereon as claimed.

The second question relates to the form of the verdict, it being objected that the finding as to the detention and right of property is in the present tense, referring to the time of trial instead of the commencement of the action. Under the circumstances of the case we regard this objection as merely technical. It is true that in replevin the relation of the respective parties to the goods, at the commencement of the action, is the primary inquiry for the jury, the gist of the controversy being the alleged unlawful detention by the defendant. Technically, the verdict ought to be so framed as to speak unequivocally on this point. Here the language is, "that the defendant, Robert James, *does* not unlawfully detain," and that "the right of property and the right of possession thereof *is* in the defendant."

There is nothing in the record, however, nor was it so much as claimed that the rights of the parties respecting the property were not precisely the same on the day of trial as at the commencement of the action. It is quite possible that a case might arise wherein such a verdict would not answer. Here, however, the case turned on the single question of ownership, and this again on the validity of the two judgments under which the defendant purchased the property at the execution sale. Therefore, holding as we do that the judgments, as to the defendant, who appeared, and whose property was taken to satisfy them, were valid, no harm can possibly result to the plaintiff in consequence of the alleged error, which must have been occasioned by mere oversight, and not from any disregard of his rights. An er-

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ror without prejudice to the party who complains of it is no ground for the reversal of a judgment.

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

JUDGMENT AFFIRMED.

F. CLARK, PLAINTIFF IN ERROR, v. J. B. WRIGHT,
DEFENDANT IN ERROR.

Practice: TRANSCRIPTS OF RECORDS. A transcript must show when, where, and the court before which the proceedings were had, so that it shall appear from the record that they were had before a court known to the law, and are *coram judice*.

GANTT, J.

The papers filed as a transcript in this case do not show by caption or otherwise in what court the proceedings were had.

As said in the case of *Orr v. Orr*, 2 Neb., 170, "no reference is made to any court, nor does it appear that the proceedings were had before any court begun and held at any place by any judge or other officers. It cannot be told, from the papers and what purports to be the transcript, that any proceedings have been had before any (district) court known to the laws of the state." And in the case referred to it is held that "the record should show where and when, and before what court the proceedings set out in the record took place, in order that it may be seen that they were before a court known to the law, and at a time and place authorized by law, so that it may appear from the record that the proceedings are *coram judice*." It is not the province of the court to put into the record by presumption such matter as

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will cure such radical defect in it, and therefore the papers so filed must be stricken from the files of this court; and it is so

ORDERED.

**GEORGE FAULKNER, AND OTHERS, PLAINTIFFS IN ERROR, v.
PHILIP MEYERS, DEFENDANT IN ERROR.**

1. **Replevin: PRACTICE: VERDICT: JUDGMENT.** In replevin, where the jury by general verdict find the right of possession in the plaintiff, assessing damages for the detention of the property, this will support a judgment in his favor, although several specific questions were submitted to the jury, to some of which no answers were returned.
2. ———: ———. In such case no objection being made at the return of the verdict, nor until after the jury are discharged, it is too late, afterward, to complain of the omission.
3. **Practice: SUFFICIENCY OF EVIDENCE.** If the record does not show that *all* of the evidence introduced on the trial has been preserved and brought into the supreme court, its entire sufficiency to support the verdict cannot be questioned.
4. ———: **BILL OF EXCEPTIONS.** Where the presiding judge certifies only that the testimony set out in the bill of exceptions "is *in substance* all the evidence on the trial of this cause, and there was no other evidence material to the issue offered by either of the parties," the finding will not be interfered with.
5. ———: **INSTRUCTIONS.** Where the jury were told to disregard "all evidence in relation to bills upon which the witnesses were examined," but it not appearing what these "bills" were, nor what the testimony respecting them was, no error in this particular is apparent, and the propriety of the instruction will be presumed.
6. **Attachment of Mortgagor's Interest in Goods.** An ordinary creditor may, by proceedings in attachment, subject the interest of a mortgagor of goods and chattels in the hands of the mortgagee to the payment of his debt. The plain, orderly course in such case is by garnishment, whereby such interest can be ordered paid over to the attachment creditor.

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ERROR from the district court of Richardson county, the case being thus:

Challiss, Druery & Co. obtained a judgment in the county court of Richardson county against George Roy and John H. Meyers, a partnership firm, doing business in Falls City, as Roy & Meyers, and caused an execution to be issued and levied upon property belonging to the firm. At the same time, William Jackson & Co. commenced an action in the same court against Roy & Meyers, and caused an order of attachment to be issued and levied upon the same property. Philip Meyers, the father of John H. Meyers, then commenced this action to replevy from the sheriff, Faulkner, the property so levied upon, claiming the possession of the goods in controversy by virtue of a mortgage given him thereon to secure the payment of \$400. The attachment creditors were brought into the cause as defendants. On the trial judgment was rendered in favor of Philip Meyers, and a motion for a new trial having been overruled, the defendants in said action brought the case to this court by petition in error.

Schoenheit, Towle & Thomas, and Isham Reavis, for plaintiffs in error, reviewing the evidence, which was not, however, considered by the court for reasons stated in the opinion, cited *Kreis v. Gorton*, 23 Ohio State, 471. *Tills Case*, 3 Neb., 261. *Sauntry v. Dunlap*, 12 Wis., 364. *Padgett v. Lawrence*, 10 Paige, 180. *Lewis v. Anderson*, 20 Ohio State, 281.

George P. Uhl, for defendant in error.

In this cause the bill of exceptions purports to contain *only the substance* of the evidence, and it is not pretended that a tenth part of the evidence is here. There is therefore no sufficient bill of exceptions to enable the

court to review the matters passed upon by the district court. *Homan v. Laboo*, 1 Neb., 204. 33 Iowa, 593. 20 Iowa, 335. 4 Neb., 22 and 569. The instructions in this cause and the motion for a new trial were all based upon the evidence given at the trial; and there being a want of a sufficient bill of exceptions, both the instructions and the motion for a new trial ought not to be inquired into.

LAKE, CH. J.

This is a petition in error to reverse the judgment of the district court of Richardson county, and the first error assigned is, that "the court erred in rendering judgment on the verdict."

There is nothing in this objection. The jury found that at the commencement of the action the plaintiff in the court below was entitled to the possession of the property in question, and assessed his damages by reason of the detention at \$175. Of these damages he remitted \$174, and thereupon judgment was rendered in due form in his favor for the possession of the property and one dollar damages.

Several questions were also submitted to the jury upon which they were instructed to find specially. Several of these questions were returned into court unanswered. This, it must be admitted, was rather loose practice. If questions are considered of sufficient importance in the decision of a case to be worthy of submission to the jury, it would certainly seem that they ought to be answered. But the plaintiffs in error are not in a situation now to take advantage of this omission. No objection was made when the verdict was returned, nor until after the jury had been discharged, and it must therefore be deemed to have been waived. If they desired full and complete answers they should

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have been vigilant and brought the matter to the attention of the court at the very first opportunity, and while the defect could have been remedied by sending the jury back to their room to complete their work. Answers to these questions were not necessary to support the judgment—the general verdict being ample for this purpose.

It was also urged that the verdict was not supported by the evidence, but the bill of exceptions is not in a condition to enable us to examine this question. We have frequently held that in order to justify this court in reviewing the evidence it must appear to have been all preserved and brought before us. This is a sound rule of practice from which we can in no case depart. *The Midland Pacific R. R. v. McCartney*, 1 Neb., 398. Here we have what the presiding judge certifies "is in substance all the evidence given on the trial of this cause, and there was no other evidence material to the issues offered by either of the parties." But this will not answer. In *The Omaha and Northwestern R. R. Co. v. Menk*, 4 Neb., 21, we held that it was not enough to state that the bill of exceptions contained "the substance of the evidence bearing upon the issues," and therefore refused to re-examine questions of fact. Upon this precise point we would also cite *Davis et al. v. Carol*, 33 Iowa, 592.

The only remaining objections relate to the instructions given to the jury at the request of the defendant in error, and to the refusal to instruct as requested by the plaintiffs. As to the instructions given, save one, it may be said that they lay down the most simple propositions of law applicable to the duty of the jury in such a case, and to which no objection was urged on the argument. By the third instruction, however, the jury were told to disregard "all evidence in relation to bills upon which the witnesses were examined." This was

equivalent to a withdrawal from the jury of all testimony respecting certain "bills," but what these "bills" were, or what the testimony respecting them was, we are not informed. The error, if any were committed by this instruction, is not shown, and it is only "for errors appearing on the record," that a judgment of the district court may be reversed. Code of Civil Procedure, Sec. 582.

There were several instructions, requested by the plaintiffs in error, refused. These related to the right of an ordinary creditor, by attachment, to subject the interest of a mortgagor of goods and chattels, *in the hands of the mortgagee*, to the payment of his debt. As abstract propositions of law these instructions were in the main correct, but having no application to the case on trial they were very properly refused.

There is no doubt, however, that the equity of redemption in property, so circumstanced, may be reached by attachment. The plain, orderly course to pursue in such case is by garnishment, whereby whatever may remain of the mortgaged goods beyond that which shall be found necessary to satisfy the mortgage debt and interest, and the costs of sale, can be ordered paid over to the attachment creditor. And we are not prepared to say, but that, even in this case, the court might properly have ordered such surplus to be so applied. But this particular question is not now before us, as the court was not requested to make such an order.

Inasmuch as there is no error appearing of record, the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

Eaton v. Hasty.

EMERSON H. EATON, PLAINTIFF IN ERROR, v. CHARLES
HASTY, DEFENDANT IN ERROR.

1. **Judgment:** REVIVAL OF. A judgment of revival is merely a continuation of the original action, and continues the vitality of the original judgment with all its incidents from the time of its rendition.
2. **Principal and Surety:** RIGHTS OF SURETY. Subrogation is purely an equitable result, and the right of a surety to be subrogated to the rights of the creditor does not depend on contract, but rests alone upon principles of justice and equity; and when such claim is contested, it depends on facts to develop and determine the rights of the parties in interest.
3. **Foreign Judgment.** The judgment of a state court duly authenticated, as prescribed by act of congress, is conclusive upon the merits or subject matter of the suit.
4. ———: PLEAS IN BAR. But want of jurisdiction, or release, or payment, or limitation by statute, or common law prescription, or fraud, is a good plea to an action brought upon a foreign judgment; and it is error to reject evidence tending to prove such defenses.

ERROR from the district court of Cass county. The cause came to this court in 1868, the judgment below being reversed, and cause remanded for a new trial. It is reported 1 Neb., 339. Maxwell's Digest, 395. The cause was again tried before LAKE, CH. J., and resulting in a verdict in favor of Hasty, Eaton, the defendant below, brought the case up by petition in error in 1872. Judge Lake having sat in the court below, and Judge Maxwell having been of counsel, the cause was continued from term to term until, by agreement of the parties, it was submitted at the present term.

Sam M. Chapman and *E. Wakely*, for plaintiff in error.

Defendant in error admits that Eaton was in Nebraska

and knew nothing of the revivor at the time it was obtained. We think that Eaton was not bound to anticipate the litigation of his own and his co-defendant's partnership affairs upon a motion to revive a judgment that had been sleeping for over ten years; that had rested upon the records of a court of common pleas in Ohio for over fifteen years. Surely, then, unless the clear warrant can be found in the law conferring upon the court of common pleas this extraordinary power, such a proceeding being entirely outside of and beyond the *scope* or *intention* of the law (unless it appears that the court had the parties before it *present and consenting*) would be void. What does "revival," in the sense used in the code, mean? Simply to put in force a *dormant, inactive, sleeping* judgment. Can it mean a *different* judgment? Can it mean a judgment with new parties? Here the parties are changed; here the creditors, Lambert & Edmunds, after relying upon a judgment five years alive, ten years dead, then *resurrected*, are to be turned around by the court of common pleas and to rely upon Eaton as principal and Hasty as security merely. This was a judgment by the law in force, clearly in the hands and in the keeping of plaintiffs, Lambert & Edmunds. A court of competent jurisdiction in the year 1847 *must now be presumed* to have passed upon Eaton & Hasty's rights and upon their relations with Lambert & Edmunds. At this *second day of judgment* can it be pretended that the relations of these defendants to their judgment creditors is to have a second overhauling? Would it be pretended that there is any warrant in the law authorizing such a change over the objections of Lambert & Edmunds? Is there anything in the record showing such consent? Even if Eaton and Hasty had both been consenting parties to it, we think the absurdity of such a proposition is apparent. Again, the record of the pretended judgment shows that the court found all these

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equities in favor of Hasty before the order of revivor was pretended to be entered, and in our view of this case (giving every question of doubt to defendant, Hasty) in any event, before any adjudication could take place between him and his co-defendants, the legal judgment as it then existed would have had to be revived. As it now appears there is, in our view of the case, no legal revival. The old judgment still sleeps on.

This judgment of revivor is clearly beyond the scope of the law in force in Ohio at the time of its pretended rendition. Clearly the court had no such jurisdiction over the defendant, Eaton, or the subject matter as would authorize such a proceeding. The want of jurisdiction appears there on the face of the judgment, and the plaintiff in error, such being the condition of the judgment, should have been allowed to show that the judgment was rendered without his knowledge, without any issues being made, and is fraudulent and void. *Lazier v. Westcott*, 26 New York, 153. Want of jurisdiction of the subject matter renders the proceedings of a judicial tribunal void in the broadest sense of the term. 29 Wis., 419. *Dudley v. Mayhew*, 3 N. Y., 9. *Borden v. Fitch*, 15 Johns., 121. *Ragan's Estate*, 7 Watts, 438. *Shawhan v. Loffer*, 24 Iowa, 217. When the court transcends the limits prescribed by law, and assumes to act when it has no jurisdiction, its adjudication is absolutely void. *Ponce v. Underwood*, 55 Ga., 601. In an action upon a judgment which is sought to be made the basis of a new recovery it is permissible to show that the court rendering the judgment had no jurisdiction, notwithstanding a recital in the judgment that the defendant was duly and legally served with notice of the pendency of the suit, and when defendant denies that he was served with notice, his defense is not a collateral but a direct attack upon the judgment. *Clark v. Little*, 41 Iowa, 497.

Sprague & Wheeler, for defendant in error, after giving a full history of the case from its commencement in Ohio, said:

"The defendant, Hasty, claims that the adjudication as to who was principal and security was fully determined in the case of revivor, in Lucas county, Ohio, and any irregularity or error in said judgment cannot be reviewed in this court; that the proper place for such review should be had in the courts of Ohio. *Bou. L. Dic.*, 548. *Spencer v. Brockway*, 1 Ohio, 260. *Shumway v. Stillman*, 6 Wend., 447. *Hatcher v. Rochelue*, 18 N. Y., 86. Where both parties are legally in court, there can be no parol testimony introduced to contradict the record in the case, either directly or collaterally." 11 Mich., 389. 9 Bar., 619. 3 Wend., 35. 2 Mich., 165. 8 Wend., 9. 12 Bar., 168. 5 Mich., 155. 25 N. Y., 616. *Wilcox Digest*, 105. *Missouri Digest*, 294 and 296. 1 *Greenleaf*, Sec. 522, 523, note 531. 1 *Bouvier*, 531.

GANTT, J.

It appears by the pleadings in this case that the plaintiff and defendant were in the year 1847 partners in the mercantile business, and that on the twenty-eighth of June of that year, Lambert & Edmunds recovered against them as joint debtors, a judgment in the court of common pleas of Lucas county, state of Ohio. Partial payments were made on this judgment; and on the ninth of November, 1863, an ordinary motion was filed in that court to revive this judgment. The defendant in error, who was plaintiff in the court below, sets up in his petition what purports to be the finding and judgment of the court upon the motion for revivor of the original judgment—stating that the parties by their respective attorneys submitted the cause to the court, and

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that the court found "that since the rendition of said judgment said Eaton has, as between himself and said Hasty, become, by his assumption to pay said judgment, the principal debtor, and said Hasty only his surety"; and that on the twelfth of December, 1864, it was "ordered and adjudged that said judgment stand revived against Eaton as principal debtor and said Hasty as surety." He further alleges that he paid the judgment as surety of plaintiff, and thereby a right of action upon the judgment has accrued to him against the plaintiff.

The plaintiff admits the original judgment recovered by Lambert & Edmunds against himself and the defendant; but alleges that it was for a debt solely due from defendant to said Lambert & Edmunds, and that he was only surety for defendant. He also pleads a release of the judgment to him from Lambert & Edmunds, dated May 20, 1860; that the defendant fraudulently obtained the judgment of revival in the form it was rendered; also want of jurisdiction of the court over him or the action in the proceedings of revivor; and that he had removed to the state of Nebraska in the month of May, 1863.

In the trial of the cause in the court below, the defendant in error offered no evidence whatever. It was admitted the plaintiff was in Plattsburgh, Nebraska, when the judgment of revival was had. In defense of the action the plaintiff made several offers, which are fully set out in the bill of exceptions, to introduce evidence tending to prove his several grounds of defense set up in his answer, but the court rejected all said evidence.

Now conceding there was a revival of the original judgment as alleged in the defendant's petition in the court below, what is the effect of such a revivor? At common law, after the expiration of one year from the rendition of a judgment without execution, the only

remedy upon the judgment was by action of debt; but the Stat. Westm. II, Ed. I, C. 45, authorized *scire facias* to issue, after the year had expired, to show cause why the matters enrolled should not be executed; and in such case the purpose of the writ was merely to continue a former suit to execution. This practice has been followed ever since; but in some states, at the present day, the statutes provide for the revival of judgments by motion and notice to the party; however, the purpose and effect of such a motion is the same as that of a *scire facias*.

In *Irwin v. Nixon*, 11 Pa. St., 425, it is said to be "a common, plain, and familiar principle, that a *scire facias* to revive a judgment * * * is but a continuation of the original action, and the execution thereon is an *execution on the former judgment*. The judgment on the *scire facias* is not * * * a new judgment, giving vitality only from that time, but *it is the revival of the original judgment*, giving or rather continuing the vitality of the original judgment, *with all its incidents*, from the time of its rendition." 1 Pet. C. C. R., 448. 2 T. & H., 379. It is therefore quite clear that the effect of the judgment of revival, if good for anything in the case at bar, is merely a revival of the original judgment *with all its incidents*, and that the attempt by the court, in its finding and order, to make it a new judgment, different in character, object, and purpose, from that of the original, cannot have any legal effect, unless it was authorized by some express provision of statutory law. But it is not shown that any such statute was in force, and therefore the case will be considered as if such attempt had not been made upon the simple motion to revive a judgment. According to this interpretation of the law the present action is upon a joint judgment rendered against the parties, plaintiff and defendant, in the year 1847, and revived in the year

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1864. The defendant claims that he was the surety of plaintiff in that judgment; and the plaintiff claims that he was the surety of the defendant.

Now is the defendant entitled to become subrogated to the rights of the judgment creditors, Lambert & Edmunds, and to maintain this action against the plaintiff?

Though the right of subrogation is one of the highest equity, still it is purely an equitable result, and the right of the surety to become subrogated to the rights of the creditor does not depend on contract, but rests alone upon principles of justice and equity; and therefore, when his claim to such a right is contested, it depends on facts to develop and determine the rights of the parties.

Subrogation will not be allowed if it would do substantial wrong, nor when the surety who has paid is indebted to the principal in more than the amount of the debt, nor can it be maintained when the party claiming has in fact been reimbursed and has sustained no loss. *Mosier's Appeal*, 56 Pa. St., 76. *Bleakley's Appeal*, 66 Pa. St., 187. *Baily v. Brownfield*, 20 Pa. St., 45. *Avery v. Petten*, 7 John. Ch., 211. *Mason v. Lord*, 20 Pick., 447, 449. *Bazzell, Adm'r, v. White*, 13 Ala., 422. *Himes v. Keller*, 3 W. & S., 401.

Now it must be borne in mind that the question of subrogation is a controversy between the two defendants in the original judgment, and that it is their rights which must be determined in this action according to the principles of justice and equity.

This is not a controversy which affects or tends to impeach the original judgment. Therefore, according to the doctrine of the law, it seems to me that, under the pleadings, the evidence offered by plaintiff in error, tending to show that the defendant was not, as surety, entitled to be subrogated to the rights of the judgment creditors, ought to have been admitted; and it was error to reject the same.

The next question is, whether a judgment of a state court, authenticated as prescribed by act of congress, can be avoided by any other plea than that of *nul tiel record*. It is said that the authenticity of such judgment and its effect depend upon this law, made in pursuance of the constitution; that the faith and credit due to such judgment, as a judicial proceeding of a state, are given by the constitution. But though such judgment is made a debt of record—not re-examinable upon its merits—still in another state it has not the efficacy of a judgment upon property or persons, to be enforced by execution, until it is made a judgment there, and then it can only be enforced in such state as its laws may permit. It therefore seems that such judgment has the force and effect of a domestic judgment only within the jurisdiction of the court, or rather within the state in which it was pronounced, and in another state it is a domestic judgment only as to the merits of the claim or subject matter of the suit. Hence, in an action on such judgment in another state, exceptions may be taken to it which would be admissible in the jurisdiction where the judgment was pronounced; and in *Rape v. Heaton*, 9 Wis., 338, it is held that “in the absence of any proof to the contrary, the laws of another state are presumed to be the same as those of the state” in which the action is pending. *Sherrill v. Hopkins*, 1 Cow., 103. *Monroe v. Douglas*, 1 Seld., 447. And this exposition of the law is not in conflict with the case of *Mills v. Duryee*, 7 Cranch, 481, for in that case the point decided is that *nil debet* is not a good plea in an action on a foreign judgment. This was the only question raised in that case, and the only legitimate effect of the decision is, that such judgment cannot be controverted on the merits. And it seems quite clear from the language employed in *McElmoyle v. Cohen*, 13 Pet., 328, that the doctrine enunciated in *Mills v. Duryee* does not ad-

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mit of the interpretation that a plea "which rests upon the ground of a release, payment, or a presumption of payment, from lapse of time, whether such presumption be raised by the common law prescription or by statute of limitation," cannot be pleaded in an action on a judgment of another state.

As far back as the case of *The Marshalsea*, 10 Coke, 68, the doctrine was settled that no adjudication can be valid unless the court has jurisdiction of the cause and the parties; and this principle applies with full force in an action on a foreign judgment. For in such case, although there may be a record, yet, under the circumstances, it is the record of a nullity without any legal force whatever. *Folger v. Columbian Ins. Co.*, 99 Mass., 269. *Price v. Hockok*, 39 Verm., 299. *Steel v. Smith*, 7 W. & S., 450. *Lawrence v. Jarvis*, 32 Ill., 304. *Bissell v. Briggs*, 9 Mass., 462. *Harris v. Hardeman*, 14 How., 339. *Shumway v. Stillman*, 4 Cow., 292.

The rule will not be questioned that the voluntary appearance of a party to a suit, by an attorney authorized, is as effective for the purpose of jurisdiction as an actual service of summons. But the appearance of an attorney, who had no authority to waive process or to defend the suit, may be explained, and the defendant may contradict the record in this respect and show that in point of fact the court pronouncing the judgment did not have jurisdiction of the cause or his person. And though it may be contended that when an attorney appears to the prejudice of a party without authority he may subject himself to damages for the injury to the party, still, as said in *Shelton v. Tiffin*, 6 How., 186, "this would not sufficiently protect the rights of the party, and he is not bound by the proceedings; there is no other principle which can afford him adequate protection." In such case the judgment is a nullity. *Hill v. Mendenhall*, 21 Wallace, 454.

In *Rape v. Heaton*, 9 Wis., 335, after an elaborate review of the question, Paine, J., who delivered the opinion of the court, says: "I can see, therefore, no reason for any distinction as to the right of the party to inquire into the jurisdiction, between cases where the record is silent as to, and cases where it avers the facts necessary to show it."

Again, does not fraud constitute a good plea to an action on a foreign judgment on the ground that it vitiates everything? In *Farmer's Case*, 3 Coke, 77, it is held that all acts and deeds, judicial as well as extra-judicial, if mixed with fraud, are void. *Hostt v. Holcomb*, 3 Foster, 554.

In *Borden v. Fitch*, 15 John., 145, in respect of a foreign judgment it is said: "It is competent to allege fraud; otherwise the party would be permitted to derive a benefit from his own misconduct; a position altogether inadmissible." *Lawrence v. Jarvis*, 32 Ill., 310. *Shelton v. Tiffin*, 6 How., 186, 188.

It only remains to remark that the act of May 26th, 1790, provides that judicial records authenticated as prescribed "shall have such faith and credit given to them, in any court within the United States, as they have, by law or usage, in the courts of the state from whence the said records are or shall be taken," and that under this law the rule seems to be well settled, that the judgment of a state court so authenticated is conclusive upon the merits or subject matter of the suit; but that it does not exclude such defenses as inquire into the jurisdiction of the court in which it was pronounced, or the right of the state itself to exercise authority over the person or the subject matter of the suit, or to plead as a defense to an action on such judgment, a release, payment, or limitation by common law prescription or statute, or fraud in obtaining the judgment.

In the case at bar the proceedings cannot be consid-

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ered as collateral, because it is an action brought directly upon a judgment revived, and in this action, founded on such judgment revived, the plaintiff offered evidence tending to prove his defense set up in his answer, but it was rejected by the court.

I think, according to the terms employed in the act prescribing the mode of authentication and effect of judicial proceedings, and the interpretation given to it by the courts, the rejection of the evidence offered was error.

The foregoing views of this case dispose of the charge given by the court to the jury.

The judgment of the court below must be reversed and the cause remanded for trial *de novo*.

REVERSED AND REMANDED.

FURNAS, IRISH & CO., PLAINTIFFS IN ERROR, v. ADOLPHUS
G. FRANKMAN, DEFENDANT IN ERROR.

1. **Agency: AUTHORITY TO APPOINT SUB-AGENTS.** An agent can do for his principal only that which his principal authorizes. Ordinarily an agent appointed to transact a particular business has not thereby a right to make another person the representative of his principal.
2. ———: ———. But when the general agent is specially authorized to employ sub-agents to act in the name of his principal, the further authority to bind the principal for their payment will be implied.
3. ———: ———. A private understanding between the principal and general agent, by which the latter was, himself, to pay such sub-agents for their services, would not bind them if not brought to their notice.
4. ———: **PRINCIPAL BOUND, WHEN.** The acts of a general agent with reference to the subject of the agency will bind his principal, although he may have received private instructions narrowing his authority, unless such instructions are known to the party dealing with him.

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ERROR from the district court of Lancaster county. The cause was tried before a referee, whose report was confirmed and judgment rendered by LAKE, CH. J., at the April term of said court, A.D., 1875, in favor of Frankman for the sum or \$237.50. The defendants there, Furnas, Irish & Co., brought the cause here by petition in error. Further facts, necessary to an understanding of the points decided, appear in the opinion.

Brown, England & Brown, for plaintiffs in error.

Lamb, Billingsley & Lambertson, for defendant in error.

No briefs on file.

LAKE, CH. J.

The only question in this case is whether the facts found by the referee justified his conclusion that the plaintiffs in error were liable on the contract under which the defendant performed the service for which the action was brought. No question is raised as to the sufficiency of the evidence to establish all the facts found by the referee, which, so far as they concern the present issue, are substantially as follows:

In July, 1873, Frankman applied to Robert W. Furnas, one of the members of the firm of Furnas, Irish & Co., to be employed in canvassing for orders for nursery stock, the firm being then engaged in the nursery business. Furnas did not employ but sent him to one John H. Martin, who was then the agent of the firm, "with very general authority to superintend, manage, and carry on said business," which he did, "*in their firm name.*" Furnas, at the same time, telling him that "Martin was doing all their business in the nursery line." Frankman, thereupon, applied to Martin, who

employed him in the name of the firm, "to engage in the business of selling, packing up, and delivering nursery stock for Furnas, Irish & Co. during the winter and spring of 1874," etc. By virtue of this employment, and under the direction of Martin, services were performed of the value found by the referee.

The chief objection to the referee's conclusion of law seems to be based on the fact, that by the terms of Martin's engagement with Furnas, Irish & Co., he "was not authorized to employ other agents for and on behalf of the firm, so as to make it liable for their services." That all sub-agents "were to be Martin's agents, and they were to look solely to him for compensation for their services."

Undoubtedly, if Frankman had been aware of this restriction upon Martin's authority, it would have proven an insuperable objection to his recovery, and he would have been compelled to look to Martin alone for compensation. And, doubtless, it would have been the same had he not been led to believe by the firm itself that Martin was possessed of all the authority in and about the business that he assumed to exercise. "An agent can do for his principal only that which his principal authorizes; and if the principal appoint an agent to act for him as his representative in any particular business, this agent has not thereby a right to make another person the representative of his principal." 1 Parsons' Contracts, 71.

But here, in addition to the declaration of Furnas, that "Martin was doing all their business in the nursery line," the referee found that Frankman "had no knowledge that Martin was not authorized to enter into the contract" in the name of the firm, "but on the contrary, he was informed by Martin, and believed that he had such authority." It was also known to him "that Martin had, and exercised, the superintendence and man-

agement of said business, and carried on the same in the firm name of Furnas, Irish & Co.”

It is clear that the facts found by the referee constituted Martin the general agent of Furnas, Irish & Co., in the sale of nursery stock, with full authority to employ subordinates to solicit orders in the name of the firm. And this authority included also the power to bind his principals for the payment of compensation as to all persons not advised of the private understanding by which Martin himself was to pay those whom he should thus employ. It is settled law that the acts of a general agent, with reference to the subject of the agency, will bind his principal, although he may have received private instructions narrowing his authority, unless such instructions are known to the party dealing with him. *Manning v. Gasharie*, 27 Ind., 399.

We are of opinion that the referee was clearly right in his application of the law to the facts found by him, and that the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

NICHOLS, SHEPARD & Co., PLAINTIFFS IN ERROR, v. J.
HALL AND JACOB HOFFMAN, DEFENDANTS IN ERROR.

1. **Warranty.** Defendants gave M. an order for a certain kind of thresher, on the back of which was a printed warranty; the order was presented to the agents of the plaintiffs; it was neither accepted, nor was the machine furnished; but M. acting for the agents sold the defendants, under a distinct contract, an old and different kind of thresher. *Held*, that the order and warranty did not apply to the machine furnished.
2. ———: **INSTRUCTIONS TO JURY.** Where no warranty, either in fact or law, is involved in a contract for the sale of a thresher, it is error for the court to instruct the jury to inquire into or determine any question of warranty in such case.

Nichols, Shepard & Co. v. Hail.

ERROR from the district court for Cuming county. The cause was first brought here in 1876, and is reported in 4 Neb., 211. A new trial resulting in a verdict against the plaintiffs, the cause was again brought up by petition in error, but there being no final judgment entered, it was remanded to the district court for further proceedings. 5 Neb., 194. Judgment being there entered on the verdict, and the cause brought to this court, it was tried during the present term.

For any further understanding of the facts in the case reference may be had to 4 Neb., 210.

Uriah Bruner, for plaintiffs in error.

R. F. Stevenson, for defendants in error.

GANTT, J.

It appears from the record that the machine in question in this case was purchased by defendants from one Wm. Malchow; that sometime prior to the purchase of the same they gave to Malchow an order for a "Nichols & Shepard thresher and power of the latest patent and most modern improvements." Malchow testifies that he left with or sent this order to Hurford & Edgar, of Omaha, but they told him they could not furnish such machine, as the order was handed in too late, and all the machines they had ordered from the factory were sold; but that they showed him an old machine, which "was shipped from some place in Kansas," and had been exposed to the weather, and that this "machine had been repainted or varnished before it left Omaha and then sent to him," at West Point. And in answer to question seventy-four, he says: "I was agent of John T. Edgar and O. P. Hurford in selling this machine to Hoffman and Hail." Defendant Hoffman substantially testified that he got the machine from Mal-

chow, and at the time Malchow told him he could not get the machine ordered, that the order was handed in too late, but "Edgar had sent him a machine that he got from Kansas which had been exposed to the weather several years, was repainted and was a Nichols, Shepard & Co., machine of an old pattern, and if we wanted a machine we could have this," and that he told defendant Hail about it. Defendant Hail testified that he knew they did not get the machine ordered—that he knew the difference between the one for which the order was given and the one they received, and that about two weeks after they got the machine, the notes were given for it. It is therefore clear from the record that the order given for a machine was not acted on, and nothing was done under it. When stripped of all extraneous matter, the entire transaction resulted merely in a contract between the defendants and Malchow, as the agent of Hurford & Edgar, for the sale of the old machine to defendants, without any warranty whatsoever.

Now, this case was heretofore tried in this court on error upon a very similar record of facts, and a mere reference to the determination of the questions presented in that case might be sufficient to dispose of the material questions raised in the case at bar. 4 Neb., 210. But it may be further observed that as there was not, either in fact or law, any question of warranty involved in the case, as shown by the record, it was error to instruct the jury to determine the question: "Was the machine the defendants received *warranted* expressly?" and also in instructing the jury as follows: "If you find the defendant has sustained damages by reason of the defective material or *breach of warranty* equal or superior to the amount of plaintiffs' claim at the commencement of this action, you will simply find for the defendant." These instructions would strongly tend to impress the minds of the jurors with the belief that the machine in

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question was warranted by plaintiffs, and were calculated to, and no doubt did, mislead the jury in regard to the real facts of the case.

The judgment of the court below must be reversed, and the cause remanded for trial *de novo*.

REVERSED.

WILLIAM FRITZ, PLAINTIFF IN ERROR, v. F. W. BARNES
AND OTHERS, DEFENDANTS IN ERROR.

1. **Practice:** SIGNING AND VERIFYING PETITION. The failure to sign and verify a petition is no ground for dismissing an action.
2. ———: ———. When these defects exist in a petition, a motion may be properly interposed to strike the petition from the files, which will compel the filing of a new petition properly verified.

ERROR from the district court of Madison county.

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

W. M. Robinson, for defendant in error.

LAKE, CH. J.

The record in this case discloses the fact that the petition when filed in the court below, and at the time the summons issued thereon, was neither signed nor verified as the statute requires. In fact these requisites were both entirely wanting. While in this condition the defendants moved "the court to dismiss the suit for the reason that there is no petition filed in said court as required by law." The court sustained this motion and "dismissed the action without prejudice at the plaintiff's costs."

When the defects here mentioned exist in a petition a

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motion particularly specifying them may be properly interposed to strike it from the files. The sustaining of such a motion will of course compel the plaintiff to file a new petition, properly verified. But so long as such defective petition remains on file it furnishes no ground for dismissing the action, nor can a motion to that end be properly sustained.

