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STATE OF NEBRASKA, EX REL. ROYAL ARCANUM, V. THOMAS H. BENTON, AUDITOR.

[FILED OCTOBER 26, 1892.]

Life Insurance: SECRET BENEVOLENT ORDERS: AUDITOR'S CERTIFICATE: FEES. A secret benevolent order, which issues certificates of indemnity solely to its members, whereby the order obligates itself to pay a stipulated sum on the death of any member to his widow or children, or other persons dependent upon him, upon complying with all the requirements of chapter 18, session laws of 1887, is entitled to a certificate from the auditor authorizing it to transact business in this state without paying the fees specified in section 32 of chapter 43 of the Compiled Statutes.

ORIGINAL application for *mandamus.*

Weaver & Giller, for relator.

George H. Hastings, Attorney General, contra.

NORVAL, J.

This is an original application to this court for a peremptory *mandamus* to compel the respondent to issue to relator a certificate of authority to transact business in this state.

Relator is a secret benevolent and fraternal society, incorporated under the laws of the state of Massachusetts, the management and control of which is confined exclusively to its members, a part of whom are residents and citizens of this state. The object and purpose of the society, in addition to its benevolent and fraternal features, is to issue certificates of indemnity to its members, promising to pay a specified sum of money, in case of the death of any of its members, to the widow, orphan, or other person dependent upon such member, all of which business

is done by and through councils, located in this and other states of the Union.

It is stipulated that relator has a sufficient membership to pay its certificates in full in case of the death of any of its members, by the usual mode of assessment; that it has filed a certificate in the office of the auditor of public accounts of this state, setting forth the total number of its members in good standing, the title and post-office address of each of its chief officers, its method of assessment upon which funds are provided to pay the certificates of indemnity by it issued, together with a certified copy of its constitution and by-laws; that on or about March 9, 1891, relator filed with the auditor a sworn statement, setting forth the total number of members in good standing on the first day of January, preceding; the total number of members who have been suspended for the non-payment of dues and assessments for the preceding twelve months, together with the amount of money paid to each, and the number of claims resisted, and the reason for resisting the payment thereof; the total amount collected for the payment of certificates of indemnity, and the amount due and unpaid upon certificates of deceased members; the total amount on hand in such fund, and the amount paid out of such fund; that relator has in all respects complied with the requirements of chapter 18, Session Laws, 1887, the same being "An act to exempt secret societies and associations from the requirements of chapter sixteen (16), of the Compiled Statutes of 1885, to define the duties, powers, and obligations of such societies and associations, and to provide penalties for violations thereof."

Respondent refuses to issue his certificate to the relator, for the sole reason that relator refuses to pay the fees provided by section 32, chapter 43, Compiled Statutes, which reads as follows:

"Section 32. There shall be paid by every company, association, person or persons, agent or agents, *to whom this*

act shall apply, the following fees: For examination and filing of the first application of any company, and issuing of the certificate of license thereon, fifty dollars, which shall go to the auditor; for filing each annual statement herein required, twenty dollars; for each certificate of authority, two dollars; for every copy of paper filed as herein provided, the sum of ten cents per folio, and fifty cents for certifying the same and affixing the seal of office thereto; all of which fees shall be paid to the officer required to perform the duties."

It will be perceived that the above quoted provisions, in express terms, only apply to such insurance companies, associations and persons as come within the purview of the act, of which said section is a part. The requirements of chapter 43 of the Compiled Statutes do not apply to secret societies or associations of the character of the relator, but such societies and associations are governed and controlled exclusively by the provisions of the legislative enactment of 1887 above referred to. Although said act requires the auditor to issue his certificate to transact business in this state to every secret society or association which, in addition to its fraternal and benevolent features, shall issue certificates of indemnity, obligating said society or association to pay a specified sum of money, in the event of the death, sickness, or disability, of any of the members thereof, to the wife, widow or orphans, or persons dependent upon such members, upon such society or association complying with all the requirements of said act, we are unable to find any provision therein authorizing the auditor to require or exact a fee for the issuing of his certificates to secret fraternal benevolent societies having an insurance feature. While the certificates of indemnity issued by societies of the kind and character of relator are, in form and substance, contracts of insurance, our conclusion is that such societies are not amenable to the provisions of said chapter 43 regulating insurance companies, and, there-

fore, relator is not required to pay the fees mentioned in section 32 of said chapter. It follows that, as the relator has complied with all the requirements of the statutes on its part to be complied with, it is entitled to a certificate authorizing it to do business in this state. Judgment must be entered in accordance with the prayer of the petition.

WRIT ALLOWED.

The other judges concur.

W. C. NORTON V. NEBRASKA LOAN & TRUST COMPANY ET AL.

[FILED OCTOBER 26, 1892.]

1. **Judicial Sales:** CAVEAT EMPTOR. It is a well settled rule that the doctrine of *caveat emptor* applies to all judicial sales, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts or fraud, where he is free from negligence. He is bound to examine the title, and not rely upon statements made by the officer conducting the sale, as to its condition. If he buys without such examination, he does so at his peril, and must suffer the loss occasioned by his neglect. MAXWELL, CH. J., dissenting.

2. ——: ——: DEFECTIVE TITLE: NOTICE. A purchaser at a mortgage foreclosure sale will not be relieved from completing his purchase on account of defective title, or on the ground of there being prior incumbrances on the property, when the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale was made, as he is chargeable with notice of such material facts as the records disclose.

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

S. S. McAllister, for plaintiff in error, contending that the bidder at foreclosure sale, having acted under mistake, and on misrepresentation of the sheriff as to title, should be relieved from the performance of his bid, cited: *Paulett v. Peabody*, 3 Neb., 196; *Frasher v. Ingham*, 4 Id., 531; *Laight v. Pell*, 1 Edw. Ch. [N. Y.], 577; *Yates v. Little*, 6 McLean [U. S. C. C.], 511.

Steele Bros., contra: Court of equity will not interfere where party seeking relief is guilty of negligence. (2 Pomeroy, Eq. Jur., 839; *Young v. Morgan*, 13 Neb., 48.) Neglect of purchaser to examine records deprives him of right to relief. If he knew of the defect, or from pursuing inquiries suggested by the pleadings, or the notice of sale, would have known it, he is not entitled to be relieved. (2 Freeman, Executions, sec. 304*k*.) Equity will not grant relief for mistakes of law. (*Smith v. Pinney*, 2 Neb., 144; *Boggs v. Hargrave*, 16 Cal., 559; *Spafford v. Janesville*, 15 Wis., 526; *Landon v. Burke*, 33 Id., 453.) The return shows the bid was unconditional, and it is conclusive. (*Johnson v. Jones*, 2 Neb., 133; *Cooper v. Sunderland*, 3 Ia., 114; *Trimble v. Longworth*, 13 O. St., 431; *Granger v. Clark*, 22 Me., 128; *Cook v. Darling*, 18 Pick. [Mass.], 393; *Lightsey v. Harris*, 20 Ala., 411; *Hill v. Kling*, 4 O., 137; *Philips v. Elwell*, 14 O. St., 240.) If the sale was conditional the return is wrong, and the bidder's remedy is against sheriff for false return. (*Angier v. Ash*, 6 Foster [N. H.], 105; *Diller v. Roberts*, 13 Serg. & R. [Pa.], 60; *Bott v. Burnell*, 11 Mass., 165; *Whitaker v. Sumner*, 7 Pick. [Mass.], 555; *Barrett v. Copeland*, 18 Vt., 69; *Wilson v. Exr. of Hurst*, 1 Pet. [U. S. C. C.], 441; *Egery v. Buchanan*, 5 Cal., 56; *Cozine v. Walter*, 55 N. Y., 304.) The rule *caveat emptor* applies in all its rigor to judicial sales. (*The Monte Allegre*, 9 Wheat. [U.S.], 616; *Corwin v. Benham*, 2 O. St., 36; *Owsley v. Smith*, 14 Mo., 153; *Mason v. Wait*, 4 Scam. [Ill.], 127; *Worth-*

ington v. McRoberts, 9 Ala., 297; *Fox v. Mensch*, 3 Watts & Serg. [Pa.], 444; *Mellen v. Boarman*, 13 S. & M. [Miss.], 100; *Lynch v. Baxter*, 4 Tex., 431; *Bingham v. Maxcy*, 15 Ill., 295; *Vandever v. Baker*, 13 Pa. St., 124; *Anderson v. Foulke*, 2 Har. & G. [Md.], 346; *Thompson v. Munger*, 15 Tex., 523; *Bickley v. Biddle*, 33 Pa. St., 276; *Strouse v. Drennan*, 41 Mo., 289; *Walden v Gridley*, 36 Ill., 523; *Creps v. Baird*, 3 O. St., 278; *Miller v. Finn*, 1 Neb., 255; *Frasher v. Ingham*, 4 Neb., 531.)

NORVAL, J.

The Nebraska Loan & Trust Co. brought suit in the district court of Butler county against Byron E. Taylor and Lila A. Taylor, his wife, to foreclose a mortgage upon the south half of section 12, in township 15 north, of range 1 east, executed by the Taylors, which mortgage was junior and subject to a prior mortgage of $3,000, on said real estate, owned and held by one Washington Quinlin. The court found there was due the Loan & Trust Company on its mortgage the sum of $1,056.60; that said Quinlin had the first lien on said premises for $3,000 with interest thereon at six per cent from July 1, 1888, and a decree of foreclosure was rendered, which directed the sale to be made subject to the lien of Quinlin. Subsequently an order of sale was issued, and the land, after being duly appraised and advertised, was sold by the sheriff to one W. C. Norton, the plaintiff in error herein, for the sum of $2,535. The sale was reported by the sheriff to the court and the same was approved and confirmed. Shortly thereafter, at the same term of court, the purchaser filed a motion to vacate and set aside the sale on the ground that he was induced to purchase the property by reason of certain representations made by the sheriff and the clerk of the district court as to the character of the title the purchaser would acquire. The motion was overruled, and Norton was ordered to pay into court the amount of his bid. To reverse said order Norton prosecutes a petition in error to this court.

It appears from the affidavits filed in support of the motion to set the sale aside, that Mr. Norton came to the place where the sheriff was offering the property for sale, and inquired what he was selling, to which the officer replied that it was the B. E. Taylor land, and requested Norton to make a bid thereon; that Norton thereupon asked what amount must be bid to get the land, to which the sheriff replied that under the appraisement it could not be sold for less than $2,533.60, as that was two-thirds of the appraised value, and that by paying said sum he would acquire a good and perfect title to the land, free from all liens; that the sheriff and Norton then went to the office of the clerk of the district court to ascertain what amount was against the land, and the clerk, after examining the papers, told Norton he would have to bid $2,533.60 to get the land, but he had better make the bid $2,535 even, and thereby get a little above two-thirds of the appraised value; that the payment of said sum would clear the land of all prior liens and incumbrances; that relying upon said statements Norton made a bid of $2,535, and the land was struck off to him at said sum.

On the next day, the sheriff, on meeting Norton, said to him that the amount of his bid was not two-thirds of the appraisement; that the land had been appraised at $4,800 and could not be sold for less than $3,200, and that unless Norton would raise his bid to said sum he could not have the land; whereupon Norton replied he would not bid the sum of $3,200, and the sheriff then stated that such sale must be declared off. It also appears that the statements of the sheriff and clerk were innocently made and without any intention to mislead or deceive the purchaser. It is also shown by uncontradicted testimony that the land was well worth $6,400.

The object and purpose of the plaintiff in error is to set aside a sheriff's sale on the ground that he did not thereby acquire the title which he at the time supposed he was pur-

chasing. No claim is made that either the plaintiff in foreclosure, or Taylor, or his wife, was guilty of any fraud, or that any representations were made by either of them to Norton, as to the character of the title to the land, or that they had any knowledge at the time of the purchase of the statements and representations made by the clerk and sheriff. The only proposition presented is whether the fact of the sheriff and clerk having represented to Norton that, if he would buy the land, he would get a clear and perfect title thereto, free from liens, although such representations were untrue, was sufficient to require the court to set aside the sale. In our view, under the facts disclosed by this record, and the law applicable thereto, plaintiff in error is not entitled to any relief. Ordinarily a purchaser at sheriff's sale takes all risks. He buys at his peril, and if the title is bad, he must stand the loss. The rule of *caveat emptor* applies in all its force to all judicial sales. The court undertakes to sell the title of the defendant, such as it is, and it is the duty of the purchaser to ascertain for himself the character of the title he is about to acquire. (*Miller v. Finn*, 1 Neb., 254; *Smith v. Painter*, 5 S. & R., 225; *Vattier v. Lytle's Exrs.*, 6 O., 478; *Lewark v. Carter*, 117 Ind., 206; *Corwin v. Benham*, 2 O. St., 36; *Mason v. Wait*, 4 Scam. [Ill.], 127; *Bishop v. O'Conner*, 69 Ill., 431; *Sackett v. Twining*, 57 Amer. Dec., 599; *Lynch v. Baxter*, 4 Tex., 431.)

An exception to the rule above stated, recognized by the weight of authorities, is where the purchaser has been induced to bid by fraud, or under a mistake of fact. A purchaser will be released from the sale on the ground of a mistake of fact, when the mistake is not the result of his own negligence, if application therefor is made at the proper time; but he will not be released from his purchase on his mere ignorance or mistake of law. (*Haden v. Ware*, 15 Ala., 149; *Burns v. Hamilton*, 33 Id., 210; *Hayes v. Stiger*, 29 N. J. Eq., 196; *Upham v. Hamill*, 11 R. I.,

565.) The facts do not bring the case at bar within the exception to the rule, so as to entitle Norton to have the sale set aside. Neither the clerk nor sheriff misrepresented any material fact concerning the condition of the title. They did not inform the purchaser that there were no incumbrances upon the property, nor does Norton claim that he was not aware of there being a prior mortgage of $3,000 on the premises at the time he made his bid. The clerk and sheriff supposed that the sale would extinguish all incumbrances and that the purchaser would acquire a perfect title to the property. In so informing Norton, they misstated the law, or the legal effect of the foreclosure proceedings and sale, and for which the law affords no relief.

We think plaintiff in error is concluded by his own neglect. He had no right to rely upon the statements of the clerk and sheriff, but should have had the title and the proceedings under which the sale was made examined for himself, before he made his bid. Had he done so, he would have been fully apprised of the condition of the title. The records of the county and of the court are open to inspection to every one, and these records disclose the objection now urged to the title of the lands. Had an examination been made of either the petition to foreclose the mortgage, the decree, the appraisement, certificate of liens, or notice of sale, he would have ascertained that Washington Quinlin had a first lien upon the premises for $3,000 and interest, and that the sale was to be made subject thereto. If Norton was deceived, it was the result of his own negligence in not taking the precaution to examine the records. He is chargeable with knowledge of their contents. Equity will not relieve a purchaser of his own negligence. (*Roberts v. Hughes*, 81 Ill., 130; *Vanscoyoc v. Kimler*, 77 Ill., 151; *Riggs v. Pursell*, 66 N. Y., 193; *White v. Seaver*, 25 Barb., 235; *Eccles v. Timmons*, 95 N. C., 540; *Weber v. Herrick*, 26 N. E. Rep. [Ill.], 360; *Dennerlein v. Dennerlein*, 19 N. E. Rep. [N. Y.], 85.)

In *Eccles v. Timmons, supra*, it is held that a purchaser at a judicial sale will not be released from his bid on the ground that the title is imperfect, when the true state of the title is set out in the pleadings under which the sale was made.

Dennerlein v. Dennerlein, 19 N. E. Rep., 85, was a partition sale. The property was described in the proceedings and in the notice of sale by metes and bounds and as "containing 31 acres, be the same more or less." Prior to the sale, hand-bills were issued in the name of the referee who made the sale, in which the boundary lines of the premises were omitted, and the property was described as "the farm of the late John Dennerlein, containing 31 acres." The purchaser, in bidding upon the property, relied upon the statement in the hand-bills as to the quantity of land. Subsequently he discovered that the premises only contained 24¾ acres, and applied to the court for an order releasing him from completing the purchase on the ground that he had been misled as to the number of acres, which motion was denied. He appealed to the general term, where the order was affirmed, and, on appeal to the court of appeals of New York, it was held that he was not entitled to relief.

Vanscoyoc v. Kimler, supra, was an appeal from an order of the circuit court, sustaining a motion made therein by the purchaser, to set aside a sale of a tract of land made upon execution, on the ground that he was led to believe, by misrepresentations made by the officer conducting the sale, that the land was not incumbered, when in fact it was mortgaged in excess of its value. The supreme court held that the maxim of *caveat emptor* applied, and that the misrepresentation of the sheriff afforded no ground for setting aside the sale.

In the case at bar the price paid was so greatly inadequate to the real value of the land as to put the purchaser on inquiry. He should have known that a half section of

land, which the evidence shows was well worth $6,400, would sell for more than $2,535, the amount of his bid, if there was no prior incumbrance. The land was actually worth several hundred dollars more than the amount bid by Norton and the Quinlin lien combined, so that, instead of losing anything by the transaction, the investment is still a profitable one. He does not complain that he has lost anything by the transaction, but rather that he failed to double on the investment.

Concerning what took place between the sheriff and Norton the day following the sale, to which reference has been made, we will say that it is unexplainable how the former made the statements he did, if correctly quoted in Mr. Norton's affidavit, in regard to what the land was appraised at. It is not true that it had been appraised at $4,800, and could not be sold for less than $3,200. The sum bid by Norton was more than two-thirds the appraised value of the land, as shown by the appraisement. However, what the sheriff may have said in that regard, as well as the statement that "the sale must be declared off," is of no importance, for the reason that the status of Norton, as purchaser, was fixed when his bid was accepted; the officer had no power or authority to afterwards release him from his purchase.

It is contended that this case falls within, and is controlled by, that of *Paulett v. Peabody*, 3 Neb., 196, and *Frasher v. Ingham*, 4 Id., 531. We do not think so. These cases were decided upon facts materially different from this. In the first case there was a decree of foreclosure of a junior mortgage, in a suit wherein the senior mortgagee was not a party. The property was sold under the decree by the sheriff, the purchaser being induced to buy the property through the false representations of the attorneys of both the plaintiff and the senior mortgagee, that the junior mortgage would be paid off out of the proceeds of the sale, and that he would take the property dis-

charged of such lien. It was held that said false representations of the parties were sufficient grounds for vacating the sale. In the case we are considering it is not pretended that any misrepresentations or fraud can be imputed to any of the parties to the suit, or to Quinlin, the senior mortgagee, whereby Norton was induced to buy the land. Of course, when a fraud is practiced upon the purchaser at a judicial sale by the party in interest, which induced the purchaser to make his bid, the sale will be set aside therefor. But the rule has no application here.

In the case reported in 4th Nebraska the sheriff levied an execution upon, appraised, and sold, a tract of land covered with timber. The sale was duly confirmed and a deed executed to the purchaser. Afterwards it was discovered that the record of the proceedings under the writ described another tract near by, which was of no value whatever. It was held, on a petition of the purchaser to set aside the sale, that he was entitled to relief. Clearly the case is not analogous to the one before us, for in this case there was no error in describing the lands, as in the case cited. The doctrine announced in these decisions should not be extended to cases not clearly of their class.

We are of the opinion that the district court did not err in overruling the motion of the plaintiff in error to set the sale aside, and its decision is

AFFIRMED.

POST, J., did not sit.

MAXWELL, CH. J., dissenting.

I am unable to give my assent to the opinion of the majority of the court, and will, as briefly as possible, state my reasons for failing to concur with the majority.

This is an application to compel the purchaser of land under a decree of foreclosure of a mortgage to complete the purchase by paying the amount of his bid.

He answers, in effect, that he was induced to bid by the

misrepresentations of the officer conducting the sale, and that a large mortgage, viz., $3,000, exists as an incumbrance against the land which he was induced to believe would be satisfied out of the proceeds of sale.

The cause was submitted to the court on affidavits as follows:

"W. C. Norton, being first duly sworn according to law, deposes and says that on the 14th day of September, 1889, while the sale was being made of the lands sold under the order of sale in this case, this affiant had a conversation with the sheriff of said county, who was then and there conducting the said sale, wherein said sheriff stated to this affiant that said land, under the appraisement, could not be sold for less than $2,533.60, and that, under the appraisement, said last named amount would be sufficient to buy the same; that said sheriff then and there examined the report of the appraisers, the certificates of the county clerk, clerk of the district court, and county treasurer, and, after making said examination, and after figuring up the amount of the decree, and the amount of liens on said lands, stated to this affiant that the said sum of $2,533.60 would be sufficient to purchase said land, and that, by paying the said sum of $2,533.60, this affiant would acquire a good and perfect title to said land, free and clear of all previous liens or incumbrances. This affiant then and there trusted and believed the said statement and representation of said sheriff, and then and there believed that by bidding the sum of $2,535.00 for said land, paying the said sum of $2,535.00 therefor, he would receive and have a good title to said land, free and clear of all other liens and incumbrances thereon. Said affiant then and there stated to said sheriff that he would give the sum of $2,535.00 for said land if he thereby would acquire a clear deed and title to said land, free of all prior liens and incumbrances; that said sheriff then and there stated that this affiant would acquire such a deed and title.

"Affiant says that the clerk of this court, Ed. G. Hall, was also present when said sheriff stated to this affiant that a bid of $2,535 would entitle the purchaser to a deed for said land, and that the payment of said $2,535 would clear said land of all prior liens and encumbrances and that said Ed. G. Hall then and there assisted said sheriff to look over and examine said appraisement and certificates, and assisted to figure up the amount of said decree and said liens, and the said Ed. G. Hall also then and there, before the time he, this affiant, bid the said sum of $2,535, stated that said sum of $2,535 was more than two-thirds of the appraised value of said land, and that by bidding the said sum of $2,535, he would be entitled to a deed therefor, and that a deed under said bid would entitle the purchaser to a deed free and clear of all prior liens and encumbrances; that this affiant then and there believed and trusted in the said statements and representations of said sheriff and said clerk, and acted upon their said statements and representations in making said bid.

"Affiant says that said sheriff and said clerk stated to said affiant that no bid less than $2,533.60 could be received for said land, stating that said last named amount was two-thirds of the value of said land, and that after the payment of said amount there would be no prior liens on said land.

"That on the next day, after bidding said sum of $2,535 for said land, to-wit, on the 15th day of September, 1889, he met said sheriff, whereupon said sheriff stated to this affiant that the said amount bid by this affiant, to-wit, $2,535, was not two-thirds of the appraised value of said land; that said land had been appraised at the sum of $4,800, and could not be sold for less than $3,200, and that unless he, this affiant, would raise his said bid to the said sum of $3,200, he, said sheriff, could not sell said land to this affiant, whereupon said affiant stated to said sheriff that he, this affiant, would not bid the said sum of $3,200;

that said sheriff then stated to this affiant that said sale must be declared off, and no sale, as he, said sheriff, could not sell said land for less than $3,200; that this affiant then and there believed that his said bid of $2,535 was wholly rejected by said sheriff, and he would not be held to act upon said bid or pay for said land, and paid no more attention to said pretended purchase, and did not suppose or anticipate that any effort would be made to confirm said sale, offer or bid, and was not present in court when said sale was confirmed, and had no notice that an application would be made to this court to confirm said sale, and was not in the court room and not in Butler county when the sale was confirmed; that if he had known or supposed that an application was going to be made to this court to ratify or confirm his said bid, he would have appeared by counsel and have opposed said confirmation on the ground, and for the reason, that in fact he was misled and deceived by the said statements and representations of said sheriff and said clerk in this, to-wit:

"First—That the decree under which said land was sold was not a first lien on said land; that in fact there was a prior lien on said land amounting to the sum of $3,000, and that said land was sold subject to said prior lien of $3,000, which said prior lien of $3,000 consists of a mortgage given thereon by Byron E. Taylor and wife to the Nebraska Loan & Trust Co., which said mortgage is in full force and effect and not yet due.

"Second—That said land, or the interest therein of said Byron E. Taylor and wife, was not appraised at the sum of $3,800 as stated by said sheriff, and said clerk, at and before the time of said bid, but that said interest of Byron E. Taylor and wife, in said premises was appraised at the sum of $1,478.64, and that in fact said land could have been bought at said sale for two-thirds of said last named amount, as fully appears by the records and files in this proceeding.

"That if this affiant had known the true condition of liens and incumbrances on said land, and had been correctly informed of the true condition of affairs regarding liens and incumbrances on said land, by said sheriff and said clerk he would not have purchased or bid on said land, and had he known or supposed that an application was about to be or going to be made to this court to confirm said sale, and had he not been misled by the said sheriff, telling this affiant that he, said sheriff, could not accept said bid, he, this affiant, would have at once, and before the confirmation of this sale, taken steps to examine and determine the regularity of said sale, and the reasonable or unreasonable extent of his said bid, that he had no knowledge or information that an application had been made to confirm said sale, until after the same was confirmed by this court, whereupon he at once took steps to institute this motion, and says that a great wrong, hardship, and injustice will be done this affiant if he is compelled to pay the amount of his said bid or offer, and that said bid or offer was made under a misapprehension of the true facts surrounding said bid or offer, as stated and recited in this affidavit. W. C. NORTON."

"I, Ed. G. Hall, being first duly sworn, depose and say: I am the clerk of the district court of Butler county, Nebraska, duly qualified and acting as such, and was on the 14th day of September, 1889. And on the said 14th day of September the sheriff of Butler county was making sale of one Byron E. Taylor's farm, by virtue of an order of sale in the above entitled cause.

"That during the time of said sale the said sheriff came to my office, and I asked him, 'Have you a bidder for the land?' He answered, 'No; I have not, but I think Norton is going to buy it.' He then went out, and shortly after, W. C. Norton came to my office and asked me how much there was against the Byron E. Taylor farm. Before having time to answer, the sheriff returned, and together with said

Norton, seated themselves at a desk in my office. While at the desk I heard said Norton say to the sheriff, 'If you'll make me a clear title to the land I will buy it.' The sheriff then said, 'I will make you a sheriff's deed.'

"I then said, 'a sheriff's deed is as good a deed as can be made'; that his, said Norton's, title, would be perfectly good upon receipt of a deed of that kind. I then picked up from the desk the order of sale and certificates attached and said to the said Norton, 'I will tell you in a minute what you'll have to pay to get the land;' but upon looking over the papers did not find the said appraisement, and being in a hurry asked the sheriff what the appraisement was; he replied that it was $——— .

"I then said to said Norton, 'You'll have to pay two-thirds of this amount, which will be $2,533.60.' and I further said to the said Norton, 'You had better make the bid $2,535, even; you'll be sure then to cover everything.' I also told said Norton that all other liens would be canceled as against this land when the sale was confirmed, not knowing at that time that said sale was being made subject to the lien of Washington Quinlin for $3,000, but did know that said lien and mortgage did exist but believed and told said Norton that said lien would be no good if the sale was confirmed under his bid, and further, this affiant sayeth not. ED. G. HALL."

It will be observed that Norton applied to the clerk who should have had the appraisement if the sheriff had done his duty. The appraisement would have shown what liens existed against the land. The sheriff did not seem to have it in his possession. In view of the course he pursued afterwards it is probable that he had a design in suppressing the appraisement.

"I, Sumner Darnell, being first duly sworn, depose and say that I am the sheriff of said county, duly qualified and acting as such; that on the 14th day of September, 1889, while I was offering the land described in the order of

sale in the above named cause for sale, under an order of sale issued in the above entitled cause, on the 12th day of July, 1889, one W. C. Norton came to me and said, 'What is this you are selling?' I says, 'A farm.' He says, 'What farm?' and I says, 'E. B. Taylor's.' He says, 'What have you been offered?' I told him, 'I have no bid yet,' and asked him to make a bid. He, Norton, said, 'What is there against it?' Then I told him to go up stairs to the clerk of district court, Ed. G. Hall, who is there in his office and see for himself. Then he, Norton, says, 'If you will make me a clear title, I'll give you $——.' Then he went up stairs to the office of the clerk of said district court. In a few minutes I followed. I asked him what he had found out. Ed. G. Hall, the said clerk, said, 'It will take $2,533.60 to make two-thirds of the appraised value.' Then Ed. G. Hall says, 'You had better make it $2,535, and make sure that the amount is sufficient for the two-thirds of the appraised value.' And I, believing that the two-thirds of said appraisement was $2,533.60, and being in good faith that that was the least amount that would buy said land at said sale, said, 'Yes, you had better make it $2,535,' and he, Norton, said, 'Well, I'll raise it that much if you'll make me a good deed.' I said, 'I'll make you as good a deed as a sheriff can make,' or words to that effect. Then I went down stairs, and receiving no other bid, declared it sold to W. C. Norton. The next day, the 15th of September, or within a day or so after, I met said W. C. Norton and told him there was a mistake, and that his bid was not two-thirds of the appraised value of said land, and the sale would not be confirmed, as I believed. And then he said, 'I will not raise my bid,' and 'I will not take the land;' that said W. C. Norton made no other bid than the offer I have above described. SUMNER DARNELL."

As an offset to these affidavits a number of persons were permitted to swear that the land in question was of greater

value than the amount fixed by the appraisers, and was worth from $15 to $20 per acre.

It is very clear to my mind that if the testimony of the witnesses swearing to the increased value is true, that it is an additional reason why the sale should be set aside, because the land-owner is being defrauded.

As an evidence that the testimony is not true, however, the land-owner, as well as the trust company, is here insisting on the performance of the contract, evidently believing that the property would not bring as much if again offered for sale; but even if the affidavits are true as to the value, they cannot be considered in this case.

Suppose the plaintiff in error to be a man of very limited means who desired the land for a farm and was able to procure a loan thereon, if free and unincumbered, for $3,000, but utterly unable to obtain a loan for any greater sum. In a case of that kind it would be possible to rob him of every cent he possessed by compelling him to accept property subject to a heavy incumbrance when he had no means of satisfying the same. It will not do to say that the plaintiff in error possesses sufficient means and is able to satisfy the incumbrance, because the same rule must apply to rich and poor alike, and both will suffer by the proposed rule. It will be observed that the majority opinion is predicated almost wholly upon sheriffs' sales under executions in actions at law, or in partition cases.

The case of *Eccles v. Timmons*, 95 N. C., 540, cited in that opinion, was a partition case, and the title of the various parties was set out in the petition. In that case the petition evidently contained a condensed statement of the title of the several parties, and the objection was not made for many months after the purchaser had taken possession, and not until a payment was due. It is said: "It will be observed that the title of the defendant-tenants is set out in the petition, and a copy of the deed under which they derive it annexed thereto. With the information thus

furnished, or of easy access, the purchaser bids for the lot, pays part of the purchase money and secures the residue by a note with the allowed credit. This credit expired on December 1, 1885, and seven months thereafter, when served with a notice of a demand for judgment, for the first time the defense is set up of an imperfect title to the lot.

"It is not a case when, upon the face of the pleadings, a perfect title purports to be sold that is afterwards discovered to be defective, when the court will relieve and not compel the purchaser to pay for what he does not get. But the true state of the title appears in the averments in the petition itself, so that every bidder may know by examination what estate he will acquire in the land, and his bid must therefore be regarded as his own estimate of the value of what he may buy, and the court may direct thereafter to be conveyed.

"A sale by the master in a case of this kind (for partition), says Ruffin, C. J., in *Smith v. Brittain*, 3 Ired. Eq. [N. C.], 347 (351), 'is but a mode of sale by the parties themselves. It is not merely a sale by the law, *in invitum* of such interest as the party has or may have in which the rule is *caveat emptor*, but professes to be a *sale of a particular estate*, stated in the pleadings to be vested in the parties, and to be disposed of for the purpose of partition only. Thereupon, if there be no such title, the purchaser has the same equity against being compelled to go on with his purchase, as if the contract had been made without the intervention of the court, for, in truth, the title has never been judicially passed on between persons contesting it."

It seems to me the case is directly against the majority opinion in this case. A sheriff is the officer provided by law in each county to execute the ordinary process of the court. His duties are clearly pointed out by statute, while to a considerable extent he is under the control of the court, yet he does not derive his power from it. Where,

however, a court renders a decree of foreclosure, it directs the sale to be made by some particular person; not necessarily the sheriff. This person may be the sheriff, but if so it is because he is designated by the court to make the sale, and not because the duty devolves upon him as sheriff.