For these reasons the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

DANIEL ALLEN, PLAINTIFF IN ERROR, v. MARTHENA
SAUNDERS, DEFENDANT IN ERROR.

1. **Pleading:** In pleading, each party must set forth a plain, concise statement of facts relied on to maintain his cause of action or his defense to the action.
2. ———: **PLEA IN BAR.** A party cannot avail himself of the benefits of a plea in bar, or of a former recovery, by exceptions to testimony, or by motion subsequent to the trial; it must be pleaded to make such defense available.
3. **Judgment: OPERATION AND EFFECT: LANDLORD AND TENANT.** A recovery of judgment for monthly rent having become due, is not a bar to a future action and judgment for rent falling due thereafter upon a lease which provides for the payment of a certain monthly rent.
4. **Practice: INSTRUCTIONS TO JURY.** An instruction asked to charge the jury that there is no proof of a certain matter in controversy, when there was some testimony in reference to the matter, though very slight, was properly refused.
5. **Landlord and Tenant: ACTION FOR RENT.** In an action for rent against a tenant, who has taken a lease for one year and abandoned the property. *Held*, it was proper to charge the jury that the landlord should let the property thereafter in as profitable a way as a prudent man would do, but that he was not obliged to let it to a tenant whose business would permanently injure it.

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ERROR from the district court of Douglas county. Tried below before SAVAGE, J. The case is stated in the opinion.

J. L. Webster and *R. E. Gaylord*, for plaintiff in error.

The petition in the court below shows that the tenant "abandoned said premises and refused to pay any more rent for the same, or to recognize any liability thereafter to pay rent to plaintiff under said contract of leasing." Afterwards the landlord sued and recovered the second month's rent. This action is to recover the rent for the remaining part of the year. Here was an entire breach of the contract. The relation of landlord and tenant was put to an end, and hence but one action accrued to the landlord, which was an action for damages. He cannot split up his entire demand, and harass the plaintiff in error with the costs of a litigation at the end of every month. Having already prosecuted one action to judgment, the same is a bar to this suit. *Clossman v. Lacoste*, 28 Eng. L. and Eq., 140. *Fish v. Folley*, 6 Hill, 54. *Gordon v. Brewster*, 7 Wis., 355. *Veghte v. Hoagland*, 5 Dutcher, 125. *C. & N. W. R. W. Co. v. Nichols*, 57 Ill., 464. *Brannenberg v. I. P. & C. R. R.*, 13 Ind., 103. *Shaffer v. Lee*, 8 Barb. 412. Par. on Cont. 6th Ed., Vol. 3, 189. *Booge v. Pacific R. R.*, 33 Mo., 212.

The court therefore erred in admitting any testimony under the petition, and in rendering judgment upon the verdict.

The court should have charged the jury what the law was as to the facts proved in Bonner's testimony. There being no proof of resulting damage to the building the court should have given the direct instructions as requested. *Wisner v. Davenport*, 5 Mich., 501. The

charge as given is erroneous in that it *assumes* that to use the building for a meat market would have permanently injured it more than an ordinary business. *Wall v. Goodenough*, 16 Ill., 415. *McLaren v. Hall*, 26 Iowa, 303. *Preston v. Keys*, 23 Cal., 194. It had a tendency to mislead or draw away the minds of the jury from what the evidence was, and was therefore erroneous. *Eames v. Blackhart*, 12 Ill., 195. *Hastings v. Bangor*, 18 Me., 436. It was erroneous for the court to lay down generally what the duty of the landlord was as to renting the premises, even though the law be correctly stated; but the charge should have been framed to conform to the particular state of facts. *Morris v. Platt*, 32 Conn., 75—82. *Am. Ex. Co. v. Parsons*, 44 Ill., 317. *Chicago v. Utley*, 38 Ill., 410.

John D. Howe, for defendant in error.

Counsel errs in the assumption that the relationship of landlord and tenant, and the contract between the parties, could be terminated by the act of the tenants alone by abandoning the premises and refusing to acknowledge any liability thereafter to pay rent. *Grant v. Ramsey*, 7 Ohio State, 157. We allege that we refused to receive a surrender of the premises, or release the lessees from liability, and so the jury found. The leasehold interest of the lessees continued till the end of the term. They had stipulated to pay \$80 per month rent, for one year; and, of course, on every default a cause of action arose to defendant. As a matter of fact, nothing was litigated in the first action but the one month's rent; indeed, nearly all of the rent sued for, herein, accrued after that suit had been adjudicated, and in the nature of things, could not have been litigated in that suit so long as the contract continued in force, and the term undetermined.

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The decisive test in the cases where the question relied on is presented, is whether the contract had been absolutely terminated, or whether it continued in force. In the former case, as in this, the plaintiff asserted and relied upon the contract; in both cases defendant denied the contract; in both cases it was adjudicated that the contract continued in existence. Being in existence, the status of the parties was the same as to this question as it would have been if the lessees had continued to acknowledge its binding force and to occupy the premises, default having been made in the payment of the rent. See Sedg. Meas. Dam., 268, [*225.] 24 Ala., 194. Sedg. M. Dam., 351, *note*; p. 267, *et seq.* *McConnell v. Kibbe*, 33 Ills., 175. *Badger v. Titcomb*, 15 Pick., 409, and citations. *Bendernagle v. Cocks*, 19 Wend., 207, and citations. *Shepherd v. Willis*, 19 Ohio, 142.

GANTT, J.

This action was brought by defendant in error against plaintiff in error, as the surviving partner of the firm of Gray & Allen, upon a parol lease for one year—to recover a balance of rent, agreed to be paid monthly, for a certain property in the city of Omaha. It appears that Gray & Allen had previously occupied the premises under an unexpired lease to other parties. It is substantially alleged in the petition that the lease to Gray & Allen was made by parol, under which they occupied the premises for some time, and that they then abandoned the same and refused to pay the rent agreed to be paid; that the rent for the month of April was paid by them, and that about the first of June suit was brought against them, before a justice of the peace, to recover the rent for the month of May, and judgment thereon was, on or about the eleventh day of August, rendered for that month's rent. It is further alleged that, at the

request of Gray & Allen, the defendant, during the unexpired term of the lease, received from other parties, for the use of the premises, a certain amount of rent on account of the plaintiff in error. The plaintiff in error pleaded specific denials to the allegations of the petition, and averred that Gray & Allen were notified by defendant to vacate the premises, and that they did so on the fifth day of May, 1874. The new matter set up in the answer is denied by the reply. Upon the issues raised by these pleadings the cause was tried, and the jury by their verdict found them in favor of defendant in error, who was plaintiff in the court below.

The first proposition urged upon the court in the argument for the plaintiff is, that the defendant having prosecuted an action to recover the rent for the month of May, and having obtained a judgment for that month's rent, such judgment is a bar to this action, and therefore the court erred in admitting any testimony under the defendant's petition, and in rendering judgment upon the verdict.

I think, upon a careful examination of the authorities cited in support of this proposition, it will be discovered that the general doctrine enunciated by them is to the effect, that when the contract, in all its essential parts, is in substance an entirety, a judgment recovered for a breach of any part of such contract will operate as a bar to any future action thereon.

In *Bendernagle v. Cocks*, 19 Wend., 207, it is said: "In respect to separate and independent contracts the books agree that separate actions, whether the proper form be covenant, assumpsit, or debt, may be brought at the pleasure of the party, subject only to the power of the court to direct them to be consolidated in proper cases. *Phillips v. Berick*, 16 John., 136. *Badger v. Titcomb*, 15 Pick., 409. *Rex v. The Sheriff of Hertfordshire*, 1 Barn. & Adolp., 572. With respect to in-

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installments of money due at successive days under the same contract, a difference is taken, that if the action be debt it must be brought for the whole. *Rudder v. Pierce*, 1 H. Bl., 550. But if it be covenant or assumpsit, the action may be for each successive installment as it falls due. *Cook v. Whorwood*, 2 Saund., 337. 15 Pick., 409. And so without doubt as to any other breaches of several covenants or promises contained in the same contract, provided the action be brought before the subsequent breaches are committed. The cases all agree that, where the demand is entire, a recovery for part, bars a suit for the whole."

In the case at bar, the monthly rents to be paid are divisible, and for each successive month's rent, as it falls due, an action of assumpsit would lie, and so will an action under our system of code procedure. If the owner of property shall lease the same for one year, or a term of years, for a certain monthly rent to be paid for the use and occupancy of the same, would it be morally right and honest or just, upon any principle of legal science, for a court by its *sic volo* to establish the doctrine that upon failure of the tenant to pay the rent monthly according to the contract, the landlord cannot by any legal proceeding collect such rent as it falls due without forfeiting that for the remainder of the term by a plea in bar of a former recovery? We cannot give our assent to the establishment of such a rule in the administration of the law. But how can the proposition contended for be maintained under the pleadings in this case? The answer contains specific denials of the allegations of the petition; and although some new matter is set up, yet it contains no averment of a former recovery as a bar to this action. No such issue is raised by the pleadings, and we think it is quite clear that a party cannot avail himself of the benefits of a plea in bar by exceptions to testimony, or by motion subsequent

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to the trial. In *A. & N. R. R. Co. v. Washburn*, 5 Neb., 124, it is said the "statute is intended to require each party to make a plain, concise, and distinct statement of the facts he intends to prove in order to maintain his cause of action or his defense to the action, and thereby inform the adverse party of the precise grounds upon which he intends to rely, * * * and in this regard it is restrictive in its operation in the admission of evidence." Therefore, "every defense to an action, whether partial or entire, must be set up in the answer."

The second proposition urged in the argument for the plaintiff is, that the court erred in refusing to instruct the jury, "that it is not denied, but stands admitted, that Bonner would have given seventy-five or eighty dollars a month for said building; you therefore must deduct the amount which Bonner was willing to pay, from any claim the plaintiff (defendant in error), might have against Allen. There is no proof that using the building for a meat market would have injured it in any wise;" and in giving the following: "It was the duty of the plaintiff (defendant in error) to let the building after it was vacated by Gray & Allen to as good advantage and in as profitable a way as would be done by an ordinarily careful and prudent man, but she was not obliged to let to tenants whose business was of such a character as would be of permanent injury to the property in a greater degree than ordinary business." The instruction asked is based on testimony substantially as follows: James Bonner testified that in a conversation with the "governor" he offered him seventy-five or eighty dollars rent for the premises, but the "governor" said the property belonged to Mrs. Saunders, and he did not like to have a market in it; and on cross-examination he says the "governor" objected to his going in to keep a meat market in it.

Was this offer to pay so much rent monthly, quar-

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terly, or for one year? The record does not show. Alvin Saunders testified that he told Bonner that he thought it would damage the building to have it rented for a butcher shop. Now it appears from the testimony that Alvin Saunders objected to the premises in question being used for a meat market on the ground that it would damage the building. And though the evidence may be very slight, still it should be submitted to the consideration of the jury, for it is not the province of the court to draw inferences from the evidence, however slight it may be, or determine what it does or does not prove. Therefore, we think the instruction asked was properly refused. But, it may be inquired, *en passant*, how does this testimony affect the rights of the defendant? Who is the "governor" to whom James Bonner made the offer? He may be Alvin Saunders, and Alvin Saunders may be the husband of the defendant, and may have been her agent in charge of the property; but the record does not state any such fact, and it is not the province of the court to put such facts into the record by presumption.

The charge given by the court to the jury, we think correctly states the law of the case, and had direct application to the evidence; but if viewed merely as an abstract proposition of law without any evidence to which it may apply, it could not prejudice any rights of the plaintiff in error, nor in any way mislead the jury, and therefore furnishes no ground for the reversal of the judgment. In *Caw v. The People*, 3 Neb., 369, it is said that "many cases are to be found wherein it is held that even an erroneous instruction, on a point entirely outside of the case, as made by the evidence, furnishes no ground for the reversal of a judgment otherwise correct." 1 Ohio State, 66.

The judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

JAMES CAMERON, PLAINTIFF IN ERROR, v. THE SANDWICH
MANUFACTURING CO., DEFENDANT IN ERROR.

1. **Stay of Execution: UNDERTAKING FOR.** To operate as a strictly statutory stay of execution, the undertaking must be given within the time limited by law. But a stay may be effected afterwards by agreement between the parties upon a sufficient consideration.
2. ———: ———. If by agreement the undertaking is given afterwards, and the stay is thereby obtained, the defendant having received the benefits of the contract will not be permitted to repudiate the obligation thereby assumed.

ERROR from the district court of Richardson county. It was an action against Cameron upon a bond for stay of execution on a judgment rendered in the probate court. Judgment was rendered against him in the court below, WEAVER, J., presiding, to reverse which he brought the cause here by petition in error.

Isham Reavis and A. R. Scott, for plaintiff in error.

At common law there was no such thing as stay of execution by bond or undertaking. This is an invention of modern legislation, and is the creature of the statute. To be of any validity, therefore, it must be taken by a court or officer, having lawful authority to do so, in a proper case, and within the time fixed by the statute. Indeed, it may be regarded as settled law everywhere, that when a bond is taken by an officer or court acting simply under statutory power, the instrument must not only be authorized by the statute but it must appear that it was taken exactly or substantially in accordance with the statutory power. *Byers v. The State, ex rel. Hutchison*, 20 Ind., 47. *Meyers v. The State*, 19 Ind., 127. *Macey v. Titcomb*, 19 Ind., 135. *Butler*

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v. Wadley, 15 Ind., 502. *Skelton v. Bliss*, 7 Ind., 77. *Ellis v. The State*, 2 Ind., 262. *Marshall v. The State*, 8 Blackf., 162. *The State v. Lynch*, 6 Blackf., 396. *Silver v. The Governor*, 4 Blackf., 15. *Parker v. Henderson*, 1 Ind., 62. *Benedict v. Bray*, 2 Cal., 251. *Olds v. The State*, 6 Blackf., 91.

Frank Martin, for defendant in error.

This is a good stay bond under the statute, because it complies with the requirements of the statute in every particular except in the time at which it was given. The statute secures the defendant the right to take the stay within the twenty days, and there are no words to negative the right of the parties to extend the time if they all agree to it. The extending of the time beyond the twenty days is a matter of grace on the part of the judgment creditor; and for him to waive any of his rights does not prejudice the defendant in execution, nor his security. The time mentioned in the statute is merely directory, and may be disregarded. Sedgwick on Statutory and Constitutional Law, 86-88, and 351. *People v. Holley*, 12 Wend., 481. *People v. Schermerhorn*, 19 Barb., 540. *People v. Allen*, 6 Wend., 487-488. *Jackson v. Young*, 5 Cow., 269. A party may always waive a statutory right the same as any other. *Ives v. Finch*, 22 Conn., 101. *Tombs v. Rochester*, 18 Barb., 583. *Buel v. Trustees, etc.*, 3 N. Y., 199. *Duckwall v. Rogers*, 15 Ohio State, 544.

The defendant recalled his execution and extended the time of payment, and stayed the execution for a year from the date of the judgment. And in consideration therefor the plaintiff in error "undertook and promised," in writing, to pay the debt. A waiving of any legal right at the request of another is a sufficient consideration for a promise. 1 Parsons on Contracts, 365.

LAKE, CH. J.

The only question in this case is whether the petition states a good cause of action.

The instrument on which the action was brought is an undertaking, in the usual form, for staying executions in probate courts; and, except as to the time within which it was executed and approved, conformed strictly to the requirements of the statute. Undoubtedly, in order to operate as a statutory stay, the undertaking must be executed within the time fixed by law. And, without the consent of the plaintiff, the court has no authority to accept an undertaking tendered after that time. But that is not this case. Here it appears that the defendant in the court below, in consideration of the recall of the execution then in the hands of the sheriff for service, and the allowance of a stay "for one year from the date of said judgment, * * * * then and there undertook and promised in writing to pay the said judgment, interest, and costs, and accruing costs."

It further appears that, in pursuance of this agreement, the execution was recalled and a stay actually had for the whole of the stipulated time. This was a sufficient consideration for the promise made by Cameron. Chitty on Contracts, 32-37, and notes. 1 Parsons on Contracts, 365. And, having received the benefits of the contract, he cannot now be permitted to repudiate the obligation which he thereby assumed. There is no principle of law behind which such a breach of good faith can find protection. If an authority were needed to support so plain a proposition, it is to be found in *Duckwall v. Rogers*, 15 Ohio State, 544, which is precisely to the point.

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

JUDGMENT AFFIRMED.

Smith v. Kinney.

LEVI C. SMITH & BROTHER, PLAINTIFFS IN ERROR, v.
G. P. KINNEY, DEFENDANT IN ERROR.

1. **Principal and Surety.** The full relation of creditor and debtor arises between principal and surety the moment the surety pays the money.
2. **Bankruptcy.** A decree of discharge in bankruptcy can only be impeached in a direct application for that purpose in the court in which it was granted.
3. ———. A certificate of discharge is sufficient evidence of bankruptcy and of the validity of the proceedings therein.
4. ———: **JUDGMENT IN STATE COURT.** When a judgment, upon a debt accrued before the institution of proceedings in bankruptcy, is entered in a state court prior to a decree in bankruptcy, the certificate of discharge is conclusive of the discharge, and a bar to further proceedings upon the judgment; and the court will relieve the judgment debtor in such case from an execution afterwards issued thereon.

ERROR from the district court of Colfax county. Tried below before Posr, J. The facts of the case appear in the opinion.

Marlow & Munger and C. J. Phelps, for plaintiffs in error.

If the defendant had the right under the statute of the United States to hold this land as exempt from sale on execution, or otherwise, for the reasons claimed, he has waived that right by not making his claim before judgment and order of sale. *Rector v. Rotten*, and cases there cited, 3 Neb., 171.

It is claimed that because the bankrupt proceedings were commenced before the attachment was levied upon the land the district court did not have jurisdiction to render the judgment against the land in question. The land was not taken possession of by the assignee—in fact as appears from the record it belonged to the de

fendant first, last, and all the time. It never was accounted for as part of the assets. Had the attachment been levied upon property in the hands of the assignee in bankruptcy, and that fact had been made to appear before judgment and order of sale had been entered, it would have been different. This land remained the absolute property of the bankrupt unaffected by any bankrupt proceedings.

If this land was exempt, either under a statute of the state or a statute of the United States, from sale on execution or attachment to satisfy debts which the defendant owned at the time he commenced the bankrupt proceedings it could not be included in his assets without his consent; if it was included he could have it set off to him. We know that it was not included in his assets; for what reason it was left out we don't know. The land was not affected by the bankrupt proceedings. *Robinson v. Wilson*, 15 Kan., 595. This land was not in any way connected with the bankrupt proceedings, but was held by the defendant the same as if no proceedings in bankruptcy had ever been commenced, and while so owned it was attached and sold. Can it make any difference whether the attachment was levied upon the land before or while the bankrupt proceedings were pending? Certainly not, because the land did not in any way enter into these proceedings. *Brown v. Gibbons*, 37 Iowa, 654. *McKay v. Funk*, Id., 661.

This was an action *in rem.*; the attachment gave the court jurisdiction. The judgment of the court is conclusive and can not be attacked in the manner here adopted. It is immaterial whether or not at the time the judgment was rendered bankrupt proceedings were pending; whether or not the attachment was commenced before or after bankrupt proceedings had been commenced; whether or not the defendant at the time this suit was commenced had a final discharge or obtained a final dis-

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charge after the order of sale was in fact made. If the land was exempt for any reason known to the law it is immaterial at this stage of the proceedings. *Rector v. Rotten*, 3 Neb., 171. *Fellows v. Hall*, 3 McLean, 281. *Bank of Missouri v. Franciscus*, 15 Mo., 304. *Johnson v. Fitzhugh*, 3 Barb. Ch., 361. *Cornell v. Dakin*, 38 N. Y., 253.

William O. Bartholomew, for defendant in error.

Where a judgment was obtained, and the judgment debtor afterwards obtained his discharge in bankruptcy, and after the discharge was granted an execution was issued and levied on his property, the court summarily set the execution aside on motion. *Curtis v. Slosson*, 6 Pa St., 265. *Cogburn v. Spence*, 15 Ala., 549. Kinney's discharge released him "from all debts, claims, liabilities, and demands which were, or might have been, proved against his estate in bankruptcy." Sec. 34, act of 1867. Sec. 5119, Rev. Stat. of U. S., 993. The only provable debts not discharged are debts created by the fraud of the bankrupt; debts created by the embezzlement of the bankrupt; debts created by his defalcation as a public officer; debts created by the bankrupt in a fiduciary character. It is not claimed that the debts due the plaintiffs fall in any of these classes. It was simply for money paid for the use of Kinney. This was its character on the twelfth day of April, 1876, the day he filed his petition, as well as the day he was adjudicated a bankrupt. According to the provisions of the bankruptcy act, a bankrupt's discharge is conclusive evidence of itself of his discharge from all debts, contracts, and other engagements existing at the time of such discharge. *Thornburg v. Madren*, 33 Iowa, 380. *Morrison v. Woolson*, 29 New Hamp., 510.

The discharge in bankruptcy is the judgment of the

court, and stands upon the footing of other judgments. Opportunity is afforded to contest it. If not availed of in the mode, within the time, and in the court allowed, all remedy to annul it is cut off. The jurisdiction of the state court does not extend so far as to admit of a direct attack upon the validity of it. *Correy v. Riply*, 57 Me., 69. *Smith v. Ramsay*, 27 O. St., 339. *Stevens v. Bowen*, 34 Miss., 597. *Alston v. Robinett*, 37 Tex., 56.

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On the the twelfth day of April, 1876, the defendant made application to the district court of the United States, for the northern district of the State of Illinois, to be discharged as a bankrupt, and for a certificate of discharge from all his debts provable under the act of congress establishing a uniform system of bankruptcy. On the fifth day of October, 1876, he was by the order and decree of that court forever discharged from all debts and claims provable against his estate which existed on the twelfth day of April, 1876. During the pendency of these proceedings in bankruptcy, the plaintiffs commenced action in the district court of Colfax county, state of Nebraska, by publication of notice and attachment against the defendant, upon three several notes—one of which matured in the month of October, 1873, one in March, and the other in April, 1874. Upon two of these notes the plaintiffs were sureties for defendant, and they allege in their petition that, on the first day of February, 1875, they were compelled to pay the full amount of one of said notes, and that on the fifth day of April and on the fifteenth day of July, 1875, they were compelled to pay a part of the other note as such sureties of the defendant. On the twenty-eighth day of September, 1876, on motion of plaintiffs the default of the defendant was entered in said action, and judgment

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was rendered for the amount claimed in their petition. On the nineteenth day of October, 1876, defendant filed in this cause a certified copy of his certificate of discharge in bankruptcy. On the eighteenth day of December his land, entered by him as a homestead under the act of congress, was sold by the sheriff upon an order of sale issued in the case. On the twenty-fourth day March, 1877, defendant filed his motion for a perpetual stay of execution on the ground that he was discharged in bankruptcy subsequent to the entry of the judgment, and as appears by the record, on the same day he filed a separate motion to set aside the sale for the same and other reasons. By order of the court the sale was set aside, and this decision of the court constitutes the error complained of.

The only question we deem necessary to consider is, whether, by virtue of the decree in bankruptcy and the certificate of discharge, the defendant is discharged from the debt upon which the judgment was entered against him in this action. It was contended in the argument for the plaintiffs, that the certificate did not release him from the payment of the debt paid by the plaintiffs as his sureties, for the reason that the liability of a principal to indemnify the surety for money paid, where there is no express promise, does not arise from the contract of suretyship. Whether this proposition correctly states the rule of law incident to principal and surety it is not necessary now to inquire, and in respect to it we express no opinion. We think it may be laid down as a rule of law, which will not be questioned, that the full relation of debtor and creditor arise between principal and surety the moment the surety pays the money. Now according to the facts stated in their petition, the plaintiffs, as sureties, paid the money long before the proceedings in bankruptcy were instituted by the defendant, and as the defendant then became the debtor of the plaintiffs

in the full sense of the term, and as this debt was provable under the bankrupt act of congress, the proposition urged by the counsel of plaintiffs does not apply to the facts of this case.

Again, it was urged that the certificate of discharge should be disregarded in this case on the alleged ground of a failure to insert in the schedule of creditors the amount paid by plaintiffs as sureties, as a debt due to them, and also for the reason that the plaintiffs deny having received notice of the proceedings in bankruptcy. The record, however, shows that the amount so paid by the plaintiffs is included in the schedule as debts, severally due to the payees of the notes sued on, and also that due publication of notice was made in the bankruptcy case. But suppose the omissions had occurred as alleged, can the certificate of discharge be impeached in a state court? Section 34 of the bankrupt act provides that "any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge, on the ground that the same was fraudulently obtained, may at any time within two years from the date thereof apply to the court which granted it to set aside and annul the same;" and in *Sandusky & C. R. R. Co. v. Sloan*, 27 Ohio St., 341, it is said that "the act itself having thus prescribed the forum, mode, and time for the direct impeachment of the discharge, on the ground of fraud in obtaining it, the remedy thus given is exclusive." And if the remedy given in the court which granted the discharge is exclusive, then it seems clear that for the omission or commission of any matter particularly set forth in section twenty-nine, the validity of the discharge must be contested in that court and no other. *Symonds v. Barnes*, 59 Me., 192. *Corey v. Ripley*, 57 Me., 69. *Burnside v. Brigham*, 8 Metc., 77. *Parker et al. v. Atwood*, 52 N. H., 181. *Black v. Blazo*,

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117 Mass., 17. *Way v. Howe*, 108 Mass., 502. *Ocean National Bank v. Olcott*, 46 N. Y., 12. *Stevens v. Brown*, 49 Miss., 597.

Again, with the exception of some debts, mentioned in section thirty-three, the bankrupt act provides "that a discharge duly granted shall release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against the estate in bankruptcy, * * * and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge." Here the act itself makes the order of discharge conclusive evidence of bankruptcy and of the validity and regularity of such discharge; and therefore, after publication of notice, the discharge is a good bar to all claims of creditors which were or might have been proved under the bankrupt act. And in *Thornton v. Hogan*, 3 Central L. J., 729, a case decided in the supreme court of Missouri, it is said that a proceeding under the bankrupt act "is certainly more analogous to a proceeding *in rem* in an admiralty court than to any of the ordinary proceedings in common law or chancery, and it seems to have been designed for the purpose, doubtless supposed to promote the public interests, that the final adjudication should be a bar to all creditors, whether their claims were proved or not, or whether they were in the schedule or not, or whether they were really notified of the proceedings or not"—unless for some act or omission, which was the result of fraud on the part of the debtor, and not the result of forgetfulness, accident, or mistake, one or more creditors shall see fit to contest the validity of the discharge and apply to the court which granted it to set aside and annul the same. *Stevens v. Mechanics Bank*, 101 Mass., 109. *Knabe & Co. v. Hayes*, 71 N. C., 110. *Downer v. Dana*, 22 Verm., 339. *Pattison v. Wilbur*, 10 R. I., 448. *Rayl Adm. v. Lapham*, 27 Ohio St., 452. Now, in the

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case under consideration as the action was commenced and judgment was entered during the pendency of proceedings in bankruptcy, the defendant could not plead his discharge, because that case was then undecided, and his certificate was subsequent to the rendition of the judgment; and a personal service on him would have placed him in no better or worse position, and therefore he could only await the determination of the bankrupt proceedings and the granting of the certificate of discharge.

Therefore, according to the exposition of the law as given in this opinion, there can be no doubt that the debt upon which the judgment was rendered was discharged by the defendant's bankruptcy, and therefore, as his certificate is conclusive of discharge, the court will relieve him summarily, by setting aside the sale and quashing the execution. *Curtis v. Slosson*, 6 Pa. St., 265. *Johnson v. Fitzhugh*, 3 Barb. Ch., 360. *Betts v. Bagley*, 12 Pick., 581.

The order of the court below setting aside the sale is affirmed.

AFFIRMED.

THE STATE, EX REL. H. T. CLARK V. THE BOARD OF
COUNTY COMMISSIONERS OF BUFFALO COUNTY, ET AL.

1. **County Commissioners:** JUDICIAL ACTS. In the audit, adjustment, and allowance or disallowance of a claim against the county, the board of county commissioners acts judicially, and its judgment in the matter is conclusive, unless appealed from, or reversed in the mode prescribed by law.
2. ———: ———. The board has no power to review, reverse, vacate, or set aside, its former adjudication of a claim against the county.

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3. **Judgment.** The judgment of a court or tribunal, having cognizance of the subject matter, is conclusive between the parties and their privies, when the same matter comes in question between them in the same or another court.
4. **Powers of Public Officers.** Where power is given to public officers in the permissive form—may—if the public interests or individual rights call for its exercise, it is peremptory.
5. **Claims Against Counties: DUTY OF COMMISSIONERS.** Upon the final adjudication of a claim against the county, it is the duty of the board to issue to the claimant his warrant for the amount, or so much thereof as shall not exceed the aggregate amount levied by tax for the current year for the fund out of which it is payable.
6. **Mandamus to levy a Tax.** When the board refuses to levy a tax clearly provided by law, it may be compelled by mandamus to levy such tax to pay a claim which has been finally adjudicated against the county.

THIS was an application for a peremptory writ of mandamus to compel the board of county commissioners of Buffalo county to levy a tax for the payment of a claim audited and allowed the relator by the said board. It was the same claim, payment of which was enjoined by William L. Dayton, a tax payer of said county, suing for himself and others in like situation, against the relator and the respondents, which suit was finally determined in this court the thirteenth day of May, 1877, in the action in this court entitled, Henry T. Clark, plaintiff in error, against William L. Dayton and the respondents in this case, *ante* page 192. A further statement of the facts out of which the indebtedness arose is unnecessary.

J. R. Webster, for the relator.

Mandamus is the proper and only remedy where there is a fixed, unchangeable ascertainment or assessment of indebtedness, whereby an open claim becomes liquidated, and there is an established liability. *Arthur v. Adams*,

49 Miss., 404, 409, 410. *Board of Police v. Grant*, 9 S. & M. 77. *Marathon v. Oregon*, 8 Mich., 372, 377. *Dayton v. Rounds*, 27 Mich., 82, 85. *Ex parte Com. Council, Albany*, 3 Cow., 358, 364. *State v. Smith*, 11 Wis., 65, 67. *People v. Supervisors*, 10 Wend., 363, 365. *People v. Supervisors*, 51 N. Y., 401. By an audit unappealed from, any claim properly within the jurisdiction of the commissioners, the indebtedness becomes fixed, liquidated, and established, the audit and allowance is a judgment, and is conclusive upon the claimant and the county. *Brown v. Otoe County*, ante page 111. *Snelson v. State*, 16 Ind., 29, 33. *State v. Buckles*, 39 Ind., 272, 274, 275. *Gaston v. Com.*, 3 Ind., 497, 499. *Burnet v. Portage*, 12 Ohio, 54, 58. *Eldorado Co. v. Elstner*, 18 Cal., 144, 149. *Babcock v. Goodrich*, 47 Cal., 488, 513, 514. *People v. Supervisors*, 1 Hill, 195, 199. *Supervisors v. Briggs*, 2 Denio, 27, 32, 44. *Carroll v. Board of Police*, 28 Miss., 38, 48, 49. *Yalabusha v. Carbry*, 3 S. & M., 529, 554, 558. *Beaman v. Board of Police*, 42 Miss., 245, 248.

The matter was not only audited, and allowed to stand unappealed from, but an action by William L. Dayton, suing for himself and other tax-payers, was brought, to which these respondents were parties defendant. In that action it was competent to have attacked the audit upon the ground that the commissioners had no jurisdiction to allow the claim, or that the funds available for road and bridge purposes would not authorize so great an expenditure. All that the parties to the controversy might have litigated in the case, and the parties are concluded and estopped from bringing it now into controversy. *Campbell v. Ayres*, 1 Iowa, 257, 261, 262. *Embury v. Conner*, 3 N. Y., 511, 622. *Danaher v. Prentiss*, 22 Wis., 311, 317. *Voorhees v. Bank*, 10 Pet., 449, 504, 505. And the estoppel applies against the real and substantial parties, though not

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on record as parties, who could control the proceedings and appeal from the judgment. *Castle v. Noyes*, 14 N. Y., 329, 332. *Cecil v. Cecil*, 19 Md., 72, 77, 79, 80. *Peterson v. Lathrop*, 34 Pa. St., 223, 227, 229. The estoppel also applies against the parties who maintain the action, though not parties to the record. *McNamee v. Moreland*, 26 Iowa, 96, 112, 113. *La Guen v. Gouverneur*, 1 Johns, Cas., 436.

E. Wakeley, for the respondents.

1. The former adjudication does not estop the county from denying its liability to Clark. To have such effect it must appear that the matter now sought to be litigated was directly in question in the former suit. But this was not the case. The former suit was by a taxpayer to enjoin the commissioners from issuing the warrants. To maintain the suit the plaintiff was required to show: 1. That the county ought not to pay Clark. 2. That the plaintiff, as a taxpayer, was in such a situation that he had a right to prevent the payment. If he failed to establish either proposition he failed in his case. By the determination of this court he failed to establish the second one, and therefore his action was dismissed. The court did not find it necessary to, and did not in fact, decide upon the first one. Again, the matter so decided must be in issue between the same parties now litigating. This was not the case—no issue was joined between Clark and the county.

2. Clark's demand being merely an audited account, or claim, is to be paid only in the ordinary manner, even if it is not subject to defense. The provisions of the statute are very plain and direct in this respect. Warrants may be issued to him on the proper fund within the limitations prescribed, namely: that they shall not exceed the amount in the treasury and the

amount of the levy for providing the fund out of which the warrants are to be paid. It seems trifling with the court to argue so plain a proposition as this. The statute forbids any over-issue, making the commissioners personally liable for it, and my learned adviser disclaimed, as I understood, the impropriety of asking this court to compel the commissioners, by mandamus, to violate the peremptory interdict of the statute.

3. That the commissioners have no power to levy a tax for the specific purpose of paying Clark the amount found due and allowed to him by the commissioners, is equally plain and indisputable.

The power of a county to levy taxes must be found in the constitution or laws, or it does not exist. And no such power as the one in question is found in the constitution or any statute, or can possibly be derived therefrom. If such a special tax can be levied, so can it be to pay any and every claim allowed by the commissioners, small or large, and every creditor of the county, upon getting his indebtedness audited, can come to this court for his mandamus.

There can be as many special tax levies as there are audited claims; and the whole machinery and process provided by statute for paying demands in their due order, and as the revenues of the county will permit, can be utterly ignored and made obsolete by the omnipotence of a supreme court mandamus. No case is found to justify this astounding assumption, and it needs no refutation. High's Ex. Legal Remedies. *The People v. Clark County*, 50 Ill., 213.

4. It was suggested by counsel that the commissioners had not exhausted their power to levy taxes because by Sec. 2, p. 45, Laws of 1877, they could in their discretion have levied a greater sinking fund than was in fact levied in July last. And therefore the court can compel them to exercise this discretion by levying such tax as the court may think it proper they should levy.

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This assumption is directly contrary to one of the plainest fundamental rules in respect to mandamus, to-wit: that where, by law, inferior tribunals or officers are permitted to exercise a discretion, a court will not, by mandamus, control such discretion, but only compel them to act and exercise it. And this rule is embodied in our statutes. Gen. Stat., Sec. 645, p. 640. High's Ex. Legal Remedies, Secs. 42, 48, and notes. *Justices v. Hoodenpyle*, 7 Humph., 145. *Morgan v. Commonwealth*, 55 Penn. State, 456.

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The relator erected a highway bridge across the Platte river, in pursuance of a contract, whereby the county commissioners of Buffalo county stipulated that said county should pay for that portion of the bridge which lay in said county. When the bridge was completed, it was accepted by the said board of county commissioners, and opened to public use as a highway bridge; and the board, having examined and audited the relator's accounts, did, on the 15th of August, 1874, adjudge the sum of \$19,577.50 to be due and owing to the relator for building that portion of the bridge which lay within said county, and directed a warrant to be drawn upon the treasurer of said county in favor of the relator for the sum of \$2,900.00, then undrawn of the bridge fund levy for the years 1872 and 1873. The board have refused to draw the warrant or to levy any bridge tax, and the relator now applies for a writ of mandamus against the respondents.

One ground on which the allowance of the writ is resisted on is, that on the third day of July, 1877, the board of county commissioners, by proceedings then had as such board, did reconsider and did "reject, rescind, and annul" the settlement, audit, and allowance of the claim

of the relator and the adjudication made in his favor on the fifteenth of August, 1874. In the case of *Brown v. Otoe County*, decided in this court, *ante* p. 111, it was held that in the audit, adjustment, and allowance or disallowance of a claim against the county, the board acts judicially, and its judgment in the matter is conclusive, unless appealed from, or reversed on error in the mode prescribed by law. Indeed, this seems to be the settled rule according to the whole current of the authorities. And it is also a well-established doctrine of the law that the board can only exercise such powers as are especially granted to it, or as are incidentally necessary to carry into effect the powers so granted. *Sioux C. & P. Ry. v. Washington Co.*, 3 Neb., 30. But there is no power conferred by law upon the board to review, reverse, vacate, or set aside its former adjudication; and therefore its proceedings, had on the third day of July, 1877, rejecting, rescinding, and annulling the adjudication of the relator's claim, were without authority, and were not merely voidable, but simply void.

Another ground on which the allowance of the writ is resisted is, that the board had no authority in law to contract with the relator for the erection of the bridge, and that as his claim or demand against the county accrued on account for building the same, the board had no authority to audit and allow the claim, and therefore the adjudication of the same does not conclude the respondents in this action, for the reason that the same was without authority and void. But the subject matter of this defense was litigated and determined in the injunction case of *W. L. Dayton v. The Board*, and the relator, which was brought to this court on error by the relator. In that case the decree of the district court was reversed, and a final decree was rendered in this court in favor of the relator. See *ante* p. 192. And in that case the validity of the adjudication in favor of the relator,

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and the contract to build the bridge, were directly in issue. and determined. And it will not be denied, as a general rule, that the judgment of a court or tribunal, having proper cognizance of the subject matter, is conclusive between the parties and their privies when the same matter comes in question in the same or in another court. Nor is it essential that in such case there must be the identical persons or parties to the action. If they are substantially the same it is sufficient. Hence, this second matter of defense is *res adjudicata*, and the respondents are estopped from inquiry into the validity of the former adjudication of the relator's claim. 2 Burr, 668. 3 East, 346. *French v. Neal*, 24 Pick., 61. *Case v. Reeves*, 14 John., 82. *Green v. Clarke*, 2 Kern., 343. *Davis v. Milburn*, 4 Iowa, 246. *Fishli v. Fishli*, 1 Blackf., 360. *Castle v. Noyes*, 14 N. Y., 335. Swift. Ev., 10. Bac. Abr. Ev., F.

It is admitted that there is "undrawn and unexpended of the taxes levied heretofore for bridge purposes in said county the sum of \$1,922.25," and that for the year 1877, no bridge tax was levied. It is also admitted that on demand by relator the respondents refused to draw a warrant in his favor upon the treasurer for this undrawn and unexpended bridge fund, or to pay the amount adjudged to be due to him; and it is further admitted that the respondents refused to levy a bridge tax to pay the debt so adjusted in favor of the relator. Now as the \$1,922.25 of bridge fund is undrawn and unappropriated, the relator is unquestionably entitled to his warrant for that amount on account of his debt.

The "act concerning counties and county officers" confers on the board the power to examine and settle all accounts of receipts and expenditures of the county, to allow all accounts chargeable against the county, "and when so settled, county warrants *may* be issued therefor as provided by law." In *The King v.*

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The Inhabitants of Derby, Skinner, 370, the court held that "may, in the case of a public officer, is tantamount to shall, and if he does not do it, he shall be punished upon an information." The rule is, that where power is given to public officers in the permissive form of language, "whenever the public interests or individual rights call for its exercise" it is peremptory. "What they are empowered to do for a third person the law requires shall be done. It is placed with the depository to meet the demands of right and prevent a failure of justice." *Supervisors v. United States*, 4 Wallace, 440, and cases cited. It was therefore the positive duty of the board to have issued this warrant when the relator demanded the same.

But it is not so clear that it was the duty of the board to issue warrants for the balance of the relator's adjudicated claim. For it is admitted "that, except as aforesaid, all the levies of taxes in said county previous to the year 1877 for bridge and road purposes had been exhausted by warrants against them for the full amounts authorized by law." And section twenty-four of the "act concerning counties and county officers," provides that "it shall not be lawful for any warrant to be issued for any amount exceeding in the aggregate the amount levied by tax for the current year." And section twenty-six makes the commissioners personally liable for warrants issued in excess of the levy of the current year. And as there was no bridge funds against which warrants could be drawn, except the \$1,922.25, we think the board had no authority to issue any in excess of that amount.

But when a claim chargeable against the county is examined and settled by the judgment of the board, such adjudication, unless appealed from or reversed in the mode prescribed by law, is conclusive and must be paid. And in the case at bar, it seems there

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can be no doubt as to the duty of the board, for in addition to the fund derived from the road tax, to be applied specially to the construction and repairing of bridges, Sec. 15, Chap. XLVII, Revised Statutes, entitled "Roads," provides that "the county commissioners may levy an additional cash tax for bridge purposes, not to exceed five mills on the dollar of the assessed value of all taxable property, to be levied and collected as other taxes," the same to be exclusively applied to the building and repairing of permanent culverts and bridges. Although the language—*may levy*—is used in the permissive form, yet, whenever individual rights call for the exercise of the power conferred by law, it is imperative.

In *King and Queen v. Barlow*, 2 Salk., 609, it is held that "when a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*." See authorities before cited.

It was, however, urged in the argument that "it is not the province of a mandamus to settle differences of opinion between municipalities and claimants as to the amount due for services rendered." This is unquestionably the correct rule. But the case at bar does not come within it, for the reason that the relator's claim was settled and the amount was judicially ascertained by the final adjudication of the board. And hence, it was clearly the duty of the board to levy the tax prescribed by law for bridge purposes, in order to raise the fund against which warrants may be drawn to pay the bridge debts of the county. This is a duty prescribed by the law, and when the board refuses to perform it we can find no reason why it shall not be compelled to do so.

It seems to us the correct rule is, that when a claim against the county is finally adjudicated, and the law clearly provides for the levy of a tax to pay such claim,

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and the board of county commissioners refuse to levy such tax, the remedy is by mandamus to compel the levy of the tax, and not to subject the county to costs of litigation for the neglect of its officers. *Covington v. Drunken*, 52 Ala., 28. *Elmore v. Zeigler*, 52 Ala., 227. *State v. Wilson*, 17 Wis., 687. *Carroll v. The Board*, 28 Miss., 48.

The peremptory writ is granted to compel the respondents to issue the warrant to the relator for the amount of the \$1,922.25 bridge fund undrawn and unexpended; and also to compel the respondents and their successors forthwith, and annually hereafter to levy the tax prescribed by law, and issue to the relator, according to law, his warrants against such tax levies until his debt is paid.

WRIT GRANTED.

ALEXANDER BAKER, ET AL., PLAINTIFFS IN ERROR, V.
WILLIAM DAILY, DEFENDANT IN ERROR.

1. Bankruptcy: REPLEVIN OF PROPERTY FROM THE U. S. MARSHAL.

In proceedings in bankruptcy in the United States district court, the marshal, under a writ duly issued, seized a stock of goods then in possession of a vendee of the alleged bankrupt, at the request of the petitioning creditor, and upon his executing a bond indemnifying the marshal "against any damages, loss, or expense" incurred by taking the property. Thereupon the purchaser, by an order of replevin issued from the state district court, took the goods from the marshal, who made no defense, but suffered judgment for damages to be entered against him on default—which he paid. *Held*—That the state court had jurisdiction, and that the damages adjudged could be recovered against the principal and his sureties on the indemnifying bond. *Held also*—That by proper answer showing the authority under which he took the goods, the marshal could have rendered it improper and erroneous for the state court to have proceeded further with the case.

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- 2 ———: ———. The possession of the goods by the marshal was the possession of the court whose officer he was, and it was the right of that court to determine whether that possession was legal or not.
8. ———: **WAIVER BY MARSHAL.** But this right the marshal could waive, and he did waive it by failure to answer.
4. **Practice in Replevin: SERVICE OF ORDER IN.** The failure of the sheriff to serve a copy of the order of delivery upon the defendant was not a fatal defect. It was an irregularity which should have been taken advantage of, if at all, before trial and judgment, for afterwards it is too late to do so.
5. ———: **DAMAGES MAY BE ASSESSED BY THE COURT.** A jury may be waived and damages assessed by the court in actions in replevin.
6. **Damages.** An expense incurred by the marshal in taking care of the goods while in his custody, but not paid until the day of trial, was properly allowed as damage.

ERROR from the district court of Douglas county, the case being as follows:

In May, 1874, one John T. Edgar commenced proceedings in bankruptcy in the U. S. district court of Nebraska, against one William Malchow, doing business at West Point. The provisional warrant, under section forty of the bankrupt act, was issued upon such proceedings, directed to the defendant in error, as U. S. marshal or messenger of said court, by which he was commanded to seize and take into his possession the property of the alleged bankrupt, Malchow. Upon attempting to obey the command of this writ, he found what was supposed to be the property of Malchow in the possession of one Charles Autzen. The property consisted of a stock of hardware and machinery. Finding the property thus situated, he refused to take possession unless indemnified. Thereupon Edgar, with plaintiffs in error, Baker and Hugus, as sureties, executed to Daily, as U. S. marshal, an indemnifying bond, and Daily took possession of the property in the hands of Autzen. In June fol-

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lowing Autzen brought his action in replevin against Daily and Crawford, who acted as store-keeper for the marshal, in the district court of Cuming county. The defendant Crawford answered, but before trial withdrew it, and judgment was entered by the court as upon default against both defendants, Daily not having answered. The summons was served upon Daily, the order of delivery was not. The court found the right of property in the plaintiff, Autzen; awarded it to him, and assessed his damages at the sum of \$218.51, and costs, taxed at \$20.06, and rendered judgment accordingly against both defendants. This judgment Daily paid, and in June, 1875, brought suit to recover of Edgar and his sureties, Baker and Hugus, upon the bond, the sum of money paid by Daily upon the judgment of the court of Cuming county, and also other items of expense, amounting to \$214.20; upon which items he gave credit of \$40.00, paid by Edgar. One of the items which went to make up this \$214.20, was \$150 alleged in his petition to have been paid Crawford, who acted as his store-keeper at West Point, during the time he, Daily, had the goods in his possession. Upon the trial of the cause it appeared that this sum of money had not been paid at the time of bringing suit, and was not paid until December 4th, 1876, the day upon which the cause was tried. Judgment below, was given in favor of Daily, and Baker and Hugus, the sureties in the indemnifying bond, brought the cause up by petition in error.

The bill of exceptions states that: "At the time of the bringing said replevin suit as aforesaid, and at the time of the rendition of said judgment by the district court of said Cuming county, the said proceedings in bankruptcy were still pending and undetermined in the district court of the United States for the district of Nebraska." The plaintiffs in error were not notified of

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the pendency of the suit in replevin and knew nothing of it. The principal in the bond, Edgar, was notified by Daily.

G. W. Ambrose, for plaintiff in error.

1. It was the duty of Daily, as messenger of the U. S. court, to seize upon the property of the alleged bankrupt, but he had no duty to perform as to the property of any other person, and the fact that he seized the property of Autzen made him a trespasser, and the giving of the bond by the others, constituted them joint trespassers with him, as was decided in *Davis v. Newkirk*, 5 Denio, 92. A suit might have been maintained by Autzen against them all, but instead an action was prosecuted against one alone, a judgment rendered against him, which he has paid, and if this was an action by the marshal for contribution from his co-trespassers, there is no question that he could not recover. Public policy speaks loudly against it, and the law does not recognize any of the rights or obligations of co-partnership in an association for mischief. *Peck v. Ellis*, 2 Johns. Ch., 131. *Miller v. Fenton*, 11 Paige, 18. *Vose v. Grant*, 15 Mass., 521. This of course, proceeds upon the theory that the parties obligated themselves to indemnify against an unlawful act. If a wilful trespass was in contemplation at the giving of this bond there could be no recovery even upon the bond. *Davis v. Arlidge*, 3 Hill (S. C.), 170. *Avery v. Halsey*, 14 Pick., 174. *Stark v. Raney*, 18 Cal., 622. Is the case changed at all when the marshal shall have done an unlawful act upon his own motion, and then seeks to compel satisfaction for his damage out of bondsmen, who, upon the face of their obligation, only desired him to do a lawful act? Can there be any recovery over by the marshal in such a case any more than when, at the

inception, it was in contemplation by all to do an unlawful act?

2. The item of \$150 paid Crawford upon the day of trial, was not a proper item of damage in this suit. The allegations of the petition as to damage, or payment of money, were all denied, and it was error to allow proof of the payment after bringing suit, or to render judgment upon such proof. The obligation on the part of Daily may have been incurred, but no recovery could have been had against the sureties until he had been damaged by being compelled to pay. This payment must have been before suit, or else no recovery.

3. The order of delivery was not served upon Daily. This was as much a requirement to confer jurisdiction upon the court to render judgment against him in a replevin case as the service of summons in a case upon a promissory note. General Statutes, 553. Statute of Wisconsin, 1857, page 611. *Abrams v. Jones*, 4 Wis., 806.

4. The damages were assessed by the court. It would seem that the court has no power or authority in the premises until the assessment of damages shall have been made by a jury. General Statutes, 553.

5. The United States court having obtained the possession of this property, and the cause being still pending therein, it was not competent for the court of Cuming county to send out its mandate to take the possession therefrom or out of the hands of its officers. The remedy of Autzen was in that court alone, and the court passing the judgment against Daily was without jurisdiction. *Hagan v. Lucas*, 10 Peters, 400. *Wallace v. M'Connell*, 13 Peters, 151. *Taylor v. Carryl*, 20 How., 583. *Freeman v. Howe*, 24 How., 450. *Riggs v. Johnson*, 6 Wallace, 196. *Amy v. Supervisors*, 11 Wallace, 136.

6. If any, or all these propositions are true, then

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Daily had a good defense to the action against him. It was his duty to have interposed this defense, and the sureties to this bond, being neither parties or privies to that suit, may impeach the judgment for any reason which would have reversed the judgment upon writ of error prosecuted by a party to the record. *Downs v. Fuller*, 2 Met., 135. *Leonard v. Bryant*, 11 Met., 370. *Vose v. Morton*, 4 Cush., 27. *Griswold v. Stewart*, 4 Cow., 457. *Dawes v. Shed.*, 15 Mass., 7. *Gookin v. Sanborn*, 3 N. H., 491. *Hayes v. Seaver*, 7 Me. (Greenleaf), 237. *Bridgeport Ins. Co. v. Wilson*, 34 N. Y., 275. *Thomas v. Hubbell*, 15 N. Y., 405.

J. L. Webster and *John D. Howe*, for defendant in error.

1. There is no ground in this action to justify any serious claim that defendant in error was a trespasser within the meaning of the rule invoked by the counsel of the plaintiff in error. When such an officer as a United States Marshal, or a sheriff, is called upon by a creditor to levy the process of a court upon property held by a third party, as the property of the debtor, the officer acts as the agent of the creditor. The bond of indemnity given him by the creditor is valid, and can be enforced, if the officer has acted in good faith; in other words, if he did not act as a willful trespasser. We hear of this point for the first time in the brief of counsel herein. There is no issue in the pleadings which will authorize any such claim. The cases cited show the unfounded character of the pretense in this behalf. *Miller v. Rhoades*, 20 Ohio State, 494. *Cole v. Parker*, 7 Clark, (Iowa), 167. 2 Hill on Torts, 288 § 11. *Clark v. Foxcroft*, 6 Maine, 296. 17 Johns., 142. 5 Humph., 57 2 Met., 53. 37 Penn., 399. 40 Penn., 359. 7 Mass. 123.

2. The item of \$150 was properly provable, and allowed. *Noble v. Arnold*, 23 Ohio State, 264. *Richardson v. Chorson*, 10 Q. B., 756. *Klein v. Thompson*, 19 Ohio State., 569. *Goodman v. Gay*, 15 Penn., St., 188. *Bancroft v. Winspear*, 44 Barb., 209.

3. That the state court has not the power to secure to a citizen of the state a trial of the right of property in goods which he claims have been improperly seized as the property of another, by process issuing out of a federal court, this court will be reluctant to admit. *Buck v. Colbath*, 7 Minn., 310. *Sifford v. Beuty*, 12 Ohio State, 189. *Howe v. Freeman*, 14 Gray, 566. 1 Kent's Com., 411, 495. *Clark v. Skinner*, 20 John., 468. *Taylor v. Corryl*, 24 Penn. State, 259. *Cropper v. Coburn*, 2 Curtis, 465. *Dunn v. Vail*, 3 Martin, La., 602. *Buck v. Colbath*, 3 Wall., 334, 343, 347. *Christmas v. Russel*, 14 Wall., 69, 80. See the dissenting opinion by Miller, in 6 Wall., 200, concurred in by the chief justice and Grier. The real question here does not require the judgment of this court upon the controverted point referred to. The question is, whether, when the state court has exercised the jurisdiction without objection, and rendered its judgment, which has been satisfied by payment in good faith, it is evidence of the "damage, loss, or expense," provided for in the bond. It is believed that even the most ultra decision of the federal courts does not hold that a judgment is void where the question as to the jurisdiction has never been raised or passed upon by the the state court, and when the jurisdiction has been exercised without objection and with permission. No suggestion is made that the judgment is unjust; nothing is pleaded here to show that there is any probability that the litigation would have resulted differently if it had been carried on in the federal court. Even if the jurisdiction of the federal court was paramount, can it be

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fairly claimed that such priority of right could not have been waived; that the proceedings of the state court stand for naught?

If all that is contended for by the counsel is sound he must plead, specially, the want of jurisdiction.

LAKE, CH. J.

The objection made to the judgment of the district court for Cuming county is not valid. That court is one of general jurisdiction. It had jurisdiction of the person of the defendant, and also of the subject matter of the action, as shown by the petition, and therefore the judgment which it pronounced is binding upon all the parties to it until regularly set aside.

I. It is very likely that, had Daily chosen to do so, he could, by proper answer, have shown a state of facts that would have made it improper and erroneous for the court to have proceeded further with the case. He was acting under a writ duly issued from the federal court, whose officer he was. His possession was in contemplation of law the possession of the court, and it was the undoubted right of that court to determine whether such possession were lawful or not. *Amy v. The Supervisors*, 11 Wall., 136. But this right he could waive, and he did waive it, by neglecting to plead the authority under which he had taken the goods as a defense to the action. While he might have shielded himself by proper answer as against the jurisdiction of the state court, this was not necessary to entitle him to the protection of the indemnifying bond by which he was induced to make the seizure. The state court was fully competent to decide all of the questions involved in the case, and its judgment in the premises is quite as conclusive as a like judgment pronounced by the federal court would have been. Besides, the plaintiffs are not in a situation to complain. Edgar,

the principal in the bond, was duly notified by Daily that the goods had been replevied, and he agreed to employ counsel to take charge of the case. Any defense that Daily could have made was also available to him, and it was his fault alone that it was not interposed. Notice to the sureties of Edgar was unnecessary. His liability under the contract is the exact measure of theirs. It may be true even that some of the items of damage allowed against Daily ought to have been rejected, but if so, it is now too late to question the correctness of the allowance then made.

II. It is further objected that the judgment in the replevin suit is void. 1st. Because a copy of the order of delivery was not served upon Daily, and 2d. For the reason that a jury was not called to assess the damages. As to the first of these objections, we hold it to have been a mere irregularity or omission not at all essential to the jurisdiction of the court. The court acquired jurisdiction over the person of Daily by the service of its summons upon him; and over the property, by the sheriff taking it into his possession under the order of delivery. Daily was in court by virtue of the summons, and if it were desired to call in question the service of the order of delivery, the proper time was before trial and judgment, for afterwards it is too late to do so.

By the second of these objections it seems to be assumed that, under no circumstances in a replevin suit has the court the authority to assess the damages. And so the supreme court of Ohio seems to have held under a statute just like ours so far as it affects this question. *Wolf v. Meyer*, 12 Ohio State, 432. But this, unlike most of the decisions of that court, is not at all satisfactory, and we think fails to recognize the full scope of another provision of the statute relative to the trial of causes by the court. Section 296, of our code of civil pro-

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cedure, corresponding with Section 279, of the Ohio code, provides that: "The trial by jury may be waived by the parties in actions arising on contract, and with the assent of the court, in other actions, in the following manner:

"*First.* By the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney.

"*Second.* By written consent in person, or by attorney, filed with the clerk.

"*Third.* By oral consent in open court entered on the journal."

An action to recover the possession of personal property does not arise on contract, and it therefore falls within the somewhat numerous class denominated in the foregoing section, "other actions," in which the waiver of a jury depends upon the assent of the court. But such assent will be presumed from the fact that the court did assess the damages. The case against Daily came within the *first* of the three sub-divisions of the section providing the manner of waiver when but one of the parties appears at the trial. In the case against Daily the plaintiff was the only party present at the trial, and he exercised the privilege of dispensing with the jury, and permitted the court to decide all the questions of fact necessary to a complete determination of the controversy. We think this practice was clearly within the statute, and fully justified, notwithstanding the decision in *Wolf v. Meyers*, above cited.

III. It is also assigned for error that the court below allowed to Daily as an item of damage, in addition to the amount found by the judgment in the replevin suit, the sum of \$150, an expense incurred by him in taking care of the goods while they were under his control, but which he did not actually pay until the day of trial.

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We think this item was properly admitted under the petition. It was very clearly covered by the bond, one of the conditions being, that Edgar and his sureties, Baker and Hugus, should "hold the said United States marshal, Daily, harmless, and afford him full indemnity against any *damages, loss, or expense*" incurred by seizing the property in question. And the petition distinctly charges this item of \$150 as a part of the necessary expense to which Daily was put, "by reason of taking possession of said property, pursuant to the request of the defendants, and under the protection of said bond." The fact that it was not actually paid until after the commencement of the action on the bond is of no consequence; he had incurred the indebtedness, and that was a damage against which the bond was designed to protect him. *Noble v. Arnold*, 23 Ohio State, 264.

We see no reason for disturbing the judgment, and it is affirmed.

JUDGMENT AFFIRMED.

THE STATE, EX REL J. J. JONES V. THE COUNTY COMMISSIONERS OF LANCASTER COUNTY.

1. **Township Organization:** VOTES NECESSARY TO ADOPT Section five, Art. X, of the constitution is mandatory; therefore to adopt township organization it requires a majority of all the legal voters of the county, voting at the general election, at which the question is submitted.
2. —: CONSTITUTIONAL LAW. The act of February 16, 1877, entitled "an act to provide for township organization," embraces several subjects not indicated by the title, and as these several subjects are dependent on each other and form inseparable parts of the same law, the whole act is unconstitutional and void.

ORIGINAL application for a mandamus to compel the county commissioners of Lancaster county to complete

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township organization in said county by dividing the county into towns, appointing town officers, etc., as provided by an act of the legislature entitled "An act to provide for township organization," Laws, 1877, 71. Further facts appear in the opinion.

M. H. Sessions, for the relator.

Section 11, Article III, of the constitution provides that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title." The first question that presents itself in the discussion of this case is, is the act of the legislature under consideration obnoxious to this provision of the constitution? It will perhaps be contended that it is in this, to-wit: that it contains more than one subject, inasmuch as it provides for township organization, and also for county government under such organization. This clause of the constitution must be read in connection with Sec. 5, Art. X, which provides that the "legislature shall provide by general law for township organization under which any county may organize, whenever a majority of the legal voters of such county, voting at any general election, shall so determine." Here we have the positive mandate of the constitution for the legislature to provide by general law "for township organization," thereby clearly indicating in the constitution that the title to the act must be "for township organization."

The whole system of township organization in this country is well understood to embrace not only the township organization or government, but as well the elements which compose the county government; and the expression, "township organization," in its popular signification, would embrace both, notwithstanding the two organizations are composed of the same material, and essentially different in their effects; the act may, in

a technical sense, embrace more than one subject, and but one expressed in the title, yet they are so closely and intimately connected by common consent, and the popular understanding of the phrase, and its general adoption, that although the technical reading may bring it within the letter of the constitution, it leaves it without the spirit and intent of the same. This is not all. The constitution not only provides that the legislature shall provide by general law "for township organization," but the same mandate directs them to provide by general law for township organization "*under which any county may organize.*" Had not this law contained that which it is contended makes it unconstitutional, the same would not be perfect nor complete; neither would it have answered the requirements of the constitution in requiring the passage of the same. *Board of Supervisors of Ramsey Co. v. Heenan*, 2 Minn., 330, 339. *Clinton v. Draper*, 14 Ind., 295. *Brewster v. City of Syracuse*, 19 N. Y., 116.

The next question is, has the county of Lancaster voted for township organization within the spirit and meaning of the constitution?

The difficulty arises in construing the clause *whenever a majority of the legal voters of such county, voting at any general election, shall so determine.* Is this to be literally construed according to the exact letter, regardless of the spirit of the same, when taken in connection with other clauses of the constitution treating upon the same subject matter? Or does it mean *a majority of all the legal voters of the county, voting on the question, shall vote for the same?*

In determining questions of construction, recourse should first be had to the instrument itself, and see if that is not its own best interpreter as to its true meaning concerning doubtful clauses, and in that light let us examine our constitution. In voting for township or-

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ganization, what is the thing involved, and what is the first act the voter seeks to do? The answer is apparent; to subdivide the county into townships—one form of the division of the county. Now when you seek to divide a county the constitution becomes its own interpreter on this question of voters or voting. Section 2, Article X, provides as follows: “Nor unless a majority of all the legal voters of the county, *voting on the question*, shall vote for the same.” That being the criterion and the construction to be adopted, the question was carried. Now let us examine section 3 of the same article, which is treating of striking territory from, or adding the same to any organized county; that provides as follows: “That no territory shall be added to any organized county without the consent of the *majority of the voters* of the county to which it is proposed to be added.” Now if you adopt the construction contended for in this case, and say that the proposition is not carried, you have this anomaly in constitutional law, viz.: of having three different tests of determining the same question or principle, and each requiring a different constitutional majority. If you desire to divide the county you can do so by submitting the question to a vote of the people, and if a *majority* of all the legal voters of the county, voting on the question, shall vote for the same the county is to be divided. Or if you wish to add territory to your county, you can only do so by obtaining the consent of the *majority of the voters of the county* to which it is proposed to be added. But if you do not desire to do either of these things, and do wish to have township organization, then another rule is applied, and you must have a majority of legal voters of such county, voting at any general election. American Laws of Elections, § 445. *First Parish v. Stearns*, 21 Pick., 153. *Taylor v. Taylor*, 10 Minn., 107, 116. *R. R. Co. v. Davidson Co.*, 1 Sneed (Tenn.),

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691. *Gillespie v. Palmer*, 20 Wis., 544. *St. Joseph Township v. Rogers*, 16 Wall., 664. *Osburn v. Staley*, 5 W. Va., 85. *Talbot v. Dent*, 9 B. M., 534, 538.

S. B. Galey, for the respondents.

The mere statement of the facts in connection with the requirement of the constitution would seem to be decisive of the point at issue. The legislature is prohibited from authorizing the adoption of "township organization" in any county, *unless* "a majority of the legal voters, voting at a general election, shall so determine." These words do not imply an acquiescence, or negative sanction, or negative assent, inferred from absence, but a positive vote in the *affirmative*. The number of votes required is specifically named, and there is no difficulty in ascertaining what that number is, since the law relating to general elections (General Statutes of Nebraska, page 354), provides the *means* or *evidence* by which the exact number of legal voters of the county voting at a general election may be determined, to-wit: the poll books in which is recorded the name of each person voting at the election. *The People v. Brown*, 11 Ill., 478. *Id. v. Wiant*, 48 Ill., 263. *State v. Winkelmeier*, 35 Mo., 103. *Id. v. Sutterfield*, 54 Mo., 391. *County Seat of Linn Co.*, 15 Kan., 530. Central Law Journal July 6, 1877, page 16.

The relator in this case relies principally on the decision of the supreme court of Wisconsin in the case of *Gillespie v. Palmer*, 20 Wis., 544, to sustain his view, that only a majority of votes cast upon *that question* is required. In that case the language used in the act of legislature was very different from the language of our constitution and act. In this case a literal interpretation of the language used leads to no difficulty or absurdity as it would in that; and the distinction between

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“a majority of the votes cast at an election,” and “a majority of the legal voters voting at an election,” is clearly shown in the opinion of the court in that case, and to which reference is here made to sustain the view of the defendants in this case.

The act is in conflict with section 11, Art. III. The provisions of the constitution are mandatory, and must be complied with, or the act embracing more than one subject will be held inoperative and void. 3 West Virginia Reports, 588. 20 Ind., 490. 5 Neb., 305, 505. Cooley Const. Limit., § 148.

The act embraces more than one subject, to wit: 1. Township organization. 2. County organization. 3. Revenue.

The legislature, by the constitutional provision before quoted, is only authorized to “provide by general law for township organization,” which both in letter and spirit means, to make provision by general law to invest the inhabitants or people of townships with certain corporate powers, by which they may have and enjoy the benefits arising from local government; giving them power as a body politic to lay out and repair roads, build their own bridges, take care of their poor, etc., etc., at their own expense, and in such manner as they shall see fit.

In pursuance of this authority—which is also a limitation upon legislative authority—the legislature, by the act in question, under articles 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, has made such provision.

By article two of said act the township corporation is created with the usual corporate powers, its rights and duties are defined, and a name is given to it. “Township organization” by this article is brought into existence “full fledged,” and endowed with all its faculties and powers. The other articles above specified, make provision for the exercise of the corporate powers, rights,

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and duties conferred and imposed by said article two; and all these provisions are germane and incidental to the subject, and are properly connected therewith. If the legislature had ceased to act at this point, the bill would have contained but one subject, and the same would have been clearly expressed in its title.

Did the convention, or the people of this state, who adopted this constitutional provision on the subject of "township organization" mean anything else than the words used indicate? If not, and the legislature has legislated upon this subject as well as one or more *other* subjects in the same bill, then the act is void.

This provision of the constitution was borrowed from the state of Illinois, as every one knows. The legislature of that state has given to it the interpretation we contend for, which is evidenced by the revised statutes of Illinois, 1874, in which, under two different chapters, will be found the law of that state on the subject of "township organization" and "county organization" respectively. The interpretation of "township organization" by the legislature of Illinois has never been questioned in the courts of that state, and it is but reasonable to say, that when we borrowed from that state our constitutional provision, we also accepted its interpretation and meaning as defined by her legislature. See Sedgwick on Statutory and Constitutional Law, pages 412 and 413, and authorities there cited.

That portion of the constitutional provision, therefore, which imposes upon the legislature the duty of "providing by general law for township organization," means just what it says, no more, no less; the words following that clause refer only to what the people of any county may do under, or with reference to such a general law, if they shall so determine. See *The American Cyclopædia*, vol. 15, p. 828, "town."

When we eliminate from the act in question the sub-

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jects of *county organization* and *revenue*, the act is still broader than its title. The title being "to provide for township organization," it in no manner indicates or expresses the provisions of the act in respect to the discontinuance of "township organization" and other provisions under article 16, relating to the same, as well as the re-enactment of the general law now in force, the election of county commissioners at a special election in January following, etc., etc.

When parts of a statute are unconstitutional, and other parts valid, the former being evidently designed as an inducement to the latter, so that the whole taken together warrant the belief that the legislature would not have passed the valid parts alone, then the whole act should be held inoperative and void. 13 Wis., 450. 2 Gray, 84. 22 Cal., 387. 33 Cal., 212. 14 Mich., 276. 5th Ohio State, 497. 25 Conn., 290.

GANTT, J.

The question of township organization was submitted to the vote of the legal voters of Lancaster county, at the general election held on the sixth of November, 1877, and a majority of the votes cast on that question were in favor of such organization. But the county commissioners refused to complete the township organization as required by the act of February 13, 1877, and in their answer to an alternative writ of mandamus against them they deny that the township organization was adopted by a majority of the legal voters of the county, voting at said general election, and aver that the act is unconstitutional, inoperative, and void. By stipulation of the parties it is admitted that 2,451 legal voters of the county voted at the general election; that 952 votes were cast in favor of township organization and 601 votes were cast against such organization. It there-

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fore required 1,226 votes to constitute a majority of all the voters who voted at such election. The decision of the first question raised by the answer depends on the construction which must be given to section five, article X, of the constitution, which declares that: "The legislature shall provide by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county, voting at any general election, shall so determine."

It is the province of a written constitution to establish fundamental maxims and fix rules of proceeding which are usually looked upon as material to be done, and to be regarded in the light of limitation upon the powers to be exercised; and therefore it is said that in the construction of a constitution "its terms must be taken in the ordinary and common acceptance, because they are supposed to have been so understood by the framers and by the people who adopted it." In *Oakley v. Aspinwall*, 3 N. Y., 568, Bronson, J., in reference to the construction of a constitution, said his "rule had been to follow the fundamental law as it is written regardless of consequences," and that "if the legislature or the courts undertake to correct defects by forced and unnatural construction they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary, in enlarging the powers of the government, opens the door for another which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the government are just whatever the authority pleases to call them."