A sale under a decree of foreclosure under the former chancery practice was made by a master in chancery or some one designated by the court; and the same rule prevails under the Code, except that the office of master has been abolished and the court is authorized to appoint a commissioner to conduct the sale. In either case the sale is made by the court and the person conducting the sale is the agent of the court.

In *Veeder v. Fonda*, 3 Paige [N. Y.], 97, it is said: "As property to a vast extent is sold under the decrees and orders of this court, much of which property belongs to infants, and others who are not able to protect their own rights, it has always been an important object with the court to encourage a fair competition at master's sale. For this purpose it is necessary that purchasers at such sales should understand that no deception whatever will be permitted to be practiced upon them. That in a contract between them and the court, they will not be compelled to carry that contract into effect under circumstances where it would not be perfectly just and conscientious in an individual to insist upon the performance of the contract against the purchaser, if the sale had been made by such individual or his agent. It is, therefore, the principle of the court that the master who sells the property shall not, in the description of the same, add any particular which may unduly enhance the value of the property, or mislead the purchaser."

To the same effect is *Post v. Leet*, 8 Paige Ch. [N. Y.], 337; *Seaman v. Hicks*, Id, 656. In the last case cited it is said: "The terms of sale show that the land was sold as and

for a good title, except as to the incumbrance mentioned. The court therefore ought not to compel the purchaser to complete his purchase unless he would have obtained under the master's deed such an interest, both in the land and in the buildings thereon, as he was authorized to suppose he was buying when the property was struck down to him upon his bid." The court in that case, however, reached the conclusion that the title was as represented and required the purchaser to perform. See also *Kauffman v. Walker*, 9 Md., 229; *Merwin v. Smith*, 1 Green Ch. [N. J.], 182; *Den v. Zellers*, 2 Halst. [N. J.], 153*; *Hodgson v. Farrell*, 2 McCart. [N. J.], 88.

Many other cases to the same effect might be cited. Where a sale is conducted by a commissioner under a decree of foreclosure, the commissioner represents the court. He is the hand of the court, so to speak, by which the decree is carried into effect. Any misrepresentations made by him, even if innocently made, but by reason of which the purchaser has been induced to bid and will not acquire the interest which he is led to believe he would acquire are sufficient to justify setting the sale aside. This, so far as I am aware, is a uniform rule in courts of equity that if the person who conducted the sale made misstatements, either honestly, ignorantly, or intentionally, whereby the purchaser was deceived, and would be defrauded, the sale will not be sustained against his objection.

It is no answer to say, in effect, that the property is cheap enough anyway, and therefore the purchaser receives the worth of his money. That is begging the question; in effect, it is admitting all that is claimed, but seeking to excuse the denial of relief.

The purchaser may justly say: "I was deceived by the false representations of your agent; he misstated the facts; the appraisement was not at hand, so that even the clerk could not obtain it. There was no bid but mine, and that was procured by falsehood and misrepresentation." The

misrepresentation is admitted, and the court answers the purchaser, in effect: "You had no right to rely upon the representations of the commissioner appointed by the court to conduct the sale, and, although you were the sole bidder and there was an incumbrance of $3,000 on the land of which you had no notice, and was in excess of the amount of your bid, yet the land is cheap enough and the court will not relieve you."

In regard to the objection that the purchaser could have examined the title for himself, the answer is that there was no time to make an investigation of the title. The sheriff had offered, and was then offering, the property for sale. There were no bidders. Norton came up and inquired in regard to the sale and the title that would be acquired. The officer professed to know, and informed the party that he would obtain a clear title. The bidder certainly could rely upon this statement. Had the officer said, "I have no knowledge in regard to the matter, you must examine the records for yourself," then the purchaser would have bid at his peril, and the doctrine of *caveat emptor* would have applied.

Considerable stress is laid upon the doctrine of *caveat emptor*, and it is said the purchaser must beware. The doctrine does not apply where a party has been induced to bid by a misstatement of facts made by the officer who conducted the sale; and I think not a single case can be found where a sale was made under a decree of a court of equity by an officer appointed by the court where such misrepresentations have not been held good cause for setting the sale aside.

The decision in this case practically overrules *Paulett v. Peabody*, 3 Neb., 196; and *Frasher v. Ingham*, 4 Neb., 531, and, I believe, does great injustice to the purchaser, and places the court in the attitude of approving deception in its officers in conducting sales under its direction.

Second—It is admitted, by not being denied, that "on

the 15th day of September, 1889, he (Norton) met the sheriff, whereupon said sheriff stated to the affiant that the said amount bid by this affiant, to-wit, $2,535, was not two-thirds of the appraised value; * * * that the land had been appraised at $4,800, and could not be sold for less than $3,200, and unless Norton would raise his bid to $3,200, the sale would be declared off," etc. That is, that Norton's bid was not sufficient to authorize the sheriff to entertain it, and therefore, unless Norton would raise the bid to $3,200, he would make a report of no sale. Norton informed him that he would not raise his bid, and the sheriff in effect declared it off.

It is probable that this was part of the scheme to defraud Norton, by putting him off his guard, and preventing an investigation of the title before the sale was confirmed, because the sheriff, without further notice to Norton, made a report of the sale and it was thereupon confirmed, without notice to Norton, and in his absence.

So far as the sheriff is concerned, his conduct is wholly indefensible, and can only be accounted for upon the theory of a scheme to defraud Norton, in which, probably, he was not alone. I do not care to comment on this feature of the case, as it presents the officer in a very unenviable light. As I understand the law, a court of equity, in making a sale of real estate under a decree of foreclosure, takes the place of the vender, and the person making the sale is the agent of the court, and it is the duty of the court to see that the sale was fairly conducted in all respects, and that it will not sanction misrepresentations in its agent as to the title of the property, or incumbrances, to induce persons to bid. In other words, misrepresentations which, if made by the land owner himself to a purchaser, would be good ground to set a sale aside, are equally so when made by the person appointed by the court to conduct a sale under a decree; and experience has shown that the establishment of this rule has induced competition in bidding

at such sales. (*McGown v. Wilkins*, 1 Paige Ch. [N. Y.], 120; *Morris v. Mowatt*, 2 Id., 586; *Veeder v. Fonda*, 3 Id., 94; *Seaman v. Hicks*, 8 Id., 656; *Kauffman v. Walker*, 9 Md., 229; *Tooley v. Kane*, 1 S. & M. Ch. [Miss.], 518.)

Third—I do not understand that the rule of *caveat emptor* applies where another element intervenes, viz., false representations. It seems to me that great injustice is done to the plaintiff in error, and a rule is established that is liable to be fraught with gross injustice, not only to purchasers at judicial sales, but to the owners of the equity of redemption as well. In my view, the sale should be set aside.

SIMEON PHILLIPS V. ISAAC C. BISHOP ET AL., APPELLEES, IMPLEADED WITH N. J. PAUL, APPELLANT.

[FILED OCTOBER 26, 1892.]

1. **Conveyance of Homestead:** ACKNOWLEDGMENTS: CERTIFICATE OF NOTARY: IMPEACHMENT. A certificate of acknowledgment of a deed or mortgage, in proper form, can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent.

2. **Evidence** in this case considered, and *held* insufficient to overcome the officer's certificate and the evidence in favor of the execution and acknowledgment of the instrument.

REHEARING of case reported in 31 Neb., 853.

Paul & Templin, and *O. A. Abbott*, for appellant.

Thompson Bros., and *T. T. Bell*, *contra*.

NORVAL, J.

This is a rehearing of the case reported in 31 Nebraska, at page 853. The action was brought in the court below

by Simeon Phillips to foreclose a mortgage given by Isaac C. Bishop and Ida Bishop, his wife. To the action, N. J. Paul was made a defendant, who filed an answer and cross-petition, praying the foreclosure of a mortgage given by the Bishops, upon the same real estate described in plaintiff's petition, to one A. G. Kendall, and by him transferred to Paul.

To the cross-petition Isaac C. Bishop filed an answer, setting up that one tract of the real estate in controversy was a homestead of less value than $2,000 over and above incumbrances thereon; that the mortgage given to Kendall was never acknowledged by his wife, and was therefore void. He also pleaded usury and payment.

The defendant Ida Bishop answered the cross petition, alleging that the mortgage included the homestead of herself and husband, and denies that she ever acknowledged the mortgage in question, or that she ever signed the same in the presence of the notary public who certified to the acknowledgment, or any other person, or that she ever received any consideration for so doing. To these answers a reply was filed by Paul.

Upon the trial the district court held that the mortgage described in Paul's cross-petition was void as to one of the pieces of property therein described, on the ground that the same was a homestead of a value not to exceed $2,000, and that the wife did not acknowledge the execution of the mortgage. On the former hearing the decision of the trial court was affirmed by this court.

It is perfectly clear that, under the homestead law of this state, a mortgage on the homestead of a married person is void unless the same is executed and acknowledged by both husband and wife. This has been the uniform holding of this court, and a citation of the decisions is unnecessary. It is strenuously urged by appellees that Ida Bishop did not acknowledge the mortgage in controversy. If the proofs establish the proposition to that de-

gree of certainty required to impeach the certificate of the officer certifying to the acknowledgment, then our former decision was right and must stand; otherwise not.

That the mortgage was executed and acknowledged by Isaac C. Bishop before W. L. Thompson, a notary public in and for Howard county, is undisputed. Mrs. Bishop admitted, when upon the witness stand, that she voluntarily signed the mortgage, but claims she did so at her home, and not before the officer. Mr. Thompson, the notary, certifies that she, as well as her husband, acknowledged the instrument before him in the manner provided by the statute. The certificate of the officer being in proper form, although not conclusive of the fact of acknowledgment, is strong and convincing evidence that the wife acknowledged the mortgage. The certificate, of course, can be impeached by proof of fraud or duress, but the evidence must be clear and satisfactory. As a general rule, the unsupported testimony of the party purporting to have made the acknowledgment is insufficient to overcome the officer's certificate. Where, as in this case, the execution of the instrument is admitted, in order to sustain such a defense, the proof must be clear and convincing. (*Insurance Co. v. Nelson*, 103 U. S., 544; *Russell v. Baptist Theo. Union*, 73 Ill., 337; *Marston v. Brittenham*, 76 Ill., 614; *Crane v. Crane*, 81 Ill., 165; *McPherson v. Sanborn*, 88 Id., 150; *Blackman v. Hawks*, 89 Id., 512; *Heeter v. Glasgow*, 79 Pa. St., 79; *Fitzgerald v. Fitzgerald*, 12 Reporter, 720; *Gabbey v. Forgeus*, 15 Pac. Rep. [Ks.], 866; *Bailey v. Landingham*, 53 Ia., 722; *Smith v. Allis*, 52 Wis., 337; *Johnson v. Van Velsor*, 43 Mich., 208.)

Applying the rule above stated to the case at bar, is the evidence sufficient to sustain the defense made by the answer? The evidence is very conflicting. In support of the officer's certificate there is in the record the direct and positive testimony of A. G. Kendall and C. H. Paul, that Mrs. Bishop did execute and acknowledge the mortgage in their

presence in the St. Paul National Bank, before W. L. Thompson, a notary public. Mr. Kendall was at the time cashier of the bank, and Mr. Paul was an employe therein, and signed the mortgage as subscribing witness. The deposition of W. L. Thompson was taken, which, while sustaining his certificate of acknowledgment, was excluded as evidence.

Mr. and Mrs. Bishop each testified that the latter signed the mortgage at their home, about two miles from St. Paul; that she never acknowledged the instrument before the notary, and that she was not in St. Paul at the time the same purports to have been acknowledged, nor for a considerable length of time prior and subsequent to said date. Mr. Bishop further testified that after his wife signed the mortgage he took it to St. Paul, acknowledged it before Mr. Thompson, and delivered it to the mortgagee. Upon the trial both appellant and appellees proved other facts having some bearing upon the question. Appellees introduced witnesses tending to establish an *alibi*—that Mrs. Bishop was not in St. Paul at the time the mortgage purports to have been acknowledged, and appellant produced witnesses, equally as credible, although not so many, who testified that Mrs. Bishop was in the bank on said date. We think the evidence on the part of the appellees is entirely insufficient to overcome the formal certificate of acknowledgment, and the testimony of Mr. Kendall, and the subscribing witness, Mr. Paul, who, so far as the record discloses, are entirely disinterested witnesses. Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment is false. The presumption is in favor of the certificate, and the burden is upon the party alleging such a defense to prove it.

This court, in passing upon a similar question in *Pereau v. Frederick*, 17 Neb., 117, said: "It is contended on

behalf of the defendant, and we think correctly, that the certificate of the officer taking the acknowledgment must stand against a mere conflict of evidence, whether the instrument was voluntarily signed, acknowledged, and delivered or not, and cannot be impeached except upon proof which clearly shows it to be false and fraudulent."

In *Marston v. Brittenham*, 76 Ill., 611, *supra*, the court say: "To impeach such a certificate, the evidence should do more than produce a mere preponderance against its integrity in the balancing of probabilities—it should, by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent."

The supreme court of the United States, in *Young v. Duvall*, 109 U. S., 573, has held that the certificate must stand as against a mere conflict of evidence. We hold, from reason and authority, that the evidence is insufficient to sustain the defense.

We agree with the conclusion of the lower court that the mortgage was given to secure a usurious loan of money, and that after deducting the usurious interest agreed to be paid from the principal sum, there is due appellant from appellee, Isaac C. Bishop, the sum of $4,223.71. The decree of the district court is reversed, and a decree of foreclosure entered in this court for said sum of $4,223.71, with costs of the lower court against appellant, the costs in this court taxed to appellees.

DECREE ACCORDINGLY.

THE other judges concur.

JOHN L. WATSON V. WILLIAM COBURN ET AL.

[FILED OCTOBER 26, 1892.]

1. **Conversion:** DEFENSES: MITIGATION OF DAMAGES. When goods have been converted, and the owner afterwards receives the whole or a portion thereof back, or the proceeds arising from their sale, he does not thereby bar his right of action for the original wrongful taking, but such fact may be shown in mitigation of damages.

2. ——: ——: ——. In an action for conversion it is no defense to show that the property has been taken from the wrongdoer by a third party, by legal process or otherwise, unless the original owner has received it, or had the benefit of the proceeds thereof, where the same has been sold.

3. ——: MEASURE OF DAMAGES. In an action by a mortgagee for conversion against a sheriff who has levied on the property at the suit of a creditor of the mortgagor, the plaintiff is entitled to receive as damages the actual market value of the property at the time of the conversion, with interest from that date, less the market value of that portion of the property subsequently recovered or the proceeds of which plaintiff has had the benefit, and not exceeding the amount remaining unpaid on the mortgage.

4. **Weight of Evidence.** *Held*, That the verdict is against the evidence.

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

Ambrose & Duffie, for plaintiff in error.

B. G. Burbank, and *Gregory, Day & Day*, *contra*.

NORVAL, J.

The action below was brought by John L. Watson against the principal and sureties on the official bond of William Coburn, sheriff of Douglas county, for the conversion of a stock of furniture. There was a trial to a jury, who re-

turned a verdict in favor of the plaintiff, assessing his damages at $1,196.25. Each party filed a motion for a new trial; both motions were overruled, and judgment was thereupon entered upon the verdict of the jury. Each party prosecutes error to this court.

On and prior to February 28, 1888, the New York Storage & Loan Company, a corporation doing business in the city of Omaha, was the owner of the goods in controversy, and on said date it executed and delivered to Watson a chattel mortgage on said stock of goods, to secure the payment of a loan of money at the time made by Watson to the corporation, and for money previously borrowed. After the execution of the mortgage Watson took possession of the goods and managed the business until about the middle of April following, when George C. Wheeler and E. G. Cundy, the president and secretary, respectively, of the corporation, forcibly took possession of the stock and certain collaterals held by Watson to secure said loan, during Watson's absence from the store.

Thereupon Watson commenced an action in the district court of Douglas county against the New York Storage & Loan Company, Wheeler and Cundy, to restrain said Wheeler and Cundy from disposing of the collaterals and from their interfering with the stock of goods. A temporary injunction was granted by one of the judges of the district court on the 23d day of April. Wheeler and Cundy immediately left the country, taking with them the collateral securities.

On the morning of April 24, Watson again took possession of the store and stock of goods therein, and in the afternoon of the same day the defendant Coburn levied upon and took the goods under an execution in favor of one W. L. Hall, and against the New York Storage & Loan Company. Subsequently the sheriff levied a writ of attachment on the goods, issued in favor of Dell R. Edwards and against said company. The Hall execution was

issued upon a judgment rendered by the county court without any summons being issued, upon the confession of Wheeler, as president of the New York Storage & Loan Company, who had no authority so to do.

It also appears that Wheeler carried on business in the various names of New York Storage & Loan Company, New York Music Company, New York Piano Company, New York Storage Company, G. C. Wheeler & G. C. Wheeler, Manager, and incurred a large indebtedness, which he was unable to pay.

Dell R. Edwards, after the levy of her attachment, commenced an action against the New York Storage & Loan Company and W. L. Hall to enjoin the collection of the Hall judgment, and to have the same declared fraudulent and void. Subsequently she commenced another suit against the New York Storage & Loan Company, the New York Music Company, the New York Piano Company, G. C. Wheeler, Manager, W. L. Hall, John L. Watson, and others, alleging that the Watson mortgage was fraudulent and void, and praying that the same be so declared by the court, and for an accounting by all the defendants, and also that a receiver be appointed to take possession of the property of the New York Storage & Loan Company and dispose of the same. These several suits were consolidated. The court appointed E. Zabriskie receiver, and the sheriff turned over to him, on order of the court, that portion of the goods which had not been taken from him by legal process. The receiver immediately proceeded, under the order of the court, to advertise and sell the stock, and on the 6th day of August, 1888, he sold the same for $1,954.28, which sale was duly confirmed. After paying the expenses of sale, receiver's fees, other costs, and various items, not costs in the case, there remains in the hands of the clerk of the district court, of the proceeds of sale, a balance of $162.19.

John L. Watson appeared in the consolidated action and

filed an answer therein, setting up his mortgage and that he was in possession of the goods therein described, under said mortgage, at the time the sheriff made his levies.

After the issues had been made up in said action the court referred the cause to A. S. Churchill, Esq., to take the testimony and report his findings of law and fact. The referee made his report, finding the judgment entered in favor of W. L. Hall to be fraudulent and void, that the levy of the execution issued on said judgment conferred upon said Hall, or those serving said writ, no right, title, or interest in the property seized thereunder; that Dell R. Edwards had no cause of action against the New York Storage & Loan Company upon which to predicate an attachment, and that the levy of the attachment in her favor should be set aside and held for naught.

It was further found that the instrument under which Watson claimed was a *bona fide* mortgage, made upon a good and sufficient consideration; that Watson, immediately after the delivery thereof, took possession of the goods under the mortgage, and was in actual possession at the time the property was seized under the execution and attachment proceedings; that said mortgage was a paramount and superior lien upon all the property for the sum of $4,493.62, and that he was entitled to enforce it against all the property levied on under the writ of attachment and execution.

Upon motion of Watson the report of the referee was confirmed in July, 1889. Two days prior to the appointment of the receiver, Watson commenced this action against the sheriff and the sureties on his official bond to recover the value of the goods covered by the mortgage, which had been levied upon by the sheriff under the execution and writ of attachment. The sheriff and his bondsmen pleaded the proceedings in the receivership case in bar of this action.

The first question we will consider is as to the sufficiency

of this defense. It is a rule sustained by judicial decisions in this country that where one's goods are converted by another, the owner may sue for their value, or recover the property, but he cannot pursue both remedies. It is equally well settled that the subsequent recovery or return of the property does not extinguish the owner's right of action against the wrong-doer for the conversion, but only goes in mitigation of damages. (*Gibbs v. Chase*, 10 Mass., 125; *Brady v. Whitney*, 24 Mich., 154; *Western Land & Cattle Co. v. Hall*, 33 Fed. Rep., 236.) Where goods that have been converted are returned to and accepted by the owner, the measure of damages is the market value at the time of the original wrongful taking, less the market value at the time the same are returned. (*Irish v. Cloyes*, 8 Vt., 30; *Lucas v. Trumbull*, 15 Gray [Mass.], 306.)

Testing the adjudication in the receiver case by these principles, Watson is not estopped from prosecuting his action for the conversion of the property. It is true Watson, in the case in which the receiver was appointed, in his answer and cross-petition filed therein, claimed a lien upon the property by virtue of his mortgage, and asked that the mortgage be foreclosed. The property had already been sold by the receiver appointed at the request of Edwards. Watson could not recover the property, so he sought to recover the money arising from the sale. The adjudication was in his favor. He is entitled to the $162.19, the net proceeds of the sale of the goods, which had been turned over to the clerk of the court by the receiver. To that amount only his claim against the officer for the conversion was satisfied. Any other rule would not make him whole. Where property is converted, just compensation to the owner is the rule. We are unable to perceive how the receipt of the proceeds differs from a return of the property, or the proceeds thereof, to the owner. Such payment is proper to be given in evidence only in mitigation of damages. Prior to the appointment of the receiver,

Watson elected to treat the levies as a conversion of the property, by bringing this action to recover the value of the goods. In our view, the adjudication of his rights in the suit referred to does not preclude him from maintaining this action.

Complaint is made because the court refused to give the third instruction requested by the plaintiff, which is as follows:

"The defendant cannot escape liability for wrongfully levying on said property, by showing that the property or any part thereof was taken from him by third parties after he had possession of the same under his levy.

"Neither is it any defense in this action that the goods were taken out of his hands and placed in the hands of a receiver under an order of this court, unless it be further shown that the goods or their proceeds afterwards came to the hands of the plaintiff, so that he had the benefit thereof.

"You will therefore disregard all evidence tending to show that any of the goods have been taken from the hands of the sheriff by third parties, or that any of them were placed in the hands of a receiver, unless it is further shown that the plaintiff has, since that time, had the entire value of such goods; and as to such goods as he has received the entire value of, the defendants should be credited with that amount."

It requires no argument or citation of authorities to show that in an action for conversion of personal property the defendant cannot defeat the action by showing that the property, or a part thereof, has been taken from him by third parties, by legal process or otherwise, unless the original owner has received the goods, or had the benefit of the proceeds thereof. If all or a portion of the goods converted are returned to the owner, or he receives the proceeds of the same, the wrong-doer may prove such facts, not as a complete defense, but in mitigation of damages.

The fact that a portion of the goods covered by plaintiff's mortgage was replevied from the sheriff, and others were turned over to the receiver, would not alone be a defense to the suit, but would be so to the extent that it was shown that Watson has had, or could have, the benefit of such property. The request stated the correct rule, was applicable to the evidence, and should have been given.

The jury disregarded the instructions of the court on the measure of damages. By the sixth paragraph of the charge the court told the jury that the plaintiff was entitled to recover:

First—The value of the property that went into the hands of the receiver, as shown by his sale thereof.

Second—The depreciation in value of the property between the date of conversion and the time when it was sold by the receiver.

Third—The value of any goods taken by the sheriff which were not turned over to the receiver, except such as were taken from the sheriff by legal process under the conditions stated in the fifth instruction.

From the amount of these items the jury were directed to deduct the amount in the hands of the clerk in the receiver case, and compute interest on the balance at the rate of 7 per cent from the time the goods were taken from the possession of the plaintiff to the first day of the term, September 23, 1889.

It is undisputed that the receiver sold the goods turned over to him for $1,950. Deducting from this $162.19, the amount in the clerk's hands, we have $1,787.81. Add $177.27 as interest for one year and five months at 7 per cent, would make $1,965.08, which is the lowest sum, under the evidence and instructions, the plaintiff was entitled to recover, and yet the jury assessed his damages at only $1,196.25.

In several of the instructions the jury were told that the plaintiff was estopped from asserting that the value of the

goods which went into the hands of the receiver was other or greater than the sum for which they were sold. This was prejudicial error. The amount the receiver obtained for the goods does not determine their value at the time of the conversion, nor was it a material inquiry what the goods brought. Plaintiff was only chargeable with that portion of their proceeds which he received or was entitled to the benefit of. To that extent alone has he received compensation. In an action by a mortgagee for conversion against a sheriff who has levied on the property, the plaintiff is entitled to recover the actual market value of the property at the time of the conversion, with interest from the time of the taking, less the market value of that portion of the property subsequently recovered, or the proceeds of which plaintiff has received, and not exceeding the amount remaining unpaid on the mortgage. This is the measure of damages.

It is unnecessary to consider the other assignments of error discussed in the brief of counsel, as the most of them are covered by what has already been said, and the others are not likely to arise on the next trial. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

IN RE THOMAS JONES.

[FILED OCTOBER 26, 1892.]

Criminal Law: COMMITMENT TO REFORM SCHOOL: JURISDICTION OF COURT TO VACATE ORDER AND RESENTENCE PRISONER. The petitioner, on pleading guilty to an information charging him with the crime of burglary, was sentenced to the state in-

dustrial school, as under the age of eighteen years, and was committed under said judgment to said institution. Shortly thereafter, and during the same term, the court sentencing him vacated and set aside said judgment, on the ground of mistake as to petitioner's age, and sentenced him again on the same information and plea of guilty, to be imprisoned in the penitentiary for the term of four years. *Held*, That the court had no jurisdiction to vacate the original judgment, or to pronounce the second sentence, and that the last sentence was a nullity.

ORIGINAL application for writ of *habeas corpus*.

Walter A. Leese, for petitioner:

A sentence takes effect from the day it is pronounced (*In re Fuller*, 34 Neb., 581), and a subsequent sentence fixing a different term is a nullity. (*People v. Messervey*, 76 Mich., 223; *People v. Kelley*, 44 N. W. Rep. [Mich.], 615; *Ex parte Lange*, 18 Wall. [U. S.], 163; *Brown v. Rice*, 57 Me., 55; *In re Mason*, 8 Mich., 70; *Sennott v. Swan*, 16 N. E. Rep. [Mass.], 451; *People v. Liscomb*, 60 N. Y., 559; *People v. Jacobs*, 66 N. Y., 8.)

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

NORVAL, J.

This is an application by the above named petitioner for a writ of *habeas corpus* against James P. Mallon, warden of the state penitentiary.

It appears that on the 18th day of April, 1890, the petitioner pleaded guilty in the Otoe county district court to an information charging him with the crime of burglary, and, on the same day, was sentenced to the state industrial school, at Kearney, as under the age of eighteen years. He was duly committed to said industrial school, in pursuance of said sentence, on the 28th day of April, 1890, where he was kept and confined until the 15th day of the following month.

On the 10th day of May, 1890, the district court of Otoe

county, on motion of the county attorney supported by affidavit, and in the absence and without the knowledge or consent of the petitioner, vacated and set aside the said sentence on the ground that the petitioner, at the time of the commission of the offense, was over the age of eighteen years, and the sheriff of said county was ordered and directed to proceed to said industrial school, receipt for and receive said petitioner and have his body before said court on the 17th day of said month. Pursuant to said order and judgment the petitioner was brought from said industrial school into said court on the 17th day of May, 1890, when the court again sentenced him, on the same information and plea of guilty, to be imprisoned in the state penitentiary, at hard labor, Sundays and legal holidays excepted, for the term of four years. Under this last sentence the petitioner has been confined in the penitentiary since May 31, 1890. Both sentences were pronounced at the same term of court.

The question presented by the record before us is, Did the district court have the power or jurisdiction to vacate and set aside the first sentence, at the same term of court at which it was rendered, but after relator had suffered part of the punishment thereby imposed, and pronounce a second sentence in the same case? If the entry of the last judgment was a mere error, which would subject it to reversal by this court upon a petition in error, then the petitioner is not entitled to his discharge upon this proceeding, for it is firmly settled in this state that *habeas corpus* is not a proper proceeding to review a judgment in a criminal case.

By section 5, chapter 75, Compiled Statutes, authority is conferred upon a court of record of this state to commit any minor, under the age of eighteen years, to the state industrial school, who has been found guilty in such court of any crime except murder or manslaughter committed under the age of sixteen years. This court has decided that the question of the age of the accused is one of fact to be decided by the trial court, and its finding can be re-

viewed only in appellate proceedings. The record discloses that the district court, by the judgment first entered, found that Thomas Jones was a minor of the age required by law for confinement in the industrial school. Although the petitioner was over the age of eighteen years, the first sentence was not for that reason void, it was merely erroneous. The sentence and the commitment thereunder to the industrial school being legal, did the court have jurisdiction to sentence the petitioner to the penitentiary after he had undergone a part of the punishment under the first judgment? The answer must be in the negative. While a district court has ample authority to correct a judgment in a criminal case at the term of court at which it is rendered, or a subsequent term, to make the same conform to the one actually pronounced, it has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by commitment of the defendant under it, and substitute for it another sentence at the same term of court. The power of a court to revise or change a judgment, even in a civil case, is at an end after the same is in process of execution. The last sentence was illegally imposed, and its enforcement is without authority of law. To sustain the second judgment would be to hold that a person can be twice punished by judicial proceedings for the same offense. The fundamental law of the state as well as that of the United States, forbids that one shall be put twice in jeopardy for the same act. (*In re Mason*, 8 Mich., 70; *Brown v. Rice*, 57 Me., 55; *State v. Cannon*, 5 Criminal L. Mag., 387; *People v. Whitson*, 74 Ill., 20; *Com. v. Weymouth*, 2 Allen [Mass.], 147; *People v. Liscomb*, 60 N. Y., 559; *People v. Jacobs*, 66 N. Y., 8; *Ex parte Lange*, 18 Wall. [U. S.], 163; *People v. Meservey*, 76 Mich., 223; *People v. Kelley*, 44 N. W. Rep. [Mich.], 615.)

The power of a court to revise, vacate, or modify a judgment in a criminal case, or substitute another for the original judgment is exceedingly doubtful in this state, since we

have held that a sentence dates from the day it was pronounced, but as the first sentence in this case had actually gone into effect by commitment under it, the question does not necessarily arise on this record.

In re Mason, supra, the petitioner was convicted of larceny and sentenced to the state reform school of Michigan, as under sixteen years of age. At the time of his sentence he was in fact, of the age of twenty years. After he had been committed to the reform school, the court sentencing him ordered him brought back from that institution that his age might be inquired into and ascertained, for the purpose of determining whether he should not be sentenced to the penitentiary. In pursuance of said order the petitioner was removed from the reform school and committed to the jail of the county, to await the action of the court. On an application for his discharge by *habeas corpus,* the supreme court of that state say: "A prisoner having been sentenced and committed to the reform school, as under sixteen years of age, the court sentencing him cannot, on the ground of mistake as to the prisoner's age, proceed to give a new sentence. The sentence is not made void by such mistake."

In *Brown v. Rice, supra,* the prisoner had been legally convicted and sentenced to imprisonment in the county jail for six months. After serving nineteen days of his sentence, he was recalled into court and sentenced on the same indictment and conviction to be imprisoned in the state prison for the period of three years. It was held that the court had no power to recall him from jail and impose another sentence. The other authorities above cited are equally in point.

The first sentence being legal, we would remand the petitioner to the state industrial school, were it not for the fact that he is now over the age of twenty-one years, and his sentence has therefore expired. It follows that the petitioner must be discharged.

WRIT ALLOWED.

THE other judges concur.

ISAAC C. HANSCOM V. PETER BURMOOD.

[FILED OCTOBER 26, 1892.]

1. **Witnesses:** IMPEACHMENT: PRELIMINARY STEPS. When it is sought to impeach a witness by proving that he has made statements out of court, or upon a former trial, contradicting his testimony, the attention of the witness must be first called to the alleged statements, to the time and place of making them, and to whom made.

2. **Herd Law:** TAKING UP TRESPASSING ANIMALS. The person taking up stock for trespassing upon cultivated lands must comply substantially with the requirements of the herd law, particularly the giving of notice, unless the same are waived, or he will acquire no lien upon such stock.

3. ———: ———: NOTICE TO OWNER. The party taking up stock must give notice to the owner thereof within a reasonable time after the same is taken up.