In the application of these principles to the above provision of the constitution, it may be remarked, in the language of Emmot, J., in *People v. Lawrence*, 36 Barb., 186, that "it would be found upon full examination to be difficult to treat any constitutional provisions as

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merely directory and not imperative;" and certainly when the words are not used in a strictly technical sense, the only safe rule is to follow the fundamental law as it is written. In the section quoted, the language admits of but one meaning, and that is imperative in its operation, and therefore it seems to me quite clear that to adopt the township organization there must be an affirmative vote of a majority of all the legal voters, voting at the general election.

In the case of *The People v. Brown*, 11 Ill., 479., in the construction of a similar constitutional provision, the court say that it "is free from all doubt or uncertainty. The language is clear and explicit, and admits of but one meaning. It does not mean a majority of those voting on the question to be submitted, but a majority of all the legal voters of the county," and that the right to organize depends on an affirmative vote of such majority. *People v. Wiant*, 48 Ill., 266. *State v. Winkelmeier*, 35 Mo., 103. *County Seat of Linn County*, 15 Kansas, 530.

In *Bayard v. Klinge*, 16 Minn., 249, it is held that when the constitution provides that a question must be submitted to a vote of "the electors of the county," and requires "a majority of such electors voting thereon," it means a majority of the electors who vote at such election, and not merely of them voting on the particular question. It is, however, true that in California, Ohio, and Wisconsin a different rule of construction has been adopted; but when these courts attempt to apply to the construction of constitutions the rules which distinguish directory and mandatory statutes, they certainly tread on very dangerous ground, and as observed by an eminent jurist, although there may be "very strong motives for declaring the law to be what it is not," yet "it would have been interesting and useful if either of these learned courts had enumerated the evils that must be placed in the opposite scale when the question is whether

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a constitutional rule shall be disregarded, not the least of which is the encouragement of a disposition on the part of legislative bodies to set aside constitutional restrictions, in the belief that if the unconstitutional law can once be put in force, and large interests enlisted under it, the courts will not venture to declare it void, but will submit to the usurpation, no matter how gross and daring." Cooley's Const. Lim., 73, note.

No doubt, as in the courts referred to, there will always be some plausible reason for latitudinarian construction. It may be urged on the ground that some real or supposed evil may be avoided, or some real or supposed good may be obtained. But will not yielding to such influences gradually undermine and finally overthrow the constitution? Indeed, if legislatures and courts may, under such rule of construction, "depart from what is plainly declared in the constitution, the people might well despair of ever being able to set any boundary to the powers of the government."

I think that section five, article X, of the constitution must be construed according to the plain meaning of the words used, and that the language employed therein is mandatory; and therefore, as the affirmative vote on the question submitted was less than a majority of all the legal voters, voting at the general election, the proposition to adopt township organization was defeated.

The second question raised by the answer is, whether the act is unconstitutional, inoperative, and void. The constitution declares that "no bill shall contain more than one subject, and the same shall be clearly expressed in the title." This provision is mandatory; and according to the whole current of authorities, it seems clear that it not only requires the purpose of the act to be correctly indicated by the title, but that it must control the effect and operation of the law, and exclude every thing which is not within the purpose indicated by the

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title. It is, however, not the intent of the constitution that each subject of legislation shall be divided into separate acts so far as the subject is capable of division, but that the subject matter of each part or section of the law must be germane to the primary object of the bill, which is denominated by the constitution as the subject of the act.

Another principle in the interpretation of a constitution is, that presumptions will always be in favor of the constitutionality of the law, when its object and provisions are within the acknowledged powers of the legislature; and therefore the power of the courts to declare a legislative act a nullity because it infringes on the constitution should be "exercised with extreme caution, and never when a serious doubt exists as to the true interpretation of the provision alleged to be repugnant." But the court is required to declare what the law is in the case which comes before it; and hence if the legislative department infringe the constitution in such case, the duty of the court, though it may be delicate and unpleasant, is a plain one, regardless of consequences. It is the duty of the court to regard the constitution, which is the fundamental law and superior to the ordinary act, and the constitution, and not such ordinary legislative act, must govern the case to which both apply. These general rules are deduced from the authorities, and seem to be well-established principles in the construction of statutory law; and with these in view, the act in question will be examined.

The title to the act is "*An act to provide for township organization.*" This title is very restrictive; it includes only township organization, and it will not be urged that the court can enlarge the scope of the title. On the contrary, it is said that "the constitution has made the title the conclusive index to the legislative intent as to what shall have operation," and as the legislature "may

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make the title to an act as restrictive as they please, it is obvious that they may sometimes frame it as to preclude many matters from being included in the act which might with entire propriety have been embraced in one enactment with the matter indicated by the title, but which must be excluded because the title has been made unnecessarily restrictive." Cooley, Const. Lim., 149.

Now notwithstanding the very restrictive terms of the title to the act in question, yet it not only contains provisions in regard to township organization, but it also provides for county organization and defines its corporate powers; it determines the number of county officers, defines their duties, provides for their election, and limits the terms of their respective offices, and it also materially amends and changes the general revenue laws; and all these various subjects of legislation are contained in the body of the law, and are so intermixed and connected that all those portions of the act not embraced within or indicated by the title "cannot be rejected and leave a complete and sensible enactment which is capable of being executed." Indeed the second section of the act makes the whole law but one system, for it provides that the county voting in favor of township organization "shall be governed by and subject to the provisions of this act." In *Mewherter v. Price*, 11 Ind., 200, the title to an act was, "an act concerning promissory notes and bills of exchange," and the court say: "We have seen that the title to the act under consideration is limited to promissory notes and bills of exchange. Its language is very explicit, and we know of no rule of construction by which it can be extended as to embrace instruments of writing other than those which it expressly names." So in the case at bar, the title is limited merely to township organization, and there is no rule of construction by which it can be enlarged so as to embrace the other subjects contained in the law, and not expressed or fairly indicated in the title.

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In *The State v. Perry Co.*, 5 Ohio St., 507, the law submitted the removal of the county seat to a vote of the electors of the county, but the act contained another subject, making the two dependent on each other. The court said in substance that the second subject, not indicated in the title, was such as would naturally influence the vote upon the adoption or rejection of the first, and would be a fraud upon the electors of the county to procure the adoption of the first by means of the second subject, and then declare it void. This would be allowing the second to accomplish its purpose, giving vitality and effect to the first, which without it would never have been adopted. The provisions of both are made equally to depend upon the result of the election; they were submitted by the legislature collectively to the voters of the county, and could only be passed upon *as a whole*, and they must stand or fall together, and therefore both parts of the act must be held to be unconstitutional. So in the case at bar, township and county organizations and a change in the general revenue laws are submitted by the legislature collectively to the voters of the county, and could only be passed upon as a whole, and therefore they must all fall together. However, the rule is not to be questioned, that when the part of an act which is clearly expressed by the title is not dependent on that which is unconstitutional, and is complete in itself and capable of being executed, it will be maintained; but where the different portions of the act form inseparable parts of the same system, and some portions are unconstitutional, the whole law is invalidated by the unconstitutionality of such parts. *Campan v. Detroit*, 14 Mich., 276. *Lathrop v. Mills*, 19 Cal., 513. *State v. Perry Co.*, 5 Ohio St., 497. *Oatman v. Bond*, 15 Wis., 20. *Reed v. Omnibus*, 33 Cal., 212. The act under consideration clearly comes within the latter rule, and therefore it must be held inoperative and void.

McCune v. Thomas.

The case of *The Board of Supervisors v. Heenan*, 2 Minn., 339, which was very much relied on by counsel for relator, cannot be approved for several reasons. It is, however, only necessary to state that the decision of that case seems to rest mainly upon "popular understanding" and "custom;" and also upon the theory that a "segment" of each township government will "aggregate and form the county government." This latter result certainly cannot follow in our state, for the county organization is separate from that of township, and none of the county officers constitute a "segment" of the township organization except the supervisors, in case township organization should be adopted as indicated by the act in question.

The writ of mandamus must be denied.

WRIT DENIED.

A. J. McCUNE, PLAINTIFF IN ERROR, v. JOHN D. THOMAS,
DEFENDANT IN ERROR.

1. **Conflicting Testimony.** NEW TRIAL. Where there is conflicting testimony, although the court may incline to the opinion that the result of the trial ought to have been somewhat different from that reached by the jury, this is not a good reason for setting aside their verdict.
2. ———: ———. If testimony is conflicting, it is within the province of the jury to determine what portion shall be received, and what rejected. The court may lay down rules by which the credit of witnesses may be tested, but the application of those rules should be left entirely to the jury.

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

Baldwin & Snythe, for plaintiff in error.

A. N. Ferguson, for defendant in error.

LAKE, CH. J.

The action in the court below was brought by the defendant in error upon an account for money loaned, labor performed, and for certain articles of personal property sold and delivered to the plaintiff in error, on which there was claimed to be due the sum of \$816.50.

The answer filed by the plaintiff in error, after denying that he was indebted in any amount whatever, admitted considerable dealings between the parties, and gave what was claimed to be a correct statement of the accounts, both debits and credits, as they actually occurred. In this statement Thomas is credited, substantially of items claimed by him in his petition, with \$375.50, but on the whole giving a balance in McCune's favor of \$440.50. To this there was a reply which put in issue the whole of McCune's claim against Thomas, so that, as the pleadings stood, had no testimony been produced by either party, Thomas would have been entitled to a judgment for at least \$375.50, in his favor.

It is contended on the part of each of these parties that the account of the other was "false and untrue," and "trumped up," which to a certain extent, judging from the testimony, was very likely true. At all events, after a very fair trial, to which no objection is made on account of any ruling of the court, the jury seem to have reached that conclusion, and therefore, disallowed many items in both accounts, returning a verdict in favor of Thomas for \$491.77. It is now urged that this verdict is not supported by the evidence; and this is the only ground on which it is sought to reverse the judgment of the district court.

Without undertaking a review of the testimony, it is not improper to say, of that given by the parties themselves, that its reconciliation is impossible. It is true

that, in some of the minor portions of it, each is in a measure supported by other witnesses, or by some attendant circumstance throwing light upon certain of their transactions. It is therefore a case in which it would probably be impossible for either judge or jury to reach a conclusion in which the mind would rest completely satisfied that entire justice had been done.

It may well be remarked of this, as we said in the case of *Blackburn v. Ostrander*, 5 Neb., 219: "It is a case peculiarly suited to a jury trial, wherein the character and appearance of the witnesses, as well as the words they utter, can be considered and weighed by twelve of their fellow citizens," etc. And although we might incline to the opinion that the result of the trial ought to have been somewhat different from that reached by the jury, this is no good reason for setting aside their verdict.

When in a jury trial, as in this case, it is found to be impossible to reconcile and give full credit to all of the testimony, it is clearly within the province of the jury to determine what portions shall be received and what rejected. The court may lay down the rules by which the credit of a witness may be properly tested, but the application of these rules should be left entirely to the jury. And it is only where it is manifest that such instructions have been disregarded, and the verdict is wholly unsupported by the evidence that the court may properly interfere and grant a new trial. To hold otherwise would be a practical extinguishment of the right of trial by jury.

JUDGMENT AFFIRMED.

Templin v. Synder.

CHRISTIAN TEMPLIN, AND OTHERS, PLAINTIFFS IN ERROR,
v. CHARLES SYNDER, DEFENDANT IN ERROR.

New Trial: JURISDICTION OF JUSTICES OF THE PEACE. A justice of the peace has jurisdiction to grant a new trial only when it is shown "that the verdict was obtained by fraud, partiality, or undue means."

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

The action was commenced before John N. Edwards a justice of the peace, by Charles Synder against Christian Templin, *et al.*, for damages sustained for the alleged wrongful conversion, by the said Templins, of certain goods and chattels, claimed to belong to said Synder. October 2, 1876, the cause was tried to a jury, who returned a verdict for the Templins, and in whose favor the justice rendered a judgment accordingly. Synder immediately filed a motion to set aside the verdict on the alleged ground that the jury, after the cause was submitted, and they had retired to deliberate upon and had agreed upon their verdict, but before returning into court with the same, separated for the space of about one hour. No evidence was introduced to support the motion, but the motion was sustained by the court, and the Templins excepted. The cause was set for trial on the tenth day of October, at which date the Templins appeared specially and filed a motion to dismiss the cause, for the reason that the court had no jurisdiction of either the subject matter or of the defendants, which motion was overruled, and an exception noted. The Templins refused to appear further, and the cause was then tried to the court, and judgment was rendered against the Templins for \$59.35 and costs, taxed at \$29.08. The Templins prosecuted a petition in error to the district court, and at

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the November term, 1876, of said court, the petition in error was overruled, and the judgment of the court below was set aside at the costs of the plaintiffs in error, taxed at \$9.45. At the next term of said court Synder filed a motion to correct the journal entry in said cause; the same was sustained, and judgment rendered against the Templins for \$59.35 and costs, taxed at \$38.56. The Templins excepted, and brought the cause here upon a petition in error.

C. L. Lewis and Norval Bros., for plaintiffs in error, cited the General Stat., 682, Sec. 983. *Sioux City & Pacific R. R. Co. v. Washington Co.*, 3 Neb., 41. *Reynolds v. Stansbury and Burch*, 20 Ohio, 353. *Cox v. Groshong*, 1 Pinney's Wis. Rep., 307. *Supervisors v. LeClerc*, 3 Pinney, 327. *Firmstone v. Mack*, 49 Pa. State, 387. 5 American Reports, 253.

Lowley & Leese, for defendant in error.

LAKE, CH. J.

There was no authority for the granting of the new trial in this case. As we had occasion to show in the case of *Cox v. Tyler*, decided at the present term, the jurisdiction of a justice of the peace in the granting of new trials is fixed by statute, and is confined to cases wherein, on motion, it is shown to his satisfaction "that the verdict was obtained by fraud, partiality, or undue means."

This case does not come within that rule, for no showing of that sort was even attempted. The action of the justice complained of was therefore wholly unauthorized, and the judgment finally rendered erroneous. For these reasons the judgments of both the district court and the justice of the peace are reversed, and the cause remanded to the last named court, with instruction to enter

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judgment on the original verdict, on motion of the plaintiffs in error, and notice to the adverse party or his attorney.

REVERSED AND REMANDED.

WILLIAM H. REED, PLAINTIFF IN ERROR, V. PHILANDER E. BEARDSLEY, DEFENDANT IN ERROR.

1. **Pleading: AMENDMENT OF.** When on a trial of an action commenced against the members of a partnership, as such, it is discovered that the transaction was really with a single member of the firm in his individual capacity, the court may permit an amended petition to be filed changing the title and form of the action accordingly.
2. **Declarations of Agent: WHEN INADMISSIBLE.** A trustee holding the legal title to land merely for convenience of transfer in case of sale, and who deeded it to a vendee by direction of the owner by whom the sale was made, cannot bind the vendor by declarations respecting the consideration. A conversation had between the vendee and such trustee concerning the consideration, in the absence of the vendor, is not admissible in evidence against him.
3. **Agreement to Exchange Lands: MEASURE OF DAMAGES ON A FAILURE TO PERFORM.** On an agreement to exchange lands, if one of the parties performs the contract on his part by conveying, and the other neglects to do so, and finally puts it out of his power to perform, the true measure of damages is the value of the property conveyed.
4. **Practice: INSTRUCTIONS TO JURY.** If an instruction be requested, abstractly correct, but not based upon the evidence, it may be rejected.

ERROR to the district court for Lancaster county. Tried below before POUND, J., and a jury. Verdict against Reed for \$850. Judgment. Motion for a new trial overruled. Exceptions, and cause brought up by petition in error. The facts are sufficiently stated in the opinion.

N. S. Scott, for plaintiff in error.

1. The court could not lawfully permit the amendment in this action. *Lake v. Morse*, 11 Ill., 587. *Locke v. Daugherty*, 43 Penn. State, 88. *Burr v. Ross*, 19 Ark., 250. *Peck v. Sill*, 3 Conn., 157. *Atkinson v. Clapp*, 1 Wend., N. Y., 71.

2. The court should have instructed the jury to find whether or not the plaintiff agreed to receive other land in exchange for the land conveyed to the defendant. *Hill v. Hobart*, 16 Me., 164.

3. The court should have allowed the jury to determine the amount of damage the defendant sustained in consequence of the plaintiff's breach of contract, and set off the amount in the action.

4. The contract for the exchange of land to the plaintiff was so far executed as to render it valid and binding upon the plaintiff. *Harris v. Knickerbocker*, 5 Wend., N. Y., 638. *Phillips v. Thompson*, 1 Johnson Ch., N. Y., 131. *Parkhurst v. Van Courtland*, Id., 274.

5. The measure of damages for the breach of contract to exchange land is the difference in the value of the premises agreed to be exchanged. *Fagen v. Davison*, 2 Duer., N. Y., 153.

6. The recovery in this action should not have been for the unpaid price of the land sold by the plaintiff, but for the value of the land agreed to be conveyed. *Rutan v. Hopper*, 29 N. J. [5 Dutch], 112.

Lamb, Billingsley & Lambertson, for defendant in error.

1. The court did not err in allowing the amendment. Laws of 1875, 35. *Bonsteel v. Vanderbilt*, 21 Barbour, 26. *Mann v. Marsh*, 35 Barb., 70. *Lamkin v. Chisom*, 10 Ohio State, 451. *Hinkle v. Davenport*, 38 Iowa, 355. *Getty v. Spaulding*, 1 Hun. (N. Y.), 115. *Dixon v. Dixon*, 19 Iowa, 512.

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2. There was no error committed by the court in instructing the jury that the sale by plaintiff in error of the West Mills property, and all interest he ever had in the same, was a waiver of the right to convey land to defendant in error in payment of defendant in error's claim. If there was an agreement to convey land in payment, there must be either an actual conveyance or a tender of conveyance, and the tender kept good.

3. The measure of damage is the value of the land sold and conveyed by defendant in error to plaintiff in error. *Bassett v. Bassett*, 55 Maine, 127. *Eaton v. Redick*, 1 Neb., 309. *Hurd v. Deemy*, 16 Ill., 492. *Newcomb v. Brackett*, 16 Mass., 162. Brown on Statute of Frauds, sec. 118.

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I. The action in the court below was commenced against the plaintiff in error jointly with Eugene Reed and Lucius F. Reed, as members of the firm of Reed Bro's. Issue being joined the case proceeded to trial, when it was discovered that the transaction constituting the subject of the complaint was not had with the partnership, but with William H. Reed alone. The court, on motion, permitted an amended petition to be filed, conforming to this view of the case, upon which issue was joined, and the case tried. The allowing of this amendment is the first ground of error to be noticed.

This amendment was clearly within the discretion of the court, and was properly allowed. Section 144 of the code of civil procedure covers a case of this kind. By it the court is authorized: "Either before or after judgment, in furtherance of justice, * * * * to amend any process, pleading, or proceeding by striking out the name of any party, or by correcting a mistake in the name of the party, or by inserting other allegations

material to the case," etc. A discretion of wider range could hardly be given to the court, and, in this instance, certainly, the manner of its exercise shows no ground for complaint.

II. The object of the action was the recovery of a balance of the consideration alleged to be due from the plaintiff in error for the sale of a farm. The answer admits the conveyance of the farm, but alleges that the agreed consideration, in addition to the payment of an incumbrance of about \$350, concerning which there is no dispute, was his agreement to purchase, for the defendant in error, an undivided one-third part of about five acres of land in Seward county, known as the "West Mills property," in which the plaintiff in error already owned an interest, and which they were to improve and operate together.

Although it is denied by the reply, there is some testimony tending to prove that the defendant in error was to take an interest in the West Mills property in exchange for his farm, but whether it was to have been a one third, or a one-half interest, it is impossible from the testimony to determine. The plaintiff in error swears it was a one-third, while the defendant is equally positive that it was a one-half interest. The defendant denies most positively that he was under any obligation whatever to take the mill property, and, in the conflicting state of the testimony, it is quite uncertain whether he was or not.

However, from the fact that when the plaintiff in error received the conveyance of the farm he did not own the interest in the West Mills property, which he says he was to give in exchange, and that, when a long time afterwards, he obtained the title, he took it in his own name, and at no time offered or showed the least disposition to transfer it to the defendant in error, and has finally put it out of his power to do so by conveying the

entire property to another person, it would certainly seem either that such was not the agreement, or that his right to so pay for the farm was voluntarily abandoned.

As the case stood before the jury, even if we give the fullest credit to the plaintiff's testimony, he was in the attitude of having obtained from the defendant a farm worth at least twelve hundred dollars, for which he had paid only about \$350, leaving the balance, together with quite an amount of interest, wholly unprovided for. If the balance of the consideration were payable, as he asserts in his answer, and he expected to insist upon that mode of payment, he should have evinced a disposition to hand it over instead of first neglecting and finally putting it out of his power to do so. The objection that the verdict is not supported by the evidence cannot be sustained.

III. At the time of the conveyance of the farm, and for awhile before, the title was in Joseph Beardsley, a brother of the defendant, it having been placed there merely for convenience of transfer in case of sale. It is assigned as one of the grounds of error that the court excluded from the jury a conversation that took place between the plaintiff and Joseph Beardsley when he executed the deed in regard to the consideration for which it was made. This conversation was clearly inadmissible. Joseph was not the agent of the defendant in error in making the contract of sale; he was merely the trustee, with no power but the single one of holding the legal title, and of transferring it to whomsoever his brother should direct. Under these circumstances there is no rule by which his declarations, in the defendant's absence, respecting the consideration which the vendee was to pay, would be admissible. It was not error to exclude this testimony.

IV. It is also claimed that the court erred in one of

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the instructions given to the jury. This instruction was in substance that although it was the agreement that Reed was to pay in part for the farm by conveying to Beardsley an interest in the West Mills property, yet if he had put it out of his power to do so by a sale and conveyance to another, he was liable for the price at which the farm was put into the trade, less the amount which he had paid to remove the incumbrance.

In a case like this the true measure of damages is the value of the property conveyed: therefore the instruction was not technically correct. But, under the testimony, the plaintiff in error has no reason to complain. There was testimony to show that the farm was put in at \$1,200, and there was not a syllable to show that its actual value was less than that. Indeed, there was no testimony by which the jury would have been justified in reducing the damages below the amount which they returned. The only cause for complaint is with the defendant, in not being allowed interest on the \$850, to which he was clearly entitled; but he does not complain. *Bassett v. Bassett*, 55 Me., 127.

V. It is claimed further that there was error in the refusal of the court to give two instructions requested for the plaintiff. We think that these requests, although abstractly correct, were based upon an entire misconception of the effect of the testimony. It was not shown that Beardsley had given notice that he would not accept a deed of the mill property. Neither was there any disposition shown on the part of the plaintiff at any time to convey it to him, but on the contrary, after acquiring control of the property, he treated it as his own until finally he conveyed it to a stranger. Of these facts there was no dispute. The two instructions were rightly refused. For these reasons the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

Becker v. Anderson.

JOHN P. BECKER, AND OTHERS, APPELLANTS, v. LAFAYETTE
ANDERSON, APPELLEE.

1. **Practice:** **INSOLVENT ESTATE: INJUNCTION.** The creditors of an insolvent estate may maintain an action in the district court against the executor, who is also the fraudulent mortgagee, to have a mortgage of personal property declared void on the ground that it was executed in fraud of such creditors.
2. — : —. And when in such action it is shown that such executor is insolvent, and he is about to sell the property under the mortgage, the plaintiffs are entitled to an injunction restraining such sale, this being the only adequate remedy afforded.

THIS was a petition in equity, filed in the district court for Platte county, by John P. Becker and Henry B. Coolidge on behalf of themselves and others, creditors of Lester Platte, whose claims had been presented to be approved and allowed by the county court for said county against Lafayette Anderson. At the hearing the plaintiff offered a witness, when the defendant objected to his testifying, on the ground that the petition did not state facts sufficient to constitute a cause of action. The plaintiff then offered to prove, by the witness, all the facts alleged in his petition. The court, Posr, J. presiding, sustained the objection, refused to receive any testimony, and dismissed the suit. Plaintiffs appeal to this court.

It is alleged in the petition—that on the twenty-fourth day of September, 1875, Platte died, seized and possessed of a considerable real and personal estate, leaving a will, appointing among others the defendant Anderson one of his executors. The will being proven, he took upon himself the execution of the trust. Upon due proceedings in that behalf, claims against the estate were duly presented to the county judge of that county, and examined, approved, and allowed by him; one of which was in favor of the plaintiff Becker, for \$167.64, and ac-

crued to him on the first day of September, 1874; and another was in favor of the plaintiff Coolidge, for \$207.26, and accrued to him the first day of July, 1874. When these debts were contracted, the testator owned large real and personal estates, which he continued to own and hold till his death. Being indebted to the plaintiff and others, in a large amount, he, on the eighteenth day of September, 1875, made a chattel mortgage to the defendant Anderson, upon nearly all his personal property, in order to hinder, delay, and defraud the plaintiffs and his other creditors. On the fourth of January, 1876, the defendant, in order to carry out that purpose and intent, under the powers in the mortgage advertised the property for sale on the twenty-seventh of January, 1876; and it is alleged that, unless he is restrained by injunction out of the district court, he will sell the property and convert the proceeds to his own use, and deprive the estate and the creditors of said Platte, of all benefit of the property, or its proceeds, and prevent them from coming to the hands of the executors of the estate as assets thereof. Upon Platte's death, and from that time to the commencement of this action, the defendant has sold and is now selling the property of the estate and applying the proceeds to his own use. Before the commencement of the foreclosure proceedings Anderson's debt against the estate had been paid in full. He never presented it to the county court for allowance. The property covered by the mortgage was nearly all the personalty of which Platte died possessed, and his realty was encumbered to nearly its full value, and his estate is insolvent; his creditors are numerous and hold claims against his estate to a large amount. If Anderson converts the mortgage property to his own use, the creditors will not be paid. He is insolvent, and has no property in the county subject to levy and sale on execution.

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The prayer is for an injunction, and a decree declaring the mortgage fraudulent and void, and ordering that it be delivered up to be cancelled.

Millet & Son (with whom was *J. M. Woolworth*), for appellants.

When a testator in his life-time makes a conveyance or transfer of his property, to defraud his creditors, a creditor of the estate whose claim has been established by an order or decree of the probate court, may, by petition in equity, avoid the transfer as fraudulent; and he may do so in his own name if he be the only creditor, or on his own behalf and on behalf of all others if there be other creditors. *Hills v. Sherwood*, 48 Cal., 386. *Loomis v. Tift*, 16 Barb., 541.

The circumstance that the executor is the fraudulent grantee, and is asserting the fraudulent transfer, and, under color of it, disposing of the property transferred, only strengthens the reason for the interference of equity; and, when the executor is insolvent, the creditor will not be remitted to his bond. *Platte v. Northam*, 5 Mason, 95. *Haag v. Sparks*, 27 Ark., 594. *Freeman v. Reagan*, 25 Id., 373. *Bate v. Graham*, 11 N. Y., 237. *Hagan v. Walker*, 14 How., 29.

E. Wakeley, and *Gerrard & Whitmoyer*, for appellee.

If this action will lie, so would it in any other case of an executor being about to dispose of, or injure or destroy, or misapply personal property so alleged to be held in trust. It would lie to prevent him from surrendering personal property to a third person holding a chattel mortgage upon it, alleged to be fraudulent; or asserting a title to it paramount or hostile to that of the deceased; or from selling it at a depreciated value, or to an irresponsible person on credit; or using it himself and for

his own benefit; or in short, in any way managing, controlling, or disposing of it to the prejudice of the estate or the creditors of the estate. The end sought and the injury to be prevented are precisely the same in all these cases as in the case at bar. So, too, it would lie if the executor had in his hands personal property which he claimed to be his own and never to have belonged to the testator, which he had refused to inventory, and which he was about to dispose of as his own. But a suit in equity to determine this question, and perpetually enjoin Anderson from selling the property as his own, would be a novelty in jurisprudence. And there would be a similar remedy to prevent the executor from paying a debt of the testator, or a tax on his property alleged to be illegal. In short, it would lie in every case of a threatened misapplication or wrongful disposal of trust funds or property of an executor. The rule in the case of an executor is the same as in other cases—that a perpetual injunction will not be granted except to prevent irreparable injury, and where there is no adequate legal remedy. *Morgan v. Rotch*, 97 Mass., 396, is directly in point, and conclusive unless overruled by this court. And *Wilson v. Leishman*, 12 Met., 316, is to the same effect.

Suppose the injunction should be granted, what is accomplished? The executor may still fail, neglect, or refuse to sell and dispose of the property to pay debts, and the creditors would have to fall back upon the very remedy which the statute gives them for the wrong complained of.

LAKE, CH. J.

This is an appeal from Platte county, and the question for review is whether the petition states a good cause of action.

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If the facts alleged be true, the mortgage falls clearly within our statute of frauds, and is void as to the plaintiffs who were the creditors of the mortgagor at the time it was executed. This, indeed, is not questioned by defendant's counsel, but they say that the plaintiffs are not in a situation to invoke the aid of a court of equity in their behalf. It is contended also that, under the circumstances, their remedy, whatever it may be, should be sought in the county court, where the settlement of the estate of Platte is being prosecuted.

In the examination of this question it should be borne in mind that the sale by this mortgage was void only as to the creditors of Platte. As between the immediate parties to the instrument, it was just as effectual to pass the title to the property as if executed in the utmost good faith. Chitty on Contracts 366, Marginal. It is true that provision is made in Sec. 211, Chap. 17, Gen. Stat., 317, for the recovery of goods, so fraudulently conveyed by a deceased person in his lifetime, whenever there happens to be a deficiency of assets in the hands of the executor, or administrator. But here the fraudulent vendee is the executor himself, who affirms the validity of the mortgage, and insists upon his right to hold and enjoy the property thereby conveyed, to the exclusion of the creditors of the estate. And he being in possession of the property under a sale, *prima facie* valid, and which until adjudged fraudulent in a proper action affords to him complete protection in his claim, we fail to see how the plaintiffs can have any remedy whatever against the sureties on the executor's bond. Therefore, where the executor is insolvent, in a case like the one now before us, the position taken by the defendant's counsel that the jurisdiction of the county court in the settlement of the estates of decedents, "provides most ample remedy," is clearly not maintainable. The only certain effectual remedy is the one here adopted,

by injunction, whereby the property can be held *in statu quo*, until the transaction can be investigated, and the validity or invalidity of the sale judicially settled.

We think that, in principle, this case falls clearly within that of *Hogan v. Walker*, 14 How. (U. S.), 29, and that the testimony afforded by the plaintiffs to sustain their petition ought not to have been rejected.

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

REVERSED AND REMANDED.

WILLIAM BRANDT, PLAINTIFF IN ERROR, v. GERHARDT
ALBERS, DEFENDANT IN ERROR.

1. **Practice: ANSWER.** In an action on a promissory note by the payee, the defendant answered a former suit by another person, in which he had recovered judgment dismissing the case, but there was no allegation to the effect that the payee had disposed of the note or any interest therein to the plaintiff in the former suit. *Held*, That the answer constituted no defense.
2. **Revivor of Action: TITLE OF CAUSE.** Where, upon the death of a plaintiff, there is an order of revivor in the name of the administrator duly entered, the failure of the clerk to change the title of the case accordingly is not fatal to the judgment subsequently rendered. This is a mistake that may be remedied on motion, even after judgment.

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

Mason & Whedon, for plaintiff in error.

It was error to render judgment in favor of Gerhardt Albers. He was beyond the jurisdiction of the court. Being dead he was but a fictitious person, and the

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judgment is a nullity. *Ford v. Doyle*, 37 Cal., 346. *McKinlay v. Tuttle*, 43 Cal., 572. *Young v. Pickens*, 45 Miss., 553. *McCreery v. Everding*, 44 Cal., 284.

A. C. Ricketts, for defendant in error, cited Freeman on Judgments, Sec. 153. *Gregory v. Haynes*, 13 Cal., 591. *McCreery v. Everding*, 44 Cal., 284. *Stoetzell v. Fullerton*, 44 Ill., 108. *Coleman v. McAnulty*, 16 Mo., 173.

LAKE, CH. J.

This case comes here by petition in error. The action in the court below was brought on a promissory note, executed by the plaintiff in error jointly with one John Engel, and payable to the defendant in error.

To the petition Brandt answered: First, That Albers was not the owner of the note, and second, that prior to the commencement of this action one Frank Larrabee had brought suit against him thereon, before a justice of the peace, in which judgment was rendered in his favor, dismissing the case. There is no allegation, however, to the effect that Albers had assigned the note to Larrabee or that he ever had any interest therein. It is quite apparent, therefore, that this answer set forth no fact constituting a defense to the petition, and that, under the pleadings, Albers was entitled to a judgment, without proof, for the whole amount claimed.

Another objection is that "it was error to enter judgment in favor of said Albers when it is shown by the record that he was dead." It is true that the title of the cause was never changed, the name of the plaintiff remaining the same throughout the progress of the case, up to final judgment, although the record shows that Gerhardt Albers had died, and that before judgment, by an order of the court duly entered, the action

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was revived in the name of Henry Albers as administrator.

After the revivor, Henry Albers, as administrator of the estate of Gerhardt Albers, deceased, was the real plaintiff, and the cause from that time should have been carried forward in his name. But the failure to do so is not fatal to the judgment, for the proper correction can be made at any time, even after judgment, by order of the court. See Sec. 144 Code of Procedure, as amended February 4, 1875. Laws 1875, p. 35. *Gregory v. Haynes*, 13 Cal., 591.

JUDGMENT AFFIRMED.

THE STATE, EX REL. THE OMAHA NATIONAL BANK v.
JOSEPH C. McBRIDE, STATE TREASURER.

1. **Constitutional Law.** Section 23, Art. III, and Section 8, Art. IX, of the constitution were designed to effect two different and distinct objects—the one to establish a permanent rule in regard to future expenditures of the state, and the other to ascertain, determine, and provide by law, for the payment of the existent state debt.
2. ———: **FUNDING STATE INDEBTEDNESS.** The funding act of February 14, 1877, requires the several classes of state indebtedness therein specified to be paid, without conditions or abatement, upon presentation of the warrants or certificates of indebtedness to the treasurer for payment.
3. ———: **DUTIES OF AUDITOR OF PUBLIC ACCOUNTS.** The state auditor had no authority to audit, adjust, or draw warrants, or make orders in respect of any part of the indebtedness specified in said act.