4. **Replevin:** VERDICT: ASSESSING VALUE OF PROPERTY. In replevin, when the property has been delivered to the plaintiff, who is the general owner thereof, if the jury find in his favor, it is unnecessary for them to assess the value of the property.

5. ———: JUDGMENT IN ALTERNATIVE: RETURN OF GOODS OR VALUE. In such an action, where a verdict is returned in favor of the plaintiff, a judgment in the alternative for the return of the property, or, in case a return cannot be had, the value thereof, is improper, but the judgment will not be reversed on that ground where it appears that the property was in plaintiff's possession when the judgment was entered.

ERROR to the district court for Hall county. Tried below before HARRISON, J.

Thompson Bros., for plaintiff in error.

Thummel & Platt, contra.

NORVAL, J.

This was an action in replevin, brought by Peter Burmood to recover the possession of eight calves. The prop-

erty was taken under the writ of replevin by the sheriff, and the possession thereof delivered to the defendant in error. On the trial the jury returned a verdict finding that the plaintiff at the commencement of the action was the owner and entitled to the possession of the calves; that they were of the value of $75, and that the damages for the unlawful detention were $2.50. A motion for a new trial was made by plaintiff in error, which was denied by the court, and judgment was rendered in accordance with the verdict.

The proofs show that at and prior to the commencement of the suit the parties resided on adjoining farms, and that defendant in error was the owner of the stock in question. The plaintiff in error introduced evidence tending to show that the calves were trespassing upon his cultivated lands. The evidence on the part of the defendant in error is to the effect that the calves escaped from his premises and went upon the highway, and were driven from the public road by plaintiff in error onto his farm, where they were placed in an enclosure; that as soon as the owner learned of their whereabouts he went to the residence of plaintiff in error for the purpose of bringing them home, and asked him to state the amount of damages they had committed, which he declined to do; that thereupon plaintiff in error in an angry and violent manner attacked defendant in error with a club, and drove him from his premises and refused to allow him to take away the calves. Subsequently this action was commenced.

The evidence was sufficient to authorize the jury in finding that the calves were not trespassing upon the premises of plaintiff in error, and that he wrongfully detained the same.

The main controversy in the court below was whether the calves, at the time they were taken up, were feeding in defendant's corn field. On the trial plaintiff called and examined as a witness one Eberhart Kurz, who testified

that within a day or two after the stock had been taken up, at the request of Mr. Burmood, he made a thorough examination of Mr. Hanscom's premises and was unable to find any tracks in the field of corn where it was alleged the calves had been trespassing. Counsel for defendant then offered to prove by Mr. Hanscom that Eberhart Kurz had testified, on the trial of the cause in the justice court, that he was in the corn field and saw the calves' tracks there at the time he made the examination of the premises referred to in his testimony, which offer was objected to by the attorney for defendant in error, and the objection was sustained by the court. This ruling is now assigned for error. The excluded testimony was offered for the purpose of impeachment, and the proper foundation for its introduction had not been laid. The witness Kurz was not asked, when on the witness stand, whether he had testified upon the former trial that he saw the calves' tracks in the corn field. Where it is sought to impeach a witness by proving that he has made statements out of court, or upon a former trial, contradicting his testimony, the attention of the witness must be first called to the alleged statements, to the time and place of making them, and to whom made. (*Wood River Bank v. Kelley*, 29 Neb., 591.)

Objection is made to the third instruction given by the court on its own motion, which is as follows: "If you find from the evidence that the calves in controversy were on the 27th day of September, 1889, trespassing on the cultivated lands of the defendant, and damaged the defendant in any sum, the defendant has a right to impound said calves while so trespassing, and hold them until paid his damages, provided he gave the notice required by section 3 of the herd law, in a reasonable time after taking up said calves in the manner and according to the requirements of said section 3 of the herd law, and would be entitled to the possession of the said calves until paid his damages."

It is the duty of a person taking up stock trespassing

upon cultivated lands, under the provisions of the herd law, to give written notice to the owner of such stock, if known, within a reasonable time after the same is taken up, stating therein the amount of damages claimed and naming the arbitrator by him selected for the purpose of assessing the damages sustained by the trespassing animal. The taker-up must comply substantially with the requirements of the statute, unless the same are waived, or he will acquire no lien upon such stock. Doubtless the written notice may be waived, as where a verbal one is given and the owner acts thereunder and appoints his arbitrator. But there was no waiver in this case. Plaintiff in error failed to choose an arbitrator and refused to state the amount of damages he claimed. The instruction complained of was not only correct as a legal proposition but was applicable to the facts proven.

Complaint is made of the form of the judgment. The jury found the value of the property and assessed damages to the plaintiff for the detention. The judgment is "that the plaintiff have and recover from the said defendant the return of the calves in controversy, or, if the same cannot be returned, then that the said plaintiff shall have and recover of and from said defendant the sum of $75, and his damages aforesaid in the sum of $2.50, and the costs of this action taxed at $——." The verdict and judgment are both in form objectionable. Plaintiff is the general owner of the property, which was in his possession at the time of the trial and the rendition of the judgment, he having become possessed of this property by means of the order of replevin. Its value should not have been assessed by the verdict nor a judgment rendered for the same, but merely for the damages found by the jury for the unlawful detention. Had the verdict been in favor of the defendant, then a judgment in the alternative in his favor for a return of the property, or for its value, would have been proper. Notwithstanding the judgment is wrong in form, the de-

fendant is not in any manner prejudiced thereby, for the reason the property was already in plaintiff's possession, so that the alternative part of the judgment was fully satisfied when rendered. There being no reversible error in the record, the judgment is

AFFIRMED.

THE other judges concur.

M. E. HERBERT, APPELLANT, V. SAMANTHA KECK ET AL., APPELLEES.

[FILED OCTOBER 26, 1892.]

Mechanics' Liens: FORECLOSURE: SUFFICIENCY OF EVIDENCE. Evidence, in the bill of exceptions, examined, and *held* sufficient to sustain the finding and decree of the district court.

APPEAL from the district court for Buffalo county Heard below before HAMER, J.

Marston & Nevius, for appellant.

Calkins & Pratt, contra.

POST, J.

This was an action by the plaintiff in the district court of Buffalo county to foreclose a mechanic's lien for a balance claimed to be due under a contract for furnishing a steam-heating apparatus for the building of the defendant Mrs. Keck, in the city of Kearney, known as the Midway hotel. The other defendants have liens thereon, which appear of record, and are for that reason made parties to the action. The written contract between plaintiff and the defendant Mrs. Keck, the execution of which is ad-

mitted, provides for a complete system of steam heating and gas pipes to be furnished and put into said hotel by plaintiff for the sum of $5,100. It is conceded by counsel for the defendant that if plaintiff had furnished and put in place all of the material, in the manner and within the time specified in the contract, there would be due thereon at the time this action was commenced the sum of $1,668.69. It is contended, however, that plaintiff should not recover that amount for three reasons, which will be noticed in their order.

First—On account of material fixtures and appliances provided for by the contract, but not furnished, which render the plant less valuable as well as diminish the cost of construction. It is conceded by plaintiff that certain appliances required by the specifications were entirely omitted, viz., for returning the water formed by the condensing of steam to the boiler by force applied through a pump, whether above or below the level of the water in the boiler. The devices specified consisted of a catch basin, receiving tank, steam pump, and other accessories to what is known as the high pressure system, which do not call for a more definite description in this connection. The plaintiff undertook to excuse the omission of these articles on the ground that the contract after its execution was so modified as to provide for a low pressure instead of a high pressure system, as specified therein. The alleged modifications, he claims to have made with Mr. Frank, the superintendent of defendant, immediately after the signing of the contract at St. Joseph, Mo., and is positively denied by Mr. Frank. The latter is strongly corroborated by the fact that on the 23d day of February, 1887, which was after his bid was accepted and before the contract was signed, plaintiff wrote to Mr. Frank suggesting the substitution of the two boilers subsequently used for the one contemplated in the specifications. This he admits in his testimony was the only change ever suggested to, or made

by, Mr. Frank. It cannot be said in view of the conflicting character of the evidence that the district court erred in finding for the defendant on that issue.

Second—Poor workmanship, which rendered the plant less valuable and delayed the use of the building. In support of this claim it is contended that there was a failure to brace and stay the masonry enclosing the boiler, as specified, in consequence of which it had to be rebuilt the first summer at an expense of $160. There is no issue upon the failure in this respect, but plaintiff contends that the damage to the brick work was occasioned by the want of capacity of the chimney and in no way attributable to any neglect or failure on his part. There was also a claim for failure to provide dampers and to insulate the pipes where they passed through walls, ceilings, and floors, and negligence and unskillful workmanship in laying and setting the gas pipes, by which it became necessary to take up the floors and remove the plastering in parts of the building. Upon this question also the finding of the district court, if not in accordance with the clear preponderance of the proofs, is supported by evidence amply sufficient to sustain it in this court.

Third—Failure to complete the work by plaintiff within the time specified, to the defendant's damage. It is provided by the contract that the work shall be performed by the plaintiff in a "prompt and diligent manner, and that he shall do the several parts thereof at such times and in such order as the architect or superintendent may direct, and as soon as is consistent with good workmanship and the progress made upon the superstructure, and in default thereof shall pay to defendant $25 per day for every day thereafter that said work shall remain unfinished, as liquidated damages." The defendant's agent, J. L. Keck, testifies that the building had been rented at the rate of $440 per month and that the tenants were ready and waiting to take possession thereof. There is also evidence by the

defendant tending to prove that the completion of the building was delayed by plaintiff from one to two months. The district court found for the defendant upon this issue also, and we are not at liberty to reverse the finding of that court. There was a general finding below for plaintiff in the sum of $312, which does not appear from the evidence to be inequitable, and the judgment is

AFFIRMED.

THE other judges concur.

R. J. E. HAYS V. FRANKLIN COUNTY LUMBER COMPANY.

[FILED OCTOBER 26, 1892.]

Corporations: ACTION ON SUBSCRIPTION TO CAPITAL STOCK: SUFFICIENCY OF EVIDENCE. The evidence in the bill of exceptions examined and *held* to sustain the judgment of the district court.

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

A. F. Moore, for plaintiff in error.

Sheppard & Black, *contra*.

POST, J.

Judgment was entered against the plaintiff in error in the district court of Franklin county in an action therein pending, and of which he now complains. The only ground assigned for a reversal of the judgment is that the findings of the referee are not supported by the evidence. We have read all of the evidence taken by the referee and

can see no sufficient reason for reversing his finding. There are two causes of action presented by the pleadings. First —for a balance due on an agreement in writing to subscribe and pay for capital stock of the defendant in error to the amount of $50. To this cause of action the defense was that the defendant in error, by its board of directors, had declared by resolution that all stock subscribed, but not paid for in full within a time named therein, including that of plaintiff in error, should be forfeited, and the names of such subscribers dropped from the list of stockholders. The resolution introduced in evidence is as follows: "Moved by Ewing that if the delinquent stockholders do not pay their full subscribed stock within the next thirty days their names shall be taken from the rolls." This is merely a resolution to declare the stock forfeited after the expiration of thirty days. There is no evidence that the action contemplated by the resolution was ever taken. The name of plaintiff in error was not dropped from the list of stockholders, nor was he excluded from a participation in the management of the company. It appears, too, that he subsequently purchased a bill of lumber from the company, and, on settlement therefor, was allowed a deduction of $10, being the amount allowed as a credit on purchases by members holding the same amount of stock. We have no occasion to discuss the second cause of action, since the finding upon that was for the plaintiff in error. There being no error in the record, the judgment is

AFFIRMED.

THE other judges concur.

ROSENBAUM BROTHERS v. JAMES D. RUSSELL.

[FILED OCTOBER 26, 1892.]

1. **Pleading:** ANSWER DENYING MATERIAL ALLEGATIONS SUFFICIENT WHEN ASSAILED FOR THE FIRST TIME BY MOTION FOR NEW TRIAL. A denial in an answer of all material allegations in the petition, although faulty, will be held sufficient when assailed for the first time by motion for a new trial, particularly where it is treated at the trial as putting in issue the allegations of the petition.

2. **Review:** HARMLESS ERROR. A judgment will not be reversed on account of errors which could not have prejudiced the party complaining.

3. **Evidence** examined and *held* to sustain the judgment complained of.

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

Charles O. Whedon, for plaintiffs in error.

S. P. Davidson, contra.

POST, J.

For a statement of the facts in this case we refer to the opinion filed when it was before the court upon a petition in error by Russell, the present defendant in error. (*Russell v. Rosenbaum,* 24 Neb., 769.) After the case was remanded to the district court an amended answer was filed by the plaintiffs in error, in which they allege that the C., B. & Q. R. Co. has paid to them the full amount of the rebates claimed. Whereupon the railroad company was dismissed from the suit and the action prosecuted against them. A second trial resulted in a verdict for the plaintiff below under direction of the court, and judgment having been entered thereon, the case was removed to this

court by petition in error. The first objection argued goes to the sufficiency of the reply, which is a denial of "every material allegation of the petition not already admitted," etc. This objection was made for the first time after verdict, the answer having been treated during the trial as putting in issue substantially all the allegations of the petition.

It is a rule repeatedly asserted by this court that pleadings will be most strongly construed against the objecting party, after trial and verdict on the merits. Had objection to the answer been made at the proper time it would undoubtedly have been sustained, but it is sufficient as against an objection made for the first time by a motion for a new trial. (Maxwell, Code Pleading, 386.)

Second—The second and third assignments may be considered together. They relate to the proof, over the objection of plaintiffs in error, of admissions by their attorney, Mr. Whedon, to the effect that the money due for rebates had been paid to them by the railroad company, and the admission in evidence of the original receipt therefor. It is plain that they could not have been prejudiced by the evidence complained of, since they had distinctly alleged the payment in their answer.

The fourth point made by counsel in his brief is that there is no evidence of an assignment of the claim in controversy by the firm of McClure & Griffin to the plaintiff below. This contention is not warranted by the record. McClure testifies, on his cross-examination, that the claim for rebates against the railroad company had been assigned to the plaintiff as collateral for money advanced to the firm of McClure & Griffin.

There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

CHARLES B. BICKEL, APPELLEE, V. CATHERINE MCALEER ET AL., APPELLANTS,

AND

JOHN C. WATSON, APPELLEE, V. CATHERINE MCALEER ET AL., APPELLANTS.

[FILED OCTOBER 26, 1892.]

Review: FINDINGS OF TRIAL COURT. In this court the presumption is in favor of the correctness of the finding of fact by the trial court, and such finding will not be reversed unless clearly wrong.

APPEAL from the district court for Otoe county. Heard below before FIELD, J.

Pound & Burr, for appellants.

Frank T. Ransom, and *John C. Watson*, *contra*.

POST, J.

The appellees commenced separate actions in the district court of Otoe county for the purpose of setting aside a conveyance by the defendants Miles and John McAleer, dated September 21, 1888, for the west half of section 22 and the northwest quarter of section 23, all in township 9, range 10, in Otoe county; also a conveyance by Miles McAleer to Thomas F. McAleer for the southeast quarter of section 23 in said township and range, dated August 22, 1888, on the ground that said conveyances were without consideration and made for the purpose of defrauding the creditors of the said Miles and John McAleer.

The answers of the several defendants put in issue all the material allegations of the petitions except the conveyances, which are admitted. The court below found that the southwest quarter of section 23 was the homestead of

the defendant Catherine McAleer, and had been occupied as such for many years by her and her husband, James McAleer, who held the title thereto at the time of his death in the month of September, 1888, and both petitions were accordingly dismissed as to that tract. The court further found that the conveyance of the southeast quarter of section 22 to Thomas F. McAleer was without consideration and in fraud of the rights of the creditors of Miles McAleer, the grantor thereof. There was a further finding that the defendants John and Miles McAleer, as heirs at law of James McAleer, deceased, each had an undivided seventh interest in the west half of section 22, subject to the dower interest of their mother, Catherine McAleer, and that the conveyance to the latter by said Miles and John was without consideration and in fraud of the rights of their creditors. The decree provided for the sale of the interests of said defendants, as found in the real estate above mentioned, to satisfy the judgments of the plaintiffs, from which the defendants appeal. It will serve no useful purpose to set out the evidence adduced on the hearing in the district court, or a statement of the facts proven. This is a typical case of its class and clearly within the rule so well settled in this court, viz., that all presumptions are in favor of the finding below, and the judgment of the trial court will not be disturbed unless clearly wrong. We have carefully read over the bill of exceptions and think there is evidence sufficient to sustain the finding, and the judgment of the district court is

AFFIRMED.

THE other judges concur.

THEODORE GALLIGHER v. WILLIAM J. CONNELL.

[FILED OCTOBER 26, 1892.]

1. **Forcible Entry and Detention:** PRIOR POSSESSION. Where a grantee of real estate, on receiving his deed, takes undisputed possession of the property conveyed, and in good faith continues in possession thereof, by himself, his agent or tenant, causing the premises to be fenced and cultivated, such facts constitute a prior possession which will entitle such grantee or his tenant to prosecute one by whom he is dispossessed for forcible entry and detention.

2. ——— : EVIDENCE. In a proceeding for forcible entry and detention the plaintiff may be permitted to prove payment of taxes by one under whom he claims, for the purpose of showing that the claim and possession of the latter is in good faith.

3. **Instructions** set out in the opinion, *held*, properly given and refused.

4. **Evidence** examined, and *held* sufficient to sustain the judgment of the trial court.

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

Gregory, Day & Day, for plaintiff in error.

Connell & Ives, contra.

POST, J.

This was an action for forcible entry and detention of certain real estate in the city of Omaha, and comes into this court by petition in error from the district court of Douglas county. A former judgment in the same case was reversed in this court. (*Galligher v. Connell*, 23 Neb., 391.) The first ground for reversal assigned by counsel for plaintiff in error at this time is, that there is not sufficient evidence to sustain the verdict in favor of the defendant in error. It is said in the former opinion, page 403: "It is

claimed, however, that the rights of Mr. Connell date from the time of his alleged possession by cutting brush in the winter of 1884 and 1885, and by the plowing which he caused to be done in the spring of 1885. But such acts will not of themselves create a lawful possession. So far as the record discloses, the entry of Mr. Connell therein was unlawful and forcible, even if it is admitted he was acting under Peabody. There is no evidence that Peabody had any title to the half lot in controversy." On the second trial the defendant in error introduced a deed from Joel T. Griffin and Rollin C. Smith, the parties who subdivided and platted the addition in question, for the property in controversy to Wm. L. Peabody, dated February 25, 1869, together with the original plat thereof. He also testifies that Mr. Peabody took possession soon afterward under his deed and remained in possession until some time in 1880, when he left the state; that it was completely enclosed by Peabody, by a good, substantial wire fence and posts, the latter being about eight feet apart, some of which still remain standing; that he, Peabody, planted trees thereon, twenty or thirty of which are still standing; that about the year 1883, Peabody, by letter, requested him to take possession of the property and hold it for the former; that he enclosed it, with land of his own, by a barbed wire fence, which was removed by order of the city marshal, being prohibited by ordinance. On removing the barbed wire he rebuilt the fence with boards and cleared away the sumach bushes; that in the year of 1884 he arranged with a tenant to cultivate the land in controversy with his own in the same enclosure; that the latter was engaged in plowing when dispossessed by plaintiff in error Galligher, and that he had been in the continual, uninterrupted possession by himself or tenant from the year 1883, until the entry of Galligher. The evidence is therefore entirely different from that adduced on the former trial. Nor can the verdict be said to be against the weight of evidence in the sense that would

warrant this court in interfering. It tends to establish the claim that defendant in error and Peabody, under whom he claims, had had the uninterrupted possession of the property in dispute since the year 1869, or shortly thereafter, under a claim of title. This is such a lawful, prior possession as will support an action of forcible entry and detention. (*Campbell v. Coonradt*, 22 Kan., 704.)

Second—It is claimed that the district court erred in giving the following instruction at the request of the plaintiff below:

"While it is the law, as stated by the supreme court, and as you have been instructed by the third instruction given you on behalf of the defendant, that the mere cutting of a few brush or the attempt to plow the land in controversy would not of itself constitute possession, nor would the attempt to enter upon the prior, actual possession of defendant (if he ever had such possession) furnish any grounds for this action, you are instructed that it is also the law that if the plaintiff, under an arrangement with Mr. Peabody, entered into the peaceful possession of the ground in controversy in 1884, with the right to occupy and use the same, and you find such to be the fact from the evidence before you, and you also find from such evidence that at such time the said ground was open, vacant, and had been abandoned, and that after Mr. Connell obtained peaceable possession of said land he built and repaired fences so as to completely enclose the same, and if you find that brush was cut in 1884 by Mr. Connell, wires removed and the fence maintained until April, 1885, and that during said month, while the fence enclosed said land, he commenced plowing said land, and while the plow was in the furrow the defendant Galligher entered upon said land, securing the plow and preventing, by threats of personal violence, the completion of said plowing by Rasmussen for Mr. Connell, such entry upon the part of Mr. Galligher would be unlawful and forcible, and it would be your duty to so decide by your verdict."

The particular objections to this part of the charge are, first, that it is argumentative; and, second, that it contains a number of independent clauses and that the jury must have understood it as a direction to return a verdict for plaintiff below if they found in his favor upon the proposition contained in either one of such clauses. As to the first objection it may be said that no force is added to an instruction by an exordium like that in the one above, yet we are unable to conceive how the plaintiff could have been prejudiced thereby. As to the second objection the instruction will not bear the construction given it by counsel for plaintiff in error. The alleged independent clauses are all connected by the word "and." The natural and reasonable construction thereof is, that if the jury found for the plaintiff below upon each of said propositions they should return a verdict in his favor.

Third—Exception is taken to the refusal of the following instruction asked by the defendant below:

"Sixth—It being made to appear without controversy that in March, 1882, the defendant Galligher, by himself and by his sub-lessee, Richard Colgan, entered into the actual possession and occupancy of the premises in question under and by virtue of a lease from one James E. North, who held title to the same by deed, and that said defendant Galligher, by himself and by his sub-lessee, Colgan, continued uninterrupted in actual, open possession of said premises up to the time of the commencement of this suit, you are directed to find for the defendant."

This instruction was properly refused. It assumes as undisputed the very question at issue, viz., the possession of the property in controversy. Defendant in error had testified to his possession since 1883, and is in part corroborated by Rasmussen, his tenant.

Fourth—Finally, exception is taken to the ruling of the court in permitting the plaintiff below to prove the payment of taxes on the property in controversy by Peabody

on the ground that it tended to raise a false issue. The objection was not well taken. The evidence was admissible for the purpose of proving the *bona fides* of Peabody's possession and claim of title. There is no prejudicial error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

PRENTISS D. CHENEY v. GUSTAVE H. STRAUBE.

[FILED OCTOBER 26, 1892.]

1. **Covenant of Warranty:** ACTION FOR DAMAGES FOR BREACH: ATTACHMENT. The action of covenant was in form and substance *ex contractu*, and an action under the code by a covenantee for damage on account of the breach of a covenant of warranty, after eviction under a paramount title, is for a debt arising under a contract, which may be recovered by attachment.

2. ———: ———: PETITION: FAILURE TO ATTACH WRITTEN INSTRUMENT. An objection to a petition on the ground that an instrument on which the action is based, or a copy thereof, is not attached, should be made by motion before answer.

3. ———: ———: ———. In an action for the breach of a covenant of warranty by the covenantee after eviction under a paramount title, it is not necessary to set out the facts attending the eviction or particularly describe the adverse title. It is sufficient to allege in general terms an eviction under a title paramount to that of the covenantor.

4. ———: ———: WHEN ACTION ACCRUES. A cause of action on a covenant of warranty, or for a quiet enjoyment, does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title.

5. ———: ———: ———. A cause of action accrues to a covenantee on his covenant of warranty, or for quiet enjoyment, upon eviction by the purchaser under a prior mortgage.

6. ———: ———: PROOF OF PARAMOUNT TITLE. One who voluntarily surrenders to a third party asserting an adverse title, must, in an action against his covenantor for a breach of warranty, establish the validity of the title he has recognized.

7. ———: BREACH: MEASURE OF DAMAGES. The measure of damages for the breach of a covenant of warranty, or for quiet enjoyment, is the consideration paid for the land, with interest, and the costs and expenses incurred in the suit by which the covenantee is evicted; and if the latter is obliged to purchase an outstanding title in order to protect his own, he may recover the amount paid for such paramount title, not exceeding the consideration paid by him.

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

L. C. Chapman, for plaintiff in error.

S. P. Davidson, and *J. Hall Hitchcock*, *contra*.

POST, J.

Judgment was rendered against the plaintiff in error in the district court of Johnson county in an action against him by the defendant in error on the covenants in a deed of conveyance executed by the former for certain lands in said county. The breach alleged, and for which a recovery was allowed by the district court, is that the plaintiff below was compelled to, and did surrender possession of the premises in question to a third party, the holder of a paramount title. The first error assigned is the overruling of a motion to discharge an attachment in the case. The ground assigned in the motion is that the defendant therein is a non-resident and that the action is not for the recovery of a debt or demand arising upon a contract, judgment, or decree. There is no error in the order complained of. A covenant is but a contract under seal (1 Rapalje and Lawrence Law Dic., 317), and the action of covenant was both in form and substance essentially *ex contractu*, and it requires no argument to prove that an action under the Code for the

breach of an undertaking in a deed to warrant and defend the title conveyed is for a debt arising upon a contract within the meaning of the statutes governing attachments. (See Wade on Attachment, secs. 12, 13.)

Second—Objection was made at the trial to the petition on the ground that it did not state a cause of action. The petition, after reciting the sale and conveyance by defendant below, is as follows: "That said deed contained provisions by which defendant covenanted with the plaintiff that he then held said land by good and perfect title, that he had good right and lawful authority to sell and convey the same, that said lands were clear and free from incumbrance, and that the defendant would warrant and defend the said premises and the title thereof against the lawful claims of all persons whomsoever; * * * that notwithstanding the delivery of the deed containing the said covenants as above mentioned, on the 29th day of March, 1890, plaintiff was compelled to surrender, and did surrender, said lands and the possession thereof to one Matthew Panko, the holder of the superior and paramount title thereto, which title of the said Panko was superior and paramount to that of said defendant and that conveyed by him to plaintiff," etc.

The first objection to the petition which we will notice is that the deed or copy thereof was not attached to the petition as provided by section 124 of the Code. This objection comes too late after answer. It should have been made by motion and not by demurrer to the petition. (*Ryan v. State Bank*, 10 Neb., 524.)

The second objection is that it does not appear from the allegations of the petition that the plaintiff below was evicted under a paramount title existing at the time of the conveyance of the land in question to him. The real contention on the part of the plaintiff in error is that it is necessary to set out the facts which it is claimed constitute an eviction. At common law, in an action of covenant

for a breach of warranty, it was sufficient to allege in general terms an eviction under a paramount title (*Townsend v. Morris*, 6 Cow. [N. Y.], 123; *Rickert v. Snyder*, 9 Wend. [N. Y.], 416; *Day v. Chism*, 10 Wheat. [U. S.], 449; *Kellog v. Platt*, 33 N. J. Law, 328); and in a declaration on a covenant for quiet enjoyment it was sufficient to allege an entry by the grantor or his heirs without showing it to be lawful or setting out his title. (*Sedgwick v. Hollenback*, 7 Johns. [N. Y.], 376.) And under the Code it is sufficient to allege an eviction by the holder of a paramount title without pleading the facts. (Maxwell, Code Pleading, 648; Boone, Code Pleading, 245.)

Third—It is contended that the action is barred by the statute of limitations. So far as the covenant against incumbrance is concerned this position is sound. The mortgage in question was executed August 15, 1876, and the deed to defendant in error August 19, 1881. His cause of action on the covenant against incumbrance accrued, therefore, more than five years previous to the commencement of the action. (*Chapman v. Kimball*, 7 Neb., 399; *Davidson v. Cox*, 10 Id., 150; *Kern v. Kloke*, 21 Id., 529.) But in addition to the covenants of seizin and against incumbrance the deed contained a general covenant of warranty in the following language: "And I covenant to warrant and defend the said premises against lawful claims of all persons whomsoever." This covenant is considered to be tantamount to that for quiet enjoyment and what will amount to a breach of the latter is also a breach of the former. (Devlin, Deeds, 932; *Real v. Hollister*, 20 Neb., 114.)

That a cause of action on a covenant for warranty or quiet enjoyment accrues to the covenantee upon his eviction by legal process under a prior mortgage, is well settled in this country. (*Stewart v. Drake*, 9 N. J. Law, 139; *Smith v. Dixon*, 27 O. St., 471; *White v. Whitney*, 3 Met. [Mass.], 81; *Tufts v. Adams*, 8 Pick. [Mass.], 547; *Sprague v. Baker*,

17 Mass., 585; *Furnas v. Durgin*, 119 Id., 500.) It is plain that the cause of action on the covenant of warranty did not accrue until defendant in error surrendered the premises to Panko, who purchased at sheriff's sale under the prior mortgage, and was therefore not barred by the statute of limitations.

Fourth—The next contention is, that there is no evidence that the mortgage in question was a valid lien upon the land. The mortgage was executed by ——— Ogden, a remote grantor, to one Steele, and foreclosed in the district court of Johnson county. Both parties hereto were made defendants in that action, and the plaintiff in error filed his separate answer, viz.: First, a general denial, and second payment in full. He also joined in the appeal to this court from the decree of foreclosure (*Allendorph v. Ogden*, 28 Neb., 201), where the decree of the district court was affirmed. The record of that case, which was introduced in evidence, conclusively establishes the validity of the mortgage, since that was the very question in issue in that suit.

Fifth—On the execution and delivery of the sheriff's deed to Panko, under the decree of foreclosure the latter demanded possession of the premises, whereupon defendant in error surrendered them to him. He was not required to wait until dispossessed by legal process, but had a right to surrender to the purchaser under the mortgage. At most, he assumed the burden of establishing the adverse title. (Devlin, Deeds, 925, 926; *Real v. Hollister*, *supra*.)

Sixth—Exception is taken to the instruction of the court upon the subject of the measure of damage as follows: "The court further instructs you as a matter of law, that the measure of damage in actions of this nature is the purchase price paid for the land in controversy, together with the interest on the same for five years last past, and for all improvements put upon the land by the

plaintiff, the value of such improvements to be computed at the time of the eviction." The measure of damage for the breach of a covenant of warranty or for quiet enjoyment is the consideration paid for the land, with interest thereon, and the costs and expenses incurred by the covenantee in the suit to evict him. And if he is obliged to purchase an outstanding title in order to protect his own, his damage is the amount paid for such title, with interest, not exceeding the consideration paid by him. Such is the rule generally accepted in this country. The cases in point are too numerous to cite in this opinion, but will be found by reference to the notes to the following textbooks: 4 Kent's Com., 474, 478; Devlin, Deeds, sec. 934; Rawle, Covenants for Title, ch. 9; 2 Sutherland, Damages, 280, 291.

The giving of the instructions set out was error for which the judgment of the district court must be reversed and a new trial allowed.

REVERSED AND REMANDED.

THE other judges concur.

ANNIE B. HUGHES, EXECUTRIX, v. WILLIAM COBURN, SHERIFF.

[FILED OCTOBER 26, 1892.]

Sale: CHATTEL MORTGAGE BY PURCHASER IN POSSESSION. The C. B. Co., doing business in Chicago, Ill., ordered stoves from the C. C. S. Co. at Quincy, Ill., which, by direction of the former, were consigned to it at Omaha in care of a designated warehouse. B., the president of the C. B. Co., who was doing business in Omaha under the name of the O. T. H. F. Co., unloaded said stoves and stored them in the warehouse named, in space rented by him in the name of the O. T. H. F. Co. During the suc-

ceeding thirty days B. exercised frequent acts of ownership over them, including the sale of a number thereof. At the expiration of the time named, B. mortgaged them to secure a debt due to the C. B. Co., giving possession under the mortgage. They were subsequently taken under an attachment against the C. B. Co. *Held*, The inference from the facts stated is that the C. B. Co. intended to part with the title and possession of said property in favor of C. B., and that the mortgagee of the latter is entitled to possession as against a subsequent attaching creditor in a suit against the C. B. Co.