THIS was an original application for a mandamus to compel payment by the treasurer of the balance claimed to be due the relator on certificates of indebtedness issued by the inspectors of the state penitentiary, in

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pursuance of law, to the contractor for the building of the penitentiary, and by him assigned and transferred to the relator. The total amount held by the relator was \$39,507.66. The treasurer, under the provisions of the act of 1877, Laws, 1877, p. 120, paid the sum of \$37,467.09, leaving a balance of the principal still unpaid of the sum of \$2,041.57. These certificates had been issued between April and November, 1876, as the work of building the penitentiary had progressed, and as the contractor, under his contract, was entitled to his pay. No appropriation having been made by the legislature for the payment of the sums represented in these certificates, warrants had not been issued. The treasurer refused to pay the above balance, because it was claimed by the auditor of public accounts that the contractor was indebted to the state for convict labor for the months of June, July, August, September, and October, 1876. The treasurer refused to pay interest to the relator upon the sum paid it. The relief demanded was the payment of balance, \$2,041.57, with the interest on the whole amount of the certificates from April 7 to April 28, 1877, and interest upon the balance due, since April 28, 1877.

G. W. Ambrose, for the relator.

The certificates upon which the claim of the relator is based being a valid indebtedness against the state, the legislature funded them with all other known and valid claims. The preamble of the act recites the fact of their issuance, the laws under which they were issued, the numbers, amounts, and dates of each; also the fact of an excess of interest in two of them, provides for its deduction before payment, and finds—"the total amount due on said certificates being the sum of \$76,233.97." Section one of the act, after providing for issuing and sale

of bonds to pay this, as well as the other funded indebtedness mentioned in the act, uses this language: "Upon the sale of said bonds, if the bid of any person *holding* any of such warrants or certificates of indebtedness be accepted, the said warrants or certificates *shall be received* by the treasurer in exchange for said bonds." Holders of these warrants and certificates were by the express terms of this law made preferred bidders, and if bidding, the law is mandatory that the class of indebtedness held by the bidder *should* be received by the treasurer in exchange for the bonds, dollar for dollar; not that a deduction might be made by the treasurer or some other party unknown to this law. The legislature was the final arbiter of the amount due. The constitution, in vesting them with authority to "fund the indebtedness of the state," made them such. The act finds the total amount due upon each class of warrants and certificates, in consequence of payments and excessive computation of interest (pages 121 and 122), provides for the issuance of bonds for the exact amount of the aggregate debt, and after fixing the date for the sale of the bonds, says: "And thereupon it shall be the duty of the said treasurer to pay *all* of said warrants and certificates, together with interest thereon, as herein provided, out of the sales of said bonds when presented to him for payment." No discretion is left in anybody to pay part, nor deduct any sum which under some prior law might have been a proper deduction, but the command of the law was to pay *all*, with interest.

In performing the duty imposed upon them by the constitution, the legislature passed the "funding act." This is a solemn adjudication upon what the legislature deemed a valid indebtedness. If the later law upon the subject has pronounced a different rule from the former one for payment of the debts of the state, or for the guidance of the officers in making that payment, the last

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statute controls. *Harrington v. Trustees*, 10 Wend., 547. *Inst. v. Commonwealth*, 14 B. Mon., 266. *Packer v. Sundbury & Erie R. R. Co.*, 19 Pa. St., 211. *Pease v. Whitney*, 5 Mass., 382. *Bank v. Commonwealth*, 26 Pa. St., 446. *State v. Bishop*, 41 Mo., 16. *Kendall v. U. S.*, 12 Pet., 604.

The state is subject to the law of estoppel as well as an individual. 3 Pick., 224. 7 Cal., 527. 4 Pet., 87. Ohio State, 319. It is an undisputed fact that the relator purchased these certificates for full value upon the day of the approval of this law. Good faith upon the part of the relator cannot be questioned. But, says the respondent, these certificates not being negotiable there can be no good faith on the part of the purchaser so as to prevent the state from making any defense it may have. This may be true in the abstract. But it is not necessary to an estoppel that the party against whom the principle invoked should design to mislead. If the act was calculated to mislead, and actually did mislead another, acting upon it in good faith, and exercising reasonable diligence under all circumstances, that is enough. *Manufacturers' Bank v. Hazard*, 30 N. Y., 226. *Cowles v. Bacon*, 21 Conn., 451. *Preston v. Mann*, 25 Conn., 118. *Copeland v. Copeland*, 28 Me., 525. *Taylor v. Zepp*, 14 Mo., 482. *Commonwealth v. Moltz*, 10 Pa. St., 527. *Eldrid v. Hazlett*, 33 Pa. St., 307. *Martin v. Righter*, 10 N. J. (Eq.), 516. *Williams v. Jackson*, 28 Ind., 334. *Weters' Appeal*, 35 Pa. St., 523.

George H. Roberts, Attorney General, and T. M. Marquett, for the respondent.

These certificates of the estimates of inspectors are not negotiable, so that the state can offset against the same any claim she may have. *Dillon's Mun. Corp.*, 406.

Floyd. Acceptances, 7 Wall, 666. *People v. Gray*, 23 Cal., 125. *Comm'rs v. Keller*, 6 Kan., 511. *Comm'rs v. Day*, 19 Ind., 450. The law makes the convict labor an offset to what is due to the contractor on the estimate of the inspectors, and the amount of convict labor is to be deducted from the certificates of indebtedness. Act of Feb. 24, 1875, Laws 1875, 128. There is no law to allow interest on certificates of indebtedness. *Comm'rs v. Carter*, 2 Kan., 115. *Hull v. County*, 12 Iowa, 142. *Goodnow v. Comm'rs*, 11 Minn., 31.

The interest on certificates of indebtedness referred to in the act of February, 1877, is for school certificates. By law, the school fund certificates draw interest. But the certificates of indebtedness in question do not draw interest. See act of 1875, page 129. The act of February 14th, 1877 (see page 120), provides for interest on all except the certificates of indebtedness, certified by the prison inspectors, and that by law. All other indebtedness referred to in said act bears interest except said certificates.

The funding of the certificates of indebtedness makes a contract between the state and creditor binding alike on creditor and state. *People v. Bond*, 10 Cal., 569. *People v. Woods*, 7 Cal., 584.

The right of the state to have the convict labor offset against the amount due on said certificates of indebtedness is a vested one, and the legislature could not deprive the state of that right by repealing the law. By leasing the convict labor, W. H. B. Stout accepted the terms of the act of February 24th, 1875, and the right of the state to have convict labor offset against the amount due the contractor for each month, became a part of the contract between the state and the contractor. So all that was due the contractor upon his contract was the amount due the state for convict labor. To allow the contractor more than this would be in violation of sec-

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tion sixteen of article III of the constitution. *Carpenter v. State*, 39 Wis., 280. The relator, by the assignment, took the said certificates subject to all the offsets the state might have. It was not the duty of the legislature to deduct the convict labor from the certificates of indebtedness. Its duty ended when they made an appropriation to pay the same. But it was the duty of the auditor to make this deduction, and he has performed it. The question of whether the convict labor should be deducted was not before the legislature. *State v. Treasurer*, 51 Mo., 23. *Rawson v. Rawson*, 59 Ill., 68.

GANTT, J.

An alternative writ of mandamus was allowed in this case. The cause was tried before the court upon the alternative writ, the answer thereto, and facts admitted by stipulation of the parties.

It appears that prior to and during the year 1866, W. H. B. Stout was contractor for building the state penitentiary, and that during the months of April, July, September, October, and November, 1866, the inspectors of the penitentiary issued to him, for work done under the contract, certificates of indebtedness, numbered 162, 177, 181, 192, 197, 198, and 204, amounting in the aggregate to the sum of \$39,507.96; that afterwards the Omaha National Bank, the relator, purchased all said certificates, and became the owner and holder of them; that under the act of February 14, 1877, providing for the funding of all outstanding indebtedness of the state, the relator presented said certificates to the respondent for payment, who paid thereon the sum of \$37,466.09, leaving a balance unpaid of \$2,041.87, which, upon demand for payment thereof by the relator, he refused to pay. This refusal to pay is based upon an order of the state auditor directing the respondent to retain said balance

upon monthly estimates made by the warden of the penitentiary for prison labor let to said W. H. B. Stout.

The respondent contends that under the provisions of the second section of the act of February 25, 1875, the auditor shall retain from the fund appropriated to the contractor the amount of such estimates for prison labor, and that this order from the auditor is, in law, a sufficient justification for the refusal to pay the amount so retained. On the contrary, the relator insists that under the act of February 14, 1877, the state auditor has no authority to make such order in respect of the certificates in question in this case, and the relator is legally entitled to the full amount of the same.

The decision of the question raised by this controversy depends alone upon the interpretation of section 22, Art. III., and section 8, Art. IX, of the constitution, and the funding act of 1877, and acts relating to the erection and revenues of the state penitentiary.

There is a seeming conflict between the two sections of the constitution, but if they shall be expounded according to the purposes for which they were severally designed and adopted, this apparent conflict will be removed.

Section 22, Art. III, declares that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on presentation of a warrant issued by the auditor thereon;" and section 8, Art. IX, declares that "the *legislature* at its first session shall provide a law for the funding of all outstanding warrants and *other indebtedness* of the state, at a rate of interest not exceeding eight per cent. per annum." The former establishes a permanent rule in regard to the mode in which all future disbursements of the public funds and revenues shall be made. It requires a specific appropriation made by law, and the presentation of a warrant issued by the auditor, to authorize the payment

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of money by the treasurer. The latter relates exclusively to the existent indebtedness of the state at the time, and declares that "the *legislature* at its first session shall provide a law for the funding" of this debt, including both "outstanding warrants and *other indebtedness* of the state."

It is clear that the sole and only object of this section was to provide for the payment of the outstanding state debt, whatever might be the nature and character of the same, and the execution of this one object exhausts the power conferred by the section.

There is no limitation to warrants only issued by the auditor, nor does the language employed, either by express terms or necessary implication, require any act to be done by the auditor in the completion of this one object; but on the contrary, from the fact that not only the outstanding warrants but all other indebtedness of the state must be included in the law, it seems that the *legislature* alone must, under the power conferred, ascertain and determine the outstanding indebtedness whatever might be its character, and provide the fund to pay and the mode of payment of the same.

It is therefore very clear that these two sections of the constitution were designed to accomplish two different and distinct purposes—the one to establish a permanent rule in regard to the future payments of expenditures of the state, and the other to ascertain, determine, and provide by law for the payment of the existent state debt. This interpretation removes all apparent conflict between the two sections, and gives full force and effect to both, without conflict.

Now by the provisions of section ten of the act of March 4, 1870, as the work progressed on the penitentiary, the inspectors were required to "certify to the auditor of state the value of the work done on the building at the time, and on such certified statement the au-

ditor shall issue a warrant on the state treasurer for a sum not exceeding ninety per cent. of the value of the work so certified to have been done;" and section thirty-five provides that the revenue derived from convict labor, etc., "shall be paid to the warden and by him paid into the state treasury." This policy was continued by acts of March 10, 1871 and February 23, 1875, and the revenues collected by the warden and paid into the treasury were held "as a fund for the care and support of state prisoners."

But the second section of the act of February 25, 1875, provides "that hereafter the auditor of state shall retain from the fund appropriated to the contractor of the state penitentiary the amount of each monthly estimate due for prison labor to the state from said contractor," and transfer the same to the penitentiary fund.

What the legislative intent was in passing the two latter acts so nearly at the same time, and so repugnant to each other, or whether that of February 25 infringes the contract with W. H. B. Stout, it is not essentially necessary now to inquire. For the new constitution adopted by the people took effect on the first day of November, 1875, and according to the interpretation given to section 22, Art. III, and section 8, Art. IX, of this constitution, the act of February 14, 1877, passed in pursuance of the latter section, must govern in respect to the payment of the existent indebtedness of the state.

This act is entitled, "An act to provide for the funding of all outstanding warrants and other indebtedness of the state." The preamble which immediately follows the title, sets forth that: "Whereas the state of Nebraska is indebted in divers sums on outstanding warrants and other forms of indebtedness as follows, to-wit:" and then follows itemized statements of four distinct classes of state indebtedness—the fourth class being "certificates

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of indebtedness issued by the inspectors of the penitentiary on balance due upon the contract for the building of the penitentiary, and other expenses connected therewith." Then section one provides "for the purpose of funding the *foregoing* indebtedness," that state bonds shall be issued and sold under certain regulations prescribed, and that "persons or corporations *owning* any of said warrants or certificates of indebtedness may be bidders therefor," and "upon the sale of said bonds, if the bid of any person *holding* any such warrants or certificates of indebtedness be accepted, the said warrants or certificates shall be received by the treasurer in exchange for said bonds;" and provides further that "*it shall be the duty of said treasurer to pay all such warrants and certificates, together with the interest thereon* * * * out of the sales of the said bonds when presented to him for payment." It is quite clear from the terms here employed in the act that the four classes of indebtedness ascertained, specified, and itemized, were considered and determined by the legislature as absolute indebtedness of the state, to be paid upon presentation of the warrant or certificate to the treasurer, without any condition or abatement whatever. It authorizes and directs the money to be paid, not to the person to whom the warrants and certificates were issued, but to be paid to the persons and corporations *owning* and *holding* them.

Therefore, when the question in controversy in this case is viewed in the light of the constitutional provision and the positive provisions of the act of 1877, it seems clear that the auditor has no authority to audit, adjust, or draw warrants, or make any orders in respect of any part of the indebtedness specified in this act; and that his order to the treasurer directing him to deduct and retain from the amount of the certificates in question, the sum of \$2,041.87, is a nullity, and constitutes no justification for the refusal to pay the money.

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It must not, however, be inferred from the exposition of the law of this case, that the act of February 14, 1877, does, either in express terms or by necessary implication, repeal any of the prior acts referred to; it merely provides the fund for and the mode of payment of the state debt existing at the time, and when this is accomplished, the legislative authority conferred by section 8, Art. IX, of the constitution is exhausted. Hence, the act effects this one object only, and does not affect the operation of prior laws relating to the revenues accruing thereafter from convict labor.

Again, the act makes it the duty of the treasurer "to pay the warrants and *certificates* with interest thereon, as herein provided, * * * provided that all interest shall cease on any of said warrants or *certificates*, if not presented for payment on or before the first day of May, 1877." This language seems to admit of only this construction, namely: that when either warrants or certificates are presented for payment before the time mentioned, and not paid, then interest shall be paid thereon, but if not so presented, then interest thereon shall cease. The legislature deemed it proper to allow interest on the certificates of indebtedness in question, and it is the duty of the court to expound the law as it finds it, when not subversive of the constitution. Therefore, the peremptory writ of mandamus is granted to compel the payment of the balance of \$2,041.87, together with interest thereon.

WRIT GRANTED.

J. R. HENDRIX, PLAINTIFF IN ERROR, v. J. A. RIEMAN,
ADMINISTRATRIX, DEFENDANT IN ERROR.

1. **Construction of Statutes.** All statutes *in pari materia* must be taken together and construed as if they were one law.

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2. **Practice: EVIDENCE: RECORD.** When the record does not contain all the evidence, or show that no evidence was introduced or offered relative to issues of fact in a trial before the court, it will be presumed that the findings of the court are based on sufficient proof of the facts.
3. ———: **REVIVOR OF ACTIONS.** The statute provides the mode and regulates the practice in cases of revivor of actions, and the judgment or final order of revivor under the mode prescribed, unless reversed or vacated on error, is conclusive, and cannot be reviewed on the subsequent trial of the cause.
4. ———: ———. And in such case, a plea of *ne unques administrator*, subsequently pleaded to the action, is bad, and may be treated as surplusage.
5. ———: **ALLOWANCE OF ATTORNEY'S FEE.** When the instrument sued on provides for an attorney's fee, the allowance of the fee is no part of the judgment for the debt itself, but it is taxed as costs, and is subject to exceptions and review in like manner as the taxation of other costs may be.

ERROR to the district court for Douglas county. The action was upon a promissory note, and was brought by S. D. Rieman, a non-resident. During the pendency of the action, and after the issues therein were made up, the cause was revived in the name of Jennie Rieman, as administratrix. Hendrix appeared specially, and filed objections to the revivor. These objections were overruled, and exceptions duly taken. The case was then called for trial, but before trial commenced Hendrix asked leave to file an answer, which was granted, and an answer was filed denying that Jennie A. Rieman was administratrix of the estate of Sylvester D. Rieman. Trial was had. Plaintiff in error declined to offer any evidence, and defendant in error also waived introduction of testimony. Thereupon the jury, under the oral instructions of the court, returned a verdict for the plaintiff for \$1,323.62. A motion for judgment *non obstante veridicto*, and a motion for new trial were made, both of which were overruled, and judgment rendered on the

verdict, to which the court added \$75 as an attorney's fee; to all of which the plaintiff in error excepted, and brought the cause up for review by petition in error.

T. W. T. Richards, for plaintiff in error.

I. Upon the return of the conditional order of revivor, a special appearance was made, and exceptions filed to the revivor. It is insisted that these exceptions were well taken, and should have been sustained. The plaintiff was a non-resident. The proposed representative was a foreign administratrix. The statute (Gen. Stat., p. 342, sec. 337), provides that such administrator "may commence and prosecute any action or suit in any court in the state," but it nowhere makes provision for revivor by a foreign executor or administrator, but special provision is made (Gen. Stat., p. 601, sec. 462), for reviving against a non-resident defendant, executor, or administrator. In the absence of a statute permitting it, a foreign executor or administrator can not sue as such in another state. *Vickery v. Beier*, 16 Mich., 50. *French v. Frazier*, 7 J. J. Marsh. (Ky.), 425. *Pond v. Makepeace*, 2 Metc., 114, 116. *Goodwin v. Jones*, 3 Mass., 514. *Beaman v. Elliott*, 10 Cush., 172. *Sabin v. Gilman*, 1 N. H., 193. *Barrett v. Barrett*, 8 Me., 346. *Kerr v. Moon*, 9 Wheaton, 566. *Dixon v. Ramsey*, 3 Cranch, 319. *Gilman v. Gilman*, 54 Me., 453.

II. After the action had been revived, the defendant, by leave of court, filed a supplemental answer, interposing the plea of *ne unques administrator*. This denial of the authority of the substituted plaintiff to prosecute the action threw the burden of proof upon the plaintiff. No proof was introduced. The court should have either entered non-suit against the plaintiff or directed verdict for the defendant. *Flinn v. Chase*, 4 Denio, 85.

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French v. Frazier, 7 J. J. Marsh. (Ky.), 425. *Vickery v. Beier*, 16 Mich., 50. *Moore v. Rand*, 1 Wis., 245.

III. It is insisted further that the court erred in giving judgment for an attorney's fee. The constitution of Neb., Art. II, sec. 6, provides that "the right of trial by jury shall remain inviolate." The courts interpret this to mean the right to a jury trial in all such cases where such right existed at the time of the adoption of the constitution. Sed. on Stat., and Cons. Law, p. 486 (note). The case at bar was an action on a promissory note, a common law action, in which the right to trial by jury has always existed. The case was in fact tried by a jury, and a verdict rendered October 7th for \$1,323.62. Three weeks afterwards, and on the 28th of October, the court arbitrarily, and without any evidence as to the value of the services, and without the intervention of a jury, and against the protest of the defendant, rendered judgment for the \$1,323.62, and the further sum of \$75 as an attorney's fee. This was denying to the defendant his constitutional right to try the question of attorney's fee before a jury. 37 Ind., 512. 1 Blackf., 375. 29 Mo., 356. 4 T. B. Mon., 43. 1 A. K. Marsh. 290.

George W. Doane, for defendant in error.

I. To admit the law to be as claimed by counsel, as applicable to this case, would involve the absurdity of admitting that the legislature has provided that a foreign administrator may commence an action in this state but may not proceed with one already commenced. Our statute does not lead to any such absurdity, even by the inference which might be drawn from an omission to provide for such a case; for the section quoted by counsel in his brief provides, in express terms, that an executor or administrator, duly appointed in any other

state or country, may not only *commence* any action or suit in any court in this state, but may *prosecute* any such action in his capacity of executor or administrator in like manner and under like restrictions as a non-resident may. So that while I do not deny the general proposition, in support of which counsel for plaintiff in error has cited so many authorities, to-wit: "that *in the absence of a statute permitting it* a foreign executor or administrator cannot sue as such in another state," I simply reply that the proposition is inapplicable to this case for the reason that our statute does not permit it.

II. The fourth ground of error urged by counsel for plaintiff in error is that an attorney's fee of \$75.00 was allowed by the court to the plaintiff below upon the entering of judgment in his favor, and that this was a violation of the constitutional provision securing the right of trial by jury. If so, why is it not equally a violation of such right to tax any other costs against a losing party; or for an appellate court to assess damages against an appellant upon the affirmance of the judgment; or for a court to make an allowance to referees in partition suits, or to attorneys in such suits, or to referees for taking testimony and stating accounts between parties; or in numberless other cases which might be stated, in which either by statutory provision or by long established practice courts have been in the habit of assessing such allowances without the intervention of a jury? It is no violation of that constitutional right, for the reason that such assessments are in the nature of costs, which follow the judgment, and have never been submitted to a jury. Such is the nature of attorneys' fees taxed under the statute in this state. *Rich v. Stretch*, 4 Neb., 189. This being the case, if the plaintiff in error felt aggrieved by this allowance, his remedy was by a motion to retax; and if, after having thus brought the

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matter to the attention of the court, relief was refused, he could then apply to the reviewing power of this court.

GANTT, J.

During the pendency of the cause in the court below the plaintiff in the action died, and it was revived in the name of defendant in error as administratrix. The principal point made in the argument for plaintiff in error is, that the defendant in error is a foreign administratrix, and therefore the revival of the action in her name is error. It is conceded that in the absence of a statutory law permitting it, a foreign executor or administrator cannot sue or prosecute an action as such in another state. However, the point made in the argument might be answered by the remark that the record does not show the defendant to be a foreign administratrix; but admitting such to be the fact, does not our statute sufficiently provide for the revival of an action in the name of such foreign administratrix?

Section 337, Chap. XIV, Revised Code (1866), provides that "an executor or administrator duly appointed in any state or country, may commence and prosecute any action or suit, in any court of this state, in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may be permitted to sue."

The only restriction imposed by statute on a non-resident to sue in this state is, that he "must furnish sufficient surety for costs." In respect of actions which survive or continue, it is provided by section forty-five of the civil code that in the case of the "death or other disability of the party, the court may allow the action to continue by or against his representative or successor in interest;" and section four hundred and fifty-eight of the civil code provides that, when a party in an action dies, "if the right of action survive in favor of or against

his representatives or successors, the action may be revived and proceed in their names."

These statutory provisions all relate to the one general subject of an action, commenced, prosecuted, or revived in any of the courts of this state, and must be taken together and construed as if they were one law. This is an ancient and well-established rule of construction.

In the case of the *Earl of Ailsbury v. Patterson*, Doug. 20, Lord Mansfield held that "all acts *in pari materia* are to be taken together, as if they were one law. * * * When there are different statutes *in pari materia*, though made at different times, and not referring to each other, they shall be taken and construed as one system, and explanatory of each other."

In *United States v. Freeman*, 3 How., 557, it is said "the correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together as if they were one law." *The People v. Weston*, 3 Neb., 312. *White v. Blum*, 4 Neb., 561.

When the above statutory provisions are construed according to this rule, if they mean any thing at all, their purpose is to authorize an administrator, foreign or domestic, to commence and to prosecute any action or suit, in any court of this state, in his capacity of administrator, and in case of the death of the party plaintiff to an action or suit, if the right of action survive, to revive the same in his name as such administrator. This seems to be the only reasonable construction of these statutory provisions, when they are taken together as one system.

Again, it was insisted that the court erred in sustaining the motion for the revivor of the action. To this motion and the proceedings for revivor of the action in the

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name of the defendant as administratrix, the plaintiff in error appeared and denied the appointment of defendant as administratrix; denied that notice of the motion was given to him, or that the conditional order was made, served, or returned as required by law. Upon the hearing of the case the court found "that the suggestion of the plaintiff's death and the appointment of Jennie A. Rieman as administratrix of the estate of the said plaintiff is true," and thereupon "ordered that this action be and the same is hereby revived in the name of the said Jennie A. Rieman, as administratrix," etc.

The record shows that the case was heard before the court, and that to its decision the plaintiff excepted. It does not show what were the proofs, or whether any were or were not made on the hearing of the case; and therefore it must be presumed that the findings of the court are based on sufficient proof of the facts. *Wilcox v. Saunders*, 4 Neb., 582. *Eastman v. Wight*, 4 Ohio St., 159.

The statute provides the mode and regulates the practice in cases of revivor of actions. The mode of procedure, when not by consent, is by motion and conditional order of the court, if made in term, or by a judge thereof, if made in vacation; and the statutory provisions very plainly indicate that the question of revival of the action in the name of the administrator must be finally determined on the hearing of the case, upon the motion and conditional order and answer thereto of the adverse party. And that this is the correct interpretation of the statute seems quite clear from the fact that no step can be taken in the prosecution of the action until there is a revival of the action by the substitution of the proper representative in the place of the deceased party. And this judgment or final order of revivor, unless reversed or vacated on error, is conclusive, and cannot be reviewed on the subsequent trial of the cause;

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and therefore the plea of *ne unqucs administrator*, subsequently pleaded to the action, is bad, and may be treated as surplusage.

Again, the error complained of in regard to the service and return of the conditional order, if any did occur, was waived by the plaintiff's voluntary appearance and denial of the facts stated in the motion and conditional order.

In respect to the attorney's fee, it is sufficient to observe the statute provides that in actions upon written instruments for the payment of money only, where the instrument expressly provides for the allowance of an attorney's fee, the court shall fix the amount, not to exceed ten per cent of the recovery, and that this allowance is not part of the judgment for the debt itself, but is merely taxed as costs and can be excepted to and reviewed in like manner as the taxation of other costs may be. *Rich v. Stretch*, 4 Neb., 189.

It was insisted that the court erred in giving a brief oral instruction to the jury; but this assignment of error cannot be considered because it does not appear in the record that any exception was taken to this instruction. *Horbach v. Miller*, 4 Neb., 43.

The judgment of the court below must be

AFFIRMED.

WILLIAM SEIDENTOPF, PLAINTIFF IN ERROR, v. A. E.
ANNABIL, DEFENDANT IN ERROR.

- 1 **Attachment.** In an application for the allowance of an attachment in an action on a claim not due, the better practice is to set forth in the affidavit, not merely a repetition of the language of the code, but also a statement of facts and circumstances, such as ordinarily evince and disclose the intent, purpose, or effect in the disposition of property as injurious to the rights of creditors.

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2. ———. The *right* to issue the attachment in such case depends alone upon the fraudulent *intent* to defraud, hinder, or delay creditors.
3. ———. The court or judge may, in its discretion, allow or refuse to allow the writ; but if by the abuse of that discretion a party is clearly injured by the disallowance of the writ, the decision may be reviewed on error, but to invoke the reviewing power of the appellate court, the record must contain such facts and circumstances as will fairly indicate the *intent* of the party.

ERROR to the district court for Merrick county. The case was tried below before Post, J., and is stated in the opinion.

J. M. Woolworth, for plaintiff in error.

Undoubtedly the first attachment was void, because issued without the previous order of the judge of the court. Accordingly, the plaintiff moved the court for another attachment, presenting at the same time an amended petition and another affidavit. Upon these papers he was entitled to the order.

The court had before it an affidavit alleging positively that the defendant was about to dispose of his property to defraud his creditors, and also another affidavit alleging positively that he had disposed of a large part of his property out of the usual course of business, and had long been absent from the county, and his place of business and his whereabouts could not be ascertained. This showing entitled the plaintiff to the order.

J. W. Sparks, for defendant in error.

The right to file an amended petition and affidavit is in the discretion of the court. *Ramsay & Co. v. Overaker*, 1 Disn., 569.

Granting leave to amend pleadings is a matter committed largely to the discretion of the trial court, and it

must appear that such discretion has been abused before a reversal will be ordered. *Davis v. Wilson*, 11 Kan., 74. *Kunz v. Grund*, 12 Id., 547. *K. R. R. Co. v. Kunkel*, 17 Id., 145.

A matter which rests in the sound discretion of the court cannot be assigned for error. *Powell on Appellate Proceedings*, 195.

GANTT, J.

On the fifth of December, 1876, the plaintiff commenced an action against defendant upon two promissory notes, not due, and his attorney filed an affidavit for an attachment on the ground of his belief that the defendant concealed himself to avoid service of summons, and was about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors. A writ of attachment was issued, but no application was made to the court or judge thereof to grant an attachment.

On the twenty-seventh of February, the defendant filed a motion to dissolve this attachment, for the reason that, "the notes on which said suit was brought were not due at the time the suit was commenced," and "that said clerk of the district court had no authority without the order of the judge thereof to issue or grant such order of attachment;" and on the following day the plaintiff filed an amended petition and an affidavit for an attachment, on the ground that "at the time of the commencement of this action the said defendant was about to convey and dispose of his property with the fraudulent intent to defraud his creditors, and to hinder and delay them in the collection of their debts." At the same time the plaintiff made application to the court, setting forth that, "having commenced his suit in said court against the defendant, on the promissory

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notes in his petition and affidavit, hereby makes application to the court for an order allowing the attachment in the case, as provided by law." The motion for the allowance of an attachment was overruled, the attachment issued on the former affidavit was discharged, and the action was dismissed.

Under section 237 of the civil code "a creditor may bring an action on a claim before it is due, and have an attachment against the property of the debtor," in certain cases.

Section 238 provides that, "the attachment authorized by the last preceding section may be granted by the court in which the action is brought, * * but before such action shall be brought, or such attachment shall be granted, the plaintiff, his agent, or attorney," shall make the oath required by the statute; and section 239 provides, that "if the court or judge refuse to grant an order of attachment the action shall be dismissed, but without prejudice to a future action; and in all such actions application for an attachment must be made." The attachment is exclusively a statutory remedy, and can be issued only on the grounds and in the mode prescribed by the statute. *Egan v. Lumsden*, 2 Disney, 168. *Mathers v. Ramsey*, 2 Ibid, 334.

Neither the affidavit nor the order of attachment is a pleading admitting of answer, but the mode provided to attack the order of attachment is by a motion to discharge it, and hence it is a special proceeding so independent of the action commenced by petition that, when the order is made final, it may be the subject of review on error during the pendency of the action.

The right, however, to maintain the action on a claim before it is due depends altogether upon the attachment, for, as said in *Harrison v. King*, 9 Ohio State, 395. If the attachment fails "the action falls with it." The statute expressly provides, that if the court or judge re-

fuse to grant the order of attachment the action shall be dismissed. *Heidenheimer v. Ogborn*, 1 Disney, 351.

It is therefore very clear that the order of attachment issued by the clerk on the filing of the first affidavit was void, because it was issued without any authority of law. The only authority to issue the attachment in such case is derived from the statute, and it expressly provides, that in all actions on claims before they are due the application for the attachment must be made, and the court or judge thereof must grant it before the order can be issued. Therefore the only matter before us is the refusal of the court to grant the attachment on the application made on the twenty-eighth of February, 1876.

The act referred to provides that the attachment may issue "where the debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts. *Second*. Where he is about to make such sale, conveyance, or disposition of his property, with such fraudulent intent."

The ground stated in the affidavit is substantially in the language of the second clause above quoted. In the case of *Harrison et al. v. King et al.*, 9 Ohio St., 393, an attachment had been allowed in a case similar to the one at bar. Gohlson, J., remarks that "no specific form of showing the existence of the ground is pointed out. In like language as in an ordinary case, the plaintiff is required to make an oath in writing, showing the nature of his claim, that it is just, when the same will become due, and the existence of some one of the grounds for an attachment enumerated. We think, however, that in this class of cases proper practice would require that something more than the mere repetition of the language of the code should be presented to the judge. He ought to be placed in a position to act intelligently in

the exercise of the power and discretion conferred by the code. A court or judge, before allowing an attachment in an action for a debt not due, might properly require a statement of facts and circumstances, such as ordinarily evince and disclose an *intent*, purpose, or effect, in the disposition of property injurious to the rights of creditors, and not act upon what might probably be a mere belief or an inference hastily drawn."

Now although no prescribed form of a statement is required by the statute as a predicate for the action of the judge, and it has been held that as a matter of practice it rests in the discretion of the court of original jurisdiction whether the statement shall be more or less definite, yet we strongly approve the practice indicated by Judge Gohlson as the better practice. And this seems more clear when we consider that the *right* to issue the attachment depends alone upon the fraudulent *intent* of the party—an *intent* to defraud, or to hinder or delay his creditors. This *intent* must not be merely inferred from the consequences of the act of the party, because the effect of such a doctrine might estop every creditor from selling his property, however advantageous it might be to himself and his creditors. It is said that "to constitute such sale fraudulent it must be with a fraudulent intent to (defraud) hinder or delay the creditor, that is, an *intent* to injure him, and reserve some supposed benefit to the debtor."

In *Gans, Adm'r v. Thompson et al.*, 11 Ohio St., 580, in an action upon a claim not due, the affidavit stated that the party "is about to dispose of his property with intent to defraud his creditors," and it was held that "on such a showing the judge might, in his *discretion*, allow or refuse to allow the writ." But upon a motion to discharge the attachment, allowed on the ground of insufficiency, and not upon a denial of the facts stated in the affidavit, the court held, that the question thus raised

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was a question, not of fact, but of law, and as matter of law the affidavit was sufficient; but further held that "the previous exercise of discretionary power by the judge in allowing the writ could not properly be reviewed on error."

In the case under consideration the court below found that in point of fact there was no *intent* on the part of the defendant to defraud, hinder, or delay his creditors. Whether this finding was based on the affidavit only, or that together with other evidence and circumstances before the court, the record does not show. Though the court or judge may, in its *discretion*, allow or refuse to allow the writ, still we think that if by the abuse of that discretion the party is clearly injured by the disallowance of the writ, in a case with a proper showing, this court may review the decision on error; but to invoke the reviewing power of this court the record must contain such facts and circumstances as will fairly indicate the *intent* of the party. In the present case the record is silent in this regard, and it is therefore impossible for us to say whether the finding of the court below should be sustained or set aside, and therefore it would be unsafe for us to "act upon what might probably be a mere belief or an inference hastily drawn."

The judgment of the court below dismissing the action must be

AFFIRMED.