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

Cornish & Robertson, for plaintiff in error.

A. C. Wakeley, *contra*.

POST, J.

This was an action of replevin for one hundred and fifty stoves by William Hughes against the defendant, sheriff of Douglas county. Hughes died and the action was revived in the name of plaintiff in error as his executrix. Plaintiff claims the property by virtue of a chattel mortgage to William Hughes by one Charles Baldwin. The defendant claims by virtue of an attachment in favor of the Comstock Castle Stove Company and against the Charles Baldwin Company, an Illinois corporation. On the 16th day of February, 1888, the Comstock Castle Stove Company sold to the Charles Baldwin Company a bill of stoves amounting to $900. By direction of the last named company, said stoves were shipped to Omaha in care of Bushman's warehouse and consigned to the Charles Baldwin Company. On their arrival in Omaha, said stoves were taken from the cars by the employes of said Baldwin, who was doing business in that city under the name of the On Time Household Fair Company, and stored in space rented by him in the warehouse aforesaid. Subsequently fourteen of them were removed by Baldwin,

or his employes, to the place of business of the On Time Household Fair Company and there sold and disposed of. The Charles Baldwin Company soon after failed, owing to numerous creditors, including the bill to the Comstock Castle Stove Company, for the stoves in dispute. On the 13th day of March, 1888, William Hughes commenced an action in Douglas county against the Charles Baldwin Company for goods sold and delivered, and caused the property of Baldwin, known as the On Time Household Fair Company, to be attached. Two days later Baldwin, to secure a settlement of the last named suit and to obtain possession of the property in the hands of the sheriff, offered to give his personal note for the sum due Hughes, secured by chattel mortgage upon the stoves in controversy. This proposition was accepted by Hughes, who receipted the bill against the Charles Baldwin Company, and paid the costs in the attachment suit, amounting to $16.55, and Baldwin immediately executed to Hughes his note for $399.92 and a mortgage on said stoves, which were turned over to the attorneys for Hughes, Bartlett & Cornish. The next day the stoves were taken by the defendant as sheriff to satisfy an attachment in an action by the Comstock Castle Stove Company against the Charles Baldwin Company. There was no further evidence introduced by either party with reference to the transaction between the Charles Baldwin Company and Charles Baldwin, the individual.

The question in whom was the title to the property, at the time it was mortgaged to Hughes, must depend therefore upon the inference to be drawn from the foregoing facts. Although there is evidence tending to prove fraud on the part of the Charles Baldwin Company, as well as Baldwin the individual, it should be remembered that fraud is not the ground upon which the defendant claims. By suing for the agreed price of the goods sold, the Comstock Castle Stove Company ratified the sale, and must now rely upon the title of the Charles Baldwin Company at the time of its

attachment against the latter. The stoves were shipped to Omaha by direction of the Charles Baldwin Company, given at the time they were purchased, were unloaded by Charles Baldwin, and stored by him in space belonging to him in Bushman's warehouse. He, Baldwin, had for nearly thirty days exercised repeated acts of ownership over them, and had sold and removed fourteen of the number. The only natural and reasonable inference from these facts is that the intention of the Charles Baldwin Company was to invest the said Charles Baldwin or the On Time Household Fair Company with both the title and possession of the property. Whether the title of the latter could be impeached for fraud is a question not presented by the record in this case, since the only question presented or discussed is that of the legal title. There is another significant feature of the case, viz., that the mortgage under which plaintiff claims, was executed to secure an indebtedness due from the Charles Baldwin Company to William Hughes, hence any equitable considerations in favor of the claim represented by the defendant are equally applicable to that of the plaintiff. It is not necessary to examine the authorities cited by counsel. As has already been intimated, both the title and possession of the property in controversy were in Baldwin, plaintiff's mortgagor, at the time it was mortgaged by the latter, and the mortgagee, William Hughes, acquired a title thereby which should prevail as against one who subsequently attached in an action against the Charles Baldwin Company. The judgment of the district court is

REVERSED.

THE other judges concur.

HENRY WILSON V. WILLIAM COBURN, ASSIGNEE.

[FILED OCTOBER 26, 1892.]

1. **Constitutional Law:** COUNTY COURT: EQUITY JURISDICTION. The constitution does not prohibit the conferring upon the county court of equity jurisdiction except as to the subjects enumerated in section 16, article 6, viz., actions in which the title to real estate is sought to be recovered or may be drawn in question, actions on mortgages and for the conveyance of real estate.

2. **Assignment for Benefit of Creditors:** FUNDS IN HANDS OF ASSIGNEE: JURISDICTION OF COUNTY COURT. The funds of an insolvent debtor which come into the hands of the assignee are within the jurisdiction of the county court, and that court will proceed to determine the rights of the creditors thereto, and, subject to the limitations of the constitution, will grant the proper relief even to the extent of recognizing and enforcing a trust. The jurisdiction of a court of equity in such cases is concurrent only.

3. ——: INSOLVENT BANK: FRAUD IN RECEIVING DEPOSIT: PREFERENCE: MINGLED FUNDS. The fact that a bank is insolvent within the knowledge of its officers, and receives the money of a depositor under circumstances which amount to a fraud upon him, is not of itself sufficient to entitle the latter to preference from the funds of the bank in the hands of an assignee. He may follow his money while he can trace and distinguish it or the proceeds thereof, but not after it has passed into the hands of the assignee, mingled with the other funds of the bank.

4. **Pleading.** PETITION examined, and *held* not to state a cause of action.

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

Ambrose & Duffie, for plaintiff in error:

On the facts stated in the petition plaintiff had a right to rescind the contract and reclaim the deposit as between himself and the bank. Where there is fraud, title to the

deposit does not pass to the bank. (*Knowles v. Lord*, 4 Whart. [Pa.], 500; *King v. Fitch*, 1 Keys [N. Y.], 444; *Nichols v. Michael*, 23 N. Y., 264.) Assignee is not a *bona fide* purchaser. (*Donaldson v. Farwell*, 3 Otto [U. S.], 631; *Housel v. Cremer*, 13 Neb., 300.) Claimant must seek his remedy in county court and no other court has right to interfere. (*Hanchett v. Waterbury*, 115 Ill., 220.)

Bartlett, Crane & Baldrige, contra.

POST, J.

The plaintiff filed with the county judge of Douglas county a claim against the Bank of Omaha, which had previously made an assignment for the benefit of its creditors, to the defendant in error, sheriff of said county. From the claim or petition aforesaid it appears that there is due to plaintiff in error the sum of $107.53 and interest, being a balance deposited in said bank prior to the assignment thereof. It is further alleged that said bank was insolvent at the time it received the deposit aforesaid, within the knowledge of all of its officers, and that the latter received said money with the intention of cheating and defrauding the plaintiff in error. He asks to be declared by the court to be a preferred creditor, and for an order for payment in full out of any funds in the hands of the defendant in error as assignee of said bank. To this petition a demurrer was interposed and sustained in the county court, on the ground that the court had no jurisdiction of the subject of the action, and because the facts stated did not constitute a cause of action. On petition in error to the district court the judgment of the county court was affirmed and the case removed to this court by petition in error.

It is urged as an objection to the proceeding that the petition is, in effect, a bill in equity for the purpose of

having declared a trust in favor of the plaintiff in error. That the granting of the relief sought involves the exercise of equitable jurisdiction by the county court must, we think, be conceded. It is, however, an entire misconception of the powers of that court under the constitution to hold that it possesses none of the attributes of a court of equity. There are many subjects over which the county court, as a court of probate, has jurisdiction, which, under the old practice, were cognizable exclusively by the chancery courts. A familiar illustration is the jurisdiction formerly exercised by courts of equity over the accounts of executors and administrators and to enforce the claims of legatees and next of kin. And in some of the states probate courts and courts of equity still exercise concurrent jurisdiction of all matters pertaining to the estates of deceased persons. (*Frey v. Demarest*, 16 N. J. Eq., 236; Hawes, Jurisdiction, 73.)

In Brown on Jurisdiction, 130, it is said: "The jurisdiction of a probate court should, and ordinarily does, extend to all matters necessarily involved in the disposition of the estate. It may be remarked that the jurisdiction of the probate court partakes largely of the chancery powers. When the statute is silent it is sometimes necessary to look to the principles and practices in that court for a guide." The precise question involved is not whether the county court has power to allow a preference in any case in which a court of equity would grant relief, but whether it may determine the rights of contesting creditors of an insolvent with respect to funds which have come into the hands of the assignee, and thus directly within its jurisdiction. Our statute on the subject is entitled "An act regulating voluntary assignments for the benefit of creditors, practice thereunder, and to prevent the fraudulent violation of the same." By its provisions, original jurisdiction appears to have been conferred upon the county court in all matters pertaining to the distribution of property assigned, with

the one exception found in section 20, viz., that the sale of real estate by the assignee shall be confirmed by the district court. It is clear that, upon delivery to the assignee of the personal property of the insolvent bank, the county court acquired jurisdiction over it, and will proceed to determine the rights thereto of all claimants, within constitutional limitations upon its power. The power vested in the county court by the assignment law over the estate of an insolvent upon a general assignment is practically the same as that possessed by it, as a court of probate, over the property of deceased persons. The jurisdiction in either case may involve the exercise of equitable power, and unless it is within some of the constitutional limitations must be sustained. By section 16, article 6 of the constitution, the jurisdiction of the county court is defined as follows:

"County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and settlement of their accounts, in all matters relating to apprentices, and such other jurisdiction as may be given by general law. But they shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment or a fine of over five hundred dollars; nor in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate; nor in civil actions where the debt or sum claimed shall exceed one thousand dollars."

It will be observed that the constitution does not prohibit the conferring upon the county court of equity powers and jurisdiction, except in actions in which the title to real estate may be called in question, and foreclosure of mortgages. In *Brook v. Chappell*, 34 Wis., 405, the residuary legatee named in a will had promised the testator to pay specific sums as legacies to certain persons

whereby the testator was induced not to change his will. On application to have the request and promise admitted to probate as a nuncupative codicil, while the application was denied on statutory grounds, it was held, under statutory and constitutional provisions practically the same as ours, that the county court as a court of probate had power to enforce a trust in favor of the proponents, and that the jurisdiction of courts of equity in such cases is merely concurrent.

The case of *Hanchett v. Waterbury*, 115 Ill., 220, called for a construction of the assignment law of that state, which does not differ materially from ours. It was held, that by the law governing voluntary assignments a new and special jurisdiction was conferred upon the county court, and that the jurisdiction of that court was exclusive. Judge Mülkey, in the opinion of the majority of the court, says: "The assignee, the insolvent debtor, and all persons claiming the fund, are subject alike to the summary jurisdiction of the court, and whatever rights, real or supposed, with respect to the fund, must be litigated therein."

While under section 32 of our assignment law a court of equity would undoubtedly have jurisdiction in a case like this, it is plain to us that such jurisdiction is concurrent only. Nor do we hold that the county court under the constitution is or could be vested with general equity powers. What we hold, and what seems to us clear, upon principle is, that the county court in the exercise of its powers with respect to the personal estate of an insolvent, in the hands of an assignee, may allow whatever relief the parties are entitled to with respect to such property, whether it would, under the former practice, have been denominated legal or equitable.

Second—Under the allegations of the petition, is the claimant entitled to preference over other creditors of the insolvent bank, or, in other words, does the petition state a cause of action? We think not. The rule on the sub-

ject is stated by Judge Story thus: "The right to follow the trust fund ceases only when means of ascertainment fail, which, of course, is the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description." (Story's Equity, 1259.) That the foregoing rule is applicable to cases like this, where the funds in controversy are the assets of an insolvent bank, is well settled.

In *Ill. Trust and Savings Bank v. Smith*, 21 Blatch. [U. S.], 275, Judge Wallace, after remarking that the property comes into the hands of the receiver as a trust fund for the benefit of all of the creditors, proceeds as follows: "It would be a violation of law upon his part to set aside any part of these assets for the complainant unless his portion is capable of identification or being definitely traced and distinguished," etc., etc.

Counsel for plaintiff in error rely with confidence upon the case of *Cragie v. Hadley*, 99 N. Y., 131. We do not, however, regard that case as authority. That was an action against the defendants for the proceeds of a draft received for collection from an insolvent bank. The fund, therefore, was easily distinguishable from the other assets of the bank. It is evident from subsequent cases in New York that that case has never been regarded as an authority in cases like this, where the money of the claimant has been mingled with the other funds of the bank, and cannot be distinguished from other assets in the hands of the assignee or receiver.

In re N. River Bank, 14 N. Y. Sup., 261, is a case directly in point. The supreme court therein, after showing that *Cragie v. Hadley* was not authority, for the reason given above, hold that the petitioner was not entitled to preference, although he deposited his money on the forenoon of the day on which the bank closed its doors, on the assurance that it was solvent, upon the ground that it did not appear that the money had not gone into the gen-

eral funds of the bank and because he had failed to impress upon the funds in the hands of the receiver the character of a trust.

In *Atkinson v. Rochester Printing Co.*, 114 N. Y., 168, the same distinction is made, and the court say: "The fact that the defendant became a creditor of the insolvent bank through the fraud of its officers, and the bank a trustee *ex maleficio*, gave the defendant no right to a preference over other creditors unless it could trace and recover its property." And such is the law as recognized from the earliest history by the courts of chancery. (*Ryall v. Rolle*, 1 Atkyns [Eng], 172; *Thompson's Appeal*, 22 Pa. St., 16; Perry, Trusts, sec. 128.) The judgment of the district court is

AFFIRMED.

THE other judges concur.

JOHN W. MCCLELLAND ET AL. V. LEONARD K. SCROGGIN.

[FILED OCTOBER 26, 1892.]

1. **Contract:** CONDITIONAL SALE: BAILMENT. By a written agreement S. leased to M. 640 acres of land and a large amount of personal property thereon, consisting of live stock and farming implements, of the agreed value of $23,331. It was provided in said agreement: "That when said M. shall pay to said S. the sum of $23,331, with interest thereon at the rate of ten per cent per annum, together with the rents above specified, and all sums which S. may advance to or for said M., with interest thereon, then all the above property shall be conveyed to him, the said M., together with all increase thereof. Until such payment such property shall be and remain the property of S. together with the increase thereof, and should any of said property be sold by consent of S., the proceeds thereof shall be ap-

plied upon the above indebtedness." *Held*, Not a conditional sale, but an agreement to sell at the election of M., and that the relation of the parties with respect to said property is that of bailor and bailee only.

2. **Bailment:** EXECUTION AGAINST BAILEE. *Held*, That the property mentioned in said agreement, before payment by M. could not be taken on execution to satisfy judgments against the latter.

3. **Evidence** examined, and *held* to sustain the decree for defendant in error.

ERROR to the district court for Nuckolls county. Tried below before Morris, J.

H. W. Short and *S. B. Pound*, for John W. McClelland, plaintiff in error, contending that the contract was a sale and not a bailment of chattels, cited: *Mallory v. Willis*, 4 N. Y., 85; *Foster v. Pettibone*, 7 Id., 435; *Chase v. Washburn*, 1 O. St., 244; *Lonergan v. Stewart*, 55 Ill., 44; *Richardson v. Olmstead*, 74 Id., 213; *Bailey v. Bensley*, 87 Id., 556; *Grier v. Stout*, 2 Ill. App., 602; *Johnston v. Browne*, 37 Ia., 200; *Nelson v. Brown*, 44 Id., 455; *Irons v. Kentner*, 51 Id., 88; *Carlisle v. Wallace*, 12 Ind., 252; *Rahilly v. Wilson*, 3 Dill. [U. S.], 420; *Williamson v. Berry*, 8 How. [U. S.], 544; 1 Story, Bailment, 2; *Baker v. Woodruff*, 2 Barb. [N. Y.], 520; *Norton v. Woodruff*, 2 N. Y., 153; *Tilt v. Silverthorne*, 11 Upper Can. Q. B., 619; *Wilson v. Cooper*, 10 Ia., 556; *Ives v. Hartley*, 51 Ill., 520; *Butterfield v. Lathrop*, 71 Pa. St., 226; *Marsh v. Titus*, 3 Hun [N. Y.], 550; *McCabe v. McKinstry*, 5 Dill. [U. S.], 509; *Grier v. Stout*, 2 Bradw. [Ill.]., 602; *Benedict v. Ker*, 29 Upper Can. C. P., 410; *Jones v. Kemp*, 49 Mich., 9; *Austin v. Seligman*, 21 Blatchf. [U. S.], 506; *Fishback v. Van Dusen*, 33 Minn., 111.

R. D. Sutherland, for Thomas L. McClelland, plaintiff in error.

S. W. Christy, for Glazier Bros. et al., plaintiffs in error.

Robert Ryan, S. A. Searle, and *T. T. Beach, contra:*

Under the contract the relation of parties with respect to the chattels was that of bailor and bailee. (*Nelson v. Brown,* 53 Ia., 555; *Sexton v. Graham,* Id., 181; *Schindler v. Westover,* 99 Ind., 395; *Foreman v. Drake,* 98 N. C., 311; *Dunlap v. Gleason,* 16 Mich., 158; *Barker v. Roberts,* 8 Greenl. [Me.], 101; *Fawcett v. Osborn,* 32 Ill., 411; *Andrus v. Mann,* 92 Id., 40; *McCall v. Powell,* 64 Ala., 254; *Pash v. Weston,* 52 Ia., 675; *Whitney v. McConnell,* 29 Mich., 12; *Clark v. Jack,* 7 Watts [Pa.], 375; *Becker v. Smith,* 59 Pa. St., 469; *Middleton v. Stone,* 111 Id., 589; *Dando v. Foulds,* 105 Id., 74; *Edwards' Appeal,* Id., 103; *Colton v. Wise,* 7 Ill. App., 395; *Hunt v. Wyman,* 100 Mass., 198; *Weir Plow Co. v. Porter,* 82 Mo., 23; *Holt v. Holt,* 58 N. H., 276; *Evansville & T. H. R. Co. v. Erwin,* 84 Ind., 457; *Sargent v. Gile,* 8 N. H., 325; *Marquette Mfg. Co. v. Jeffery,* 49 Mich., 283; *Emerson v. Fisk,* 6 Greenl. [Me.], 200.)

POST, J.

This case comes into this court by petition in error from the district court of Nuckolls county. On the 20th day of October, 1888, the defendant in error, Leonard K. Scroggin, filed in said court his petition in which he alleges in substance that he is the owner of certain live stock and farm implements then in the possession of the plaintiff in error McClelland upon land owned by him, Scroggin, in said county. He alleges that the defendant below, McClelland, with intent to defraud him, had confessed judgments in favor of the other defendants therein named, amounting in the aggregate to $10,068.80, and had procured the personal property aforesaid to be taken on execution to satisfy said judgments. In said petition it is alleged that the only right, title, or interest of the said McClelland in or to said property is such as is conferred by the following agreement, to-wit:

"This contract and agreement, made and entered into this twenty-first day of February, A. D. 1888, by and between Leonard K. Scroggin, of Mt. Pulaski, Logan county, state of Illinois, of the first part, and John W. McClelland, of Oak, Nuckolls county, Nebraska, party of the second part, witnesseth:

"That said first party hereby leases to second party for the term of two years from the first day of March, A. D. 1888, to-wit: One section of land containing six hundred and forty acres, situated in Nuckolls county, Nebraska, upon the Little Blue river, now occupied by said second party.

"Said McClelland is to farm three hundred and twenty acres of said farm in a good farmer-like manner in corn and small grain, and therefor is to pay said Scroggin one-third of the corn in the crib clean and well gathered, one-third of the small grain delivered in the market designated by said Scroggin. For the pasture land of three hundred and twenty acres said second party is to pay to said Scroggin the sum of three hundred and twenty dollars yearly, on the first day of each March, on and after March 1, eighteen hundred and eighty-nine, for and during the continuance of this lease, being six hundred and forty dollars in all. Said Scroggin further agrees to lease to said McClelland the following property to be used upon said farm, to-wit: Two hundred and six cows, one hundred and twenty-six calves, coming one year old, forty-nine horses and colts, six bulls, forty hogs, and all the implements and machinery on said farm; and it is further agreed, that when said McClelland shall pay to the said Scroggin the sum of twenty-three thousand three hundred and thirty-one dollars ($23,331), with interest thereon at the rate of ten per cent per annum, together with the said rents above specified, and all sums of money which said Scroggin may advance to or for said second party, with the interest thereon, then all the above described property shall be con-

veyed to said second party by said Scroggin, together with all the increase thereof; until such payment, said property shall be and remain the property of said Scroggin, together with the increase thereof; and should any of said property be sold by consent of said Scroggin the proceeds therefor shall be applied in payment upon said above indebtedness. All property that may be purchased by said second party to be kept and used upon said farm shall be and remain the property of said Scroggin until said above mentioned debts shall be fully satisfied and paid, and thereafter the same or the remainder thereof unsold shall be conveyed to said second party by first party. It is further agreed by and between the said parties that in case the rents above mentioned and the above described debts shall be paid at the expiration of this lease the said second party is to have the privilege at his election to renew and extend this lease, at the same rental, for the period of two years from the expiration thereof. It is further agreed by and between said parties that said second party is to feed and take care of above mentioned stock in a good and farmer-like manner during the term of this lease.

"In witness whereof said parties have hereunto subscribed their names this twenty-first day of February, A. D. 1888. L. K. SCROGGIN.

"J. W. MCCLELLAND."

It is further alleged that since the defendant went into possession of the real estate and personal property above named, the plaintiff Scroggin has advanced to him large sums of money, and that he, defendant, has sold live stock and other property raised on said premises but has failed to account for the proceeds or any part thereof, wherefore he prays for an accounting, etc.

The answer of McClelland, after denying *seriatim* the several allegations of the petition as to fraud and collusion, non-performance of his undertakings, etc., alleges that on the 10th day of February, 1883, a written contract was en-

tered into between the parties substantially the same as the one set out in the petition. The consideration named in the contract set out by defendant is $8,762.30, and the personal property described as being on the farm consists of thirteen horses, eighty-seven head of cattle, forty hogs, one stallion, twenty-seven head of sheep, four wagons, three cultivators, three breaking plows, one harrow, one sulky plow, one set of harness and one corn planter; said instrument to take effect and be in force from the first day of March, 1883. It is further alleged that he, McClelland, took possession under said agreement and managed said property until February 21, 1888, at which time he entered into the agreement with the plaintiff set out in the petition; that at the last named date he had fully paid the amount named in the first agreement, by his check on the bank of Scroggin & Son for $5,000, and cash paid on said day $4,271.35, and that he thereby became the owner of said property and the increase thereof, together with other property purchased by him and kept and used on the farm aforesaid, and that he had fully performed all the conditions of the agreement bearing date of February 10, 1883. It is also alleged that prior to the twenty-first day of February, 1888, the plaintiff had received from the defendant at five different times, money amounting in the aggregate to $19,938.44, which with interest it was understood should be applied on the $23,331 mentioned in the agreement executed on that day.

For a second defense it was alleged that defendant below had paid taxes on the plaintiff's real estate amounting to $1,092.18 and on his personal property amounting to $748.15; that he had made valuable and lasting improvements of plaintiff's land of the value of $1,000, and performed services for him in making loans and collecting money, $2,400; in digging wells, building fences and windmills, etc., $3,498; and in managing the farm and feeding and caring for plaintiff's stock, $1,500. He further alleges

that he is the head of a family, owning neither town lots nor lands, and claims his statutory exceptions from the property in controversy.

For reply the plaintiff admits the execution of the agreement on the 10th day of February, 1883, and alleges that during the time it was in force he had advanced the defendant large sums of money under said agreement, and had furnished him live stock and implements, so that on the 21st day of February, 1888, defendant was indebted to him in a large amount, and on that day they had a full and complete settlement of all matters of account on either side, at which it was found that defendant was indebted to him in the sum of $23,331, after deducting all credits, including all of the items set out in the answer. He denies the payment of $4,271.35 on that day as well as the $5,000 by check on the bank of Scroggin & Son, and denies that there had been a settlement at any time anterior to said date. He further alleges that he furnished to defendant the $8,762.30 mentioned in the agreement of February 10, 1883, and denies all other allegations of the answer.

The other defendants by answer pleaded their judgments against McClelland and claim to recover under the provisions of sec. 1 of the act approved February 19, 1877, Comp. Stats., chap. 32, sec. 26. The issues having been made up the cause was referred by the district court to Hon. E. F. Warren, with instructions to hear the evidence and report his findings of fact and conclusions of law to the court at a succeeding term thereof. Subsequently the report of the referee was filed, in which he found for the plaintiff below against all of the defendants. Exceptions to several of the findings by the defendants having been overruled, judgment was entered for the plaintiff below in accordance with the recommendation of the referee, and the case was removed to this court by petition in error. The report is too voluminous to set out at length in this opinion, while the evidence comprises five large volumes of

printed matter. Counsel for plaintiffs in error, realizing the difficulty under which we would labor in examining such a mass of evidence, have pointed out in their brief the parts thereof essential to an examination of all questions now at issue. We have carefully and patiently examined the proofs in question and are entirely satisfied with the conclusion of the district court.

Accompanying his report, the referee filed a written opinion which we find in the record, in which the questions involved are ably and fully discussed. Believing that the profession of the state is entitled to the benefit of his labor and learning, we copy it in full below, accepting his conclusion as the law of the case:

"LEONARD K. SCROGGIN,
Plaintiff,
v.
JOHN W. MCCLELLAND ET AL.,
Defendants.

"On the 21st day of February, 1888, the plaintiff and the defendant, John W. McClelland, entered into a written contract, which was in renewal of one containing similar provisions dated February 10, 1883, whereby said Scroggin leased to McClelland a section of land in Nuckolls county, Nebraska, for a term of years, with certain rents reserved; the contract then proceeds:

"'Said Scroggin agrees to loan to said McClelland the following property to be used on said farm, to wit: (Here follows a description of the cattle, horses, and stock.) And it is further agreed that when the said McClelland shall pay to said Scroggin the sum of $23,331, with the interest thereon at the rate of ten per cent per annum, together with the rents above specified, and all sums of money that said Scroggin may advance to or for said McClelland, with the interest thereon, then all the above described property (chattels) shall be conveyed to said second party by said Scroggin, together with the increase thereof; until such

payment such property shall be and remain the property of the said Scroggin.'

"Certain judgment creditors of the said McClelland levied upon the chattels, or some of them, and I have found, as a matter of fact, that they had no actual knowledge or notice of any claims of the plaintiff, and, while the contract was recorded as a chattel mortgage, it had annexed thereto no affidavit so as to make it constructive notice, if the instrument be construed as one of conditional sale. As between these creditors and the plaintiff, the question to be determined is: What is the legal force and effect of said contract? Is it 'a sale, contract, or lease, wherein the transfer of the title or ownership of personal property is made to depend on any condition?' If so, it is void as against such judgment creditors, without notice, of the vendee or lessee in the actual possession of the chattels. (Sec. 26, chap. 32, Comp. Stats.) But if it is a mere agreement to sell, or a bailment, coupled with the provision that the bailee or promisee may have the option of purchasing the chattels, it will not fall within the provisions of said section, and so need not have been recorded, or verified, as therein provided.

"Before the passage of the act of 1877, which is taken, in the main, from the Iowa statutes, a sale upon condition, reserving the title in the vendor, was held good as against purchasers and creditors of the vendee without notice. (*Aultman v. Mallory*, 5 Neb., 178; *Blunk v. Kelley*, 9 Id., 441.) And such is the general rule in the absence of a controlling statute, and no further authorities need be cited to sustain the position. But cases are found in which, under the guise of a lease, the title to personal property is reserved in the vendor or lessor. Familiar examples are found in the leases of sewing-machines or pianos, cars, and agricultural implements. Such contracts are held to be conditional sales—that is, sales with a condition that the title shall remain in the vendor until the

property is paid for. (*Murch v. Wright*, 46 Ill., 487; *Mich. Cent. R. Co. v. Phillips*, 60 Id., 190; *Heryford v. Davis*, 102 U. S., 235; *Hervey v. Rhode Island Locomotive Works*, 93 Id., 664.) And in all such cases, while as between the parties the title does not pass, they are held to be really sales upon condition; and so invalid as to purchasers and creditors without notice, under a statute similar to ours.

"Therefore, the first inquiry here is: Is there any sale of any kind, conditional or otherwise, of the chattels by Scroggin to McClelland? If there was no sale, but only *an agreement for a sale*, then not only would no title pass to the promisee, but it was unnecessary to record the instrument for the purpose of giving constructive notice to creditors and purchasers. A sale 'upon condition' invariably presupposes a *sale*. The language of the contract under consideration is, that on payment of a stated amount by McClelland, Scroggin will convey the chattels to him. Here there is no sale, since McClelland does not agree to purchase, and the minds of the parties have not met upon any such proposition; he does not agree to pay any amount whatever for the chattels; the essential elements, or some of them, of a sale, are wanting. 'To constitute a valid sale, there must be a concurrence of the following elements, viz: (1st) Parties competent to contract; (2d) Mutual assent; (3d) A thing, the absolute or general property in which is transferred from the seller to the buyer; and (4th) A price in money paid or promised.' (Benjamin, Sales, sec. 1.) Here, at most, there are but the first two requisites of a sale. In every conditional sale, or sale upon condition, the vendor can waive the condition and sue for the purchase price; this is one criterion. Here McClelland had agreed to nothing; he had merely an option of purchase—an agreement to sell upon compliance with certain conditions, and it is not claimed that those conditions have been complied with. Scroggin could not

sue for the purchase price on the contract, and herein the case at bar differs from the sewing machine, piano, and other like cases; in those the vendee has agreed to pay the 'rents' reserved, and it is provided that on payment of the last installment the chattel is to be the property of the lessee, or that the vendor will then execute a bill of sale therefor. In case of the loss of these chattels by an epidemic upon whom would the loss have fallen? Upon Scroggin or upon McClelland? Clearly upon the plaintiff, since there was no sale.

"Sec. 26 of chap. 32, Comp. Stats., is similar to the provisions of sec. 1922 of the Iowa Code, and was taken therefrom. The judicial construction given to the section by the supreme court of Iowa was also adopted by the legislature of Nebraska in enacting it. (*Campbell v. Quinlin*, 3 Scam. [Ill.], 288; *Martin v. Judd*, 81 Ill., 488; *Hopkins, v. Medley*, 97 Id., 404.)

"In *Budlong v. Cottrell*, 64 Iowa, 235, Cottrell ordered from Budlong nineteen harrows, thirty cultivators, and other property, all with the prices carried out, and the contract contained a stipulation to pay the price in these words: 'We agree to settle for all goods herewith and subsequently ordered by giving our notes. The title, ownership, and right of possession shall be and remain in Budlong until settled for as provided in this contract.' Cottrell mortgaged the goods before a settlement, and the question was as between the 'owners' and such mortgagees, there being no record of the contract under sec. 1922 of the Iowa Code. The court says: 'The theory of the contract is that it was to be fully executed by both parties at substantially the same time, and that until fully executed neither the title to the property nor any right or interest therein should pass.' And the court held it to be neither 'a sale, contract, or lease' within the meaning of said sec. 1922. (See also *Colton v. Wise*, 7 Brad. [Ill. App.], 395; *Hunt v. Wyman*, 100 Mass., 199; *Emerson v. Fisk*, 6 Greenl. [Me.],

200; *Weir Plow Co. v. Porter*, 82 Mo., 23; *Mowbray v. Cady*, 40 Ia., 604.)

"In *Austin v. Dye*, 46 N. Y., 500, the court says: 'It is well established that neither an ordinary bailee of property nor any one having possession under an executory agreement to purchase can give title thereto to a purchaser, although the latter acts in good faith and parts with value without knowledge or notice of the want of title of his vendor, or that third parties have claims upon the property.' And in *Comer v. Cunningham*, 77 N. Y., 398, the court reviews the cases and draws the distinction made in the case at bar.