E. O. FOX AND OTHERS, PLAINTIFFS IN ERROR, v. S. H. MEACHAM, DEFENDANT IN ERROR.

1. **Motion for new trial.** The statute requiring a motion for a new trial to be made at the term at which the verdict was rendered, and within three days after its rendition (except for newly discovered evidence), is mandatory; and if the motion is afterwards made it is of no avail to the party filing it.

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2. **Justice of the Peace: JURISDICTION.** In a case tried before a justice of the peace, without a jury, he judicially determines the whole case, and must make an entry of his judgment within the time fixed by the statute for that purpose; after the expiration of this time, his judicial functions in respect to the subject matter cease, and he has no authority thereafter to amend, change, or modify his judgment.
3. ———: **LIABILITY OF SURETIES ON OFFICIAL BOND.** When a justice of the peace, acting as such justice, violates the law and abuses his authority to the injury and damage of another, the sureties on his official bond are liable for his acts, and an action lies primarily against him and his sureties.

ERROR from the district court for Otoe county. Tried below before POUND, J. It was an action brought by Meacham against Fox, a justice of the peace, and the sureties on his official bond, for damages sustained by Meacham on account of a levy and sale of his property under an execution issued against him by Fox. Judgment below for \$500 and costs was given in his favor. Fox and the sureties bring the cause here by petition in error.

H. H. Blodgett & Brother, for plaintiffs in error, claimed that the authorities recognizing a principle or rule by which the security on official bonds may be liable can be distinguished from those acts for which they will not be held liable. The former are termed acts done *virtute officii*, and the latter *colore officii*. The distinction is the acts done, *virtute officii*, are where they are within the authority of the officer, but in doing it he exercises that authority improperly or abuses the confidence which the law reposes in him, whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them. *Seeley v. Birdsall*, 15 Johns., 267. *Dozpner v. The State*, 36 Ind., 111. *State v. Woodman*, Id., 511. *People v. Schuyler*, 4 New York, 179. *Tompkins v. Sands*, 8 Wend., 462. *Carpenter v. Sloane*, 20 Ohio, 330.

The record shows that the verdict was rendered December 22, 1876, and at that date court adjourned until December 28, at which an application for a new trial was made, and it seems to us, by a fair construction of the statutes, the adjournment of the court was sufficient to unavoidably prevent the application being made before. It seems to us it must have been the legislative intent to give litigants three judicial days to make application, unless court adjourned; for what benefit can it be to file the motion when it cannot be heard? We suppose it was the legislative intent to limit the time to three days so as to bring it before the court while the errors complained of are fresh in his memory. Then how could it avail anything if court had adjourned? The application was made before judgment. *McWillie v. Perkins*, 20 La. Ann., 168. *Citizen's Bank v. Bellocq*, 19 La. Ann., 376, say litigants have three judicial days to move for a new trial under a statute similar to ours.

There is framed in the bill of rights in the constitution of Nebraska: The right to be heard in all civil cases in the court of last resort by appeal, error, or otherwise shall not be denied.

Sedgwick says this is peremptory language of our constitution to keep the legislature in constant control. Sedgwick, 216. Cooley's Constitutional Limitations, 37.

GANTT, J.

In the court below, the motion for a new trial in this case, was not filed until several days after the expiration of the time limited by the statute, which provides that application must be made at the term the verdict is rendered, and, except for cause of newly discovered evidence, "shall be made within three days after the verdict or decision is rendered."

It is, however, now insisted, on the part of the plain-

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tiffs in error, that this limitation fixed by the statute may be disregarded by the court, and that, as the right to grant a new trial is an inherent power in the court, it is in the discretion of the court to grant the new trial upon a motion filed at any time without regard to the time limited by the statute. Now the authority of the legislature to regulate by statute the application for a new trial will not be questioned; and as the legislature of our state has, by a mandatory act, fixed the time within which the application must be made, we think the court has no power to disregard such law, and none of the authorities cited by the counsel go that far. In the case of *Johnson v. Semple*, 31 Iowa, 50, which is relied on here, it was insisted that, as no motion was made for a new trial, no question was raised upon which the court would pass; but the court held that the act of 1860 waived the filing of such motion, which before that act was necessary for raising legal questions; that the act was in itself "a perpetual motion" for a new trial in every case where the same questions were formerly raised by motion, and suggested that the title of the act would more properly have been "an act for the relief and benefit of lazy and careless lawyers."

In *Munch v. Williamson*, 24 Cal., 170, it does not appear that the motion was made after the entry of judgment, and section 1182 of the code of that state provides that "the application for a new trial must be made before judgment." And in *Williams v. St. Louis Circuit Court*, 5 Mo., 254, it is said that: "A party who sleeps upon his rights until the time allowed him to make his motion for a new trial expires can no longer claim to make his motion as a matter of right." But upon a suggestion that substantial justice has not been done, "the court may look into the matter or not. If they refuse to grant a new trial no error will lie, because no law authorized the motion after the four days ex-

pired." This seems to be the correct exposition of the law, and therefore, in the case at bar, as the motion was not made within the time limited by the statute, it cannot avail the plaintiffs anything.

But when we look into the record, we discover no sufficient grounds for disturbing the judgment of the court below.

The plaintiff, Fox, was a justice of the peace, before whom a criminal complaint was made by defendant against one Isaac S. Collins, and after hearing the case the prisoner was discharged, and the plaintiff, as such justice of the peace, rendered "judgment against the state" for costs. Afterwards, he issued execution upon this judgment against the defendant in error, and caused his property to be sold by the officer executing the writ; and the defendant alleges, that by reason thereof, he was injured, and sustained damages, and this is the subject matter of the action. The main ground of error is, that the court refused to permit plaintiff, Fox, on the trial of this cause, so to amend his docket entry in the criminal case, as to set forth a finding that the prosecution was malicious and without probable cause, and the entry of judgment against this defendant for costs. It is said he so intended his record to be made, and had made some such minutes on loose papers, but such papers became lost. Suppose such minutes were made (which seems questionable), can he make any such amendment or entire change of his record on a trial against him for damages sustained by his misconduct in issuing the execution? We think not. But it is contended that the entry of the judgment was merely a ministerial act, and can be amended at any time, and the authority mainly relied on to support this proposition is the case of *Stephens v. Santee*, 49 N. Y., 39. In that case the court held that the entry of a judgment on his docket by a justice of the peace upon the verdict of a jury is minis-

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terial, as the law made a judgment for that amount the only one that could be rendered; but "when the case is tried by a justice, without a jury, he is judicially to determine the amount of the recovery, and he must do this, and make an entry thereof, as required by law within the time fixed by the statute for that purpose. After the expiration of this time his judicial functions in respect to the matter cease, *and he can do nothing further in the premises.*" We think this is a correct interpretation of the law. Hence, as all judicial functions of Fox as justice of the peace ceased after the entry of the judgment by him in the criminal case, he could do nothing more in the premises, and had no authority to amend, change, or modify the judgment. The proposed amendment and evidence in respect to it were properly rejected by the court.

Again, it is urged that the court erred in overruling the motion to dismiss the action as to Taggart and Bottsford, the sureties on the official bond of Fox. It is clear that in the matter of the criminal proceedings and the issuance of the execution, the plaintiff Fox did not act as a private individual, but by virtue of his office, clothed with official power; and that under the power delegated to him by the statute, he had jurisdiction over the subject matter, and that he had authority to issue executions upon judgments properly rendered by him as such justice of the peace, but when, in the exercise of this authority as justice of the peace, he infringes the law and abuses this authority to the injury and damage of another, we think his sureties on his official bond are liable for his acts in such case. This principle is clearly announced in the case of *Kane v. The Union P. R. R. Co.*, 5 Neb. 107-8, and we adhere to the rule laid down in that case. The action lies primarily against the principal and his sureties. *Van Pelt v. Littler*, 14 Cal., 194. *Briley v. Copeland*, 14 Ill., 39.

We are satisfied that the petition states facts sufficient to constitute a cause of action.

The judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

A motion for a rehearing in the foregoing case was denied, the defendant in error having entered a remittitur of \$120. LAKE, J., dissented, and said he thought the motion should be sustained and a new trial granted; the entry of the remittitur only cured one defect, but there were others fatal to a maintenance of the claim of the defendant in error.

JOHN B. BROWN, PLAINTIFF IN ERROR, v. P. W. STRAW,
DEFENDANT IN ERROR.

1. **Promissory Note: ALTERATION OF.** An alteration of a promissory note in any material part renders it invalid as against a party not consenting thereto, even in the hands of an innocent purchaser.
2. ———: ———. After an instrument is completed and delivered, no alteration can be made therein except by consent; an alteration of the date, whether it hasten or delay the time of payment, is a material alteration, and if made without the consent of the party sought to be charged, extinguishes his liability.
3. ———: **JURISDICTION OF DISTRICT COURT.** In an action between the original parties to a promissory note, the district court has ample power to correct mistakes and enforce the original contract; but the law does not permit the payee to change its terms and conditions without the assent of the maker, even if the alteration is in his favor, or to correct a mistake.

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

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B. F. Perkins, for plaintiff in error, cited 1 Smith's Leading Cases, 1141. *Wood v. Steel*, 6 Wall., 89. *Low v. Merrill*, 1 Pinney, 340. *Britton v. Dierker*, 46 Mo., 591. *Simpson v. Davis*, 119 Mass., 269. *Hunt v. Gray* 35 New Jersey Law, 227.

T. Appelget, for defendant in error.

An alteration in law is where the change made is such as to make the instrument express something different from the contract entered into between the parties. The change made in the date of the note in controversy (if there was a change) was simply a correction, making the instrument conform to the agreement entered into by the parties. Such a correction is not, in contemplation of law, an alteration. Edwards on Promissory Notes, page 151. *Duker v. Franz*, Bush, 239. *Jessup v. Denison*, 2 Disney, 150. Smith's Leading Cases (4 American edition), 820.

MAXWELL, J.

On the eleventh day of September 1874, Erastus Eames executed a promissory note for the sum of \$225, payable to the order of the defendant, and due in twelve months from date. The note was dated September 13, 1874, and in that condition was signed by the plaintiff in error as surety and delivered to Eames, who delivered the note to the defendant in error. At the time Eames delivered the note to the defendant the mistake in the date was discovered, when the defendant erased "13" and inserted "11" in place thereof, thereby changing the date of the note from September 13, to September 11. This change was made without the consent of Brown. In an action on the note Brown pleaded the alteration as a defense. The defendant in error recovered judgment in the court below, to reverse which Brown brings the case into this court by petition in error.

The rule is well settled that the alteration of a note in any material part renders it wholly invalid as against a party not consenting thereto, even in the hands of an innocent purchaser. *Palmer v. Largent*, 5 Neb., 225. *Wait v. Pomeroy*, 20 Mich., 425. *Benedict v. Cowden*, 49 New York, 396. *Bruce v. Westcott*, 3 Barb., 376. An alteration, to avoid a note, must be material. It has been held that altering the date was a material alteration. *Stevens v. Graham*, 7 S. & R., 505. *Hacker v. Jamison*, 2 W. & S., 438. *Wood v. Steele*, 6 Wall., 80. Inserting the words "or order" in a note not before negotiable. *Bruce v. Westcott*, 3 Barb., 374. *Haines v. Bennett*, 11 N. H., 181. *Pepoor v. Stagg*, 1 Nott & McCord, 102. Appointing a particular place of payment where none was stated in the note as signed. *Nazro v. Fuller*, 24 Wend., 374. *Woodworth v. Bank*, 19 Johns., 391. 1 Smith's Leading Cases, 1172.

After an instrument is completed and delivered, no alteration can be made therein except by consent of the parties. The alteration of the date, whether it hasten or delay the time of payment, is a material alteration, and if made without the consent of the party sought to be charged extinguishes his liability. If a party may, without consent, change the date for two days and bind the maker, he might change the date to such other time as he saw fit.

In an action between the original parties the court has ample power to correct mistakes and to enforce the original contract; but the law does not permit the payee of a note to change its terms and conditions without the assent of the maker, even if the alteration is in his favor, or to correct a mistake. In *Wood v. Steele*, 6 Wall., 82, the court say: "The agreement is no longer the one into which the defendant entered; its identity is changed; another is substituted without his consent." As it is clearly shown that the alteration in the date

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was made after the plaintiff in error had signed the note and without his consent, he is discharged from liability thereon.

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

REVERSED AND REMANDED.

JOSIAH C. RATCLIFF AND OTHERS, APPELLEES, v. JAMES H. FARIS, TREASURER OF HAMILTON COUNTY, APPELLANT.

1. **County Superintendent of Public Instruction.** The powers and duties of a county superintendent of public instruction are derived entirely from the statute. He can only exercise such powers as are especially granted, or are incidently necessary to carry the same into effect. It must appear from the record of his proceedings that he has jurisdiction, or his acts will be void.
2. ———: **DIVISION OF SCHOOL DISTRICTS.** When the statute requires him, in cases where a new school district is formed in whole or in part from one or more districts possessed of a school house, or other property, to ascertain and *determine* the amount justly due to such new district from any district or districts out of which it may have been formed, and to certify the same to the county clerk—*Held*, where it appeared that there was no finding, or determination whatever, by the superintendent, as to property of any kind retained by a district, out of which a new district was formed, that his certificate to the county clerk, stating the amount of tax to be levied on the old district to be paid to the new, when collected, was a nullity.

APPEAL from the district court of Hamilton county. The action there was in equity to enjoin the collection of a tax levied upon the real and personal property of the plaintiffs. This property was situated in school district number six of that county, and the tax in question was levied by the county commissioners in pursuance of an order of the county superintendent of public instruc-

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tion, stating that the sum of \$1,178,48 was due from district number six to district number nine, which had formerly been a part of district number six. The defendant alleged in his answer that at the time of the division and formation of district number nine the above amount properly belonged to that district, that district number six had levied upon its original territory a sum of which the above amount belonged to district number nine, and that the same had been collected by district number six and used by it. The plaintiffs replied, denying these allegations of the answer. Upon a trial before GASLIN, J., sitting in the district court of Hamilton county, a decree was entered enjoining the collection of the tax, and Faris, the treasurer, appealed.

Edward Bates, for appellant, contended that the certificate of the county superintendent could not be attacked in this collateral way. It is a kind of an adjudication, and if erroneous, must be corrected by a direct proceeding. General Statutes, 1873, Chap. 68, page 962, Sec. 7, 8, and 9. *Wallace v. Brown*, 22 Ark., 118. *Western R. R. Co. v. Nolan*, 48 N. Y., 513. *Mechanics and Traders Bank v. Henry Dubolt*, 1 Ohio State, 591.

A court of equity will not entertain an injunction in the case of personal property tax. Cooley on Taxation, page 538; subject, "Personal Tax." The appellees make no case for such relief. *Williams v. Detroit*, 2 Mich., 560. *Conley v. Chedie*, 6 Nev., 222.

Mason & Whedon for appellees.

Does the evidence warrant the decree of the court below? Admitting for the purpose of this argument that district six had property on the second of April, 1872, it then became the duty of the county superintendent, un-

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der section 4, of chapter 68, of the General Statutes (if that section is constitutional), "to determine at the time of forming the new district." But it is submitted that to determine the amount due more than three years after the formation of the new district, was not in any sense a compliance with the requirements of this section of the statute, and especially so where the pretended determination was made by one who assumed the duties of the office long after the formation of the new district. It was for the court below to determine, under the issues, whether the superintendent complied with the laws in his pretended finding as to the amount due, and as that court passed upon that question of fact, its finding should not be set aside here. *A. & N. R. R. v. Washburn*, 5 Neb., 117.

But the important question to be determined in this case is: Was school district six possessed of any property on the second of April, 1872? It will be conceded by the appellant that the only property the district had, if any, was the tax voted on the first day of April, 1872, one day before the formation of the new district.

The appellees contend that this tax was not "property" in any sense of the term. The term property is said to include lands, and tenements, hereditaments, and commodities, the value of which may be measured in money. *Herman on Executions*, 140.

If this be a correct definition of the word property, what was the money value of this pretended tax on the second of April, 1872?

Suppose the district board had never reported to the county clerk this vote, and the tax had never been placed upon the tax duplicate, would district six have acquired any property by this vote? We think not. The tax could not be collected until all the steps imposed by the statute had been taken, and the fact that these steps were taken after the division and the tax collected does not

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entitle district nine to any portion thereof. *Grant Co. v. Delaware Co.*, 4 Blackf., 256. *Devor v. McClintock*, 9 Watts & S., 80. *Barnett v. Jefferson Co.*, 9 Watts, 166. If this court should hold that the vote by the district is all that is necessary in order to constitute a tax, even then district nine is not entitled to any part of the same, because a tax is not property. Opinion of Judges, 58 Me., 591. *Hilbish v. Catherman*, 64 Penn. State, 154. *Perry v. Washburn*, 20 Cal., 318. Cooley on Taxation, 1 Blackwell on Tax Titles, 1. The appellant contends that the finding of the superintendent was an adjudication, and cannot be attached collaterally, and cites authorities to support this theory. But it is submitted that the authorities cited do not sustain the proposition.

The statute says the county superintendent, at the time of forming the new district, or as soon thereafter as may be, shall ascertain, etc. It nowhere authorizes his successor in office to perform this duty; he acted without jurisdiction, and his acts are void, granting he acted judicially. 1 Conn. 40. 5 Harr & J., Ind., 42. 8 Cranch, 9.

MAXWELL, J.

School district number six, of Hamilton county, was organized in February, 1872, and comprised the east half of township ten north, range six west of the sixth principal meridian. In the following month, the boundaries of the district were enlarged so as to include all of township ten, range six, and also townships ten north, ranges seven and eight west of the sixth principal meridian.

On the first day of April, 1872, the district held its first annual meeting, at which "it was voted that the amount of taxes levied on the taxable property for school district purposes for the coming year be as follows, to-

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wit: For building and school-house fund, ten mills on assessed valuation. Incidental and teacher's fund, five mills; total, fifteen mills." On the ninth day of April, 1872, a new district was formed from district number six, by taking the west half of township ten north, range six west, and all of townships ten north, of ranges seven and eight west. The new district thus formed was numbered nine. At the time district number nine was formed there was no school-house or property of any kind belonging to school district number six. Consequently, the then county superintendent made no report to the county clerk, as required by section eight of the school law (Gen. Statutes, 962.) On the twenty-seventh of May, 1872, school district number six, at an election duly held, voted bonds to the amount of \$1,000, for the purpose of building a school-house, and again, on the twenty-fifth of January, 1873, voted bonds in the further sum of \$800 for the purpose of completing the school-house, and \$225 for other purposes. A considerable portion of these bonds has been paid.

On the first day of July, 1875, the county superintendent of public instruction transmitted the following order to the county clerk of Hamilton county:

"To the Hon. County Clerk of Hamilton County:

"SIR:—Report to the county commissioners to be levied on school district number six, to be paid when collected to school district number nine, \$1,078.48.

"J. T. PRICE,

"County Superintendent.

"July 1, 1875."

Upon this order the tax in question was levied.

Neither the pleadings nor proof make it entirely clear as to the amount collected in school district number six, for school purposes, under the levy for 1872. And so far as the legality of the tax in controversy is concerned,

it is not material, as the inquiry is limited to the authority of the county superintendent to make the certificate in question. Section seven of the chapter entitled, "Schools" (General Statutes 962), provides that: "When a new district is formed in whole or in part, from one or more districts possessed of a *school-house, or other property*, the county superintendent *at the time of forming such new district, or as soon thereafter as may be*, shall ascertain and determine the amount justly due to such new district from any district or districts out of which it may have been in whole or in part formed, which amount shall be ascertained and determined according to the relative value of the taxable property in the respective parts of such former district or districts at the time of such division."

Section eight provides that: "The amount of such proportion, when so ascertained and determined, shall be certified by the county superintendent to the county clerk," etc.

The powers and duties of a county superintendent of public instruction are derived entirely from the statute. He can only exercise such powers as are especially granted, or are incidently necessary to carry the same into effect. Any proceedings on his part beyond the scope of his authority, or where he has no jurisdiction, are absolutely void.

There is no pretence that school district number six had a school-house, or property of any kind, at the time district number nine was formed in April, 1872; yet, more than three years after the formation of district number nine, the successor to the officer who formed the district, without a *finding or determination* of any kind as to the property received by district number six, issued the certificate in question to the county clerk. The certificate does not purport to state the object of the levy, and is merely a direction to the county clerk.

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Section three of the act provides that: "Whenever the county superintendent of any county shall form a new district therein, he shall deliver to a taxable inhabitant of such district a notice in writing of the formation of said district, describing its boundaries, and specifying the time and place of holding the first meeting, which notice, with the fact of such delivery, shall be entered upon the record by the county superintendent." This record is also referred to in section fifteen.

While there is nothing in the statute prescribing the requisites of *the record*, yet, from the nature of the duties of the superintendent, it should contain a minute detail of his proceedings in the formation of a new district, and of the amount justly due (if anything) to such new district from any district or districts out of which it may have been in whole or in part formed. In determining the amount due he acts judicially, and the record should show that he has jurisdiction.

As it does not appear from either the pleadings or proof in this case that the superintendent had jurisdiction, his action in the premises is void. The decree of the district court is clearly right, and must be affirmed.

DECREE AFFIRMED.

DANIEL GEIGER, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: EVIDENCE.** Under section 328 of the criminal code, neither husband nor wife are competent to testify concerning any communication made by one to the other during marriage. But when papers or letters are offered in evidence on the trial of a cause, which are pertinent to the issue, they should be admitted, and the court will not take notice how they were obtained, nor will it form a collateral issue to determine that question.

2. ———: ———: PRACTICE. Where there is no testimony whatever, showing the *value* of property stolen by the accused, other than that with which he stands charged in the indictment, it is not error for the court to refuse to instruct the jury that they cannot add the value of such property to that in the indictment, the court having previously instructed the jury that the ownership of the property stolen must be proved as charged in the indictment.
3. ———: DISCRETION OF TRIAL COURT IN SENTENCING PRISONER. Within the limits fixed by the statute, the term of imprisonment to which a party convicted of crime may be sentenced, rests entirely with the judge of the court before whom the case was tried, and the judgment will not be set aside because it seems to be severe.

THE plaintiff in error, upon an indictment for grand larceny, found against him in Buffalo county, was found guilty and sentenced to imprisonment in the penitentiary for the term of four years. Upon the trial before GASLIN, J., and a jury, the contents of a letter, purporting to have been written by the prisoner to his wife, was offered in evidence. The letter was not produced, but the witness, Achey, testified that he had had it in his possession; that he got it at Geiger's house: that it commenced—"Dear Wife," and continued—"I have looked out a place for some more tar paper to-day, and if I have luck, I will get enough to tar-paper the house, and I have got flooring enough to lay the floor, and make a door; siding enough to side up the house; and I have got lumber to make a cupboard for you; and I have got a rocking chair for you, and some glass, and lime, and bedsteads." To the introduction of this evidence, the counsel for the prisoner objected on the ground that it was a privileged communication, being from husband to wife. Objection overruled, and an exception taken.

The plaintiff in error requested the court to give the following instruction to the jury, which the court refused to do, and an exception was taken.

"3. If the jury find that the defendant unlawfully

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took from More & Sunderland, or other persons, other property than that described in the indictment, they will nevertheless be precluded from adding the value thereof to the value of any property described in the indictment, and which they may find was unlawfully taken by the defendant."

Hamer & Conner, for plaintiff in error.

Achey went to Geiger's house when Geiger had been arrested, and when his mother was gone and got a letter purporting to have been written by Geiger to his wife. We claim this letter was obtained surreptitiously, and that it was a privileged communication from husband to wife, and not admissible in evidence, if written by Geiger, and if not written by Geiger, certainly not admissible. It was not proved to have been written by Geiger, or mailed or sent by him. If it was not, then it should not have been introduced in evidence, because it was not the defendant's act. If it was written by defendant, then it should not have been admitted, because a privileged communication. Gen. Statutes, 582, section 331, 332.

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

There were no errors in admitting or rejecting testimony on the grounds assigned by counsel at the time, as the statute provides. The only objection made to the letter at the time of the introduction of testimony concerning it was its privileged character—not of the want of proper foundation, as stated in assignment of errors, motion for new trial, and in brief.

The wife or husband cannot be compelled to disclose confidential communications. But even an eavesdropper can testify when of the *res gestæ* as to the communications; and papers and other subjects of evidence

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which have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, if pertinent to the issue, are admissible. 1 Greenleaf on Evidence, 287, § 254 a.

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In the year 1876, the plaintiff in error was indicted by the grand jury of Buffalo county for the larceny of four hundred feet of pine flooring, of the value of \$14.00; five hundred feet of pine siding, of the value of \$11.50; one box of window glass, of the value of \$5.00; one bedstead, of the value of \$3.50; one barrel of lime, of the value of \$2.50; and one lot of window stops and mouldings, of the value of \$1.00; all of said goods being the property of Luman R. More and William C. Sunderland.

On the trial of the case the plaintiff in error was found guilty, and the property stolen was found to be of the value of \$35.70. A motion for a new trial having been overruled by the court, the plaintiff was sentenced to imprisonment in the penitentiary for the term of four years. To reverse the judgment the plaintiff has brought the cause before this court by a writ of error.

The first objection urged is that there is no sufficient proof of the identity of More and Sunderland as the owners of the property taken. E. F. Lougee, a witness called by the state, testified that he "was doing business for M. & S. in 1875 in the lumber business; cannot say how long before bedstead was brought back; I saw it; lime and lumber kept in shed; plunder unloaded in street; I recognized the bedstead as the property of More and Sunderland; recognized the lumber as the property of More and Sunderland; measured it; I think there was about four hundred feet of flooring, worth \$35 per M; measured siding, five hundred

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feet, worth \$23.00 or \$24.00 per M; recognized the flooring as M. & S.'s; am not positive about the siding, but think it was ours (More & Sunderland's)."

W. C. Sunderland testified that he recognized the flooring, siding, bedstead, barrel of lime, box of glass, and that it had not been sold by the firm, and that the property was taken in Buffalo county. There is other testimony tending to show that the property stolen was owned by More and Sunderland, and we think there is sufficient on that point to warrant the jury in finding they were the owners of the stolen property.

The objection that the proof failed to show that the property was of the value of \$35.00, is equally untenable. Sunderland identified the flooring, siding, bedstead, box of glass, and barrel of lime, and stated that the lime was of the value of \$2.50, the window glass of the value of \$5.00, and the bedstead of the value of \$3.50. Other witnesses testified that the flooring was of the value of \$14.00, and that the siding was of the value of \$11.50, amounting in all to the value of \$36.50.

Section three hundred and twenty-eight of the criminalcode provides that neither husband nor wife shall be competent to testify concerning any communication made by one to the other during marriage. Where, however, papers or letters are offered in evidence on the trial of a cause, which are pertinent to the issue, they should be admitted, and the court will not take notice how they are obtained, nor will it form a collateral issue to determine that question. *Leggett v. Tollering*, 14 East, 302. *Jordan v. Lewis*, Id., 306. *Commonwealth v. Dana*, 2 Met., 337. But there is no admission of the plaintiff contained in the letter given in evidence tending to show that he was guilty of the offense charged.

There is no testimony whatever showing the *value* of any property found in possession of the plaintiff except that taken from More & Sunderland. There was there-

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fore no evidence to warrant the third instruction asked by the plaintiff in error, and the court had already instructed the jury that to authorize a conviction they must find that the property taken by the plaintiff was the property of More and Sunderland, and of the value or in excess of \$35.00.

On the whole case the plaintiff appears to have had a fair trial, and no errors appear in the record sufficient to authorize the reversal of the judgment. The sentence may appear to be severe, but that is a matter, within the limits fixed by statute, resting with the judge of the district court.

The judgment of the district court is affirmed.

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BOARD OF PUBLIC LANDS AND BUILDINGS.

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CONTRACT.

1. **Rescission: FRAUD: PLEADING.** A contract procured by fraud will be rescinded at the suit of the party defrauded. But in such action the particular and precise circumstances which constitute the alleged fraud must be set forth in the petition. It is not enough to allege that a party by false and fraudulent representations induced another to enter into a contract, but he must state the facts on which he bases his claim for relief. *Arnold v. Baker*..... 184
2. **Payment: CONDITIONS.** When a debt is divided into several payments, to be made at different periods of time, and the parties contract that upon a failure to make any one of the payments when it becomes due, the whole amount of the debt shall become due and payable, the court is bound to give effect to their contract. Such condition of payment is not in the nature of forfeiture. *Pope v. Hooper*..... 178
3. **Fraud: RESCISSION.** In morals the failure to perform a promise may be without excuse or justification, but in law false representations to authorize the rescission of a contract must be made in regard to existing facts. *Perkins v. Lougee*. 220
4. **Action: CONTRACT AND PROMISES.** Where a condition or promise is only to indemnify and save harmless a party from some consequence, no action can be maintained until actual damages have been sustained by the plaintiff. *Gregory v. Hartley*..... 356
5. **Jurisdiction of Court of Equity.** A court of equity will relieve a party against contracts made by him while temporarily insane from the use of intoxicating liquor, where such contracts have been procured by the fraud or imposition of the other party. *Johnson v. Phifer*..... 401
6. — : **SETTING ASIDE CONTRACTS ON GROUND OF DRUNKENNESS.** In order to set aside a contract on the ground of drunkenness it is not sufficient that the party was under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where a party is utterly deprived of his reason and understanding. *Id.*... 402

See CONSTITUTIONAL LAW, 3. COUNTIES, 8, 9. MORTGAGE,
1, 2. PARTNERSHIP. REAL PROPERTY WARRANTY.

CONVEYANCE.

See MORTGAGE. REAL PROPERTY. VENDOR AND VENDEE.

CORPORATIONS.

See APPEAL, 3. ESTOPPEL. MUNICIPAL CORPORATIONS.
RAILROADS.

COSTS.

1. **Where a Justice of the Peace has jurisdiction of an action, and it has been brought in any other court, the plaintiff cannot recover costs.** *Ray v. Mason*..... 101
2. **An Attorney's fee is a part of the costs, and is subject to exceptions and review in like manner as other costs.** *Hendrix v. Rieman*..... 517

See COUNTY COURTS. PRACTICE, 59.

COUNTIES.

1. **County Commissioners: JURISDICTION OF.** The board of county commissioners is invested by statute with exclusive original jurisdiction in the examination and allowance of accounts against a county. *Brown v. Otoe County*..... 111
2. **——: JUDICIAL ACTS.** In the audit, adjustment, and allowance or disallowance of a claim against the county, the board of county commissioners acts judicially, and its judgment in the matter is conclusive, unless appealed from or reversed in the mode prescribed by law. The board has no power to review, reverse, vacate, or set aside its former adjudication of a claim against the county. *Id.* 777. *The State, ex rel. Clark v. Buffalo County*..... 454
3. **——: ———.** As to accounts against a county, the jurisdiction of the district court is appellate only, and an original action on such demands cannot be maintained. *Id.*... 112
4. **Fees for Publishing Delinquent Tax List.** The publisher of the delinquent tax list for a county has no right to withhold from the treasurer the proof of publication, which the statute requires him to deliver to that officer, because of the non-payment of fees, and if he do so it is good ground for a refusal of the county commissioners to allow his account for publishing the list. *Id.*..... 112
5. **As to Jurisdiction of County Commissioners in location of county roads.**—*State, ex rel. Sims v. Otoe County*... 130

6. **County Bridges: POWER OF THE COUNTY COMMISSIONERS.** Section sixteen of the road law, as construed by this court in the case of *The People v. Commissioners of Buffalo County*. 4 Neb., 150, applies to contracts for erection of bridges as well as to those for the improvement of roads, and prohibits the commissioners from entering into a contract for the expenditure of more than double the amount of money on hand to the credit of the bridge fund. *Clark v. Dayton*..... 192
7. ———: ———. While it is true that the general road fund may be lawfully applied to the erection or reparation of permanent culverts and bridges, it is *not* true that the bridge fund raised from the five mills levy, under section fifteen, can be used in the general improvement of roads, but must be devoted exclusively to the object for which this levy may be made. *Id.*..... 192
8. ———: ———. The contract in this case provides for the payment of the cost of the bridge, in excess of the nine thousand dollars received in county bonds, by warrants drawn on the *bridge* and road funds. The petition alleges the want of sufficient money in the *road* fund to justify the contract, but no mention whatever is made of the condition of the special *bridge* fund. *Held*, that for this omission the petition was fatally defective. *Id.*..... 193
9. ———. ———. Although this contract was illegal by reason of the failure of the commissioners to advertise for proposals under a plan and specifications, still the contractor having completed the bridge, and the same having been accepted by the commissioners, he is entitled to compensation. Under such circumstances payment will not be enjoined at the suit of taxpayer. *Id.*..... 193
10. **Claims Against a County. ALLOWANCE OF: REMEDY.** The building of county bridges being entirely within the control of county commissioners, and they having accepted the bridge from the plaintiff, and allowed his claim therefor, the remedy for any person feeling himself aggrieved was by appeal to the district court. Having neglected this remedy the plaintiff cannot resort to equity for relief by an original suit. *Id.*..... 193
11. **Roads and Bridges.** Section sixteen of the road law requires all contracts for the improvement of roads to be let to the lowest competent bidder, and this includes contracts for the erection and repair of permanent bridges and culverts. *Follmer v. Nuckolls County*..... 204

12. ———. POWER OF COUNTY COMMISSIONERS. County commissioners have no authority either personally or by agent to engage in the business of erecting public bridges on the credit of the county. The law defines their power and points out the mode of its exercise, and that mode is exclusive. *Id.*..... 204
13. ———. ———. The words "permanent" and "substantial" are used in section fifteen of the act in a descriptive sense, and apply only to such structures as are of a permanent and substantial character, and do not include merely temporary structures or ordinary repairs. *Id.*..... 204
14. County Commissioners possess no powers except such as are expressly granted, or are incidentally necessary to carry such powers into effect. *Hamlin v. Meadville.*..... 227
15. Claims Against Counties: DUTY OF COMMISSIONERS. Upon the final adjudication of a claim against the county, it is the duty of the board to issue to the claimant his warrant for the amount, or so much thereof as shall not exceed the aggregate amount levied by tax for the current year for the fund out of which it is payable. *The State, ex rel. Clark v. Buffalo County.*..... 455
16. Mandamus to Levy a Tax. When the board refuses to levy a tax clearly provided by law, it may be compelled by mandamus to levy such tax to pay a claim which has been finally adjudicated against the county. *Id.*..... 455
See BONDS.

COUNTY COMMISSIONERS.

See BONDS. COUNTIES. ROADS.