"*Chamberlain v. Smith*, 44 Pa. St., 431, was a case where one McWharter took from Benson chattels under the following contract: 'Received of John Benson one pair of three-year-old past stags to keep and work for the term of one year; said cattle to be returned in one year. But said McWharter has the privilege, by paying $40 and legal interest at the expiration of the year, to keep said cattle.' Held, a bailment and not a conditional sale. To the same effect, *Becker v. Smith*, 59 Pa. St., 469; *Middleton v. Stone*, 111 Id., 596.

"In *Hart v. Carpenter*, 24 Conn., 426, C. put one Beebee in possession of a cow under the following contract: 'Beebee to keep and fodder, paying himself therefor out of the milk and butter, and if at any time within four months, or at the expiration of four months, said B. should pay for said cow $35, then, on payment, the title of said cow shall vest in said B., but if within said time he shall not pay said amount,' the cow was to be returned. Held, a mere letting of the cow, with the privilege of purchase by paying the stipulated price, and not a sale either absolute or conditional. And the purchaser Hart, without notice of Carpenter's rights, obtained no title to the cow. In this case it will be noticed that Beebee promised to pay nothing; he did not agree to purchase; he could not have been sued

for the contract price; and therein it is analogous to the case at bar.

"In *Lickbarrow v. Mason*, Smith's Lead. Cas., vol. I, pt. II, p. 1227, it is said: 'There is more plausibility than force in the argument that a man who enables another to establish a false credit by intrusting him with the possession of goods should bear the loss if third parties are deceived. Personal property would be comparatively valueless to the owner if he could not suffer it to go out of his keeping into that of a bailee or agent without enabling the latter to pass the title by a fraudulent sale.'

"In cases cited by counsel for creditors to show the transaction in the case at bar to be a conditional sale, there is always a promise by the vendee or promise to pay for the chattels or goods delivered; and in such cases, no matter under what form the transaction is disguised, it is held to be a conditional sale, and not a bailment. (See *Bryant v. Crosby*, 36 Me., 562; *Plummer v. Shirley*, 16 Ind., 380; *Rowan v. Union Arms Co.*, 36 Vt., 129.)

"In *Miles v. Edsall*, 14 Pac. Rep. [Mont.], 701, Edsall leased to Murphy cattle at a certain rent, with the understanding that the tenant might purchase at any time during the hiring, at a certain price, by paying the difference between the rent paid and such price, the title meanwhile remaining in the lessor; it was held that the transaction was valid as lease with the privilege of purchase, and the chattels were not liable for the debts of the lessee.

"The supreme court of the United States, in the recent case of *Harkness v. Russell*, 118 U. S., 663, have considered this question, only that the facts in that case were more favorable to the creditors than in the one at bar. There Russell delivered to Phelan & Ferguson certain boilers and engines, upon the express condition that the title should remain in the vendors until payment. Russell took the vendees' notes for the price; some of the notes had been paid; Phelan & Ferguson sold the machinery to

a third party. The case arose under the statutes of Idaho, which contain a provision with regard to the affidavit required to be filed similar to ours. In a long and well considered opinion the court, by Bradley, J., says, the first question to be decided is 'whether the transaction was a conditional sale or a mortgage; that is, whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase money.' If the latter, it was conceded to be void as against third parties because not verified by affidavit, and not recorded as required by the laws of Idaho. The court held it to be an agreement for a conditional sale, and in conclusion says: 'It is only necessary to add, that there is nothing, either in the statute or adjudged law of Idaho, to prevent, in this case, the operation of the general rule, which we regard as established by overwhelming authority, namely, that, in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction; and the further rule that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed.'

"If these views are correct, it follows that the judgment creditors of John W. McClelland acquired nothing by the levy of their executions upon the chattels in the possession of the defendant McClelland, and that, as against them, the plaintiff must recover.

"In this discussion I have treated the instrument as in no sense a mortgage taken by Scroggin to secure a debt. It is true that the contract speaks of the 'debt' and the 'indebtedness' owing by McClelland to Scroggin, and provides that in case any of the cattle are sold with the plaintiff's consent, the proceeds shall be applied 'upon the above indebtedness,' yet I do not consider such carelessness and in-

artistic expressions as controlling, or as overruling the plain import of the language used elsewhere. But, if it were the fact that the relation of debtor and creditor existed under the contract, and if the contract is to be construed as a mortgage given to secure the same, the judgment creditors will be in no better position, since the contract was recorded as a chattel mortgage in Nuckolls county, and, therefore, was constructive notice to all persons. But the creditors themselves strenuously insist that the instrument must be construed as one of conditional sale, and not a mortgage.

"The only question of fact worthy to be considered here is that relating to the alleged application of the $20,000, deposited in the bank of Scroggin & Son, at Mt. Pulaski, Ill., by the defendant John W. McClelland. The plaintiff claims, and so testifies, that all those moneys were applied to the payment of the notes and drafts given by the defendant; McClelland swears that not one dollar of that sum was so applied, but further, that it was agreed between himself and the plaintiff, on February 21, 1888, that that sum stood to McClelland's credit on the books of the bank, and was to be credited, with other items, upon the $23,331 mentioned in the contract, whenever they should have a final settlement at the end of two years. To determine this question I have gone into the accounting between the parties since the date of the first contract in 1883; I have charged McClelland with all sums of money he admits having received from Scroggin, or that the proofs show that he did receive. He admits that on February 21, 1888, the plaintiff surrendered to him unpaid notes and drafts amounting, with interest, to the sum of $21,015.73. A large number of similar notes and drafts had been paid and taken up by McClelland before that time, but there is no evidence as to the time when they were so paid, nor when the moneys on deposit were applied thereto, if they were so applied. I have, therefore, charged McClelland in-

terest on all those notes and drafts to an arbitrary date—the date of the last settlement, February 21, 1888—and have allowed interest on the deposits to the same date; this method does injustice to neither. And the figures show that prior to that date McClelland was properly chargeable with notes and drafts, including interest, to the amount of $28,501.96; and that he had paid about $29,-500. How was this large sum of money paid? McClelland atttempts to show two cash payments, one of $2,500, made to Scroggin in Kansas, and another of $4,271.35, made at the date of settlement, February 21, 1888. The plaintiff swears positively that no such cash payments were ever made to him; while McClelland is corroborated as to the first transaction by his brother George, and as to the latter by his wife, his brother-in-law, and his young son.

"It will perhaps be sufficient to say that the court could not, and cannot, accept as conclusive the evidence of these payments, contradicted as they are by the circumstances surrounding the transactions. Men do not do business in that way. It is incredible that McClelland should have had in his possession large sums of money, of cash, amounting to thousands of dollars, and at the same time be so hard pressed for cash that he could not and did not pay his hired hands their wages, but gave his notes at ten per cent interest therefor, and should suffer his bank account to be overdrawn for small amounts for weeks at a time with the consequent loss of credit. He at the same time was borrowing large sums of money of Scroggin and paying ten per cent interest on the loans. And when pressed to explain his possession and acquisition of such large sums of money, and how he came to receive it to put into a satchel, which resembled the widow's cruse of oil, he refuses absolutely to answer, refuses to explain the source of his income, refuses to tell from whom it was derived, shielding himself from answering behind the provisions of the statute which protect a witness from testify-

ing when his answers may subject him to a criminal prosecution, or tend to expose him to public infamy and ignominy. The court is asked to believe that the defendant did business as no other man ever did business before under similar circumstances. The court is the keeper of no man's conscience, and unless bound by the evidence of four witnesses as against one, and all unimpeached, must reject the testimony as too improbable for belief. A boat is missing from its moorings on the Missouri river; it is found six miles above on a sand bar upon the premises and under the control of an individual who, when called upon to account for the possession of the boat, brings into court a half dozen unimpeached witnesses, who testify that they saw the boat floating up the stream without other motive power than that afforded by the current itself. Is the court bound to accept the testimony as true, even if uncontradicted? I doubt it. (*Elwood v. Western Union Tel. Co.*, 45 N. Y., 549; *Koehler v. Adler*, 78 Id., 291.) The story of these cash payments, taken in the light of the surrounding circumstances, is as improbable, if not impossible, as would be the floating of boats up the current of the Missouri river by force of the current alone. The mind rejects it as untrue.

"Throwing those two items out of the account, therefore, and giving to McClelland credit for all sums he has proved he paid to Scroggin, and we find that he has paid about $29,500; that is, very nearly the amount of the deposits and interest, and the $6,000 of drafts and interest. The slight difference between this sum and amount with which he is properly chargeable is easily accounted for by the allowance of interest, or mistake in computation, and the coincidence is startling. He had owed about $28,500, and he had paid about $29,500, if we include in such payments the moneys deposited in the bank at Mt. Pulaski. If these moneys are deducted, if they still stand to his credit, how has he shown payment of the notes and drafts?

"Let us tabulate the figures:

"'John W. McClelland,

"'In account with Leonard K. Scroggin.

Dr.

To notes surrendered Feb. 21, 1888		$21,015 73
notes paid prior to Feb. 21, 1888		28,501 96
rent of 'home farm' for 1886 and 1887		1,000 00
products of other farms for 1886 and 1887,		2,315 27
amount due on contract of 1883		13,170 07
Total indebtedness		$66,003 03

Cr.

By deposits and interest	$22,321 17	
real estate taxes paid	1,279 13	
improvements 'home farm'	3,498 00	
improvements other farms	1,000 00	
drafts and interest	7,231 94	
check of Feb. 21, 1888	5,000 00	
services rendered	2,500 00	
		42,830 24
Balance due Scroggin		$23,172 79'

"The closeness of these figures to the amount stated in the contract of February 21, 1888, is another of the significant coincidences of this startling case. They agree to within $160, and that difference easily explainable as an honest mistake, error in computing or otherwise, and would have justified the referee in finding as a fact in this case, that on the 21st day of February, 1888, the parties did have a settlement and accounting and the balance of $23,331 was found due to the plaintiff, as he alleges. Here is further confirmation of the fact that the moneys in bank at Mt. Pulaski were in truth applied to the payment of the notes and drafts of McClelland. McClelland has shown no sources from which he could have paid them, outside of

the deposits. But there is one other, and a conclusive reason why it must be so: the written contract between the parties provided that the proceeds of all sales should be so applied. It was ample authority to Scroggin, without a special transfer thereof on the books of the bank, to so apply them.

"To have found as a fact that such settlement, accounting, and balance due were had and found on said date as a fact herein, would have saved the referee a vast amount of labor and comparison of figures, but would have been convincing, nor satisfactory, to neither of the parties to the action; while the tabulating of the figures and the statement of the accounts from the commencement of their dealings give almost a mathematical demonstration that we have arrived at a correct conclusion in the case.

"Respectfully submitted.

"E. F. WARREN, *Referee.*"

There being no error apparent of record the judgment should be

AFFIRMED.

THE other judges concur.

MILWAUKEE & WYOMING INVESTMENT COMPANY V. ADDISON B. JOHNSTON ET AL.

[FILED OCTOBER 26, 1892.]

1. **Principal and Agent:** AGENT'S AUTHORITY: USAGE: LIMITATIONS. Where a principal empowers an agent to transact business with respect to which there is a well defined and publicly known usage, the presumption is, in the absence of facts indicating a different intent, that such authority was conferred in contemplation of such usage, and persons dealing with such agent in good faith will not be bound by limitations upon such usual authority.

2. ———: ———: ———. But such usage, to bind a principal, must have existed for such a time, and become so widely and generally known, as to warrant the presumption that he had it in view at the time of the appointment of the agent.

3. ———: ———: ———: RULE APPLIED. The M. & W. I. Co., a Wisconsin corporation owning a cattle ranch in Wyoming, appointed one A. its agent in Wyoming with limited power, viz., to hire and pay for the necessary help, and pay the current expenses with money remitted on his statement, and to care for and round up the cattle and ship them when fit for market to Chicago in care of a particular commission house. In an action of replevin by the company aforesaid against J. & R., to recover cattle claimed by the latter to have been purchased from A. on the ranch aforesaid, *held*, error to receive evidence on the part of the defendants to prove that, at the time they purchased the cattle from A., it was the custom or usage of managers of cattle companies doing business in Wyoming to sell the cattle from the ranches of such companies, in the absence of any evidence that the plaintiff company had knowledge of such usage.

ERROR to the district court for Merrick county. Tried below before MARSHALL, J.

George H. Noyes, and *J. W. Sparks*, for plaintiff in error:

Where authority is conferred by an express agreement the extent thereof must be ascertained from the agreement or instrument itself, and cannot be enlarged, modified, or controlled by evidence of implied authority at variance with that which was given expressly. (Story, Agency, sec. 76; *Schooner Reeside*, 2 Sumner [U. S.], 567; *Dickinson v. Gay*, 7 Allen [Mass.], 29; 1 Greenleaf, Ev., sec. 292, 293; Mechem, Agency, sec. 274; *Hopper v. Sage*, 112 N. Y., 530.) Usage cannot enlarge or vary the authority or character of an agent, where such powers or authority have been conferred by express contract, or by instrument in writing. (*Robinson v. Mollett*, L. R. 7, H. L. [Eng.], 802; *Higgins v. Moore*, 34 N. Y., 417; *Hibbard v. Peek*, 75 Wis., 619; *Lamb v. Henderson*, 63 Mich., 302; Story,

Agency, sec. 76; *Assurance Soc. v. Ins. Co.*, 84 Va., 116; *Hermann v. Ins. Co.*, 100 N. Y., 411; 2 Parsons, Contracts, 546; *Graves v. Horton*, 38 Minn., 66; *Lucke v. Yoakum*, 25 Neb., 427; *Wanless v. McCandless*, 38 Ia., 24; *Bradley v. Wheeler*, 44 N. Y., 503.) Plaintiff must be shown to have knowledge of custom before it can be bound by it. (Mechem, Agency, sec. 262; *Walls v. Bailey*, 49 N. Y., 464; *Barnard v. Kellogg*, 10 Wall. [U. S.], 383; *Hopper v. Sage*, 112 N. Y., 530; *Pickert v. Marston*, 68 Wis., 465; *Power v. Kane*, 5 Id., 268; *Hall v. Storrs*, 7 Id., 277.) Every person who contracts with the officers or agents of a corporation must at his peril take notice of the limits of their powers. (*Wheeler v. Plattsmouth*, 7 Neb., 270, 279; *Graul v. Strutzel*, 53 Ia., 712, 715; *N. Y. I. M. v. Negaunee Bank*, 39 Mich., 644.) Representations by agent cannot establish fact of agency. (*Bond v. R. Co.*, 62 Mich., 643; *Delta Lumber Co. v. Williams*, 73 Id., 86.) Agent had no implied authority to sell. To authorize an inference of authority where none is expressly conferred, it must be practically indispensable to the execution of the duties really delegated. (*Bickford v. Menier*, 107 N. Y., 490; *Dodge v. McDonnell*, 14 Wis., 553*; *Coquillard's Adm'r v. French*, 19 Ind., 274; *Billings v. Morrow*, 7 Cal., 171; *Hodge v. Combs*, 1 Black [U. S.], 192.)

John L. Webster, contra, cited: *Spangler v. Butterfield*, 6 Col., 356; *Sacalaris v. E. & P. Co.*, 18 Nev., 155; *Adams M. Co. v. Senter*, 26 Mich., 73; *Grafins v. Land Co.*, 3 Phila., 447; *Lee v. Pitts C. M. Co.*, 56 How. Pr. [N. Y.], 376; *Griswold v. Gebbie*, 126 Pa. St., 353; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y., 415; *McKiernan v. Lenzen*, 56 Cal., 61; *Antoine v. Smith*, 40 La. Ann., 560; *Brooks v. Martin*, 2 Wall. [U. S.], 70; *Niemeyer v. Wright*, 75 Va., 239; *Pratt v. Short*, 79 N. Y., 437; *Prince v. Church*, 20 Mo. App., 332; *Bowditch v. Ins. Co.*, 141 Mass., 292; *Larned v. Andrews*, 106 Mass., 435; *DeMers v. Daniels*, 39 Minn., 158.

A. Ewing, also, for defendants in error.

POST, J.

This was an action of replevin commenced by the plaintiff in error, a corporation organized under the laws of the state of Wisconsin, to recover the possession of 250 head of cattle. The plaintiff is organized for the purpose of acquiring land in Wyoming and raising and selling cattle therefrom. Its capital stock is $500,000, and its business is managed by a board of directors. It owns and carries on a ranch with a large number of cattle in Wyoming. By its by-laws, all deeds, contracts, and other instruments in writing to which the company may be a party, are required to be signed by its president and secretary, which latter officer is to affix the seal thereto. The president is invested with the general care and supervision of the affairs and property of the company. It is the duty of the treasurer to receive and pay all moneys, and he is custodian of contracts and other papers belonging to the company. The by-laws provide that there may be appointed, by the board of directors or executive committee, a manager and subordinate officers and agents, and further that the manager shall reside and keep his office in the territory of Wyoming, and shall have the charge and management, subject to the orders of the directors, of all the affairs and property of the company. He may appoint employes and agents necessary to protect and take care of the property and interests of the company, and fix their salaries subject to the approval of the board or the executive committee. He is prohibited from contracting any debt or entering into any contract involving an expenditure of more than $500, unless specially authorized by the directors or executive committee. The office of the company is to be in Milwaukee as well as those of the secretary and treasurer.

The testimony on behalf of the plaintiff was, in substance, that George Mitchell, a stockholder, director, and vice president of the company, managed its affairs in Wyoming down to the fall of 1887, when one Chadwick acted in that capacity until the fall of 1888, but neither had authority to sell the cattle, but shipped them as directed, to the commission house of Geo. Adams & Burke, Chicago, to sell and remit the proceeds to the treasurer at Milwaukee. At a meeting of the board of directors of the plaintiff, held in Milwaukee, July 7, 1887, the president was instructed to make such changes in the management of the ranch as might in his judgment be necessary for its more economical management, and that, in pursuance of such instructions, in November, 1888, he employed one Thomas R. Adams to perform certain specified duties on the ranch, instructing him to purchase supplies therefor, hire the men, and send in the accounts monthly to the treasurer at Milwaukee, who would remit the money for the payment thereof; to gather the cattle on the round up and ship them to George Adams & Burke, Chicago. Adams was given no authority to ship cattle elsewhere, nor was he authorized to sell or dispose of the cattle at any time or in any way or place. He had specific instructions from the officers of the plaintiff company not to sell any cattle from the ranch. These instructions were verbal, given him at the time of his employment and never modified thereafter. In addition to the above terms of hiring, there was no official or corporate action appointing Adams as manager, and no record in the minutes of the company of his employment. He had instructions in writing from the president of the company on or about the 20th of July, 1888, to consign about 300 four-year-old steers and 400 three-year-old steers to George Adams & Burke, billing them by the way of Omaha to Chicago to be sold at one or the other of such places by such commission house. It also appears undisputed by the record that

Adams had never sold any cattle prior to the time in question. It also appears to be undisputed that he had never sold anything from the ranch except some old fence wire, and exchanged with a neighboring ranch a part of a cow killed for beef, but such facts are unknown to plaintiff, or any of its officers or directors prior to the time of the institution of this suit.

The testimony on behalf of the defendants shows that in October, 1889, said Adams, through one T. D. Perrine, a cattle salesman of Omaha, negotiated a sale of 250 head of three and four year steers from the plaintiff's ranch to the defendants, at $22 per head; that the defendants were in Wyoming at the time of such transfer, and having been informed by Perrine of Adams' offer, directed the latter to look the cattle over and select 250 head from them and take charge of their shipment to Central City, Nebraska. Rush wrote out a check for $1,000 on a bank of Pittsburg, Pennsylvania, payable to Thomas Adams, which he gave to Perrine to be delivered to Adams as part payment for the cattle. The testimony is, that he made the check payable to Adams instead of to the company or its treasurer, or other of its officials, because at the time he could not think of the name of the company. A day or two after the delivery of the first check, Rush gave Perrine another check for $4,000, payable to Adams on a bank in Chicago, and authorized Adams to draw for the balance. Perrine deposited, in a bank at Cheyenne, Rush's check for $1,000, November 1, 1889; the check for $4,000, November 11, 1889, and a check for $480, on the 14th of November, 1889. This money was all checked out by Adams for his own use. This transaction with Adams was the first one that was ever had with him, either by Perrine or the defendants. Nor had either Perrine or the defendants ever before dealt with the plaintiff or any of its officers or employes, nor was it shown that either of the defendants had ever heard of a similar transaction by Adams. Soon after

this transaction Adams left the ranch and ran off to Canada. It appears that no bill of sale or other instrument, in writing, was delivered by Adams or received by the defendants for the cattle, and that no writing of any kind passed between them in the negotiations for, or the consummation of, the transfer and delivery of the cattle. The defendants, over the objections of the plaintiff, were permitted at the trial to show that there existed in the territory of Wyoming, at the time in question, a custom or usage for the manager or general manager of cattle ranches or cattle companies doing business in that territory to sell the cattle from the ranches, and that said Adams was such manager, as would, under such a custom of usage, be empowered to make a valid sale of cattle on the ranch. There is no evidence tending to prove that plaintiff or any of its officers had knowledge of such a custom or usage. On the other hand the positive evidence of all of such officers is, that if any such usage existed at the time in question it had never been heard of by them. The rule is, that where a principal entrusts to his agent the management of business with respect to which there is a known and generally recognized usage, as to third persons dealing with such agent the principal will be held to have intended him to act in accordance with such usage, and in the absence of notice thereof third parties will not be bound by any limitation upon such usual authority. But this rule has its limitations. For instance, it is said by Mechem in his recent work on the Law of Agency, sec. 281: "In order to give the usage this effect it must be reasonable; it must not violate positive law, and it must have existed for such a time and become so widely and generally known as to warrant the presumption that the principal had it in view at the time of the appointment of the agent; but if the usage was a purely local and particular one, the principal may repel this presumption of knowledge by showing that in fact he had no notice of it;" and the doctrine of the cases in this country

may be summarized thus—Custom or usage in a trade or business may be shown for the purpose of interpreting a contract or controlling its execution, but not for the purpose of changing its intrinsic character, provided it is known to the party sought to be charged thereby, or is so well settled and so uniformly acted upon as to create a reasonable presumption that it was known to both contracting parties and that they contracted with reference to it. (*Bradley v. Wheeler*, 44 N. Y., 495; *Walls v. Bailey*, 49 Id., 464; *Hopper v. Sage*, 112 Id., 530; *Paine v. Smith*, 33 Minn., 495; *Globe Milling Co. v. Minneapolis Elevator Co.*, 44 Id., 153; *Corcoran v. Chess*, 131 Pa. St., 356; *Brown v. Foster*, 113 Mass., 136; *Barnard v. Kellogg*, 10 Wall. [U. S.], 383; *Power v. Kane*, 5 Wis., 268; *Hall v. Storrs*, 7 Id., 253*; *Pickert v. Marston*, 68 Id., 465; *Raisin v. Clark*, 41 Md., 158; *Keystone v. Moies*, 28 Mo., 243; *Steele v. McTyers Adm'r*, 31 Ala., 677; *Reynolds v. Ins. Co.*, 36 Mich., 142.)

In Evans on the Law of Principal and Agent, 544, is cited with approval the case of *Robinson v. Mollett*, 7 Eng. & Ir. App. L. R., 802, which is quite similar to this. In that case it is said by Lord Chelmsford: "The effect of this custom is to change the character of a broker who is agent to buy for his employer into that of a principal to sell for him. No doubt a person employing a broker may engage his services upon any terms he pleases, and if a person employs a broker to transact business for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts and do not change their intrinsic character. * * * * Of course if the appellant knew of the existence of the usage and chose to employ the respondents without any restrictions upon them, he might be taken to have authorized them to act for him in conformity to such usage." He further says that such usage should have no application to a person ignorant of

its existence, particularly where it would give the agent an interest wholly opposed to that of his principal. It will be noticed (1) that the usage proved in this case is local in its application, since it is confined to the territory (now state) of Wyoming only; (2) the managing officers of plaintiff were ignorant of it if any such custom existed; (3) there is no evidence in the record which warrants the presumption that plaintiff, in appointing Adams as its agent, acted with reference to such a usage. The question at issue is the apparent scope or extent of Adams's authority with respect to the cattle on the ranch, and whether, under the circumstances of the case, strangers dealing with him were justified in assuming that he was authorized to sell and dispose of them. That question is to be determined (1) from the authority actually given by the plaintiff; (2) from the conduct of the parties with respect to the ranch and the property thereon. For it will not be questioned that if the conduct of Adams in that respect, within plaintiff's knowledge, was such as to warrant the defendants in believing that he was authorized to sell the cattle on the ranch, and that they bought and paid for them relying upon such apparent authority, the plaintiff would now be estopped to deny their title, whatever may have been the authority actually conferred by it upon its said agent.

We think that the court erred, therefore, in receiving evidence of a usage for managers to sell cattle, the product of the ranches of Wyoming. It is, without doubt, competent for persons or corporations engaged in a like business to entrust to a manager or general agent the power to sell and dispose of their property. It may be further admitted that said authority has been conferred by a majority of cattle companies doing business in that state. But the rule contended for by defendants in this case would, in our opinion, prove subversive of the interests such companies are intended to promote. Since the judgment must be reversed, for reasons stated, it is not deemed necessary to consider the

other questions presented. With respect to the sufficiency of the evidence it may be said that we are not at liberty to presume that the same evidence will be adduced on a second trial. We have therefore no occasion to express an opinion upon that question. The judgment of the district court is reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

J. P. ALBERT, APPELLANT, V. JAMES P. TWOHIG, COUNTY CLERK, ET AL., APPELLEES.

[FILED NOVEMBER 2, 1892.]

1. **Contest of Election:** EVIDENCE: PRESERVATION OF BALLOTS. In a contest of election the ballots cast at the election constitute the primary evidence to determine the rights of the respective parties. It must appear, however, that they have been preserved substantially in the manner and by the officers prescribed by the statute. If they have been placed in a position to be tampered with by interested parties, the burden of proof is on the party offering them in evidence to show that they are in the same condition as when sealed up by the several election boards.

2. ———: JURISDICTION OF DISTRICT COURT. The district court has jurisdiction in case of contested election in relation to township organization.

3. **Statutes:** VALIDITY: REPEAL BY IMPLICATION. Repeal by implication is not favored, and a statute will not be declared so repealed unless the repugnancy between the new statute and the old one is plain and unavoidable.

4. ———: ———: TOWNSHIP ORGANIZATION. *Held*, That the several statutes in relation to township organization to which objections are made are valid and are to be construed together; that section 7 of the act of 1891 in reference to elections, was

designed to apply to future elections and does not affect art. 4, sec. 4, chap. 18, Comp. Stats., which provides for temporary organization.

APPEAL from the district court for Dakota county. Heard below before NORRIS, J.

Davis, Gantt & Briggs, for appellant.

Barnes & Tyler, and *Jay & Beck, contra.*

MAXWELL, CH. J.

Contestant alleges that he is an elector of Dakota county, competent to bring the action; that James P. Twohig is the duly elected, qualified, and acting county clerk of Dakota county; that Wm. Taylor, M. Beacon, and J. O. Fisher are duly elected, qualified, and acting board of commissioners of said county; that E. B. Wilbur, E. L. Wilbur, and C. D. Smiley are residents and electors of said county, and as such, with certain other electors, to the number of thirty-five, signed a petition which was filed on the 13th of August, 1891, in the office of the county clerk of Dakota county, and which asked the board of commissioners to submit to the voters of Dakota county the question of township organization, at the general election held on the 3d day of November, 1891; that this question was submitted and voted on at said election, and that the highest number of votes cast at said election, for any office, was fifteen hundred, and on the question of township organization there was cast for township organization 826, and against township organization 154, and that 620 of the electors voting at said election did not vote on said question; that the canvass of votes showed an apparent majority of 52 for township organization and the same was declared to be carried.

As the grounds of the contest, the contestant alleges that the election is illegal and void—first, because the act of

the legislature, providing for township organization, is unconstitutional; second, because the act of the legislature providing for township organization is incomplete by reason of defects and omissions in the act providing for the same, and it is impossible to organize and carry on the business of the county under the laws that now exist; third, because a part of the law relating to township organization was passed by the legislature of 1879, and incorporated in the acts of the legislature of 1879 under the head of revenue, as is found in said laws, being sections 62 to 72, inclusive, of said act in relation to counties, and 91 to 101, inclusive, under the head of revenue; and at the time of the passing of said act no provision had been made by the legislature providing for township organization, nor was any provision made until the session of 1883, at which time the act providing for township organization was passed; and said last act is incomplete without incorporating therewith the acts of 1879; and said acts are not in said act of 1883, or in any other act of the legislature referred to, or adopted or made a part of said law, or in any manner referred to; nor is the same adopted by any other act of the legislature passed before or since that date; and said act of 1883, and any amendment thereto made since, is incomplete and void without said acts of 1879 being considered therewith, for the further reason that the legislature of 1891, in chapter 23 of the laws of said session, amended section 7 of the Compiled Statutes, entitled Elections, and by said amendment repealed, by implication, that part of section 5 of the original act of 1883, and the amendment thereto, that provided for the election of supervisors at the same time the question of township organization was submitted to the electors, and by reason thereof the election of supervisors at said election is null and void; that no petition for the submission of said question, signed by fifty legal voters of said county, was filed with the county clerk and acted upon by the commissioners

in calling said election; that the commissioners of said county, in submitting said question to a vote, did not make any finding that a petition containing the names of more than fifty legal voters of said county had been presented to them asking that said question be submitted; that in each precinct in said county illegal votes were cast and counted, sufficient in number to change the result of the election, and by persons whose names are unknown to contestant.

In their answer the defendants allege: First, that the court has no jurisdiction to try and determine the questions raised by the petition. Second, that there is a defect of parties defendant in this cause. Third, denying that Albert, the contestant, is an elector of Dakota county, and competent to contest in this cause. There are a number of admissions that need not be noticed.

The cause was referred to a referee to take the testimony and find the facts. The referee took the testimony and made his report as follows:

"I find that at the general election held on November 3, A. D. 1891, within Dakota county, Nebraska, the question of township organization was submitted to the electors of said county, and that the total vote on said question as returned by the several election boards of the county and as canvassed and declared by the canvassing board of said county, is as follows, to-wit:

For township organization	826
Against township organization	154
Leaving an apparent majority for township organization of	672

"I further find that no return was made as to any double ballots being cast.

"Second—I find that on the recount of the ballots of the several precincts of said Dakota county, Nebraska, by me as referee, of the votes cast in said county at the general

election held in said county on the 3d day of November, A. D. 1891, said ballots showed the following facts, to-wit:

For township organization	697
Against township organization	162
Ballots voted with two crosses, both for and against township organization	136
Ballots that were voted blank, neither for nor against township organization	497
Ballots not counted	5
Total vote of county	1497

"Third—I find and report that the ballots of Covington precinct were in a ballot box which had been opened for the taking out of the poll book; and that the ballots of Omadi precinct were in a paper sack, a common grocery sack, and that the same were unsealed when they were given to me to recount; and that the ballots of St. John's precinct were opened and unsealed when they were given to me to recount; and that the ballots of Hubbard precinct were tied in a compact, almost square bunch with a string through the center of them, and they were well sealed up in an envelope provided for that purpose, when they came into my hands for the purpose of the recount; and that the ballots of Dakota precinct were in a large package and apparently attempted to be sealed, but not much sealed when they came into my hands for the purpose of the recount; and that the ballots of Summit, Pigeon Creek, and Emerson precincts were apparently sealed up properly at the time they came into my hands for the purpose of the recount. I further find that the ballots of all eight precincts of Dakota county were on strings.

"Fourth—I find that the testimony taken by me, as hereto attached and herewith reported, of parts or all of the several members of the election boards of Covington, Omadi, St. John's, and Hubbard precincts, tends to sustain and affirm the returns as made by them to the canvassing

board of the county, as set forth in the poll books of the said several precincts, of the general election held on the 3d day of November, 1891, and as canvassed and declared by the canvassing board of said county.

"Fifth—I find that the testimony taken by me, as hereto attached and herewith reported, of parties other than the members of the several election boards mentioned in the fourth finding herein, tends to establish the fact that said ballots were in the condition, at the time I received them for the purpose of the recount herein, that they were in when they were first deposited in the vault of the county clerk of said Dakota county, Nebraska, after the official canvass of the vote of said several precincts was completed.