COUNTY COURTS

1. Practice. The practice in civil cases in probate courts in all essential particulars was regulated by statute, and, except in a very few matters, was the same as that established for justices of the peace. *Bank v. Uhl.*..... 145
2. Dismissal of Action. The dismissal of actions in the probate courts—now county courts—is governed by the rules applicable to cases commenced before justice of the peace. *Id.*..... 145
3. ———. The plaintiff in an action brought in the probate court, could at any time before the case was finally submitted, and on his own motion, dismiss it. And the failure to pay the costs that had then accrued will not prevent him from exercising this right. *Id.*..... 145

4. ———. And such voluntary dismissal was practically a final disposition of the case, except as to unpaid costs, for which alone the court could render judgment against him. *Id.*..... 145
5. ———. Nor was it any objection to the exercise of the right of dismissal that it was done in order to enable the plaintiff to proceed with another action, concerning the same subject matter, fraudulently instituted in another county. *Id.*.... 145
6. **New Trial in.** The jurisdiction of the county courts, in the granting of new trials, is the same, and no greater, than that given to justices of the peace, and is derived from the same statute. *Cox v. Tyler*..... 298
7. ———. It is only when the judge is satisfied that the verdict was obtained by *fraud, partiality, or undue means*, that a new trial can be granted in these courts. *Id.*..... 299

COUNTY SUPERINTENDENT.

See SCHOOLS.

COUNTY TREASURER.

See COUNTIES, 4.

COURTS.

1. **Powers of District Court.** In the year 1875, G. was indicted for rape. The court fixed the amount of bail required of the accused, and the cause was continued until the next term. In 1876 the cause, on motion of the accused, was continued until the next term. At the next term of the court, held in 1877, the accused filed a plea in abatement, alleging that there was no record of the finding of the indictment against him. The judge who held court at the time the indictment was found had ceased to be judge of the district court, and had failed to sign the journal of the court. The presiding judge of said court in the year 1877 ordered an entry conforming to the facts to be made on the journal of the court, showing that an indictment had been found against the accused. *Held*, that the court had authority to make such entry. *Garrison v. The People*..... 274
2. ———. The entire purpose of entering orders or judgments as of a prior date is to supply matters of evidence. Where it is clear that an order or judgment was in fact rendered, but through the inadvertence or negligence of the clerk was not entered upon the journal, the court has authority to order it to be supplied. *Id.*..... 274

3. ———: **NUNC PRO TUNC ORDER**. But the failure of the court to act does not authorize the entry of a *nunc pro tunc* order or judgment. If no order or judgment was in fact rendered, the court cannot treat such defects as a clerical error. *Id.*..... 274
4. ———: **AMENDMENT OF RECORDS**. Courts retain authority over their records after the entry of judgment, and possess authority to supply a record which has been lost or destroyed, and in doing so must be governed by the rules of evidence. A court may amend its record to correspond with the facts, and this may be done from the judge's notes, or any other satisfactory evidence. *Id.*..... 274
- See **NEGOTIABLE INSTRUMENTS, §. PRACTICE.**

CRIMINAL LAW.

1. **Autrefois Convict**. It is indispensable to the plea of former conviction that the court, whose record is relied upon to sustain it, had jurisdiction of the offense. *Thompson v. The State*..... 102
2. ———: ———. The rule of constitutional law cannot span country and country in such a way as to cause jeopardy in one country to free the party from trial in another, but as "a sort of merciful dispensation" a court may consider favorably the fact, if it exists, that the accused had been prosecuted and punished for the same offense in a foreign country, when it appears that he was convicted and his punishment was full and complete. *Marshall v. The State*..... 120
3. **Murder**. At common law, on a charge of murder, malice is presumed from the fact of killing, unaccompanied with circumstances of extenuation; in such a case it devolves on the accused to disprove malice. *Milton v. The State*..... 136
4. ———: **EVIDENCE**. Under our statute, to convict of murder in the first degree the evidence must show that the party accused perpetrated the act purposely, that he did it with intent to kill; and of deliberate and premeditated malice. *Id.*..... 136
5. **Murder in Second Degree: PRESUMPTION**. Where a homicide is proved, the presumption is, that it is murder in the second degree. *Id.*..... 136
6. **Murder in First Degree: STATUTORY DEFINITION**. The words "deliberate and premeditated malice" in the statutory definition of murder in the first degree, were intended to restrict murder in that degree to cases where deliberation was shown to have taken place before the commission of the crime. *Id.*.....

7. **Rape: DEFINITION OF.** Rape is defined to be the unlawful carnal knowledge by a man of a woman *forcibly and against* her will. *Garrison v. The People*..... 274
 8. ———: **ASSAULT WITH INTENT TO COMMIT RAPE.** To constitute an assault with intent to commit rape there must have been an intent to commit rape, and that intent must have been manifested by an assault for that purpose upon the person intended to be ravished. Both of these ingredients are necessary to constitute the offense. *Id.*..... 275
 9. ———: **WITNESS.** The injured party is a competent witness, but her credibility must be submitted to the jury. Where the jury are satisfied beyond a reasonable doubt, from the testimony of the prosecutrix alone, of the guilt of the accused, they will be justified in returning a verdict of guilty. *Id.*..... 275
 10. **Murder: IMPLIED MALICE** On a trial for murder, where the prosecution establishes against the prisoner an intentional homicide, and nothing explanatory is shown, the implication of malice at once arises, which it is incumbent upon the prisoner to remove. *Williams v. The State*..... 335
 11. **Evidence.** Under sec. 328 of the criminal code neither husband nor wife are competent to testify concerning any communication made by one to the other during marriage; but where papers or letters are offered in evidence, which are pertinent to the issue, they should be admitted. The court will take notice how they were obtained, nor will it form a collateral issue to determine that question. *Geiger v. The State*..... 545
- See COURTS. EVIDENCE. PRACTICE IN CRIMINAL CASES.

EJECTMENT.

See PRACTICE, 35.

EQUITY.

See COUNTIES, 10. ESTATES OF DECEDENTS. ESTOPPEL
INJUNCTION, 1, 2. JURISDICTION. JUDGMENT. PRACTICE.

ERROR.

See ATTACHMENT, 13. JUDGMENT, 12. PRACTICE, 11, 12,
42. PRACTICE IN SUPREME COURT, 4. REPLEVIN, 7.

DAMAGES.

See APPEAL, 3. BANKRUPTCY, 8. CONSTITUTIONAL LAW, 7. LIBEL
REAL PROPERTY, 9. REPLEVIN, 1, 2, 3, 6, 8.

DEBTOR AND CREDITOR.

See ATTACHMENT. BANKRUPTCY. PARTNERSHIP. PRINCIPAL AND SURETY.

DECEDENTS.

See ESTATES OF DECEDENTS.

DEED.

See MORTGAGE. REAL PROPERTY. VENDOR AND VENDEE.

DEMURRER.

See PLEADING.

DISMISSAL OF ACTIONS.

See COUNTY COURT.

DISTRICT SCHOOL.

See SCHOOLS.

ESTATES OF DECEDENTS.

1. **Practice:** INSOLVENT ESTATE: INJUNCTION. The creditors of an insolvent estate may maintain an action in the district court against the executor, who is also the fraudulent mortgagee, to have a mortgage of personal property declared void on the ground that it was executed in fraud of such creditors. *Becker v. Anderson* 499
2. ———: ———. And when, in such action it is shown that such executor is insolvent, and he is about to sell the property under the mortgage, the plaintiffs are entitled to an injunction restraining such sale, this being the only adequate remedy afforded. *Id.* 499

ESTOPPEL.

1. **By Acts in Pais.** If a company, incorporated with the exclusive privilege to establish and keep a ferry and wagon bridge across a river, within a certain district, stand by and silently see and permit other parties to construct and complete another wagon bridge across the same river, within the same district—or acquiesce and consent to the erection thereof—it will, by reason of such silence or assent, be estopped from controverting, by injunction or otherwise, the right of the other parties to use and repair such bridge. *Fremont Ferry and Bridge Co. v. Dodge County* 18

2. ———. The receipt of purchase money with the knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience and binds the rights of the parties as effectually in a void as a voidable proceeding; and the same principle applies when a party retains the benefits derived from an agency, and has ratified the acts of the agent. He is thereby precluded from denying the authority of the agent. *McMurtry v. Brown*.. 368

EVIDENCE.

1. **Admission of Parol Evidence to vary Description of Property in a Deed:** OPINIONS OF WITNESS. Where there is no ambiguity in the description of property in a deed, parol testimony is not admissible to show what was in fact conveyed. Nor is it competent for a witness to give opinion as to what was appurtenant to property conveyed, and a question which in effect called for such an opinion was rightly excluded. *Frey v. Drahos*..... 2
2. **Grade of Streets in Cities.** To establish the existence of a street grade the records and files pertaining thereto should be produced, and unless these are shown to be lost or destroyed secondary evidence will not be received. And loose expressions made by city officers, indicating that they supposed such a grade to have been established, are but hearsay, by which the corporation is not bound. *Nebraska City v. Lampkin*..... 27
3. **Larceny:** PRESUMPTIONS. It is a rule of evidence in trials for larceny of goods that the finding of a portion of them in the exclusive possession of the prisoner, very shortly after the theft was committed is presumptive evidence that he stole the whole, and may be sufficient to warrant a conviction accordingly. *Thompson v. The State*..... 103
4. **Murder.** To convict of murder in the first degree, the evidence must show that the accused perpetrated the act purposely; that he did it with intent to kill; and of deliberate and premeditated malice. *Milton v. The State*..... 136
5. ———: Where a homicide is proved, the presumption is that it is murder in the second degree. *Id*..... 136
6. **Disturbance of Public School.** On the trial of a person charged with the willful disturbance of a public school it is competent for the defendant to prove that he was a member of the district school board, and that what he did was in pursuance of an order of the board and in the honest discharge of his official duty. And it is error to exclude such testimony. *Bays v. The State*..... 167

7. **New Matter in Answer.** When new matter set up in an answer is denied by the reply, the burden of proof is on the party alleging the same as a defense. *Williams v Evans*... 216
 8. **Good Character.** Where evidence of good character is before the jury it is their duty to give it such weight as they think it is entitled to. It is the province of the jury to weigh the evidence and determine the facts, and they should be left as free and untrammelled to give such weight to the evidence of good character as they are in relation to other facts. *Garrison v. People*..... 275
 9. **Presumption of Innocence.** In the absence of evidence to the contrary the law presumes every one innocent. And this legal presumption of innocence is a matter of evidence to the benefit of which the party accused is entitled. *Id.*..... 275
 10. **Impeachment of Witness.** A witness may be impeached by bringing other witnesses to swear that his reputation for truth is bad. In this mode of impeachment, however, it is not competent to show what two or three persons only may think or say concerning him, but the inquiry should be confined to the general estimation in which he is held by his neighbors and acquaintances. *Matthewson v. Burr*.. 312
 11. **As to Communications Between Husband and Wife.** See *Geiger v. The State*..... 545
- See FRAUD, 1, 2, 3. MORTGAGE, 1, 2. PRACTICE, 5, 6, 9, 10, 11, 12, 24, 32, 56. PRINCIPAL AND AGENT, 7. PUBLIC LANDS, 2. ROADS, 4.

EXCEPTIONS.

See PRACTICE, 5, 6, 21, 22, 30, 36, 38, 45, 52.

EXECUTION

1. **Stay of Execution: UNDERTAKING FOR.** To operate as a strictly statutory stay of execution the undertaking must be given within the time limited by law. But a stay may be effected afterwards by agreement between the parties upon a sufficient consideration. *Cameron v. The Sandwich Manfg Co.*..... 444
2. —: —. If by agreement the undertaking is given afterwards, and the stay is thereby obtained, the defendant having received the benefits of the contract, will not be permitted to repudiate the obligation thereby assumed. *Id.*... 444

See EXEMPTION.

EXECUTOR.

See ESTATE OF DECEDENTS. PRACTICE, 55, 57, 58.

EXEMPTIONS.

1. **Of Personal Property.** Upon an application for mandamus, it appeared that personal property of the relator, including two mules, harness, and wagon, had been levied upon by an officer under a writ of attachment; that relator thereupon filed an inventory, under oath, with the officer holding the attachment, of the whole of the personal property owned by him, and claimed the property as exempt; that the officer refused to call to his aid three freeholders of the county and have the property appraised; and that the property was not taken for clerks', laborers', or mechanics' wages, or for money due and owing by an attorney at law for money or other valuable consideration received by said attorney for any person or persons. *Held:* 1. That the relator was entitled to a release of the mules, harness, and wagon. 2. That the respondent take the necessary steps to have the property in question appraised as required by law, and to permit the relator to select therefrom to the value of five hundred dollars. *State v. Cunningham*..... 90
2. ———. Where an inventory, under oath, is made by a debtor, and filed with an officer holding an execution or order of attachment, he must call appraisers to ascertain the value of the property seized. He has no discretion in the matter. *Id.*..... 90
3. ———. Although section 530 of the civil code exempts, among other things, a pair of horses, but not "mules," yet as the object of the law is to exempt a "team" for the debtor, and such team consist of mules, they are exempt. *Id.*..... 90

FEES.

See COUNTIES.

FOREIGN JUDGMENT.

See JUDGMENT, 11, 12.

FRAUD.

1. **Evidence.** Fraud is never presumed, but must be proved, and the degree of proof necessary to establish it is the same in equity as at law. *Tootle & Maule v. Dunn*..... 93

2. ———. The question of fraudulent intent is one of fact and not of law. *Id.*..... 93
 See also *Williams v Evans*..... 217
 Robison v. Uhl..... 328
 Hedman v. Anderson..... 392
3. **Vendor and Vendee.** Where the vendee has participated in the fraud of the vendor, by accepting from him a conveyance of real estate, with the intent to hinder, delay, or defraud the creditors of such vendor, the conveyance will be void as to those creditors, even though full consideration had been paid for the property. *Tootle & Maule v. Dunn*..... 93
4. **Fraud** cannot be predicated on a promise not performed. To be available there must be a false assertion in regard to some *existing* matter by which a party is induced to part with his money or property. *Perkins v. Lougee*..... 220
5. **Rescission of Contract.** In morals the failure to perform a promise may be without excuse or justification; but in law false representation to authorize the rescission of a contract must be made in regard to *existing facts*. *Id.*..... 220
6. **Possession.** Under our statute of frauds the delivery of possession of goods sold is not necessary to protect the purchaser as against the creditors of the seller, provided the purchase was made in good faith. *Robison v. Uhl*..... 328
7. ———. By our statute the retention of possession by the seller is, at most, only *prima facie* evidence of fraud, which may be rebutted by proof. *Id.*..... 326
 See CONTRACT, 1, 3. JUDGMENT, 1. MORTGAGE. PLEADING, 4. REAL PROPERTY, 1, 2.

GARNISHMENT.

See ATTACHMENT, 7, 8, 9.

HABEAS CORPUS.

See PRACTICE IN CRIMINAL CASES, 11.

HERD LAW.

1. **Notice to Owner of Stock.** It is the duty of a party taking up stock, under the provision of an act for a general herd law to protect cultivated lands from trespass by stock, to give notice to the owner of such stock within a reasonable time after taking up the same. As to what is a reasonable time must be determined by the circumstances of each case. *Haggard v. Wallen*..... 271

2. **Arbitration.** The object of the provision for arbitration is to afford a speedy and inexpensive mode of ascertaining the damage sustained by trespass of stock upon cultivated lands. Courts construe proceedings of this kind with great liberality in all matters except as to the jurisdiction. *Id.*.. 271

HIGHWAYS.

See ROADS.

HOMESTEAD.

See PUBLIC LANDS OF UNITED STATES.

HUSBAND AND WIFE.

1. **Deed.** In the year 1870, a husband and wife owning lands in severalty, in the state of Wisconsin, sold the same, the husband receiving the money therefor, which, on removing to this state in the spring of that year, he deposited in his own name in a bank in the city of Lincoln. Afterwards, with the knowledge and consent of his wife, he purchased certain lands and paid for the same with the money in question, and took the deed in his own name. In the year 1875 the husband made a deed to his wife for the lands in controversy. *Held*, that the deed was absolutely null and void at law. *Aultman v. Obermeyer*..... 261
2. ———. When it is apparent that such a deed has been made in pursuance of a valid antenuptial agreement, or upon a sufficient consideration, it may be sustained in equity. *Id.* 261
3. **Common Law.** By the common law neither husband nor wife could convey lands to each other. And our law still regards them, in relation to each other, as one person, notwithstanding the statutes enlarging the rights of the wife. *Id.*.... 261
4. **Transactions Between Them.** Transactions between husband and wife in relation to the transfer of property from one to the other, by reason of which creditors are prevented from collecting their just dues, will be scrutinized very closely, and the *bona fides* of such transactions will have to be established beyond question in order to be sustained by a court of equity. *Id.*..... 261
5. **Common Law in Force:** The common law in respect to the rights of husband and wife is in force in this state, except so far as it has been modified by statute. *Id.*..... 264

6. **Married Woman's Act.** Under the statute of 1871, a husband may act as the agent of his wife, and she may authorize him by power of attorney to convey her lands, although they cannot convey to each other, being generally deemed but one person in law; yet this does not preclude the husband from acting as agent to his wife. *McMurtry v. Brown*..... 368
7. **Evidence.** As to communications between husband and wife. See *Geiger v. The State*.....

See MARRIED WOMEN.

INDICTMENT.

See PRACTICE IN CRIMINAL CASES, 2, 3, 4, 9.

INJUNCTION.

1. **An Injunction** by a tax payer to restrain the payment of a claim for the erection of a county bridge cannot be maintained where it appears that the contractor has completed the work, and the same has been accepted by the county commissioners, although the contract was illegal by reason of the failure to advertise for plans and specifications. *Clark v. Dayton*..... 193
2. ———. But where county commissioners are engaged in erecting public bridges by their own agents, without letting the contract therefor to the lowest bidder, and are purchasing material and employing workmen, a tax payer may restrain such action by injunction. *Follmer v. Nuckolls County*..... 204

See ESTATE OF DECEDENTS. ESTOPPEL.

INSTRUCTIONS TO JURY.

See PRACTICE, 4, 14, 23, 25, 26, 27, 46, 47, 50, 51. PRACTICE IN CRIMINAL CASES, 5, 15.

INTEREST.

Decree. A decree can draw interest at the rate of twelve per cent only in cases where the debt upon which it was predicated was drawing interest at that rate. *Gregory v. Hartley*..... 356

See PRACTICE, 34. USURY.

INTERNAL IMPROVEMENTS.

1. **Precinct Bonds.** Precinct bonds may be issued to aid in building a public wagon bridge across the Platte river, that being a work of internal improvement. *Fremont Building As'n. v. Sherwin*..... 48
2. ———: **TOLL BRIDGE.** Where the vote is regular in all other respects, it is not a valid objection to the bonds issued in pursuance thereof that the proposition contained a provision for collecting tolls from persons crossing the bridge —especially after the bonds have passed into the hands of innocent purchasers. *Id.*..... 48
3. **Proposition Voting Aid to.** In voting aid to works of internal improvement, it is not necessary that the proposition shall contain a provision for the levy of a tax to pay the *principal* of the bonds, but simply to pay the *interest* as it falls due. As to the *principal*, it is made the duty of the proper officers to levy taxes to pay it independently of any vote on that subject; but this cannot be done until after the year 1880. *Id.*..... 48

See BONDS.

JUDGMENT.

1. **Vacating.** In an original action in equity to vacate a judgment or decree, if the ground of complaint is not the result of fraud on the part of the plaintiff, or some circumstance beyond the control of the defendant, but is occasioned by the fault, negligence, or want of ordinary diligence on the part of the defendant, he will not be permitted to deny the correctness of the judgment or decree, or to renew the controversy. *Pope v. Hooper* 178
2. **Exception to Final Judgment** is not necessary. *Black v. Winterstein*..... 224
3. **Damages** in actions of replevin. *Id.* 224
4. **In Supreme Court.** An accident or mistake in respect of a fact occurring on the trial of a cause in the district court which is not incorporated in a bill of exceptions and made a part of the record, is not sufficient ground to set aside the judgment of the supreme court and grant a new trial. *Morrill v. Taylor*.... 236
5. **Judgment non obstante veridicto.** When a plea or replication is good in form only, but is bad in substance, and constitutes neither a bar or answer, and issue is taken on it and the verdict finds it true, such verdict leaves the cause of

- action or bar unanswered and confessed, and judgment *non obstante* should be entered for him whose cause of action or bar is confessed; and the rule applies to equity cases, when the issue of fact raised by the pleadings is submitted to the consideration of a jury, but in either case such judgment or decree can only be rendered in a very clear case. *Oades v. Oades* 304
6. **Bastardy Judgment.** In an action of bastardy, on a verdict of guilty, it is the duty of the court to adjudge the defendant to be the reputed father of the bastard child, and a failure to do so will render the orders of the court for the support of the child erroneous. *Spurgeon v. Clemmons*.... 307
7. **Justice of the Peace: JURISDICTION OF.** A justice of the peace, with the assent of the plaintiff, may render judgment on the personal confession of a defendant made orally in open court. *Mercer v. James*..... 406
8. ———: **PLAINTIFF'S ASSENT PRESUMED.** In such case the plaintiff's assent, although not affirmatively shown by the transcript, will be presumed from the fact that he procured a satisfaction of the judgment by an execution, levy, and sale of the defendant's property. *Id.*..... 406
9. **Judgment may be Void as to one Defendant, but Good as to Another.** W, the maker of a promissory note, signed also by B, as surety, appeared and confessed his indebtedness thereon, and requested judgment to be entered. Thereupon the justice rendered judgment against both principal and surety. *Held*, that the judgment, although void as to B, was valid as to W. *Id.*..... 406
10. **Revival of.** A judgment of revival is merely a continuation of the original action, and continues the vitality of the original judgment with all its incidents from the time of its rendition. *Eaton v. Hasty*..... 419
11. **Foreign Judgment.** The judgment of a state court duly authenticated, as prescribed by act of congress, is conclusive upon the merits or subject matter of the suit. *Id.*.. 419
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2. ———: PLAINTIFF'S ASSENT PRESUMED. In such case the plaintiff's assent, although not affirmatively shown by the transcript, will be presumed from the fact that he procured a satisfaction of the judgment by an execution, levy, and sale of the defendant's property. *Id.*..... 406
 3. ———: JUDGMENT MAY BE VOID AS TO ONE DEFENDANT, BUT GOOD AS TO ANOTHER. W, the maker of a promissory note, signed also by B as surety, appeared and confessed his indebtedness thereon, and requested judgment to be entered. Thereupon the justice rendered judgment against both principal and surety. *Held*, that the judgment, although void as to B, was valid as to W. *Id.*..... 406
 4. **New Trial.** A justice of the peace has jurisdiction to grant a new trial only when it is shown that "the verdict was obtained by fraud, partiality, or undue means." *Templin v Synder*..... 491
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fifty feet and the latter over one hundred feet distant from the warehouse, and entirely disconnected therefrom. *Held*, That as a matter of law, the property in question could not be regarded as appurtenant to the warehouse, nor did it pass to the mortgagee under the general term "appurtenances thereto belonging." *Frey v. Drahos*..... 1

3. ———: ———: ———. By the term "appurtenances" is commonly understood in law, purely incorporeal hereditaments usually annexed to lands or to houses. But the word may be used by parties to a contract in a broader and much more comprehensive sense, and when the proof shows that it was so used a corresponding effect should be given to it. *Id*..... 2

3. Chattel Mortgage. A mortgage of goods and chattels, with possession and *power of sale* in the mortgagor, is void against the creditors of such mortgagor. *Williams v. Evans*..... 216

4. ———. In such case, the illegality of the transaction appears on the face of the instrument, and it is the duty of the court to pronounce it fraudulent as to creditors, it being presumed that the transaction was not entered into in good faith as *security* for the payment of a debt, but as a mode of covering up property, in order to hinder, delay, or defraud creditors. But the words, "It shall and may be lawful for him (the mortgagor) to retain the possession of the said goods and chattels, and to use and enjoy the same" until default, do not render the instrument void on its face. *Hedman v. Anderson* 393

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6. ———: WHEN FRAUDULENT INTENT A QUESTION FOR THE JURY. Where an instrument is not void upon its face the question of fraudulent intent is a question of fact which should be submitted to the jury. *Williams v. Evans*, 217. But if certain facts tending to establish fraud are *conceded to exist*, the question of their sufficiency to establish a fraudulent intent is a question of law, to be decided by the court. *Hedman v. Anderson*..... 393

7. Foreclosing Mortgage: PLEADING. In an action to foreclose a mortgage the petition must state whether any

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10. ———. In this state, a mortgage of real estate is a mere pledge, or collateral security, creating a lien upon the mortgaged property, but conveying no title or vesting no estate, either before or after condition broken. *Id.*. 386
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12. ———. When an instrument is given as *security* for the payment of money, or the performance of some collateral act, it is a mortgage whatever may be its form. *Id.*. 386
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1. **Grade of Streets in Cities: DAMAGES.** Action to recover damages alleged to have been occasioned to a store building by reason of changing the grade of the street adjoining thereto. Under the issues it was necessary for the plaintiff to show the existence of a prior grade with refer-

ence to which the building was erected. *Held*, that to establish the existence of a grade for a street in a city the records and files pertaining thereto should be produced; that unless these be shown to be either lost or destroyed, secondary evidence will not be received. *Held*, also, that loose expressions made by officers of the city, indicating that they supposed such a grade to have been established, are but hearsay, by which the corporation is not bound. *Nebraska City v. Lamarkin*. 27

2. ———: ———. Where a city, in the reasonable exercise of an authority given by its charter, establishes a grade for its streets, and works them in accordance therewith, there being no provision of law for payment of damages, an action will not lie. *Id.*. 27

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NEGOTIABLE INSTRUMENTS.

1. **Promissory Note.** A promissory note, drawn for a sum certain and made payable to any person, "or order," "or assigns," "or bearer," is negotiable; but if it is payable to a certain person without words making it payable "to order," "or assigns," "or bearer," it is not a negotiable instrument. *Hosford v. Stone*. 380
2. ———. Any words in a promissory note, from which it appears that the person making it intended it to be negotiable, will give it a transferable quality; but the words "negotiable and payable without detraction or discount," do not of themselves make an instrument, otherwise non-negotiable, negotiable. *Id.*. 380
3. **Alteration of.** An alteration of a promissory note in any material part renders it invalid as against a party not consenting thereto, even in the hands of an innocent purchaser. *Brown v. Straw*. 536
4. ———. After an instrument is completed and delivered, no alteration can be made therein except by consent; an alteration of the date, whether it hasten or delay the time of payment, is a material alteration, and if made without the consent of the party sought to be charged extinguishes his liability. *Id.*. 536

5. ———: JURISDICTION OF DISTRICT COURT. In an action between the original parties to a promissory note, the district court has ample power to correct mistakes and enforce the original contract; but the law does not permit the payee to change its terms and conditions without the assent of the maker, even if the alteration is in his favor, or to correct a mistake. *Id* 536

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NON COMPOS MENTIS.

Persons Non Compos Mentis. There are four different classes of persons who are deemed in law *non compotes mentis*. *First.* An idiot or fool natural. *Second.* He who was of a good sound memory, but by the act of God has lost it. *Third.* A lunatic who is sometimes of a good sound mind and memory and sometimes *non compos mentis*. *Fourth.* One who is *non compos mentis* by his own act, as a drunkard. *Johnson v. Phifer* 401

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2. **Mandamus.** An action by mandamus will lie to compel an officer to deliver up property of the state, held by him without authority of law. *The State v. Bacon* 286
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ner is not liable for the debts incurred or contracts made
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2. ———. There must be a novation before the new firm is lia-
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the parties, and must have the effect to extinguish the old
contract, and create a new liability of debtor add creditor,
or of contractors between the creditor or contractor and the
new firm, and such new contract must be based on some
consideration. *Id.*..... 322
3. ———. The mere receipt of money by the new firm is not
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made a parol contract, binding him to fulfill the terms and
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PAYMENT.

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ments to be made at different periods of time, and the par-
ties contract that upon failure to make any one of the pay-
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PLEADING.

1. **Demurrer.** When a demurrer only specifies as ground therefor that the facts stated in the petition are not sufficient to constitute a cause of action, the court, in its decision of the demurrer, should confine itself to that objection. *Turner v. Althaus*..... 55
2. **Contract: RESCISSION.** In an action to rescind a contract on the ground of fraud, the particular and precise circumstances which constitute the alleged fraud, and the facts upon which the plaintiff bases his claim for relief, must be stated in the petition. *Arnold v. Baker*..... 134
3. **In an Appeal** from the assessment of damages for land taken by a railroad company it is not necessary to file pleadings in the case, in the district court—a jury is impaneled by the court to hear the proofs and assess the damages sustained by the owner of the land. *Nebraska Railway v. Van Dusen*..... 160
4. **Averment of Fraud.** An allegation in a petition that a claim presented to the county commissioners for allowance “was unjust, and was audited and allowed through fraudulent and undue means,” is too general for either the admission of proof, or the entry of a decree establishing fraud against any of the parties to the transaction. *Clark v. Dayton* 192
5. **Reply.** A reply must be made to all the material allegations of new matter contained in an answer, or they will be taken as true. *Williams v. Evans*..... 216
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7. **A Petition in Replevin** should state that the plaintiff is the owner of the goods sought to be recovered (or has a special property therein, stating its nature), that he is entitled to the immediate possession of such goods, and that the defendant wrongfully detains the same. The gist of the action is the unlawful detention of the property. *Haggard v. Wallen*. 271
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9. **Denial of Adultery.** A general denial is a good plea to an allegation of adultery, and the verdict of the jury find-

ing the defendant not guilty is conclusive, unless upon proper grounds shown it is set aside and vacated. *Oudes v. Oudes*. 304

10. **Foreclosing Mortgage.** In an action to foreclose a mortgage the petition must state whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt or any part thereof has been collected and paid. *Gregory v. Hartley*. 356
11. ———. If an action has been commenced on the note, the petition must show either that the action has not proceeded to judgment, or if a judgment has been obtained, then that an execution against the property of the defendant (other than the mortgaged premises) has been returned unsatisfied in whole or in part, and that the plaintiff's remedy is exhausted. *Id.* 356
12. **Statement of Facts.** In pleading, each party must set forth a plain, concise statement of facts relied on to maintain his cause of action, or his defense to the action. *Allen v. Saunders*. 436
13. **Amendment of.** When, on a trial of an action commenced against the members of a partnership, as such, it is discovered that the transaction was really with a single member of the firm, in his individual capacity, the court may permit an amended petition to be filed changing the title and form of the action accordingly. *Reed v. Beardsley*. 493
14. **Answer.** In an action on a promissory note by the payee, the defendant answered a former suit by another person, in which he had recovered judgment dismissing the case, but there was no allegation to the effect that the payee had disposed of the note, or any interest therein, to the plaintiff in the former suit. *Held*, That the answer constituted no defense. *Brandt v. Albers*. 504

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PRACTICE.