"Sixth—I find that the vault of the county clerk of Dakota county, Nebraska, wherein the ballots cast at the general election held in said county on the 3d day of November, 1891, were kept, is very unsafe and insecure, and that said vault is not kept locked either by day or night, and that said ballots were readily accessible to others than their proper custodians."

It will thus be seen that the ballots from some of the precincts were not sealed up when sent to the county clerk and that they were not kept by him in a place free from access of persons generally. The court below refused, under these circumstances, to recount the ballots. Did it err?

The first objection of the defendant is to the jurisdiction of the court in case of contest of election. In *Burke v. Perry*, 26 Neb., 414, it was held, in effect, that a contest of election for county seat was an action and was properly brought in the district court. We see no reason to change our views in that regard and therefore hold that the court below had jurisdiction and that the case is properly here.

Second—As between the ballots cast at an election, and a canvass thereof by the election officers, the former are the primary and controlling evidence; but in order that they

may continue controlling evidence it must appear that they have been preserved in the manner and by the officers prescribed by the statute. (*Hudson v. Solomon*, 19 Kan., 177.) In the case cited it is said: "It is a primary rule of elections that the ballots constitute the best, the primary evidence of the intentions and choice of the voters. (*State v. Judge*, 13 Ala., 805; *People v. Holden*, 28 Cal., 123; McCrary, Elections, secs. 291, 439; Cooley's Const. Lim., 625.)

In the case from California the court uses this language: "Intrinsically considered, it must be conceded that the ballots themselves are more reliable, and therefore better evidence, than a mere summary from them. Into the latter errors may find their way, but with the former this cannot happen. The relation between the two is at least analogous to that of primary and secondary evidence." A canvass is but a count of the ballots, a convenient and expeditious method of determining the choice of the people as disclosed by the ballots, and therefore but secondary evidence. The necessities of the case make it *prima facie* evidence, but unless expressly so declared by statute it is never conclusive. (*State v. Marston*, 6 Kan., 524; *Russell v. State*, 11 Id., 308.)

As between, therefore, the ballots themselves and a canvass of the ballots, the ballots are controlling. This is, of course, upon the supposition that we have before us the very ballots that were cast by the voters. And this presents the difficult question in this case. For, as under the manner of our elections, there is nothing to distinguish one ballot from another of those cast by the members of the same party, as no file-mark or other mark is made in the canvass or otherwise after the election upon any ballot, by which its actual use at such election may thereafter be established, and as at any election there is always a large surplus of unused ballots, it is evident that if opportunity were offered ballots might be withdrawn from the box and

others substituted, with but little chance of detection. Thus in the case before us, if there was but a single officer to elect, and but a single name on the ballot, how easily could one having access to the box throw in twenty-three or four additional ballots, and thus bring about the very difference that appears before us now. And who could thereafter tell which were actually voted, and which subsequently thrown in? The ballot, then, upon its face containing no marks of identification, we must look *aliunde* for evidence of the identity of those offered and counted before us with those actually cast at the election. And this evidence we find in the testimony as to the manner in which the ballots have been preserved, a comparison of the canvass made as to all the officers voted for at that election, with the result as shown by the ballots, and certain other circumstantial evidence; and it was held that the proof in regard to the safe keeping of the ballots in that case was sufficient to admit them as evidence.

The question was again before the supreme court of that state in *Dorey v. Lynn*, 31 Kan., 758, and it was held, "Where an election is held in a certain ward of a city for the election of councilmen, and the judges and clerks of the election count the ballots and place them in a sealed envelope, and then place the envelope with the ballots in the ballot box, and seal the ballot box and deliver the same to the city clerk, in whose custody they remain until the trial is had in the case, and this is shown by testimony of witnesses beyond all reasonable doubt, held, that the ballots are sufficiently identified and are controlling, although the city council, while acting as a board of canvassers did, in the presence of the city clerk, illegally open the envelope containing the ballots and count them."

These cases, in our view, state the law correctly. In the case at bar the proof fails to show that ballots from three of the precincts were preserved in the manner and by the officers prescribed by the statute.

If the loose methods which were adopted in this case as shown by the proof were held sufficient, it would be possible to change the result of any election and defeat the choice of the electors. It would have been an easy matter for a person so disposed to place one or more crosses opposite the proposition for or against township organization and thus render the ballot inoperative, and the very large number, viz., 136, with two crosses thereon, is suggestive of improper practice, particularly as no mention is made thereof by the various election boards. It is not very creditable to an official that the papers and ballots in his office are so carelessly kept that persons having no right to have access to them may handle or inspect them if they see fit, and the circumstances are such as to cast suspicion upon them. The court did not err, therefore, in rejecting the ballots.

Third—But it is claimed on behalf of the plaintiff that the several acts providing for township organization are unconstitutional and therefore void. The legislature of 1877 passed an act providing for township organization in certain cases. This act was declared invalid in *Jones v. Co. Com. of Lancaster Co.*, 6 Neb., 474, upon the ground that the title of the act was too restricted for the subject-matter of the act.

The revenue law of 1879 was amended so as to provide for the collection and disbursement of taxes in case of the adoption by any county of township organization. While it is true that there was no statute in existence at that time that authorized township organization, yet the provision above referred to in no manner affected county organization or the collection of the revenue, and could only become effective upon the adoption by any county of township organization.

In 1883 an act was passed to provide for township organization, and that, with the amendments thereto, constitute the law upon that subject at the present time. It

is claimed, however, that the act of 1891 repealed by implication the township act of 1883.

The question of repeal by implication has been presented to this court in several cases and it has been uniformly held that a statute would not be repealed by implication unless the repugnancy between the new statute and the old is plain and unavoidable. (*White v. Lincoln*, 5 Neb., 505; *State v. McCall*, 9 Id., 203; *In re Hall*, 10 Id., 537; *Lawson v. Gibson*, 18 Id., 137; *State v. Babcock*, 21 Id., 599.) The statute of 1891 does not repeal the former act by implication.

Fourth—It is contended that section 7 of the election law as amended in 1891 repeals the provision for election of supervisors. In our view, however, the act in question merely provides for future elections and does not change the law in relation to election for township officers on temporary organization. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

FARMERS UNION INSURANCE COMPANY, MUTUAL, v. STEPHEN WILDER.

[FILED NOVEMBER 2, 1892.]

1. **Mutual Fire Insurance:** PREMIUM NOTES: ASSESSMENTS: JUDGMENT: EXECUTIONS. Where premium notes have been given to a mutual insurance company, assessments to be made thereon from time to time as losses occur, in case an assessment is not paid in thirty days after personal demand therefor or by letter, the company may recover for the whole amount of the deposit note with costs, and executions will thereafter be issued on such judgment as assessments for losses may require.

2. ———: ASSESSMENTS: DEFAULT IN PAYMENT: FORFEITURE: WAIVER. Where there is a default in paying assessments and the company does not declare the policy forfeited, but continues to make further assessments as losses occur, it will be a waiver of the cause of forfeiture.

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

Thompson Bros., and *Capps, McCreary & Stevens*, for plaintiff in error.

Hewett & Olmstead, contra.

MAXWELL, CH. J.

This action was brought by defendant in error against the plaintiff in error to recover for the loss of a barn, etc. It is alleged in the petition:

"That at the time hereinafter mentioned the defendant was, and still is, a corporation duly organized under the laws of the state of Nebraska, with lawful authority to make contracts of insurance against fire.

"Second—On the 29th day of December, 1888, the plaintiff was the owner of a barn and granary situated on section 2, township 5, range 10 west, in Adams county, state of Nebraska, and a large amount of oats, to-wit, 2,000 bushels, in said granary, said barn and granary being adjoining each other, and together of the value of $550, and the said corn in said granary being of the value of $200.

"Third—On the 10th day of January, 1889, the defendant, in consideration of $16 to it paid on the said 29th day of December, 1888, as a membership fee, and a further consideration of a premium contract for the sum of $48, to be paid in assessments as specified, made, and delivered to the plaintiff a policy of insurance on said barn, granary, and grain therein, for the period of five years, from January 24, 1889, in which policy the insurance on said barn is

stated at $500, and the oats as grain at $200, but the insurance of the granary to the amount of $50, by mistake of the said defendant, was omitted in said policy."

Then follows a statement of the loss, etc., and facts showing the liability of the company.

The defendant below in its answer admitted the policy, but alleged that it contained the following provision: "If any assessment be not paid within thirty days after date of same, this certificate shall thereupon lapse and cease to be in force, and if remittance be received after date of such lapse no indemnity will be paid for any loss happening between the date of such expiration and receipt of such remittance; but the amount so received shall be placed to the credit of the member and he shall be reinstated and this certificate renewed;" that the said Wilder had failed and neglected to pay the following assessments, to-wit: March, 1889, $1.28; June, 1889, $1.60; September, 1889, $1.60; and for that reason the said policy of insurance had lapsed and was null and void at the time and previous to the pretended loss by fire, and was not binding upon the said company at the time of the said loss, or at any time since the first assessment became due and owing. Also denies that it was indebted to the said plaintiff in the sum claimed or any other amount.

The plaintiff, for reply, admits the assessments and the amounts thereof, and the non-payments thereof, but said the same had been waived by the defendant company. The case was tried to the court, judgment for plaintiff, to reverse which this action is presented to this court.

On the trial of the cause the court stated the reasons for the judgment in its findings, viz.: "This cause came on for trial before the court upon the pleadings and evidence and was submitted on consideration. The court finds said policy should not be reformed; the court further finds that plaintiff, on December 29, 1888, made the application in writing, introduced in evidence, to defendant for insur-

ance of his granary, barn, and grain therein, described in petition, among other property in said application described, giving therefor his note for $16, and premium contract for $48, and that on January 10, 1889, defendant issued to plaintiff the policy introduced in evidence, insuring said granary and stable at $500, and grain therein for $200, for five years from January 24, 1889; that said property was totally destroyed by fire, without any fault or neglect of plaintiff, November 11, 1889, and that said property so destroyed was of the value of $700 and covered by said policy at time of said loss; that plaintiff duly notified defendant of said loss and that no part of said loss has been paid; that three assessments were made on said premium contract of $48, to wit, March, June, and September, 1889, respectively, and no part thereof was paid by plaintiff, and all were due at time of said loss; that after said loss plaintiff offered to pay the same, which defendant declined and refused to receive; that said policy provides that thirty days after date of notice of any assessment it shall lapse and cease to be in force; that last part of said application and contract of insurance provides as follows: 'This contract may be canceled at the request of the assured by paying all assessments up to date of such request, together with $2 extra as a cancellation fee, and the surrender of membership certificate to the company. This company reserves the right to cancel this contract by giving notice of same and returning premium contract or pledge to member.'

"Court also finds that defendant never returned or offered to return to plaintiff his $16 note and premium contract of $48, or either of them, nor did said defendant cancel said policy or notify said plaintiff of any intention to do so. Court further finds defendant is entitled to a credit of $——, principal and interest on the three assessments unpaid by plaintiff.

"From last clause in sec. 3, secs. 17, 18, and 42, ch.

43, Statutes Nebraska; vol. 11, Encyclopædia of Law, p. 342; No. 7, p. 336, No. 2 and p. 308, No. 5, and in particular cases cited in said numbers or sections, 26 Ia., 10; 59 N. Y., 521; 34 N. W. Rep., 151; 18 Id., 749; 39 Wis., 120, last part of the case, 16 Neb., and cases cited on p. 406; 15 Id., 494; 18 Id., 501, the court do find in law the defendant's continuation to make assessments against plaintiff and notice to pay same, thereby recognized said policy and waived the forfeiture of the same, even if it lapsed by failure to pay said assessments, and continued it in force.

"The court further finds their retention of plaintiff's $16 note and $48 premium contract and making three assessments thereon, and notice to pay same, in law waived any lapse of said policy, and that their failure to return to plaintiff his said note and contract and cancel said policy, and notify plaintiff of the same, renders the defendant liable in this case.

"It is therefore ordered by the court that said policy be not reformed but remain in full force as issued, and it is also considered and adjudged that the said plaintiff have and recover of and from said defendant $695, and his costs herein expended, taxed at $——."

Section 17 of chap. 43, Comp. Stats. of 1887, is as follows: "All notes deposited with any mutual insurance company, at the time of its organization, as provided for in section 3 hereof, shall remain as security for all losses and claims, until the accumulation of the profits invested as required by the sixth section of this act shall equal the amount of cash capital required to be possessed by stock companies organized under this act, the liability of each note decreasing proportionately as the profits are accumulated; but any note which may have been deposited with any mutual insurance company subsequent to its organization, in addition to the cash premiums, or any insurance effected with such company may, at the expiration of the

time of such insurance, or upon the cancellation by the company of the policy, be relinquished and given up to the maker thereof, or his legal representatives, upon his paying his proportion of losses and expenses which may have accrued thereon during such term. The directors or trustees of any such company shall have the right to determine the amount of the note to be given, in addition to the cash premiums, by any person insured in such company, and every person effecting insurance in any mutual company, and also their heirs, executors, administrators, and assigns continuing to be so insured, shall thereby become members of said company during the period of insurance, and shall be bound to pay for losses and such necessary expense as aforesaid accruing to said company, in proportion to the amount of his or their deposit note or notes; *Provided,* That any person insured in any mutual company, except in the case of notes required by this act to be deposited at the time of its organization, may at any time return the policy of cancellation, and upon payment of the amount due at such time upon his premium note, shall be discharged from further liability thereon."

"Sec. 18. The directors shall, as often as they deem necessary, after receiving notice of any loss or damage, settle and determine the sums to be paid by the several members thereof, as their respective portions of such loss, and publish the same in such manner as they shall deem proper, or the by-laws shall have prescribed; but the sum to be paid by each member shall always be in proportion to the original amount of his deposit note or notes, and shall be paid to the officers of the company within thirty days after the publication of said notice; and if any member shall, for the space of thirty days after personal demand, or by letter, for payment shall have been made, neglect, or refuse to pay the sum assessed upon him as his proportion of any loss aforesaid, the directors may sue for and recover the whole amount of his deposit note or notes, with costs

of suit; but execution shall issue for assessments and costs as they accrue only, and every such execution shall be ac-accompanied by a list of losses for which the assessment was made; if the whole amount of deposit notes shall be insufficient to pay the loss occasioned, the sufferers insured by the said company shall receive, toward making good their respective losses, a proportionate share of the whole amount of said notes, according to the sums to them respectively insured, but no member shall ever be required to pay for any loss more than the whole amount of his deposit note or notes."

Section 3 requires the certificate of a justice of the peace, notary public, or clerk of the district court to accompany each note received from a person insured, certifying that in the opinion of such officer the person making the same is pecuniarily good and responsible for the same in property not exempt from execution by the laws of the state, etc.

By section 18, where an assessment has been made and is not paid to the officers of the company within thirty days after the publication of notice, and after thirty days from personal demand or by letter, neglect, or refuse to pay his assessment, the company may sue for and recover the whole amount of his deposit note with costs of suit, and executions shall thereupon be issued on said judgment from time to time as assessments are made for losses. That is the mode provided by law for collecting delinquent assessments and should have been followed in this instance. In addition to this no forfeiture was declared and the company treated the contract as continuing. Upon the whole case the judgment is supported by the clear weight of evidence and is

AFFIRMED.

THE other judges concur.

STATE BANK OF WILCOX v. F. G. WILKIE.

[FILED NOVEMBER 2, 1892.]

1. **Negotiable Instruments:** ACTION ON DRAFT: PROOF OF ACCEPTANCE. An action was brought upon two drafts which it was claimed one W. had accepted. This he denied. The proof tended to show that the alleged acceptance had been obtained, if at all, January 14, 1890, about 7 P. M., by one H., a stranger; that W. had then signed a property statement for an alleged hydro-carbon burner, which H. professed to be about to furnish to him. W. also signed two contracts. He denied that the signatures to the acceptance were his, and the jury having found that he did not sign the same, *held*, that the verdict conformed to the proof.

2. ———: ———: BONA FIDE PURCHASERS: EVIDENCE. On the night of January 14, 1890, H., a stranger, took the alleged drafts above described and indorsed the same and delivered them in the night season to one Wheeler, and thereupon left the county. Wheeler soon after, 9 A. M. next morning, took the drafts to a bank and had them discounted for four-fifths of their face value. The alleged acceptor lived less than three miles from the bank and apparently was solvent, yet no inquiry was made of him, nor any one having knowledge of the matter in regard to the drafts. *Held*, That these facts were proper to be submitted to the jury in determining the question of good faith of the purchaser.

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

C. C. Flansburg, for plaintiff in error.

S. A. Dravo, Leese & Stewart, and *Dilworth, Smith & Dilworth, contra.*

MAXWELL, CH. J.

The causes of action are set forth in this case as follows:

"Plaintiff states that it is a corporation duly organized under the laws of Nebraska. Its first cause of action is

founded upon a written instrument made and executed by defendant in the words and figures following:

"'WILCOX, NEB., January 14, 1890.

"'June 1st after date pay to the order of Thomas Hall $500 with exchange, and eight per cent interest from date if not paid when due. Value received and charge to the account of HALL & CO.,

"'By THOS. E. HALL.

'"To F. G. Wilkie, Wilcox, Nebraska.'

"That on the back of said instrument appeared the following indorsement:

"'To indemnify on acceptance I hereby certify that I own in my own name 320 acres of land in sections 26 and 35, T. 5, R. 17, county of Phelps and state of Nebraska, worth $8,000 above incumbrance; personal property, chattels, and merchandise, $3,000 above incumbrance.

"'Dated Wilcox, Neb., January 14, 1890.

"'F. G. WILKIE.

"'THOS. E. HALL.

"'H. H. WHEELER.'

"That on the 14th day of January, 1890, said Thomas E. Hall indorsed his name thereon and sold the same for a valuable consideration to H. H. Wheeler, who, on the 15th day of January, 1890, indorsed his name on the back of said instrument and sold the same to the plaintiff herein for a valuable consideration, and plaintiff is now the owner and holder thereof.

"That no part thereof has been paid, and there will be due on the said instrument from said defendant to plaintiff on the 1st day of June, 1890, the sum of $500.

"Second cause of action:

"That on the said 14th day of January, 1890, the said defendant made, executed, and delivered his certain instrument in writing, in words and figures following:

"'WILCOX, NEB., January 14, 1890.

"'October 1st after date pay to the order of Thomas E.

Hall $500 with exchange, and eight per cent interest from date if not paid when due. Value received, and charge to the account of HALL & CO.

"'By THOS. E. HALL.

"'To F. G. Wilkie, Wilcox, Neb.'

"That on the back of said instrument appeared the following indorsement:

"'To indemnify on acceptance I hereby certify that I own in my own name 320 acres of land in sections 26 and 34, T. 5, R. 17, county of Phelps and state of Nebraska, worth $8,000 above incumbrance; personal property, chattels, and merchandise, $3,000 above incumbrance.

"'Dated Wilcox, Neb., January 14, 1890.

"'F. G. WILKIE.

"'THOS. E. HALL.

"'H. H. WHEELER.'

"That no part of said instrument or the amount therein expressed has been paid, and there will be due thereon from said defendant to plaintiff on the 1st day of October, 1890, the sum of $500; plaintiff having purchased the same for a valuable consideration of the said H. H. Wheeler on January 15, 1890, or in the usual course of business, without any notice of any defense, and said H. H. Wheeler purchased said instrument of said Thomas E. Hall on the 15th day of January, 1890, for a valuable consideration.

"Plaintiff therefore prays for a judgment against said defendant for the amounts and at the times in his petition set out, and for such other relief as may be just in the premises."

The answer is a general denial.

On the trial of the cause the jury returned a verdict for the defendant, upon which judgment was rendered.

The principal objection is that the verdict is against the weight of evidence. The testimony tends to show that the defendant resides from two and a half to three miles from Wilcox; that about 7 P. M. on the 14th of January, 1890,

a person calling himself Thomas E. Hall went to the defendant's residence and made some arrangement to furnish him an alleged carbon hydrogen burner, and apparently pretended to employ him as agent in that locality for the alleged burner.

The issues being restricted the exact nature of the contract does not appear, but this much is clear that Hall was to furnish one or more alleged burners to the defendant, and required a property statement, which the defendant made as follows:

"To indemnify on acceptance I hereby certify that I own in my own name 320 acres of land in sections 26 and 34, Tp. 5, R. 17, county of Phelps and state of Nebraska, worth $8,000 above incumbrance; personal property, chattels and merchandise, $3,000 above incumbrance.

"Dated Wilcox, Neb., January 14, 1890.

"F. G. WILKIE."

On the other side is a draft in regular form, apparently filled out and signed by Hall by using an indelible pencil, while Wilkie's name purports to have been signed in ink. Wilkie denies the acceptance absolutely.

The proof tends to show that he owed Hall nothing and hence had no occasion to give him one or more drafts; that Hall came to Wilcox on the night of the 14th of January, 1890, after leaving the residence of the defendant, and called upon one Wheeler, the agent at Wilcox of the K. C. & O. R. R. It does not appear whether there had been any previous arrangement between these parties or not, but Wheeler very readily made an arrangement with Hall by which the drafts were indorsed by Hall that night and delivered to Wheeler.

In the morning, almost immediately after the bank opened, Wheeler went to the bank and offered to sell the drafts for a large discount. The drawer was a stranger, comparatively unknown to the bank or any of its officers. The alleged acceptor seems to have been possessed of con-

siderable property, so that the drafts if genuine were worth their face, yet these were alleged to have been bought of Wheeler after a few minutes', not to exceed twenty minutes, conversation, for the sum of $800, without inquiry of the alleged acceptor.

It is very evident from the testimony that the man traveling under the name of Hall is engaged in disreputable business, worse, if possible, than larceny, and one who purchases paper from such a person under suspicious circumstances, need not be surprised if he finds that the man who has no scruples as to the means he uses to obtain a signature to a paper which afterwards turns up as a negotiable instrument, will have no compunctions of conscience to prevent his tracing or otherwise copying the name thus obtained.

The proper place for men of the Hall order is the penitentiary, and the proper prosecuting officers should see that the law is enforced.

The testimony fails to establish the acceptance by the defendant, and also good faith on the part of the plaintiff in error. No objection is made to the instructions. The judgment is right and is

AFFIRMED.

THE other judges concur.

E. A. WEDGWOOD, SHERIFF, v. A. B. WITHERS ET AL.

[FILED NOVEMBER 2, 1892.]

Replevin: THE EVIDENCE in this case examined and considered, and *held* insufficient to support the verdict of the jury.

ERROR to the district court for Hall county. Tried below before HARRISON, J.

Thummel & Platt, Abbott & Caldwell, and *A. W. Agee,* for plaintiff in error.

Thompson Bros., and *Montgomery & Montgomery, contra.*

NORVAL, J.

This suit was instituted in the court below by the defendants in error to recover the possession of a stock of dry goods, boots, shoes, hats, caps, and other merchandise, which had been seized by the plaintiff in error, as sheriff of Hall county, to satisfy certain executions issued upon judgments rendered against Jesse H. Withers and Gustavus Kolls. There was a trial to a jury, with verdict and judgment in favor of plaintiffs below.

But a single question is presented for our consideration, and that is: Does the evidence sustain the verdict? It is insisted that the goods levied upon by the sheriff, which are in controversy in this action, were purchased by, and belonged to, the defendants in error. It is undisputed that on the 16th day of February, 1889, the said Jesse H. Withers and Gustavus Kolls were engaged in the mercantile business in Grand Island under the firm name and style of Withers & Kolls, and were then indebted to wholesale houses and others in sums aggregating more than $18,000. On said date their stock of goods, which was covered by insurance, was destroyed by fire. Shortly thereafter they made settlement with the insurance companies, and received over $13,000 in cash. Subsequent to the loss, but prior to its adjustment, they wrote to their creditors saying that they would pay as soon as the insurance companies adjusted their loss; but as soon as they had effected a settlement with the insurance companies and received the money from them, so that it was beyond the reach of creditors, they sent to their various creditors a proposition offering to pay fifty cents on the dollar of their indebtedness, in full settlement. Some of the creditors

accepted the proposition, while others commenced attachment proceedings, and others still obtained judgments on their claims and had executions issued. To the creditors who declined to accept the terms of settlement proposed, they have refused to pay anything.

It also appears that said Jesse H. Withers and Gustavus Kolls on April 10, 1889, procured their wives, the defendants in error, to file a certificate of copartnership. A new stock of goods was purchased, and on the 20th day of the same month business was resumed at the old stand under the old firm name of Withers & Kolls. The husbands had exclusive control and management thereof the same as before the fire. They took goods from the store for their own use without charging themselves therewith. They did not keep any account of the moneys which were taken from the store and used by either of them, nor have they ever rendered an account of the business to their wives. The defendants in error had no money, yet the record shows several hundred dollars were paid in cash on the goods at the time the same were purchased. A pertinent inquiry—who furnished the money? The proofs disclose that of the $13,000 received from the insurance companies only about $9,000 was paid to the creditors of the old firm of Withers & Kolls, and the remaining $4,000 they failed to account for, although repeatedly requested so to do when upon the witness stand. A fair inference from the testimony is that the first cash payment on the goods was made out of moneys received from the insurance companies, and all others were made from the proceeds of the sale of goods or moneys borrowed. It is certain that the first payment on the stock was not derived from the $2,500 borrowed from one of the banks in Grand Island, as claimed by defendants in error, for the reason the same was paid several days prior to the making of the loan. As to this loan, it was negotiated by Jesse H. Withers and Gustavus Kolls, each signing his wife's name to the note given therefor.

It is suggested that the payment of the goods, which were purchased on credit after the fire, was secured by mortgage on the separate properties of the wives. While it is true for the purpose of obtaining goods on credit from Kerkendall, Jones & Co., and Samuel C. Davis, a mortgage was given upon two pieces of real estate in Grand Island to Charles A. Coe as trustee for said parties, yet the evidence is undisputed that on and prior to December 24, 1887, one of these tracts belonged to Jesse H. Withers, and the other was owned by Gustavus Kolls; that Withers, without any consideration therefor, made a deed to his tract directly to his wife, which deed purports to have been executed on December 24, 1887, and a deed bearing the same date was executed by Kolls, without consideration, for the premises belonging to him, to Mrs. Kolls. Neither of these conveyances was placed upon record until after the fire and about the time the alleged new partnership was formed. While the real estate thus conveyed was exempt, and not subject to fraudulent alienation, the same being the homesteads of the parties, the proofs satisfy us that the placing of these transfers upon record and the making of the mortgage to Coe were parts of the scheme devised by the husbands to enable them to resume business in the name of their wives, without paying the creditors of the old firm of Withers & Kolls who had declined to compromise their claims for fifty cents on the dollar. After a careful consideration of the evidence we have reached the conclusion that it fails to support the finding of the jury. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

MARY H. RUPERT ET AL. V. PETER PENNER ET AL.

[FILED NOVEMBER 2, 1892.]

1. **Ejectment:** ADMISSION OF EVIDENCE: DISCRETION OF TRIAL COURT. Permitting the introduction in evidence of records of deeds duly recorded, for the purpose of proving title to real estate in an action in ejectment, instead of requiring the production of the original deeds, rests largely in the discretion of the trial court, and its ruling thereon will be regarded as conclusive unless there has been an abuse of discretion.

2. ———: ———: SUFFICIENCY OF OBJECTION. The admission of a deed in evidence was objected to at the time by the adverse party as incompetent, immaterial, and irrelevant. *Held*, That the objection was not specific enough to reach defects in the execution of the instrument, as that it was not witnessed.

3. **Evidence:** OBJECTIONS: WAIVER. Ordinarily objections to the admission of testimony not made when offered are waived and cannot be urged for the first time on appeal to this court.

4. **Deed:** DESCRIPTION OF REAL ESTATE. Real estate is sufficiently described in a conveyance when the deed refers for identification to another deed specifically mentioned therein, which contains an accurate description of the property sold.

5. ———: IDENTITY OF GRANTOR. In the body of a deed and in the certificate of acknowledgment the grantor was correctly described as Archibald T. Finn. The deed was signed as Arch. T. Finn. The certificate of acknowledgment identified the party mentioned as grantor as known to the officer to be the person whose name is affixed to the instrument and who executed the same. *Held*, That it sufficiently appeared that "Archibald T." and "Arch. T." were one and the same person.

6. ———: IDENTITY OF THE NAME of a grantor or grantee is *prima facie* evidence of identity of the person.

7. **Conveyance of Real Estate:** CONSTRUCTION OF INSTRUMENT. Under the provisions of section 53, chapter 73, Compiled Statutes, in construing an instrument conveying real estate, when by any reasonable interpretation the granting clause and the *habendum* can be reconciled, effect must be given both.

8. ———: ———. The premises of a deed were, "do hereby grant, sell and convey unto J. P. C." The *habendum* clause was "to have

and to hold said premises with the appurtenances unto the said J. P. C. for and during the term of his natural life, and at his decease the same shall descend in equal shares to his children," naming them. *Held*, That the deed conveyed a life estate to J. P. C. with remainder to his children therein mentioned.

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

Savage, Morris & Davis, for plaintiffs in error.

Mahoney, Minahan & Smyth, contra.

NORVAL, J.

This is a suit in ejectment brought in the court below by Mary H. Rupert, Sarah A. Burchmore, Thomas B. Cleveland, Sophia Cleveland, John B. Cleveland, Clara H. Cleveland, Grace M. Cleveland, and Grant W. Cleveland, the plaintiffs in error, to recover certain real estate situated in the city of Omaha.

A jury was selected to try the cause, but, after the testimony was closed, by agreement of parties the question of title was submitted to the court, who found for the defendants, and judgment was entered dismissing the action.

Plaintiffs claim title from the United States through numerous conveyances, the following being their chain of title to the premises: United States to Preston Reeves, patent, dated May 1, 1860, recorded January 5, 1861; Preston Reeves and wife to Jesse Lowe, mayor of the city of Omaha, warranty deed, dated October 31, 1857, recorded November 2, 1857; Jesse Lowe, mayor, etc., to Thomas B. Cuming, deed, conveying the undivided one-half of the premises, dated October 31, 1857, recorded November 2, 1857; Charlotte Cuming, widow of Frank H. Cuming, deceased, May Cuming, Francis Cuming, Anne Cuming, Emily Cuming, and Caroline Large, sisters of said Thomas B. Cuming, to Margaretta C. Cuming, quitclaim deed,

dated August 22, 1864, recorded December 2, 1864; Jesse Lowe, mayor, etc., to Archibald T. Finn and Charles Bridge, deed to undivided one-half, dated October 31, 1857, recorded November 2, 1857; Charles Bridge to Archibald T. Finn, deed, dated April 29, 1861, recorded May 14, 1861; Margaretta C. Cuming to George Armstrong, deed, dated December 1, 1864, recorded December 2, 1864; Archibald T. Finn to George Armstrong, deed, dated September 27, 1862, recorded December 6, 1864; George Armstrong to Mason L. Derwin, deed, dated September 19, 1872, recorded same date; Mason L. Derwin to Moses Hotaling, warranty deed, dated December 14, 1867, recorded December 20, 1867; warranty deed from Moses Hotaling and Ellen M., his wife, to John P. Cleveland for life, with remainder to his children, the plaintiffs herein, bearing date September 13, 1877, and filed for record the next day.

It appears from the evidence that said John P. Cleveland died in 1886, and that Mary H. Cleveland and Sarah A. Cleveland, mentioned in the deed last referred to, have since married, the former to Louis Rupert, and the latter to one Burchmore.

The record shows that John P. Cleveland and wife mortgaged the premises sought to be recovered in this action on the 8th day of January, 1880, to Charles C. Housel to secure the payment of $150; that subsequently said mortgage was foreclosed, the property sold under the decree to said Housel, and, by direction of the court, Wallace R. Bartlett, as special master commissioner, executed a deed to Housel covering said premises. On the 5th day of November, 1883, said Charles C. Housel, with his wife, Myra J., executed and delivered a warranty deed of the property to the defendant, Peter Penner, which was duly placed upon record.