1. **Demurrer.** When a demurrer only specifies, as ground therefor, that the facts stated in the petition are not sufficient to constitute a cause of action, the court, in its decision of the demurrer, should confine itself to that single objection. *Turner v. Althaus*. 55
2. **Action: MISJOINDER.** And even if there be a misjoinder of different causes of action, if the defendant do not object, it is not within the province of the court to do so. *Id.* . . . 55

3. ———: **LEGAL AND EQUITABLE MAY BE JOINED, WHEN.** Legal and equitable causes of action may be properly joined whenever they fall within Sec. 87 of the Code of Civil Procedure. This section of the statute is not in conflict with Sec. 9, Art. VI, of the constitution, by which district courts are given "both chancery and common law jurisdiction." *Id.* 55
4. **Instructions to Jury : VERDICT.** Where, from the testimony in a case, the facts are in dispute, it is error for the court to direct the jury how they shall find a verdict. *Hall v. Vanier*..... 85
5. **Bill of Exceptions.** Where evidence has been introduced in the court below, which is not properly a matter of record, a party who desires to avail himself of it in the supreme court must preserve the same by a bill of exceptions. *Ray v. Mason*..... 101
6. **Affidavits of Jurors** in support of a motion for a new trial, which are not embodied in the bill of exceptions, will not be considered by the supreme court. *Id.*..... 101
7. **Costs in Cases where Justice of the Peace has Jurisdiction.** Where a justice of the peace has jurisdiction of an action, and it has been brought in any other court, the plaintiff cannot recover costs. *Id.*..... 101
8. **Motion for New Trial.** In an action at law, in order to obtain a review of the case in the supreme court, the party aggrieved must have presented to the court below, by motion for a new trial, his objections to the judgment or order of the court, and have obtained a ruling thereon. *Hull v. Miller*..... 128
9. **Verdict: WEIGHT OF EVIDENCE.** In a jury trial, where the evidence is conflicting, the verdict will not be set aside simply because the testimony to support it is not entirely satisfactory to the court. *High v. Merchants Bank*..... 155
10. ———. When conflicting testimony is fairly submitted to a jury, the court has no right to interfere with their finding, on the ground of a mere difference of opinion as to its weight. *Id.*..... 155
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11. ———: ———. But if a verdict is clearly against the weight of the evidence, a new trial should be granted. *Spurgeon v. Clemmons*..... 807
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12. ———: ———. Where, on the trial of a defendant under the bastardy act, an *alibi* was established by two credible witnesses in addition to that of the accused, as against the unsupported testimony of the mother of the child—*Held*, That the verdict should be set aside as being against the evidence. *Id.* 307
13. **Error. IRRELEVANT TESTIMONY.** On a jury trial, the admission of irrelevant testimony tending to prejudice the adverse party is good ground for the reversal of the judgment. *Id.* 155
14. ———: **CHARGE TO JURY WHEN THERE IS NO EVIDENCE TO WHICH IT IS APPLICABLE.** Where the court, in charging the jury, gives an instruction not called for by the evidence, and which is calculated to mislead them, the judgment will be reversed. *Id.* 155
15. **Attachment: AFFIDAVIT IN.** An objection that affiant's name was omitted from the body of the affidavit, he having duly signed it at the close, is technical merely, and no ground for dissolving the attachment. *Rudolf v. McDonald.* 163
16. ———: **VENUE; AMENDMENT OF.** The want of a venue, however, if taken advantage of by the defendant at the proper time, is a fatal defect, unless cured by amendment. And when the venue is omitted by mistake, it is proper for the court to allow an amendment in accordance with the facts. *Id.* 163
17. ———: **MOTION TO DISSOLVE; WHEN TO BE MADE.** But to be available, the motion to dissolve, in such cases, must be made before final judgment in the action. *Id.* 163
18. ———: **SUBSEQUENT ATTACHING CREDITOR.** And a subsequent attaching creditor, even if he could take advantage of this defect at all, which we do not decide, is entitled to no advantage over the defendant in this respect. *Id.* 163
19. ———: ———. The true rule of practice in such case is, that where property is seized under an order of attachment, and no question of ownership is raised nor any fraud or collusion charged, final judgment in the action concludes all inquiry, by third persons, concerning the validity or regularity of the proceedings, no matter how erroneous they may have been, provided the court had jurisdiction. *Id.*... 163
20. ———: **WAIVER BY DEFENDANT.** The defendant in attachment may waive anything, when it will cause no substantial injustice to the other creditors, or is not intended to guard

- their rights, and if he do so, a subsequent attaching creditor can take no advantage of a former by reason of any such waiver. *Id.*..... 164
21. **Exception to Charge to Jury.** In order to obtain a review of instructions given to a jury in the court below, in civil cases especially, it is necessary that they be excepted to at the time when given. And the rule is the same when a proper instruction tendered by a party is rejected by the court. *Black v. Winterstein*..... 224
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24. **Evidence. IMPEACHMENT OF WITNESS.** A witness may be impeached by bringing other witnesses to swear that his reputation for truth is bad. In this mode of impeachment, however, it is not competent to show what two or three persons only may think or say concerning him, but the inquiry should be confined to the general estimation in which he is held by his neighbors and acquaintances. *Matthewson v. Burr*..... 312
25. **Instructions: NOT TO BE REFUSED WHEN.** When an instruction is requested which states the law correctly in any possible view of the evidence it ought not to be refused. *Id.*..... 312
26. ———: **SHOULD BE CLEAR AND DEFINITE.** If an instruction containing several distinct propositions is so confused and indefinite, as to some of them, as to convey no clear idea of what is intended, the whole instruction may be properly rejected. *Id.*..... 312
27. ———: **SHOULD NOT TEND TO PREJUDICE.** If an instruction be given not called for by the evidence, and which had a direct tendency to prejudice the party complaining, a new trial will be granted. *Id.*..... 312
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29. ———. If in such case, after process of garnishment, the judgment is set aside, the garnishment becomes dissolved and the garnishee discharged. *Id.*..... 343
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32. **Evidence**. Where evidence is before the court which is unimpeached, the court cannot disregard it. If improper it should have been excluded; if properly admitted it must be considered and given due weight. *Roberts v. City of Lincoln*. 352
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34. **Decree**. **INTEREST**. A decree can draw interest at the rate of twelve per cent only in cases where the debt upon which it was predicated was drawing interest at that rate. *Gregory v. Hartley*..... 356
35. **Ejectment**. **DEFENSES**. Under the code, an equitable defense may be set up in an action of ejectment. *Stalnaker v. Morrison*.. 364
36. **Exceptions to Report of Referee**. Where no exceptions are filed to the report of a referee his finding of the facts will be conclusive. *McMurtry v. Brown*..... 369
37. **Judgment on Report of Referee** Where an action at law has been referred to a referee, who has made his report, on which judgment has been rendered, such judgment can only be reviewed *on error*. *Hosford v. Stone*..... 378
38. **Failure to Take Exceptions**. When no exceptions are taken in the court below, in an action at law, where a trial on the merits has been had, the case cannot be reviewed in the supreme court. *Id.*..... 378
39. **Motion for New Trial**. In an action at law, it is not sufficient merely to take exceptions to the ruling of the court confirming the report of the referee, but the alleged errors must be brought before the court by a motion for a new trial. *Id.*..... 378
40. **Referring Legal Action**. A purely legal action cannot be referred except by consent of parties; but the court will

- presume that consent was given when the record fails to show that objections were made to a reference. *Id.*..... 378
41. **Witnesses.** The question of the credibility of witnesses rests entirely with the jury. *Hedman v. Anderson*..... 392
42. **Error Without Prejudice.** An error resulting in no prejudice to the party complaining, is not sufficient to reverse a judgment. *Mercer v. James*..... 407
43. **Transcripts of Records.** A transcript must show when, where, and the court before which the proceedings were had, so that it shall appear from the record that they were had before a court known to the law, and are *coram judice*. *Clark v. Wright*..... 413
44. ———. If the record does not show that *all* of the evidence introduced on the trial has been preserved and brought into the supreme court, its entire sufficiency to support the verdict cannot be questioned. *Faulkner v. Meyers*..... 414
45. ———: **BILL OF EXCEPTIONS.** Where the presiding judge certifies only that the testimony set out in the bill of exceptions “is *in substance* all the evidence on the trial of this cause, and there was no other evidence material to the issue offered by either of the parties,” the finding will not be interfered with. *Id.*..... 414
46. **Instructions.** Where the jury were told to disregard “all evidence in relation to bills upon which the witnesses were examined,” but it not appearing what these “bills” were, nor what the testimony respecting them was, no error in this particular is apparent, and the propriety of the instruction will be presumed. *Id.*..... 414
47. **Warranty.** Where no warranty, either in fact or law, is involved in a contract for the sale of a thresher, it is error for the court to instruct the jury to inquire into or determine any question of warranty in such case. *Nichols v. Hail*..... 422
48. **Signing and Verifying Petition.** The failure to sign and verify a petition is no ground for dismissing an action. *Fritz v. Barnes*..... 435
49. ———. When these defects exist in a petition a motion may be properly interposed to strike the petition from the files, which will compel the filing of a new petition properly verified. *Id.*..... 435
50. **Instructions to Jury.** An instruction asked to charge the jury that there is no proof of a certain matter in contr-

- versy, when there was some testimony in reference to the matter, though very slight, was properly refused. *Allen v. Saunders*..... 435
51. If an instruction be requested, abstractly correct, but not based upon the evidence, it may be rejected. *Reed v. Beardsley*..... 493
52. **Plea in Bar.** A party cannot avail himself of the benefits of a plea in bar, or of a former recovery, by exceptions to testimony, or by motion subsequent to the trial; it must be pleaded to make such defense available. *Allen v. Saunders* 436
53. **Conflicting Testimony: NEW TRIAL.** Where there is conflicting testimony, although the court may incline to the opinion that the result of the trial ought to have been somewhat different from that reached by the jury, this is not a good reason for setting aside their verdict. *McCune v. Thomas*..... 488
54. ———: ———. If testimony is conflicting, it is within the province of the jury to determine what portion shall be received and what rejected. The court may lay down rules by which the credit of witnesses may be tested, but the application of those rules should be left entirely to the jury. *Id.*..... 488
55. **Revivor of Action: TITLE OF CAUSE.** Where upon the death of a plaintiff there is an order of revivor in the name of the administrator duly entered, the failure of the clerk to change the title of the case accordingly is not fatal to the judgment subsequently rendered. This is a mistake that may be remedied on motion, even after judgment. *Brandt v. Albers*..... 504
56. **Evidence: RECORD.** When the record does not contain all the evidence, or show that no evidence was introduced or offered relative to issues of fact in a trial before the court, it will be presumed that the findings of the court are based on sufficient proof of the facts. *Hendrix v. Rieman*. 517
57. **Revivor of Actions.** The statute provides the mode and regulates the practice in cases of revivor of actions, and the judgment or final order of revivor under the mode prescribed, unless reversed or vacated on error, is conclusive, and cannot be reviewed on the subsequent trial of the cause. *Id.*..... 517
58. ———. And in such case, a plea of *ne unques administrator* subsequently pleaded to the action, is bad, and may be treated as surplusage. *Id.*..... 517

59. **Allowance of Attorney's Fee.** When the instrument sued on provides for an attorney's fee, the allowance of the fee is no part of the judgment for the debt itself, but it is taxed as costs, and is subject to exceptions and review in like manner as the taxation of other costs may be. *Id.*.... 517
60. **Motion for New Trial.** The statute requiring a motion for a new trial to be made at the term at which the verdict was rendered, and within three days after its rendition (except for newly discovered evidence), is mandatory; and if the motion is afterwards made, it is of no avail to the party filing it. *Fox v. Meacham* 530
- See APPEAL. ATTACHMENT. BANKRUPTCY. EXECUTION. EXEMPTION. JUDGMENT. MORTGAGE. REPLEVIN.

PRACTICE IN CRIMINAL CASES.

1. **Felony. JURISDICTION OF POLICE JUDGE.** The police judge in cities of the first class has no jurisdiction in cases of felony, except to recognize the accused to appear before the district court for trial. *Thompson v. The State*..... 102
2. ———: ———. Where the charge against the prisoner, in the police, was *petit larceny*, and the jury returned a verdict of "guilty," and fixed the value of the property stolen at \$35.00—*Held*, that this verdict was no bar to an indictment for grand larceny in the district court for stealing the same property, as no valid judgment could have been rendered thereon. *Id.*..... 103
3. **Autrefois Convict: PLEA.** If the accused is charged in one court, in an indictment, with an offense for which he was convicted in a foreign country, and also in a second court is charged with a different and distinct offense, the plea of *autrefois convict* is bad. *Marshall v. The State*.... 120
4. ———: ———. When a defendant pleads not guilty, he cannot in connection with such plea, by other pleas raise questions in respect to a former conviction. *Id.*..... 120
5. **Instructions to Jury.** The charge of the court to the jury should be a clear and explicit statement of the law applicable to the facts in the case, and should cover all questions involved in the issue. *Milton v. The State*..... 136
6. **If the original complaint in a case of misdemeanor appealed to the district court be lost, the court may order a new complaint to be substituted covering the same offense as shown by the justice's transcript.** *Bays v. The State*.... 167

7. **Rape:** JOINDER OF COUNTS IN AN INDICTMENT. It is proper in an indictment to join a count for an assault to commit a rape with a count for rape itself. *Garrison v. The State*.... 275
8. ———: EVIDENCE. Where evidence of good character is before the jury it is their duty to give it such weight as they think it is entitled to. It is the province of the jury to weigh the evidence and determine the facts, and they should be left as free and untrammelled to give such weight to the evidence of good character as they are in relation to other facts. *Id.*..... 275
9. **Presumptions of Innocence.** In the absence of evidence to the contrary the law presumes every one innocent. And this legal presumption of innocence is a matter of evidence, to the benefit of which the party accused is entitled. *Id.*..... 275
10. **Judgment in Criminal Cases.** A judgment of an inferior court in a criminal action is conclusive, unless appealed from, or reversed on proceedings in error. *Ex parte Fisher*..... 309
11. ———. *Habeas corpus* is not a proper proceeding to review such judgment; nor will the court, upon such writ, look beyond the judgment and re-examine the charges on which it was rendered, or the decisions upon questions of law raised on trial of such case. *Id.*..... 309
12. **Continuance.** On motion for a continuance it is not good practice to permit counter affidavits as to what an absent witness would testify. *Williams v. The State* 334
13. ———: AFFIDAVIT. An affidavit of the prisoner to the effect that he had been *informed* that a person absent from the state would swear to certain material facts is not sufficient to warrant a continuance. If the information came from the proposed witness, it should be so stated, but if from a third party who knows he would so testify, then the affidavit of that person should be procured. *Id.*..... 334
14. **Murder:** IMPLIED MALICE. On a trial for murder, where the prosecution establishes against the prisoner an intentional homicide, and nothing explanatory is shown, the imputation of malice at once arises, which it is incumbent upon the prisoner to remove. *Id.*..... 335
15. **Charge to the Jury.** Instructions given to a jury should be applicable to the case as made by the testimony, and if they are not, and have a tendency to mislead, the judgment will be reversed. *Id.*..... 335

16. **Verdict.** The jury returned a written verdict in these words; "We, the jury in this case, being duly impaneled and sworn, do find and say that — — — is guilty of manslaughter." This was held to be void, for wholly omitting in any manner to designate the defendant as the guilty party. *Id* 335
17. ———. Under an indictment charging murder in the *first* degree where the jury finds the defendant guilty of manslaughter merely, the failure to specifically negative the fact that the crime was of a higher grade than that found is no ground for a reversal of the judgment. *Id*..... 335
18. **Evidence.** Under section 328 of the criminal code, neither husband nor wife are competent to testify concerning any communication made by one to the other during marriage. But when papers or letters are offered in evidence on the trial of a cause, which are pertinent to the issue, they should be admitted, and the court will not take notice how they were obtained, nor will it form a collateral issue to determine that question. *Geiger v. The State*..... 545
19. ———. Where there is no testimony whatever, showing the *value* of property stolen by the accused, other than that with which he stands charged in the indictment, it is not error for the court to refuse to instruct the jury that they cannot add the value of such property to that in the indictment, the court having previously instructed the jury that the ownership of the property stolen must be proved as charged in the indictment. *Id*..... 546
- 20 **Discretion of Trial Court in Sentencing Prisoner.** Within the limits fixed by the statute, the term of imprisonment to which a party convicted of crime may be sentenced, rests entirely with the judge of the court before whom the case was tried, and it will not be set aside because it seems to be severe. *Id*..... 546

See COURTS. CRIMINAL LAW.

PRACTICE IN COUNTY COURTS.

See COUNTY COURTS.

PRACTICE IN SUPREME COURT.

1. **Affidavits of Jurors** in support of a motion for a new trial, which are not embodied in the bill of exceptions, will not be considered by the supreme court. *Ray v. Mason*..... 101

2. **Setting Aside Judgment.** An accident or mistake in respect of a fact occurring on the trial of a cause in the district court, which is not incorporated in a bill of exceptions and made a part of the record, is not sufficient ground to set aside the judgment of the supreme court and to grant a new trial. *Morrill v. Taylor*. 236
3. **Rehearing of a Cause.** A petition for the rehearing of a cause upon such ground is somewhat in the nature of a writ of error in fact, and lies only to the same court in which the judgment was given to examine its own record and rectify the error, if any exist. *Id.* 236
4. **Proceedings in Error.** Under the constitution and statute relating to proceedings in error the supreme court can only reverse, vacate, or modify a judgment rendered by the district court *for errors appearing on the record*. *Id.* . . . 236
5. **Rehearing: AFFIDAVITS INADMISSIBLE.** Upon an application for a rehearing the court cannot receive any affidavits in respect of matters entirely foreign to the record. *Id.* 236

See APPEAL.

PRECINCTS.

See BONDS.

PRE-EMPTION.

See PUBLIC LANDS OF THE UNITED STATES.

PRESUMPTIONS.

See CRIMINAL LAW. EVIDENCE. PRACTICE, 56. PRACTICE IN CRIMINAL CASES.

PRINCIPAL AND AGENT.

1. **Power of Agent.** The character of a power under which an agent may execute a deed for another depends upon the presence or absence of the principal. *McMurtry v. Brown*. 368
2. **Execution of Deed by Agent.** If the deed is signed in his presence, by his direction, an oral request is all that is required. But when the deed is to be made in his absence the authority must be given by an instrument under the hand of the principal, and duly acknowledged. *Id.* . . . 369
3. **-----: AUTHORITY TO APPOINT SUB-AGENTS.** An agent can do for his principal only that which his principal authorizes. Ordinarily an agent appointed to transact a par

ticular business has not thereby a right to make another person the representative of his principal. *Furnas v. Frankman*..... 429

4. —: —. But when the general agent is specially authorized to employ sub-agents to act in the name of his principal, the further authority to bind the principal for their payment will be implied. *Id.*..... 429
5. —: —. A private understanding between the principal and general agent, by which the latter was himself to pay such sub-agents for their services, would bind them if not brought to their notice. *Id.*..... 429
6. **Principal Bound When.** The acts of a general agent with reference to the subject of the agency will bind his principal, although he may have received private instructions narrowing his authority, unless such instructions are known to the party dealing with him. *Id.*..... 429
7. **Declarations of Agent: WHEN INADMISSIBLE.** A trustee holding the legal title to land merely for convenience of transfer in case of sale, and who deeded it to a vendee by direction of the owner by whom the sale was made, cannot bind the vendor by declarations respecting the consideration. A conversation had between the vendee and such trustee, concerning the consideration, in the absence of the vendor, is not admissible in evidence against him. *Reed v. Beardsley*..... 498

See HUSBAND AND WIFE. REAL PROPERTY. USURY.

PRINCIPAL AND SURETY.

1. **Rights of Surety.** Subrogation is purely an equitable result, and the right of a surety to be subrogated to rights of the creditor does not depend on contract, but rests alone upon principles of justice and equity; and when such claim is contested, it depends on facts to develop and determine the rights of the parties in interest. *Eaton v. Hasty*..... 419
2. **The full relation of creditor and debtor** arises between principal and surety the moment the surety pays the money. *Smith v. Kinney*. 447

See JUDGMENT, 12. JUSTICE OF THE PEACE, 3, 6.

PRINTING.

See COUNTY, 4.

PRIVATE PROPERTY.

See CONSTITUTIONAL LAW, 9.

PROBATE COURTS.

See COUNTY COURT. ESTATES OF DECEDENTS.

PROMISSORY NOTES.

See JUSTICES OF THE PEACE. NEGOTIABLE INSTRUMENTS.

PUBLIC LANDS OF THE UNITED STATES.

1. **Taxation.** Lands purchased from the United States by private entry are subject to taxation as soon as the sale is completed by the payment of the purchase money. But, until this time, the land is not so liable, and every step taken by way of the assessment or levy of taxes is void. *Donovan v. Klope*..... 124
2. **Purchase.** The plaintiff, in 1869, purchased at private entry the south-east quarter of a section of public lands, and received the usual certificate. In 1873 this entry was cancelled, and he was permitted to enter in lieu thereof the north-east quarter of the same section. But, instead of issuing to him a new certificate, the old one, numbered 2,258, was so changed, by writing across its face, as to make it apply to the latter tract, but without changing its date—*Held*, that by this transaction as to the north-east quarter, the plaintiff became the owner in 1873, and not in 1869, the date of the certificate. *Id.*..... 124
3. —: CERTIFICATE OF PURCHASE. Where a certificate of purchase is so changed, it will be given the same effect as if it were actually issued at the date of such substitution. *Id.*..... 124
4. **Pre-emption along Line of Railroad.** The even-numbered sections along the line of the Union Pacific R. R. and its branches may be settled upon and entered under the provisions of the pre-emption and homestead laws, but are not subject to private entry. *Stalnaker v. Morrison*..... 363
5. —: U. P. R. R.: B & M. R. R. The B. & M. R. R. extension is one of the branches of the Union Pacific R. R., and the lands within the limits of the grant to that corporation are not subject to private entry. *Id.*..... 363
3. —: —. It is only in cases where lands are subject to private entry *at the date of settlement*, that a pre-emptor must make proof and payment within a year from the date of settlement. *Id.*..... 363

7. ———: ———. When lands have been offered at public sale, and thereby become subject to private entry, if they are afterwards included within the boundaries of a grant to a railroad company, and are thereby withdrawn from private entry, and subject to settlement and entry under the pre-emption and homestead laws exclusively, they are to be treated in all respects like unoffered lands. *Id.*..... 364
8. ———: ———. A party pre-empting any portion of such lands has thirty months after the date of filing his declaratory statement in which to make final proof and pay for the same. *Id.*..... 364
9. ———: ———. The object of the guards thrown around the privilege of pre-emption by the law, is to secure on the public lands actual permanent settlers. *Id.*..... 364

PURCHASER.

See MORTGAGE. REAL PROPERTY, 1, 2, 9.

RAILROADS.

1. **Constitutional Law.** That part of the act of June 22, 1867, which gives to the owner of live stock "double the value" of his property accidentally injured or destroyed on a railroad track, is void. *A. & N. R. R. v. Baty*..... 37

See APPEAL, 3. BONDS.

PUBLIC LANDS OF THE UNITED STATES.

RAPE.

See CRIMINAL LAW, 7.

REAL PROPERTY.

1. **A bona fide purchaser,** for a valuable consideration, without notice, is protected, whether purchasing from the fraudulent grantor or grantee. *Tootle & Maule v. Duran*. . . 93
2. **Conveyance: REGISTRATION.** The proper registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property; and such notice given by the record is as effectual in law as personal notice. *Edminster v. Higgins*. 265
3. **Deed.** A deed at common law is defined to be a written instrument under seal, containing a contract or agreement, which has been delivered by the party to be bound and accepted by the obligee or covenantee. *McMurtry v. Brown*. 368

4. ———: POWER TO CONVEY. A mere power to convey is not regarded in law as a contract, therefore, it is not necessary that the donee of a power should be capable of contracting. *Id.*..... 368
 5. **Trespass.** In order to maintain an action of trespass *quare clausum fregit* by one not holding the legal title to lands, he must show an *actual possession* in himself at the time the alleged trespass was committed. *Yorgensen v. Yorgensen*..... 383
 6. ———: POSSESSION. It is not necessary that the party in possession should actually reside on the land; his possession may be obtained by cultivation, fencing, or otherwise improving the land. *Id.*..... 383
 7. ———: ———. When land is unimproved and unoccupied, the person holding the legal title is deemed to be in possession thereof. *Id.*..... 383
 8. **Deeds: EXECUTION.** Mere imbecility or weakness of mind will not avoid a contract or deed. There must be a total want of reason or understanding. *Johnson v. Phifer*. 401
 9. **Agreement to Exchange Lands: MEASURE OF DAMAGES ON FAILURE TO PERFORM.** On agreement to exchange lands, if one of the parties performs the contract on his part by conveying, and the other neglects to do so, and finally puts it out of his power to perform, the true measure of damages is the value of the property conveyed. *Reed v. Beardsley*..... 493
- See CONTRACT, 5, 6. HUSBAND AND WIFE. MORTGAGE.

RECORDS.

See COURTS. PRACTICE, 43, 44. PRACTICE IN SUPREME COURT.

REGISTRATION.

See REAL PROPERTY, 2.

REPLEVIN.

1. **Judgment for Damages.** The judgment for damages in favor of the defendant in an action of replevin must conform in amount to the finding of the jury, and when the verdict is silent on this point judgment cannot be rendered for any amount whatever. *Black v. Winterstein*..... 224
2. **Measure of Damages.** While the value of property replevied is, in some cases, the just measure of damages to

- which a party is entitled, still a formal assessment of damages should never be omitted when proper to be allowed.
Id. 224
3. ——— Where the defendant in replevin lawfully held the property by virtue of a levy for the satisfaction of taxes which he was required to collect, the measure of damages, within the value of the property, was the amount of the taxes and legal costs and charges in making the collection.
Id. 224
4. **Pleading.** A petition in replevin should state that the plaintiff is the owner of the goods sought to be recovered (or has a special property therein, stating its nature), that he is entitled to the immediate possession of such goods, and that the defendant wrongfully detains the same. The gist of the action is the unlawful detention of the property.
Haggard v. Wallen 271
5. **Verdict.** In replevin the gist of the action is the alleged unlawful detention of the property at the commencement of the suit, and the verdict should, technically, be so framed as to speak unequivocally on this point. But notwithstanding the verdict is in the present tense, and finds that the defendant “does not unlawfully detain,” and that “the right of property and the right of possession thereof *is* in the defendant,” if there be nothing in the record showing a possible prejudice to the plaintiff by reason of the defect, the verdict will not be disturbed. *Mercer v. James* 408
6. ———: **JUDGMENT.** In replevin, where the jury by general verdict find the right of possession in the plaintiff, assessing damages for the detention of the property, this will support a judgment in his favor, although several specific questions were submitted to the jury, to some of which no answers were returned. *Faulkner v. Myers* 414
7. ———: ———. In such case no objection being made at the return of the verdict, nor until after the jury are discharged, it is too late, afterward, to complain of the omission. *Id.* 414
8. **Practice:** DAMAGES MAY BE ASSESSED BY THE COURT. A jury may be waived and damages assessed by the court in actions in replevin. *Baker v. Daily* 463

See BANKRUPTCY, 4, 7 HERD LAW.

REFEREE.

See PRACTICE, 36, 37, 40.

REPLY.

See PLEADING, 5.

RESCISSION.

See CONTRACT, 1, 3.

REVENUE.

See TAXES.

REVIVOR OF JUDGMENT.

See JUDGMENT, 10.

REVIVOR OF ACTIONS.

See PRACTICE, 55, 57, 58.

ROADS.

1. **Highway: HOW CREATED.** A highway may be created by legislative authority, exercised through a municipal corporation authorized to open streets, or through the general road law, or by dedication. *State, ex rel Sims v. Otoe County* 129
2. ———: **DEDICATION.** A dedication is defined to be the act of devoting or giving property for some proper object in such manner as to conclude the owner. It may be made by parol, and may be presumed from lapse of time. *Id.*... 130
3. **Proceedings in Road Matters.** When the inhabitants of a county desire the opening of a new road, or the discontinuance or change of a road heretofore established, at least ten land holders, residents of the county, must give notice, as provided by law, that *they* will, at a specified time, present a petition asking for the opening of a new road, or the discontinuance or change of a road heretofore established. *Id.*... 130
4. ———. Proof of posting the notices should be made by affidavit of the party who posted the same, stating *when*, *where*, and by whom the notices were posted. *Id.*... 130
5. ———: **JURISDICTION OF COUNTY COMMISSIONERS.** The commissioners have no jurisdiction to locate a county road unless the petition mentioned above has been presented to them, and after the notice thereof has been given. *Robinson v. Mathwick*, 5 Neb., 255, adhered to. *Id.*... 130
6. **Power and duty of county commissioners in erecting public bridges.** *Clark v. Dayton*... 192
Follmer v. Nuckolls County... 420

SALE.

See CONSTITUTIONAL LAW, 3. FRAUD. MORTGAGE. VENDOR AND VENDEE.

SCHOOLS.

1. **Powers of the School Board: TEACHER.** The district school board is specially invested by statute with the general care and management of the school and the employment of the teachers, and as an incident to these powers, has a right to discharge a teacher for incompetence, or for any other sufficient cause, at the will and pleasure of a majority of its members. *Bays v. The State*..... 158
2. **The Institution for the Blind** is not an educational institution within the meaning of section 19, Art. V. of the constitution. *The State v. Bucon* 286
3. **County Superintendent of Public Instruction.** The powers and duties of a county superintendent of public instruction are derived entirely from the statute. He can only exercise such powers as are especially granted, or are incidentally necessary to carry the same into effect. It must appear from the record of his proceedings that he has jurisdiction, or his acts will be void. *Ratcliff v. Faris*..... 539
4. ———: **DIVISION OF SCHOOL DISTRICTS.** When the statute requires him, in cases where a new school district is formed in whole or in part, from one or more districts possessed of a school house or other property, to ascertain and *determine* the amount justly due to such new district from any district or districts out of which it may have been formed, and to certify the same to the county clerk—*Held*, where it appeared that there was no finding or determination whatever, by the superintendent, as to property of any kind retained by a district, out of which a new district was formed, that his certificate to the county clerk, stating the amount of tax to be levied on the old district to be paid to the new, when collected, was a nullity. *Id.*..... 539

See PRACTICE IN CRIMINAL CASES, 6.

SHERIFF.

See EXEMPTION.

STATE AND STATE OFFICERS.

1. **Funding State Indebtedness.** The funding act of February 14, 1877 requires the several classes of state in-

debtedness therein specified to be paid, without conditions or abatement, upon presentation of the warrants or certificates of indebtedness to the treasurer for payment. *State, ex rel. Omaha National Bank v. McBride*..... 506

2. **Duties of Auditor of Public Accounts.** The State Auditor had no authority to audit, adjust, or draw warrants, or make orders in respect of any part of the indebtedness specified in said act. *Id* 506

See BOARD OF PUBLIC LANDS AND BUILDINGS.

STATUTES.

1. **Construction.** The words "deliberate and premeditated malice" in the statutory definition of murder in the first degree were intended to restrict murder in that degree to cases where deliberation was shown to have taken place before the commission of the crime. *Milton v. The State*.... 136
2. ———. The several parts of an act are to be construed together in order to ascertain the intention of the legislature. *Follmer v. Nuckolls County*..... 204
3. ———. As a primary rule the intention of the legislature is to be collected from the words; if the words are not explicit it may be gathered from the occasion and necessity of the law. Words are to be interpreted with reference to the general object and scope of the statute. *Id*..... 204
4. ———. The words "permanent and substantial" are used in section 15 of the road law in a descriptive sense, and apply only to such structures as are of a permanent and substantial character, and do not include merely temporary structures or ordinary repairs. *Id*..... 204
5. **All statutes in pari materia** must be taken together and construed as if they were one law. *Hendrix v. Rieman*. 516

See CONSTITUTIONAL LAW.

STATUTES CITED AND CONSTRUED.

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- Decedents, Sec. 337, Chap. 14. *Hendrix v. Rieman*..... 521
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- Cities of the first class. Sec. 24, Chap. 8. *Turner v. Althaus*.... 72
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———, Sec. 104, Chap. 66. <i>Id.</i>	247
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STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STAY OF EXECUTION.

See EXECUTION.

STOCK.

See HERD LAW.

SURETY.

See JUSTICE OF THE PEACE, 3, 6. PRINCIPAL AND SURETY.

TAXES.

1. **Action to Recover.** An action at law is the proper remedy to recover taxes illegally paid, when the same have been paid under protest, to prevent distress and costs. *Turner v. Althaus*..... 54
2. **Power of the Legislature.** The power to arrange and distribute the administrative functions of government, and to change the same from time to time, as the public exigencies may require, belongs exclusively to the legislature, and this includes the authority to incorporate towns and cities. *Id*..... 54
3. ———. The taxing power is vested in the legislature, and it is exclusively within its province to apportion and direct the assessment and collection of taxes. *Id*..... 54

- 4 **United States Lands.** Lands purchased from the United States by private entry are subject to taxation as soon as the sale is completed by the payment of the purchase money. But until this time every step taken by way of the assessment and levy of taxes is void. *Donovon v. Kloke*..... 124
 5. **Assessment.** A valid assessment is an essential pre-requisite to any exercise of the taxing power by the board of county commissioners. *Morrill v. Taylor*..... 236
 6. ———: **OATH OF ASSESSOR.** The requirement of the law prescribing the oath to be taken and subscribed by the assessor, certified by the officer administering it and attached to the assessment roll, must be substantially complied with; and without such compliance with the law no jurisdiction can be conferred on the board of commissioners in the matter of the taxation of property. *Id.*..... 236
- See BONDS, 5. CONSTITUTIONAL LAW, 10, 11. COUNTIES, 4, 7. PUBLIC LANDS, 2. REPLEVIN, 3. SCHOOLS, 4.

TOWNS.

See LIQUOR SELLING.

TOWNSHIP ORGANIZATION.

1. **Votes Necessary to Adopt.** Section five, Art. X, of the constitution is mandatory; therefore to adopt township organization, it requires a majority of all the legal voters of the county, voting at the general election at which the question is submitted. *The State, ex rel Jones v. Lancaster Co.*... 474
2. **Constitutional Law.** The act of February 16, 1877, entitled "An act to provide for township organization," embraces several subjects not indicated by the title, and as these several subjects are dependent on each other and form inseparable parts of the same law, the whole act is unconstitutional and void. *Id.*..... 474

TRANSCRIPTS.

See PRACTICE, 43.

TREASURER OF STATE.

See CONSTITUTIONAL LAW, 14. STATE AND STATE OFFICERS.

TRESPASS.

1. **Action.** In order to maintain an action of trespass *quare clausum fregit* by one not holding the legal title to lands,

- he must show an *actual possession* in himself at the time the alleged trespass was committed. *Yorgensen v. Yorgensen*..... 393
2. **Possession.** It is not necessary that the party in possession should actually reside on the land; his possession may be obtained by cultivation, fencing, or otherwise improving the land. *Id* 383
3. ———: ———. When land is unimproved and unoccupied, the person holding the legal title is deemed to be in possession thereof. *Id*..... 383

TRUSTS.

1. **Trust Deed: MORTGAGE.** A deed of trust is a mortgage, and only differs from a mortgage with a power of sale, in its being executed to a third person, instead of a creditor. *Hurley v. Estes* 386

See BONDS. PRINCIPAL AND AGENT, 7.

UNITED STATES.

See PUBLIC LANDS.

USURY.

1. **Usury.** If the agent of the lender of money takes from the borrower a note and mortgage for the payment of a bonus or commission for making the loan, the transaction is tainted with the vice of usury. Such contract is void, and payment of the money so secured cannot be enforced by action upon the note and mortgage. *Cheney v. Woodruff* 151
2. ———. In law, it makes no difference whether the usurious interest is expressed in terms in the instrument given for the payment of the debt created by the loan, or whether it is taken as a bonus, or as commission, or is secured by any other corrupt agreement, device or shift, at the time of the contract. *Id*..... 151

VENDOR AND VENDEE.

1. **Fraud.** Where a vendee has participated in the fraud of the vendor, by accepting from him a conveyance of real estate, with the intent to hinder, delay, or defraud the creditors of such vendor, the conveyance will be void as to those creditors of such vendor, even though full consideration has been paid for such property. *Tootle & Maule v. Dunn.* 93
2. **Vendor's Lien.** A vendor of real estate, upon an absolute conveyance thereof by deed, has no lien on the land so

- conveyed for such portion of the purchase money as remains unpaid. *Edminster v. Higgins* 265
3. ————. The policy of our law is to discourage secret liens, and to require all instruments affecting the title of real estate to be entered of record. *Id.*..... 265
4. ————. The doctrine that a vendor has a lien on the land conveyed for the purchase money remaining unpaid is repugnant to our statutes in relation to real estate, and is no part of the law of this state. *Id.*..... 265
5. **Rights of Vendor.** Where a purchaser of real estate agrees to assume and pay certain outstanding indebtedness against the vendor and save him harmless from the same, if he fails to do so it is not necessary, in order to give the vendor a right of action against him, that he should have first paid the debt himself. *Gregory v. Hartley*..... 356
- See FRAUD, 1, 2, 3. MORTGAGE.

VERDICT.

See PRACTICE, 4. PRACTICE IN CRIMINAL CASES, 4, 9, 10.
REPLEVIN, 1, 5, 6, 7.

WAIVER.

See ATTACHMENT, 6.

WARRANTY.

1. **Defendants gave M. an order for a certain kind of thrasher, on the back of which was a printed warranty; the order was presented to the agents of the plaintiffs; it was neither accepted, nor was the machine furnished; but M. acting for the agents sold the defendants, under a distinct contract, an old and different kind of thrasher. Held, that the order and warranty did not apply to the machine furnished. *Nichols v. Hail*..... 432**
2. **Instructions to Jury.** Where no warranty, either in fact or law, is involved in a contract for the sale of a thrasher, it is error for the court to instruct the jury to inquire into or determine any question of warranty in such case. *Id.*.... 432

WITNESSES.

See CRIMINAL LAW, 9. EVIDENCE. PRACTICE IN CRIMINAL CASES, 1, 8, 10.

WORDS AND PHRASES.

See STATUTES.