Numerous objections are urged by defendants to certain deeds in plaintiffs' chain of title, and defendants further in-

sist that the deed of Moses Hotaling and wife conveyed the fee to John P. Cleveland, instead of a life estate to him, with remainder to plaintiffs.

The plaintiffs, for the purpose of showing the devolution of title, introduced in evidence, over defendants' objections, record copies of the deeds, instead of the originals. Defendants contend with much earnestness that the proper foundation for the introduction of secondary evidence of the conveyances was not laid, and, although the records were admitted, the trial court ought to have excluded the same in reaching a conclusion, and therefore it will be presumed to have done so.

Section 13 of chapter 73 of the Compiled Statutes of 1891, among other things, provides that "the record of a deed duly recorded, or a transcript thereof duly certified, may also be read in evidence with the like force and effect as the original deed, whenever, by the party's oath or otherwise, the original is known to be lost, or not belonging to the party wishing to use the same, nor within his control."

It appears from the testimony of Mrs. Cleveland that she was the wife of John P. Cleveland and was residing with him at the time of his death; that he kept his papers in his desk at his home, where she made diligent search for the deeds, but was unable to find either of them, and that none of the original deeds constituting plaintiffs' chain of title were in her possession or under her control. True, Mrs. Cleveland is not a party plaintiff in her own right, yet she is the natural guardian of and appears and prosecutes the suit as the next friend for the minor plaintiffs.

In view of the statutory provisions and the construction placed thereon by this court, we are of the opinion that sufficient foundation was laid for the introduction of the record of conveyances. The question of admitting in evidence records of deeds and other instruments duly recorded, instead of requiring the production of originals, rests largely in the discretion of the trial court. There was no

abuse of discretion in this case in admitting secondary evidence. The deed to John P. Cleveland and the plaintiffs embraces only a portion of the lands described in the deeds to which objections are made; therefore, the record of such deeds was admissible in evidence without laying any foundation therefor, as there is no presumption that the originals were ever in plaintiffs' possession. (*Delaney v. Errickson*, 10 Neb., 492; *Hapgood Plow Co. v. Martin*, 16 Id., 27; *F., E. & M. V. R. Co. v. Marley*, 25 Id., 138; *Buck v. Gage*, 27 Id., 306.)

The point is made that the deed from Jesse Lowe, mayor, to Finn and Bridge was incompetent to show a transfer of title from the grantor to the grantees therein named, because the same is not witnessed; therefore it should not have been admitted by the trial court, and hence must now be disregarded. A sufficient answer to this contention is that no such objection was urged in the court below. The record shows that when the deed, or rather the record thereof, was offered in evidence the defendants objected to its introduction, as being incompetent, immaterial, and irrelevant. This objection is too general to reach the defect now insisted upon. (*Gregory v. Langdon*, 11 Neb., 166.) Had the ground of the defendants' objection to the deed been that it was not witnessed, its admission in evidence would have been improper. While this is true, it by no means follows that, since the deed was admitted without such objection being made, the court would be justified in rejecting the same when it comes to weigh the testimony.

The cases of *Enyeart v. Davis*, 17 Neb., 228, and *Willard v. Foster*, 24 Id., 213, cited in brief of defendants, are inapplicable. No such a question as we are now considering was therein decided. These decisions affirm the doctrine, which has been repeatedly recognized and applied by this court, that error will not lie for the admission of irrelevant testimony in a cause tried to a court without a jury. The reason for the rule is well stated in *Willard v.*

Foster, thus: "The court must necessarily have an opportunity to examine each article of evidence offered, even for the purpose of rejecting it; and so the duty of acting and deciding the cause, upon the legal and relevant evidence selected from the mass that may have been introduced, may be as well discharged by the court upon the final consideration of the cause, as to pause in the course of trial to pass upon the admissibility of the several matters offered in evidence." In causes tried without the intervention of a jury, the court must base its decision solely upon the material and relevant testimony, and as the court is presumed to have considered none other, the admission of irrelevant testimony could not prejudice the party complaining of its introduction. But neither of the cases cited by counsel is authority for holding that a court, after admitting relevant and material testimony, may disregard the same because it was inadmissible, for the reason no foundation had been laid, or because of some other ground which properly might have been made, but which was not urged. No good reason has been suggested why the rule for which defendants contend should be adopted. It certainly would not aid in the administration of justice. Under such a rule, objections to testimony would be unnecessary, but the court would be compelled to regard all objections which could properly be made, but which were not insisted upon when the testimony was received. Ordinarily, in a case tried to a jury, objections not made to testimony when offered are waived, and we think the same rule should obtain where the trial is to the court.

The deed from Reeves to Lowe shows that the conveyance was made to the grantee as mayor of Omaha, and to his successors in office, in trust to convey the tract therein described, which includes the premises involved in this lawsuit, to the several owners and occupants. It is objected that it is not shown that Finn and Bridge were beneficiaries under the trust, therefore the deed from Lowe to them

was not competent. The legal presumption, in the absence of any evidence upon the subject, is that Finn and Bridge were entitled to the deed under the terms of the trust, and that the trust was properly executed. (*Tecumseh Town Site Case*, 3 Neb., 267.)

It is urged that the deed from Bridge to Finn is void for want of certainty in the description therein contained, which reads: "All and singular that certain piece or parcel of land situated and being within the corporate limits of the city of Omaha, in the county of Douglas, and territory of Nebraska, it being an undivided quarter section, number sixteen (16), known and designated on Byers' map of the city of Omaha as Bridge and Cummings tract, the said land is the same as conveyed by deed to Archibald T. Finn and Charles Bridge, now on record in the recorder's office in the city of Omaha, containing forty acres, more or less." The precise quarter of section 16 intended to be conveyed is not stated, nor is the township and range mentioned; therefore the description is so defective and imperfect that nothing passed by that alone; yet the location of the property is definitely fixed and made certain by that part of the deed which refers to Byers' map of the city of Omaha and to the deed to Finn and Bridge. The deed from Bridge to Finn identifies the property as being the same as is designated in the Byers map as Bridge and Cummings tract, and as the same land conveyed by the deed to Archibald T. Finn and Charles Bridge, then on record, in which the property is described as the "undivided one-half of the southeast quarter of section sixteen (16), in township number fifteen (15) north, of range thirteen east, of the 6th principal meridian." Taking these two deeds together there is no uncertainty as to the property intended to be conveyed. (*Caldwell v. Center*, 30 Cal., 539; *Coats v. Taft*, 12 Wis., 389*; *Newman v. Tymeson*, 13 Wis., 172; *Nelson v. Broadhack*, 44 Mo., 596.)

But even if the property was not sufficiently identified,

the judgment could not stand. Independent of the conveyance from Bridge to Finn, the latter was the owner of the undivided fourth of the tract in dispute by virtue of the deed from Lowe to Finn and Bridge, and if plaintiffs only obtained title to the undivided one-fourth, they would still be entitled to maintain the action.

It is insisted that the record does not show that Archibald T. Finn has ever parted with his title. This contention is based upon the fact that in the body of the deed from Finn to George Armstrong, the grantor is designated as Archibald T. Finn, while the signature to the conveyance is Arch. T. Finn. In the certificate of acknowledgment the name of the grantor is written the same as in the body of the deed, the officer taking the acknowledgment certifying that "personally came Archibald T. Finn, personally to me known to be the identical person whose name is affixed to the above deed as grantor, and acknowledged the instrument to be his voluntary act and deed." This was sufficient to show that the grantor described in the deed and the person who signed and acknowledged the instrument were one and the same person. It is obvious that Arch. was intended as an abbreviation of Archibald, therefore there is no contradiction between the certificate of acknowledgment and the deed. It frequently occurs in transferring lands that the grantor in making a deed signs either his initials or the abbreviation of his given name, although the Christian name is stated in full, both in the body of the deed and in the certificate of acknowledgment, yet the instrument would not be inadmissible in evidence for that reason alone, where from an examination thereof it clearly appears that the same was signed and acknowledged by the grantor. This doctrine is well supported by the adjudicated cases.

In *Lyon v. Kain*, 36 Ill., 362, the grantors were correctly described in the body of the conveyance and in the acknowledgment as Samuel B. Postley and Abraham

B. Kain, while the deed was signed "S. Brook Postley" and "A. Boudoin Kain." It was held that as the officer taking the acknowledgment certified that he knew them to be the identical persons named in the deed as makers thereof, the identity of the grantors with the persons signing was sufficiently established to entitle the instrument to be received in evidence without other proof. Walker, C. J., in delivering the opinion of the court, observes: "When it is remembered that the law requires the officer to be personally acquainted with the grantor, or to have his identity proved, before he receives the acknowledgment, we can perceive no irregularity in the execution of this conveyance. The identity of the grantor, and not the person who merely signs the deed, must be established before the officer can act. His identity is a fact that the officer must know, or have proved, before he is authorized to grant his certificate, and when he has found and certified that fact, it is binding until rebutted. There is no evidence in this record attacking the truth of these certificates, and they must in this particular be held sufficient. The party executing any instrument may adopt any name, and he will be bound by its execution. If not his real name, his identity with the execution must be proved, and we think it has been done in this case."

In *Grand Tower Mfg. Co. v. Gill*, 111 Ill., 541, one of the grantors was named in the body of the conveyance as well as in the certificate of acknowledgment as "Robert P. McClintock," but the deed was signed "R. Parker McClintock." It was ruled that as the certificate of acknowledgment showed that Robert P. McClintock acknowledged the instrument, it sufficiently appeared that "Robert P." and "R. Parker" were the same person and that the instrument was properly received in evidence. In this connection we also refer to the following cases cited in the brief of plaintiffs: *Fenton v. Perkins*, 3 Mo., 106; *Houx v. Batteen*, 68 Id., 87; *Middleton v. Findla*, 25 Cal., 76.

None of the cases cited in brief of defendants conflict with the proposition above stated. The one nearest holding a contrary doctrine is *Boothroyd v. Engles*, 23 Mich., 21; but a cursory examination shows that it is not really an authority on the question under consideration. In that case Hiram Sherman was named as grantor in the body of the deed and in the acknowledgment, while the instrument was signed Harmon Sherman. It was held that the defect was not supplied by the certificate of acknowledgment and the deed was excluded. Hiram and Harmon are not similar, nor is one the abbreviation of the other. The decision therefore is not in point.

Another case cited by defendants is *Burford v. McCue*, 53 Pa. St., 431. There R. P. O'Neill was described as grantor in the deed, and the acknowledgment and conveyance were so signed. It was ruled that the deed was not admissible in evidence to show a conveyance from Patrick O'Neill without evidence of identity, and that without such proof it would not be presumed that R. P. O'Neill stood for Rev. Patrick O'Neill. In the case at bar the certificate of the officer who took the acknowledgment, established that the grantor described in the deed is the same person who signed and acknowledged the same. Parol proof of identity was therefore unnecessary.

We have no doubt that the deed from Finn to George Armstrong vested in the latter the title to the undivided one-half of the property in dispute. As to the other undivided one-half, the record shows that it was conveyed by Jesse Lowe, mayor, to one Thomas B. Cuming; that said Thomas B. Cuming died in February or March, 1858, intestate without issue, leaving him surviving, his widow, Margaretta C. Cuming, his father, Frank H. Cuming, and his sisters, Mrs. Large, Mary Cuming, Charlotte Cuming, Frank Cuming, Emily Cuming, and Anna Cuming. It is conceded that, under the law of descent in force at the time of the death of Thomas

B. Cuming, his undivided one-half of the real estate descended to his widow, Margaretta C. Cuming, for life, with remainder to his father, Frank H. The record discloses that the said Frank H. died in 1862, and that his widow and children on the 22d day of August, 1864, executed the deed to said Margaretta C. Cuming, to which reference has been made. The widow of Thomas B. Cuming not only acquired by descent a life estate in the property, but also the remainder by purchase, if the above mentioned deed bearing date August 22, 1864, conveyed to the grantee therein the interest which descended to the father of Thomas B. Cuming. Numerous objections are urged against this deed, but in our view it is not important for the purpose of this hearing that we should stop and determine whether the same are well founded or not, for it is conceded by both parties that Margaretta C. Cuming, the widow of Thomas B. Cuming, deceased, who owned a half interest in the property at the time of his death, is still living, and as the property went to her during her life, she is still entitled to possession unless she has conveyed her interest, in which case, the person owning such interest is entitled to possession while she lives.

But it is urged by defendants that there is no evidence that Margaretta C. Cuming has parted with her interest. This contention is not borne out by the record, for, as already stated, Margaretta C. Cuming conveyed the property on December 1, 1864, to George Armstrong. A similar objection is urged against this conveyance as was made to the deed from Finn to Armstrong, which we have already discussed; and for the reasons there stated the objection to the validity of this deed must be overruled. It is signed M. C. Cuming, but in the body of the deed and the acknowledgment the grantee and the person executing the instrument is described as Margaretta C. Cuming. This was sufficient *prima facie* to establish that M. C. and

Margaretta C. are one and the same, and there is no evidence in the record to the contrary.

It is said there is nothing in the deed to identify the grantor with Margaretta C. Cuming, the widow of Thomas B. Cuming. The failure to recite such fact in the deed does not invalidate the conveyance. Identity of the name is sufficient to make a *prima facie* case of identity of the person. (2 Phillips, Ev., 508; Maxwell, Pl. & Pr., 612; *Aultman v. Timm*, 93 Ind., 158; *Stebbins v. Duncan*, 108 U. S., 47; *Douglas v. Dakin*, 46 Cal., 49; *Flournoy v. Warden*, 17 Mo., 436.) It follows that the life estate of the widow of Thomas B. Cuming vested in George Armstrong, who conveyed the same, with the half interest obtained from Finn, to Mason L. Derwin, and from him the title passed down through Moses Hotaling to John P. Cleveland or the plaintiffs. If the latter acquired such title under said deed, then they are entitled to the possession of the premises. The determination of this question necessitates a construction of the following provisions of the deed executed by Hotaling and wife:

"Know all men by these presents, that we, Moses Hotaling and Ellen M., his wife, of Washington county, Neb., for the consideration of one hundred dollars, in hand paid, do hereby grant, sell, and convey unto John P. Cleveland, of Omaha, Nebraska, the following described real estate in the county of Douglas, state of Nebraska, and bounded and described as follows:

* * * * * * *

"Together with all the hereditaments and appurtenances to the same belonging. To have and to hold said premises, with the appurtenances, unto the said John P. Cleveland for and during the term of his natural life, and at his decease the same shall descend in equal shares to his children, Mary H. Cleveland, Sarah A. Cleveland, Thomas B. Cleveland, Sophia Cleveland, John F. Cleveland, Clara H. Cleveland, Grace M. Cleveland, and Grant W. Cleve-

land, and to their heirs and assigns. And I, the said Moses Hotaling, for myself and my heirs, executors, and administrators, do hereby covenant with the said John P. Cleveland and his heirs and assigns that I am lawfully seized of said premises; that they are free from incumbrance, except the taxes aforesaid; that I have good right to sell the same, and that I will, and my heirs, executors, and administrators shall, warrant and defend the same against the lawful claims and demands of all persons whomsoever."

The defendants contend the above deed conveyed to John P. Cleveland an estate in fee-simple, while plaintiffs, on the contrary, insist that he took only a life estate with remainder to his children named in the deed, who are the plaintiffs herein. If it were not for the limitation contained in the *habendum* clause, the contention of defendants would be unanswerable, for under our statute the use of the word heirs in a deed is not indispensable to the conveyance of a fee. In this respect the legislature has changed the common law rule. Where no estate is expressly mentioned in the granting clause or premises of a deed it will be presumed that all the interest of the grantor passed by the conveyance, unless a contrary intent is clearly manifest from the language of the entire instrument.

Counsel for defendants claim that the *habendum* contradicts the granting clause, and they invoke the familiar doctrine that when the *habendum* in a deed is repugnant to the limitations appearing in the premises, it will not control the terms of the premises. We do not think this rule is applicable to the construction of the instrument under consideration, for the reason that the premises and the *habendum* are not contradictory. No definite estate is mentioned in the former, while the latter describes what estate in the property is conveyed. Such being the case, effect should be given to the limitations contained in the *habendum*. This is in harmony with the provision of section 53, chap-

ter 73, Compiled Statutes, which provides: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

Under the above provision, in construing an instrument conveying real estate, when by any reasonable interpretation the granting or conveying clause and the *habendum* can be reconciled, effect must be given both. Applying this rule to the construction of this deed it is manifest from the language used that it was the intention of the grantor to convey only a life estate to John P. Cleveland. Argument could not make it plainer. Why specify that John P. Cleveland should have and hold the premises for and during the term of his natural life, "and at his decease the same shall descend in equal shares to his children," naming them, if it was the intention of the parties that he should take an estate in fee-simple? Clearly the purpose in using this language was to limit the estate conveyed to Mr. Cleveland to a life estate.

A case precisely in point, decided under a statute similar to ours, is *Riggin v. Love*, 72 Ill., 553, in which the conveyancing clause of the deed granted, bargained, sold, and conveyed to Eliza McGilton certain described real estate. The *habendum* clause, "to have and to hold the said above granted premises to the said Eliza McGilton during her natural life, and at her death the same is by these presents conveyed and confirmed absolutely unto her husband, Andrew McGilton; * * * and in case of the death of him, the said husband, Andrew McGilton, before that of her, the said Eliza McGilton, then by these presents the said afore described real estate is conveyed and confirmed absolutely unto the heirs at law of him, the

said Andrew McGilton, subject only to the lawful claims of her, the said Eliza McGilton." It was held that there was no repugnancy between the granting clause and the *habendum,* and that the deed conveyed a life estate to Eliza McGilton, with remainder in fee-simple to Andrew McGilton. See the following cases cited in plaintiffs' brief: *Tyler v. Moore,* 17 Atl. Rep. [Pa.], 217; *Montgomery v. Sturdivant,* 14 Cal., 290; *Bodine v. Arthur,* 14 S. W. Rep. [Ky.], 904; *Bean v. Kenmuir,* 86 Mo., 666; *Watters v. Bredin,* 70 Pa. St., 237.

It is claimed that the word "children" used in the deed should be interpreted as a word of limitation and not a word of purchase; in other words, it should be construed to mean heirs, and, if so construed, Cleveland took a fee-simple title. While the word "children" is sometimes held to mean heirs, such a construction is not permissible here, for the reason that certain specified children of John P. Cleveland are named in the deed as the persons to whom the title should pass, thus clearly excluding the inference that it was the purpose of the parties that the property should go to the persons who might be his heirs at his death. We think the word "children," in the connection in which it is used, is merely descriptive, being employed for the purpose of identifying the particular persons named in the deed as remainder-men.

We think counsel for defendants attach too much importance to the word "deceased," mentioned in the *habendum* clause of the deed. To give the word, in the connection it is employed, its ordinary legal meaning would be to reject and disregard other parts of the sentence in which it is found, and ignore the intention of the parties as gathered from the entire instrument. We cannot believe it was used to denote that the children of John P. Cleveland were to take by inheritance and not as purchasers. Had such been the intention of the grantor, it is not reasonable to suppose the names of those who were to acquire the es-

tate on the death of John P. Cleveland, would have been mentioned, for at that time they might not be living, and other children might have been born to him after the making of the deed, who might be heirs at his death. (*Dennett v. Dennett*, 40 N. H., 498; *Ballentine v. Wood*, 42 N. J. Eq., 558; *Halstead v. Hall*, 60 Md., 213; *Hodges v. Fleetwood*, 102 N. Car., 122; *Tyler v. Moore*, 17 Atl. Rep. [Pa.], 216.)

Our conclusion is that only a life estate vested in John P. Cleveland, which passed by the mortgage foreclosure proceedings to Housel, and by conveyance from him to the defendant Penner. This brings us to the consideration of the question whether or not the said John P. Cleveland is dead. If alive, plaintiffs would not be entitled to the possession of the property until after his death. Mrs. S. S. Cleveland, who was sworn on the part of the plaintiffs, testified on that branch of the case as follows:

Q. You were the wife of John P. Cleveland, were you not?

A. Yes, sir.

Q. Is he living?

A. No, sir.

Q. When did he die?

A. Three years ago.

Q. Where did he die?

A. At Kansas City.

Q. You were living with him at the time?

A. Yes, sir.

* * * * * * *

Cross-examination:

Q. You say Mr. Cleveland died in 1886?

A. Yes, sir; three years ago.

* * * * * * *

The witness further testified that plaintiffs are her children; that after the death of her husband she made an

ineffectual search in the place where he usually kept his papers for the deeds to the property in controversy.

The objection that the death of John P. Cleveland, who took the life estate, is not proven, is technical, and without merit. It is based upon the fact that in the question propounded to Mrs. Cleveland relating to her husband's death, the middle letter of his name is written "B." instead of "P." An examination of the bill of exceptions satisfies us that it is a clerical error of the official stenographer in taking down the testimony and transcribing his short-hand notes of the same. The transcript makes it appear that the plaintiffs introduced in evidence a deed from Hotaling to John B. Cleveland and a mortgage from John B. Cleveland to Housel. Yet an examination of the instruments referred to, copies of which are in the record, shows that in each the middle initial of Mr. Cleveland's name is written "P." To suggest that plaintiffs proved the death of a person who was never connected with the property in any manner and searched among his papers for the deeds in plaintiffs' chain of title is to reflect upon the intelligence of their counsel without any just grounds therefor.

Lastly, it is contended that there is no proof that plaintiffs are the persons named in the deed from Hotaling to Cleveland as remainder-men. The undisputed testimony shows that the witness, Mrs. S. S. Cleveland, was the wife of John P. Cleveland, and that plaintiffs are his children. The names of all but two correspond exactly to the names mentioned in the deed, and these two, Mary H. and Sarah A., it is established beyond controversy, are sisters of the other plaintiffs, but, as already stated, are married, respectively, to Rupert and Burchmore. There is no evidence which in the least casts any suspicion upon the identity of the plaintiffs with the persons named in the deed as remainder-men, and the only conclusion we can draw from the testimony is that such identity is shown.

The judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOHN W. JOHNSON ET AL. V. WILLIAM TORPY ET AL.

[FILED NOVEMBER 2, 1892.]

1. **Joint Tort Feasors:** CONTRIBUTION. In determining whether one joint wrong-doer is entitled to contribution from another the test is, whether the former knew, at the time of the commission of the act for which he has been compelled to respond, that such act was wrongful.

2. ——: ——: INTOXICATING LIQUORS: DAMAGES FOR UNLAWFUL SALE. T., a licensed saloon-keeper, sold intoxicating liquor to R., an habitual drunkard, for which the wife of the latter recovered judgment against him on his bond. T. having satisfied said judgment, sued J., another saloon-keeper in the same village, to enforce contribution on the ground that the latter had also sold liquor to R. which contributed to the injury for which the wife of the latter had recovered. As the undisputed evidence proves that R. was known to be a common or habitual drunkard at and before the sale of the liquor to him, the presumption is that T. knew when he sold the liquor in question that he was doing a wrongful and unlawful act and he is therefore not entitled to contribution from J.

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

J. Hall Hitchcock, E. W. Thomas, and *S. P. Davidson* for plaintiffs in error.

D. F. Osgood, and *Talbot & Bryan, contra.*

POST, J.

This was an action in the district court of Johnson county to enforce contribution on account of a judgment against the defendants in error on the bond of Torpy, a licensed saloon-keeper. It appears from the petition that said Torpy obtained a license from the village board to sell liquor in the village of Sterling, and gave bond as required by law, with the other defendants in error as sureties, and that Johnson, the plaintiff in error, was also a licensed saloon-keeper in said village, having given bond with the other plaintiffs in error as sureties. It is further alleged that during the year for which said licenses were issued, Sarah Rowell commenced an action in the district court of said county against the plaintiff below, Torpy, on his bond, the cause of action stated being the sale to her husband, William Rowell, of intoxicating liquors which caused or contributed to the death of the latter; that said action resulted in a judgment against Torpy and sureties in the sum of $1,000 and costs, which they have fully satisfied, and that the plaintiff in error, Johnson, defendant below, sold liquor to said Rowell which also contributed to his death. They accordingly ask judgment for $740, being the one-half of the amount paid to satisfy the judgment aforesaid, with costs. A trial was had in the district court which resulted in a verdict and judgment for the plaintiffs below, whereupon the case was removed to this court by petition in error. On the part of the plaintiffs in error it is claimed that under the provisions of our statute the furnishing of intoxicating liquors must be regarded as a tort and all who participate in it as wrong-doers, between whom there can be no enforced contribution, while on the part of the defendants in error it is contended that the cause of action against them for the furnishing of liquor to Rowell was a mere statutory liability for an act not illegal either at common law or by statute; hence, all who con-

tributed to his death are as between themselves jointly liable therefor. After a careful examination of the record we have reached the same conclusion as counsel for plaintiffs in error, although by a somewhat different course of reasoning, viz.: From the allegations of the petition of Mrs. Rowell it is apparent that the said William Rowell was, at the time the cause of action accrued against defendants in error, a common or habitual drunkard within any judicial definition of the term. (*Com. v. Whitney*, 5 Gray [Mass.], 86; *Com. v. McNamee*, 112 Mass., 286; *Magahay v. Magahay*, 35 Mich., 210.)

The testimony of witnesses for defendants in error, which is not contradicted, clearly proves that for several months last previous to his death, which occurred on the 28th day of August, 1888, said Rowell was in the habit of drinking to excess; that from the time the license was issued to Torpy, in the month of May previous, he, Rowell, was generally under the influence of liquor when possessed of the means of procuring it, and that his reputation was that of a common drunkard.

The sale of intoxicating liquor to a common or habitual drunkard is unlawful in a double sense—first, as the ground for a civil action by one who is injured thereby; and second, a violation of the statute, which imposes upon the sellers a severe penalty therefor. (See section 10, chapter 50, Compiled Statutes.) In determining whether the right of contribution exists in favor of one wrong-doer against another the test is, must the party demanding contribution be presumed to have known that the act for which he has been compelled to respond was wrongful? If not, he may recover against one equally culpable, but otherwise he is without remedy. (Maxwell, Code Pleading, 64, 172; *Jacobs v. Pollard*, 10 Cush. [Mass.], 287; *Armstrong Co. v. Clarion Co.*, 66 Pa. St., 218; *Lowell v. R. Co.*, 23 Pick. [Mass.], 24; *Acheson v. Miller*, 2 O. St., 203; *Barley v. Bussing*, 28 Conn., 455; *Adamson v. Jarvis*, 4 Bing. [Eng.], 66.)

Since the proofs clearly show that Rowell was an habitual drunkard, within the meaning of the statute, at the time of the sale to him of the liquors for which his widow recovered in the action against Torpy, the latter must be presumed to have known, when he sold such liquor, that he was doing a wrongful and unlawful act, for which he was liable to be punished by indictment. Had he been on trial for a violation of the statute against selling intoxicating liquors to an habitual drunkard, it would not have been necessary for the state to allege or prove knowledge by him that the party named in the indictment was an habitual drunkard; that fact, under our statute, is purely a matter of defense. (Bishop, Statutory Crimes, sec. 1022.) As the sale of the liquor by Torpy to Rowell appears from the evidence to have been wrongful within the knowledge of the former, the judgment of the district court should be reversed and the case remanded for further proceedings therein.

REVERSED AND REMANDED.

THE other judges concur.

ATCHISON & NEBRASKA RAILROAD COMPANY v. A. P. FORNEY.

[FILED NOVEMBER 2, 1892.]

1. **Eminent Domain:** CONDEMNATION PROCEEDINGS: JUDGMENT ON APPEAL FROM AWARD. The judgment of the district court on appeal from an award in a condemnation proceeding for right of way is conclusive upon the parties thereto as to all matters actually litigated therein, and also as to all matters necessarily within the issues joined, although not formally litigated.
2. **Railroads:** RIGHT OF WAY: CONDEMNATION PROCEEDINGS: DAMAGES. A railroad company built its track along an alley

and across S. street in the town of R. at an elevation of twenty feet above the level of the ground, upon trestle-work, the benches of the foundation of which rest mostly in the alley, but extending onto the lots adjacent thereto and in the street, being about twenty feet apart. It condemned twenty-five feet of lots 15 and 16 in block 5 next to the said alley for right of way. An appeal was taken from the award of damages to the district court, where judgment was rendered in favor of F., the owner of the lots. *Held*, That the construction of the track is a direct injury to the property, for which the owner was entitled to recover damage in the condemnation proceeding.

3. ——: ——: OBSTRUCTION OF STREET: ACTION FOR DAMAGES: RES JUDICATA. In a subsequent action by F. against the railroad company to recover damage for the obstruction of S. street by said track adjacent to said lots, in the absence of evidence to the contrary, *held*, the presumption is that the cause of action stated in the petition was included in the judgment in the condemnation proceeding, and is now *res judicata*.

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

Marquett & Deweese, and *E. W. Thomas*, for plaintiff in error.

John Gagnon, and *C. Gillespie*, *contra*.

POST, J.

This was an action by the defendant in error to recover for damages on account of the appropriation by plaintiff in error, defendant below, of a street and alley adjacent to his property in the town of Rulo, in Richardson county. It appears from the petition that the defendant in error is the owner of lots 15 and 16, in block 5, in Rulo proper; that said property is situated at the intersection of Stutzman and Commercial streets; that Stutzman street runs east and and west and bounds said lots on the north; that Commercial street runs north and south and bounds said lots on the east, and that an alley extends through said block from north to south and is the western boundary

of the lots aforesaid. It is further alleged that a building situated on lot 16, near the northwest corner thereof, had been used by plaintiff below, and his tenants for many years as a hotel, and that owing to the sloping character of the ground at that point, the only convenient means of access to said hotel was through the said alley; that some time in the summer of 1886 the defendant below constructed, and has since that time continuously used, a line of railroad through said alley adjacent to said lots, and over and across Stutzman street at and adjacent to the northwest corner of said property; that the track of said railroad through said alley and over said street is twenty feet and more above the level of the ground and is supported by timbers, the benches of which are about eighteen feet apart and so constructed as to make a continuous frame of trestle-work, and that the benches or supporting timbers for said track over Stutzman street are placed inside of said street so that they interfere with the right of way therein, to plaintiff's damage, etc.

The defense relied upon below was, first, a license from the town board; second, a judgment and satisfaction thereof in a condemnation proceeding. The allegation with respect to the condemnation proceeding was not controverted by the plaintiff below, but at the trial the court held that the judgment in that proceeding did not include any cause of action which might have accrued in his favor for the obstruction of the street and alley, and instructed the jury to find for the plaintiff, notwithstanding the condemnation proceeding. This direction we all agree was error, for which the judgment of the district court must be reversed. The evidence, to say the least, tends to prove that the damages claimed in this action were included in the award in the condemnation proceeding, and that question should have been submitted to the jury. The rule is well settled in this state that where the record does not disclose upon what particular cause of action or defense the judgment is

based, parol or other evidence may be received for the purpose of proving what issues were tried and settled by the finding and judgment (*Wilch v. Phelps*, 16 Neb., 515; Freeman, Judgments, 272), although where a cause of action is directly within the issues presented by the pleadings in a former suit or proceeding, the presumption is that it was considered and settled by the judgment therein rendered (*Id.; McDaniel v. Fox*, 77 Ill., 343). There is, however, a more serious objection to the judgment in this case, viz., it is apparent from the record that the question at issue herein was in fact considered and determined in the condemnation proceeding, and that it is now *res judicata*. The petition or application addressed to the county judge for the appointment of commissioners to assess damages, etc., is in due form, and, among other tracts, names the west twenty-five feet of lots 15 and 16 in block 5, in Rulo proper. Subsequently the commissioners filed their report or award as follows:

"We, the undersigned, disinterested freeholders and commissioners, residents of Richardson county, Nebraska, appointed by the county judge of said county to appraise the damages accruing to the following named owners and lien-holders by reason of the appropriation of the hereinafter described lots, parts of lots, and parcels of land taken for right of way, side tracks, and railroad purposes by the Atchison & Nebraska Railroad Company, situated in Rulo proper, * * * in Richardson county, Nebraska, as shown on the map of said railroad as submitted to us by the agent of said railroad company, and belonging to the hereinafter named owners and lien-holders, having been duly qualified, and each having personally examined the premises on the day pursuant to adjournment from June 26, 1886, and at the time mentioned in the notice filed with the county judge at the office of said county judge in said county, find the value and damages according therefor as follows:

"Lots 15 and 16, block 5, Rulo proper—A. P. Forney

and Geo. Bowker, owners of west twenty-five feet of lots 15 and 16, block 5, $1,650. And all other damages accruing by reason of the taking of said lots and parcels of land we hereby appraise, and accordingly award, said values and damages at the total sums set opposite said owners' and lien-holders' names."

From this award the railroad company took an appeal to the district court, where a trial was had, resulting in a judgment for the defendant in error, Forney, which has been paid and satisfied in full.

It further appears to be undisputed that, at the time of the trial of the case on appeal, the track had been fully completed and was in operation along the alley and across the street in question, and that the jury, under the direction of the court, were taken to view the premises. The whole question of the damage to the property was certainly submitted to the jury upon the very best of evidence, viz., the senses of the jurors themselves. When they inspected the property in order to assess the damage of defendant in error they must have observed, not only the situation of the track with reference to the buildings, but also the elevation thereof along the alley and in the street. They saw the foundations or benches upon which the trestle-work rests, extending from the alley onto the lots, and the track extending along the alley and across the street at an elevation of twenty feet and upward, and they could not have excluded the obstruction of the street from their estimate of damage. That was certainly one of the elements of damage, since its direct tendency was to diminish the value of the property. This is but stating in different language the rule that a single cause of action, whether arising *ex contractu* or *ex delicto*, is indivisible. (Freeman, Judgments, 238, 241; *Gapen v. Bretternitz*, 31 Neb., 302.)

Decisions of this court are uniform to the effect that an action for damage will lie in behalf of the owner of property abutting upon a public street, where his easement is

interfered with in the construction of a railroad track, although no part thereof is appropriated. This rule is so well settled as to render the citing of the cases entirely superfluous. It has also been held that the statutory remedy by condemnation proceeding, when once instituted, is exclusive as to all damage for the proper construction of the road. (*F., E. & M. V. R. Co. v. Whalen*, 11 Neb., 585; *R. V. R. Co. v. Fink*, 18 Id., 82; *C., K. & N. R. Co. v. Wiebe*, 25 Id., 542.) As said by the present chief justice in *R. V. R. Co. v. Fink*, "The statutory mode of acquiring the right of way and ascertaining the damages therefor is exclusive as to the manner of assessing the value of the land taken, with damage to the residue of the tract." In the recent case of the *A. & N. R. Co. v. Boerner*, 34 Neb., 240, the question now involved was carefully considered by Judge NORVAL. In that case the point at which the street was obstructed by the railroad track was more than one thousand feet distant from the property involved in the prior condemnation proceeding. Although it was held that there was no presumption that the question of damage was adjudicated in the condemnation proceeding, it is said in the second point of the syllabus: "The judgment of the district court on appeal from an award of damages in condemnation proceedings is conclusive upon the parties as to all questions actually litigated therein, and as to all matters necessarily within the issue joined, although not formally litigated." One cause of action in that case was the obstruction of an alley adjacent to the property by an elevated track, as in this case, but it was held that the conclusive presumption is that compensation for that injury had been allowed in the condemnation proceeding. It is said in the opinion, "Boerner was entitled to have all proper elements of damage considered by the commissioners, and if they failed so to do he cannot afterwards maintain an action to recover the damage then omitted, which was necessarily involved in the issues in the condemnation

proceeding, and which he was bound to present for their consideration therein." And in *R. Co. v. Weimer*, 16 Neb., 272, it was held, in a condemnation proceeding, that the proprietor was entitled to recover on account of a deep cut in a highway adjacent to his property.

The question how remote the obstruction in a street must be from the property involved in a condemnation proceeding to entitle the owner to maintain a subsequent action therefor, may involve difficulty in its solution; nor have we any occasion to assert a general rule on the subject. The obstruction for which defendant in error claims is so near to his property as to amount to a direct injury to the property itself, so that both the commissioners and the jury in the district court must have taken it into consideration in their estimate of damage. The rule for assessing damage in such cases is well settled in this state, viz.: First, the value of the land actually taken (in this case twenty-five feet next to the alley); second, the depreciation in value, if any, of the remaining part of the tract caused by the construction of the railroad. (*R. Co. v. Marley*, 25 Neb., 138; *Blakeley v. C., K. & N. R. Co.*, Id., 207.) The jury, therefore, in assessing the damage in the condemnation proceeding must have determined the extent of the depreciation in value of the lots in question by the construction of the track, and we are no more at liberty to presume that the obstruction in the street was excluded from their consideration than that they overlooked a building situated on the property itself. The judgment of the district court should be reversed and the case remanded for further proceedings therein.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA v. TIM O'ROURK ET AL.

[FILED NOVEMBER 10, 1892.]

1. **Sunday Law:** SPORTING. Under the provisions of section 241 of the Criminal Code any person of fourteen years of age or upwards who shall, on Sunday, engage in sporting, etc., shall be fined in a sum not exceeding twenty dollars, or be confined in the county jail not exceeding twenty days, or both.

2. ———: ———: PLAYING BASE-BALL. Playing base-ball on Sunday comes within the definition of sporting, and renders the persons engaging therein liable to the punishment provided for in section 241.

EXCEPTIONS to the decision of the district court for Lancaster county, HALL, J., presiding. Filed under the provisions of section 515 of the Criminal Code.

The defendants were arrested on a complaint charging them with violating section 241 of the Criminal Code, by playing base-ball on Sunday, as an exhibition at which an admission fee was charged. The case was tried on a stipulation of facts before the county judge. He held that the complaint and stipulation do not charge or establish facts constituting an offense under the laws of the state of Nebraska. The defendants were discharged. Upon a hearing in the district court the decision of the county judge was sustained. The county attorney filed exceptions and removed the cause to this court to settle the law. *Exceptions sustained.*

Novia Z. Snell, County Attorney, Frank W. Lewis, and *J. R. Webster,* for the state:

The Christian religion and the sanctity of Sunday as a holy day are parts of the fundamental law of the United States. (*People v. Ruggles,* 8 Johns. [N. Y.], 290; *Campbell v. International Society,* 4 Bos. [N. Y.], 298; *Common-*

wealth v. Jeandelle, 3 Phila., 509; *Moore v. Hagan*, 2 Duv. [Ky.], 437; *Davis v. Fish*, 1 Greene [Ia.], 406; *Gholston v. Gholston*, 31 Ga., 625; *Weldon v. Colquitt*, 62 Id., 449; *State v. Ricketts*, 74 N. Car., 187; *Lindenmuller, v. People*, 33 Barb. [N. Y.], 548; *Commonwealth v. Eyre*, 1 S. & R. [Pa.], 347; *Johnson v. Commonwealth*, 22 Pa. St., 102; *Stockden v. State*, 18 Ark., 186; *Kilgour v. Miles*, 6 Gill. & J. [Md.], 268; *Commonwealth v. Wolf*, 3 S. & R. [Pa.], 48; *Lieberman v. State*, 26 Neb., 469; *Commonwealth v. Depuy*, Brightly Rep. [Pa.], 44; *State v. Ambs*, 20 Mo., 214; *Nashville v. Linck*, 12 Lea [Tenn.], 499; *State v. King*, 23 Neb., 546.) The Sabbath being so regarded and recognized by the law, the community have and ought to have power to enforce its observance. (*Scammon v. Chicago*, 40 Ill., 146; *Cotton v. Huey*, 4 Ala., 56; *Brackett v. Edgerton*, 14 Minn., 174; *Shaw v. McCombs*, 2 Bay [S. Car.], 232; *Kountz v. Price*, 40 Miss., 341; *O'Donnell v. Sweeney*, 5 Ala., 467; *Commonwealth v. Nesbitt*, 34 Pa. St., 398; *State v. B. & O.*, 15 W. Va., 362; *Shover v. State*, 10 Ark., 259; *State v. Mark*, 9 S. E. Rep. [Va.], 475; *Towle v. Larrabee*, 26 Me., 464; *Rapp v. Reehling*, 23 N. E. Rep. [Ind.], 777; *Allen v. Gardner*, 7 R. I., 22; *People v. Scranton*, 61 Mich., 244; *Lovejoy v. Whipple*, 18 Vt., 379; *Troenert v. Decker*, 51 Wis., 46.)

Except where a word, term, or phrase is especially defined, all words used in the Criminal Code are to be taken and construed in the sense in which they are understood in common language. (Criminal Code, sec. 254.) Under this rule of construction, the word "sporting," as used in section 241 of the Criminal Code, includes playing base-ball. (Webster's Dic.; Century Dic.; Encycl. Dic.)

Charles E. Magoon, contra.

In the absence of a statute there is no legal obligation to observe Sunday as distinguished from any other day of the week. (*Bloom v. Richards*, 2 O. St., 387; *McGatrick*

v. Wason, 4 Id., 566; *More v. Clymer*, 12 Mo. App., 11; *Commonwealth v. L. & N. R. C.*, 80 Ky., 291.) Playing base-ball is an athletic exercise, the same as walking, running, riding, and rowing, and is not prohibited by the statute. Walking does not violate statute. (*Hamilton v. Boston*, 14 Allen [Mass.], 475; *Davidson v. Portland*, 69 Me., 116; *O'Connell v. Lewiston*, 65 Me., 34.) Nor does driving or sailing. (*Nagle v. Blown*, 37 O. St., 7.) Nor does shaving customers. (*State v. Lorry*, 7 Baxt. [Tenn.], 95.) Nor does transporting cattle. (*Phila. & B. R. Co. v. Lehman*, 56 Md., 209.) Nor repairing switch on railroad. (*Yonoski v. State*, 79 Ind., 393.) Nor gathering grain. (*Turner v. State*, 67 Ind., 595.) Nor labor to prevent waste of sap in making maple sugar. (*Whitcomb v. Gilham*, 35 Vt., 297.) Nor is playing base-ball on Sunday a violation of the law. (*St. Louis Association v. Delano*, 37 Mo. App., 284.)

The legal definition of sporting is "killing and taking game on a man's own land." (Rapalje's Law Dic.) This being the well known meaning of the term at common law, its use in the statute is restricted to that sense. (Sutherland, Statutory Construction, sec. 253, and cases cited.)

MAXWELL, CH. J.

In April, 1891, the county attorney of Lancaster county filed in the county court a complaint as follows:

"The complaint and information of James G. Guild of said county made before me, Willard E. Stewart, county judge of said county, on this 30th day of April, A. D. 1891, who, being duly sworn on his oath, says: That Tim O'Rourk, Charles S. Abbey, Clarence Baldwin, John O'Brien, Clarence Conley, William Goodenough, Frederick Ely, Charles Hamburg, Jewett Meekin, Charles Collins, John Cline, Henry Raymond, John Rowe, Jesse Burkett, John Irwin, Owen J. Patten, Philip Tomney, Park Wilson, Emmett Rogers, William Darnbrough, each of said

persons being of the age of fourteen years and upwards, on the 26th day of April, A. D. 1891, said day being the first day of the week, commonly called Sunday, at said county of Lancaster, did unlawfully engage in sporting, and were found sporting and engaged in the game commonly called base-ball, at Lincoln Park base-ball grounds, an enclosure where the game or athletic sport commonly known as base-ball is played and performed as an exhibition by professional players to spectators who are admitted to such exhibition for a fee and reward by such spectators paid to view the same, there being then present about thirty-five hundred spectators at the time aforesaid and place aforesaid, viewing said athletic sport, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Nebraska.

"Affiant further says the said Tim O'Rourk, Charles S. Abbey, Clarence Baldwin, John O'Brien, Clarence Conley, William Goodenough, Frederick Ely, Charles Hamburgh, Jewett Meekin, Charles Collins, John Cline, Henry Raymond, John Rowe, Jesse Burkett, John Irwin, Owen J. Patten, Philip Tomney, Park Wilson, Emmett Rogers, William Darnbrough, each of said persons being of the age of fourteen years and upwards, on the 26th day of April, A. D. 1891, said day being the first day of the week, commonly called Sunday, at the county of Lancaster, at Lincoln Park base-ball grounds, an enclosure where the game or athletic sport commonly known as base-ball is played and performed by professional players employed and hired for and during a fixed period of six months then current at a fixed and agreed reward and monthly salary to pursue the vocation of playing said game of base-ball for the entertainment of spectators for hire, did unlawfully engage in common labor, to-wit, performing the game or athletic sport commonly known as base-ball for hire, the same being their regular employment and vocation, in which said employment and vocation they were then and

there found, such common labor not being a work of necessity or charity, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Nebraska."

The parties were thereupon arrested and taken before the county judge for trial.

The attorneys for the parties entered into an agreement as to the facts as follows:

"It is hereby stipulated and agreed that this case shall be submitted to the above named county judge for trial and determination upon the following agreed state of facts, viz.:

"First—On Sunday, the 26th day of April, 1891, between the hours of 3 o'clock and 5 o'clock P. M., in the county of Lancaster and state of Nebraska, the defendants played a game of base-ball.

"Second—On said 26th day of April, 1891, each of said defendants was over the age of fourteen years.

"Third—The playing of said game of base-ball was not a work of charity or necessity.

"Fourth—Three thousand spectators were present at the time said game of base-ball was played and paid an admittance fee for the privilege of viewing said game while it was being played, but no part of said admittance fee was paid to or received by the defendants or any of them.

"Fifth—On the day said game of base-ball was played the defendants were each under employment by the month to play base-ball for compensation, but playing base-ball was not the usual or ordinary vocation of the defendants or any of them.

"Sixth—Said game of base-ball was played upon the grounds of private parties, and was not played within one-half mile of any dwelling house, school house, church building, or the limits of any incorporated city or village. Said game was not played within one hundred yards of any public highway, and the grounds upon which said game was played were enclosed by a tight board fence ten

feet high, which fence completely obstructed the view from the outside of said enclosure. Said game was not played for any stake, wager, or thing of value.

"Seventh—Upon the foregoing agreed state of facts, and without further testimony or evidence, this case shall be submitted to said county judge for trial and determination."

The case was then submitted to the county judge upon the complaint and stipulation of facts. He held that the "complaint and stipulation of facts do not charge or establish facts constituting an offense under the laws of the state of Nebraska," and therefore discharged the persons accused. The case was taken on error to the district court to settle the law relating to the matter. The district court affirmed the judgment of the county court, whereupon the county attorney asked and obtained leave of this court to file a petition in error to settle the law of the case.

Section 241 of the Criminal Code provides: "If any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, sporting, rioting, quarreling, hunting, fishing, or shooting, he or she shall be fined in a sum not exceeding twenty dollars, or be confined in the county jail for a term not exceeding twenty days, or both, at the discretion of the court. And if any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, at common labor (work of necessity and charity only excepted), he or she shall be fined in any sum not exceeding five dollars nor less than one dollar; *Provided,* Nothing herein contained in relation to common labor on said first day of the week, commonly called Sunday, shall be construed to extend to those who conscientiously do observe the seventh day of the week as the Sabbath, nor to prevent families emigrating from traveling, watermen from landing their passengers, superintendents or keepers of toll bridges or toll gates from attending

and superintending the same, or ferrymen from conveying travelers over the water, or persons moving their families on such days, or to prevent railway companies from running necessary trains."

Webster defines "sporting," "1. To play; to frolic; to wanton. 2. To represent by any kind of play," and as synonyms gives "to play; frolic; game; wanton." (Ed. of 1881, p. 1276.) The definitions in the Century are the same, but somewhat more extended. In the same authority (Webster), p. 111, "base-ball" is defined as "a game of ball, so called from the bases or bounds (usually four in number) which designate the circuit which each player must make after striking the ball." That playing base-ball comes within the term "sporting," and is, therefore, a violation of the statute, there can be no doubt.

But it is claimed, in effect, that restraint of the kind named is in contravention of natural right or religion, and therefore is in excess of the powers of the legislature. The right of free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and to fully discuss the same, is secured to every one. Free discussion, however, is the outgrowth of free government. All free government is based on the divine law. God gave the ten commandments to Moses, which contain rules designed to apply to the whole race. Although given to the Israelites, they were designed for all humanity. The Israelites were constantly lapsing into idolatry. There are noble examples of manhood, however, in their history, but the ignorance of the public, the almost continuous wars, internecine, offensive, or defensive, together with the pagan influences of the surrounding nations, prevented the development of the nation, and it became a prey to the Babylonians, and later to the Roman empire. If we look at the world at the time of the birth of Christ, there was not, so far as we know, a nation where equal and just rights were enjoyed by all, nor where the rights of the poor were adequately

protected and enforced, if indeed, considered. The Roman empire, then at the height of its power, had much to commend it. Many of its rulers were men of genius, ability, and manhood, but punishments of all kinds were of the most cruel character; war was carried on for conquest and with a degree of barbarity that shocks our feelings of humanity. Captives were sold into slavery and practically possessed no rights that their masters were bound to respect. A pastime of the Roman populace was to witness deadly contests of captives with wild beasts or each other. Even as late as the third century after Christ's birth this barbarous practice was in force. Gibbon, in the Decline and Fall of the Roman Empire, vol. I, p. 386 (Millman ed.), says: "We cannot, on this occasion, forget the desperate courage of about fourscore gladiators, reserved, with near six hundred others, for the inhuman sports of the amphitheatre. Disdaining to shed their blood for the amusement of the populace, they killed their keepers, broke from the place of their confinement, and filled the streets of Rome with blood and confusion. After an obstinate resistance, they were overpowered and cut in pieces by the regular forces; but they obtained at least an honorable death, and the satisfaction of a just revenge." Cruelty was the rule and death inflicted as punishment for trivial causes. Specimens of Roman justice may be seen in the trial of Christ before Pilate, and Paul before Felix and Festus. In neither case was there the semblance of an accusation based upon law; yet Christ was condemned to please a mob and Paul would have been delivered to men who had sworn to kill him but for his appeal to Cæsar, and even then he was held a prisoner for two years without a charge against him. The indigent, unfortunate, and discouraged were permitted by the law to sell themselves as slaves, and the rights of the poor were to a great extent at the mercy of the rich and powerful. While there were amphitheatres for the exhibition of brutal contests between men and wild beasts, or between captives to furnish

amusement to an unfeeling populace, there were no public hospitals for the insane, sick, or unfortunate. In addition to this, covetousness, licentiousness, and other vices prevailed to an extent unknown at the present time, nor, so far as we are informed, was any nation superior in any of these respects to the Romans. The most favorable view that can be taken of any government of that date is to say that might alone controlled, and right was a remote consideration.

The birth of Christ was ushered in by the proclamation by angels of peace, "Glory to God in the highest, and on earth peace, good will toward men." (Luke 2:14.) His birth was among the poor and lowly, as if to show that wealth is a mere circumstance which adds nothing to either the usefulness or respectability of its possessor. He taught purity of life, unselfishness, good will toward friends and foes alike, doing good to all as opportunity offered; that religion affected and controlled the life of the individual, and did not consist in mere outward observances. He condemned covetousness, licentiousness, selfishness, and self-righteousness, and insisted on the equality of the race. He practiced his own preaching, and led a life of poverty, purity, and doing good. None so poor as not to claim his sympathy and assistance, nor so wealthy and great as to be above his consideration. The lepers, the blind Bartimeus, the rich centurion, alike were recipients of his beneficence. All were welcome, the only conditions being that they needed his aid and applied for it. His unselfishness, His magnanimity, the nobility of His character were misunderstood by those who were looking for a deliverer from the Roman yoke, and by others who had been taught to regard the law of Moses as perfection. The Jews, who, as the children of Abraham, deemed themselves the favored people of God, were neither expecting nor desiring a leader for mankind, but rather one who, like Moses, would lead them out of hated Roman bondage; neither could they

understand a system that, while accepting much of the law of Moses, proposed to supersede its rites and ceremonies. Many centuries before, the prophets in glowing language had foretold the birth of a son, the Prince of Peace, who would establish His throne with judgment and justice forever. These statements seem to have been taken literally, as applying alone to an earthly prince who should destroy the enemies of the Jews. It is apparent, however, that the prophets' utterances refer to a spiritual ruler who would conquer by love, and whose followers would be guided by his precepts and establish justice and right.

From the crucifixion of Christ until the present time the contest between Christianity and wrong has been going on. Wherever Christianity has prevailed free and untrammeled, liberty has existed. It forbids cruelty, haughtiness, arrogance, pride, licentiousness, and covetousness. It requires a return of good for evil, and aid for the suffering in distress, whether friend or foe, and has established the rule that we shall do unto others as we would have them do unto us. It requires honesty, honor, and integrity in all the affairs of life, and fair treatment for every one. In every Christian land it has swept away the harem and seraglio, made bigamy and polygamy crimes, and elevated woman from a condition of semi-serfdom to be the equal of man. It has broken the captive's chains and mitigated the horrors of war, and there are indications that between Christian nations at least soon "They shall beat their swords into ploughshares and their spears into pruning hooks." It has abolished slavery in every Christian land and enfranchised the slave and given him an opportunity to develop his manhood. It has ennobled labor and established the rule that "the laborer is worthy of his hire." We admire the declaration of independence as a statement of principles based upon the equality of the race and give credit to the authors as statesmen and benefactors, not only of this nation, but mankind. The sturdy independence of

the barons who at Runnymede compelled King John to sign *Magna Charta*, has been the subject of eulogy in both song and story, but the principles of both are found in the sermon on the mount. It may safely be said that the charter of liberty reaches back to Christ's teaching. Christianity is woven into the web and woof of free government and but for it free government would not have existed, because no other system has been able to check the selfishness, greed, arrogance, cruelty, and covetousness of the race.

In *People v. Ruggles*, 8 Johns. [N. Y.], 294, in a prosecution for blasphemy, Ch. J. Kent said: "There is nothing in our manners or institutions which has prevented the application or the necessity of this part of the common law. We stand equally in need, now as formerly, of all that moral discipline, and of those principles of virtue which help to bind society together. The people of this state, in common with the people of this country, profess the general doctrines of Christianity as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. It would go to confound all distinction between things sacred and profane, for, to use the words of one of the greatest oracles of human wisdom, 'profane scoffing doth by little and little deface the reverence for religion,' and who adds in another place, 'two principal causes have I ever known of atheism—curious controversies and profane scoffing.' (Lord Bacon's Works, vol. 2, 291–503.) Things which corrupt moral sentiment, as obscene actions, prints, and writings, and even gross instances of seduction, have, upon the same principle, been held indictable, and shall we form an exception in these particulars to the rest of the civilized world?"

It may be true that the professed followers of Christ are not, in all cases, as unselfish as they should be, or as is their right and privilege, but progress is being made in that direction and many examples of self-denial and unselfishness may be found. Let a cry of distress and a call for help come from any part of the world by reason of some great calamity, and the Christian nations at once respond by liberal contributions and other means to relieve the distress. Schools and colleges are liberally provided and patronized, and education is general. Hospitals and asylums exist on every hand for the poor, the insane, the blind, deaf, and unfortunate, while punishments for offenses are graduated in proportion to the offense, and a conviction can only take place after a fair public trial upon specific charges, and death is imposed in no case except murder or treason. No fair-minded student of history will deny that these benefits and liberty itself flow from Christianity. It appeals alone to reason and asks for adoption because of its excellence. It makes no person the keeper of another's conscience, but requires every one to judge and act for himself. It tolerates the utmost freedom of opinion and worship, and seeks to coerce no one except by the force of reason.

But while allowing the force of reason to be the sole guide in the adoption or rejection of Christianity, its followers have been impelled from duty to combat wrong and oppression on every hand. These were strongly intrenched in the selfishness, covetousness, and other vices of the race, so that they have yielded slowly, but they have been gradually dispelled like clouds after a storm, so that the sun shines almost clearly, and without obstruction. This result has been brought about by almost constant effort, and has cost the lives of hundreds of thousands of martyrs and patriots, and it can only be preserved by constant vigilance.

As a Christian people, therefore, jealous of their liberty and desiring to preserve the same, the state has enacted

certain statutes, which, among other things, in effect, recognize the fourth commandment, and the Christian religion and the binding force of the teachings of the Saviour. Among these is the statute which prohibits sporting, hunting, etc., on Sunday.

The human body, considered as a machine, is the most perfect mechanism of which we have any knowledge. If properly cared for and treated, it will, in ordinary cases where there are no hereditary defects, retain its vitality and vigor to old age, but every movement of the body or action of the brain involves waste of the vital force, and this the Creator has provided shall, to a great extent, be replenished during sleep. Hence, it is necessary to spend about one-third of our time in sleep. While it is true that the reserve force of life is so great in many persons as to enable them to live for a time with less than the normal amount of sleep required, yet, if continued for any considerable time, the general health will be affected, and to entirely abstain from sleep for a week or more, as in cases of certain fevers, like the typhoid, almost unavoidably results in temporary insanity, if not death. But the recuperation from sleep in most cases does not restore full tone to the system, and Sunday is like an oasis in the journey of life where each traveler may be refreshed and become more able to continue the performance of his duties or labors. As a natural consequence, if the vitality of the body is permitted steadily to decrease without being replenished, life will be proportionately shortened. Therefore, if a person labors continuously at hard and exacting labor without rest for many years, his health is liable to be impaired and he become prematurely old. No doubt one of the objects of the Creator in establishing the Sabbath as a day of rest was to provide for restoring and retaining, as far as possible, health and strength and perfect action of the body. Every person of observation knows that the man who labors seven days in the week continuously for any considerable length

of time lacks the spring and elasticity of action of another of like years and naturally active habits who rests on Sunday. Experience has also shown that men will accomplish more labor in a series of years by working six days in the week than by continuous application.

Sunday is to be a day of rest. Worldly cares are to be laid aside, and the worries of business or pleasure thrown off. How gladly the tired laborer, workman, farmer, merchant, manufacturer, attorney, and judge welcome Sunday as a day of rest and on the succeeding Monday enter upon their respective labors with renewed strength and vigor The idler and trifler may complain of the loss of time from resting on Sunday; but the active, intelligent, worker knows that thereby he has increased his capital stock of health and chances of longevity. Christ sought to apply the Sabbath to its appropriate use. The Jewish religion at that time consisted largely of outward ceremonies which were performed with a rigor never intended by the author of the Mosaic law. It is evident that great reliance was placed upon these outward ceremonies. Christ, however, while not condemning many of these ceremonies, intended to show that the mere observance of these was not sufficient; that the Sabbath was made for man, and not man for the Sabbath; and in effect, therefore, that works of charity, mercy, and necessity not only could, but if necessary should, be performed on that day. He recognized the Sabbath, however, as a day of rest set apart by the Creator. After His death and resurrection, His disciples, to commemorate that event, changed the day to the first day of the week, and that day is now observed by the great body of His followers throughout the world, and is recognized by both the common and statute law.

In this state the right of every one to worship God according to the dictates of his own judgment and conscience is recognized, and hence permits those who prefer to keep the seventh in place of the first day of the week to do so.

The law, both human and divine, being thus in favor of abstaining from sporting, etc., on Sunday, is a reasonable requirement and should be enforced. The deliberate violation of such a law, there is reason to believe in many cases, is but the commencement of a series of offenses that lead to infamy and ruin; and in any event the influence upon the participants themselves has a tendency to break down the moral sense and make them less worthy citizens. The state has an interest in their welfare and may prevent their violation of the law. The state, in order to prevent vice and immorality, may punish licentiousness, gambling of all kinds, the keeping of lotteries, enticing minors to gamble, or to permit one under eighteen years of age to remain in a billiard room; to punish publishing, keeping, selling, or giving away any obscene, indecent, or lascivious paper, book, or picture, and also punish any person who shall lend or show to any minor child any such paper, publication, or picture, etc. The law also punishes the disturber of a religious meeting, school meeting, election, etc. These cases show the importance felt by the legislature, of evils of the kind named, and others, by means of which, in addition to wrongs inflicted on the persons injured, a spirit of insubordination is created and fostered which incites to evil and tends to subvert the just and equal rights of some, or all. In addition to this, every person has a right to the quiet and peace of a day of rest. He has also a right to the enforcement of the law so that the evil example of a defiance of the law shall not be set before his children. The state has an interest in their welfare also, in order that they may become useful citizens and worthy and honorable members of society. The fact that the defendants were some distance away from the residence of any person can make no difference. It did not change the nature of the offense nor excuse the act. It was a violation of the law just the same.

The question here presented was before the Kansas City

court of appeals in *State v. Williams*, 35 Mo. App., 541, and it was held the parties were liable. Afterwards the question of the validity of a contract arose. In *St. Louis, etc., Ass'n v. Delano*, 37 Id., 284, in an action upon a contract, it was held that under the Missouri statute athletic games and sports on Sunday were not prohibited. The case was then taken to the supreme court of that state, where the judgment was affirmed. (*St. Louis, etc. Ass'n v. Delano*, 18 S. W. Rep. [Mo.], 1101.) An examination of the statute shows that it is not as broad as ours. In addition to this it is evident the question of the validity of the contract was not raised by the pleadings and therefore was not in issue. Under our statute, however, sporting is clearly prohibited and the party guilty thereof is liable to the punishment provided by statute.

It is unnecessary to consider the other branch of the case.

The district court and also the county court erred in holding that the defendants were not liable, and dismissing the action.

EXCEPTIONS SUSTAINED.

THE other judges concur.

MCCORMICK HARVESTING MACHINE COMPANY v. M. K. HARTMAN.

[FILED NOVEMBER 10, 1892.]

Action on Notes Given for Harvesting Machine: GUARANTY: WEIGHT OF EVIDENCE. *Held*, That the testimony failed to show a substantial compliance on the part of the defendant with the terms of the guaranty proved, and that the verdict was against the clear weight of evidence.

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

Hewett & Olmstead, for plaintiff in error.

S. H. Smith, B. F. Smith, and *C. H. Tanner, contra.*

MAXWELL, CH. J.

On the 13th day of August, 1889, the plaintiff in error filed his petition in the court below, claiming judgment on four promissory notes given to the plaintiff in error by the defendant in error and dated July 3, 1883; one due October 1, 1883; two due October 1, 1884; and one due October 1, 1885, for the purchase price of a McCormick harvesting machine, each note being set up as a separate cause of action.

The answer thereto filed by the defendant in error admits the execution of the notes as described, pleads the statute of limitation as to the first ground of defense, and alleges as a general defense a failure of warranty of plaintiff for said machine, in this, that "the said machine was not a first-class machine and would not do good work, and the plaintiff, after being notified, failed to make it do good work, and that during the months of July, August, and September, 1883, defendant repeatedly notified plaintiff by mail, at its general office, and their local agent in person, that said machine would not do good work, and that if plaintiff could not make said machine do good work he (defendant) would not pay said notes, and that said machine was subject to their (plaintiff's) order, according to the terms of said notes. Plaintiff has failed to make good its representation and warranty."

The reply is a general denial of new matter in the answer.

On the trial of the cause the jury returned a verdict for the defendant in error, and a motion for a new trial having

been overruled, judgment was entered on the verdict dismissing the action.

The principal ground of error is that the verdict is against the evidence.

The testimony shows that the defendant purchased the machine of one Charles Stone at Hastings. The defendant in his testimony, in answer to a question by his own attorney as to the guaranty, said: "Well, he guaranteed the machine to do good work in every respect," and on cross-examination testifies: "It was guaranteed to do good work in all respects." He also states that he signed a contract which was lost, but the proof clearly shows was on a printed form, of which the following is a copy:

"These machines are all warranted to be well made, of good material, and durable with proper care. If upon one day's trial the machine should not work well, the purchaser shall give immediate notice to said McCormick Harvesting Machine Company, or their agent, and allow time to send a person to put it in order. If it cannot then be made to work well, the purchaser shall return it at once to the agent of whom he received it, and his payment (if any has been made) will be refunded. Continuous use of the machine, or use at intervals through harvest season, shall be deemed an acceptance of the machine by the undersigned."

The latter warranty is the only one established by the proof.

The defendant testifies in regard to the machine as follows:

Q. When the machine run, and it took an extra team, it elevated the grain?

A. Yes, sir.

Q. The principal fault of the machine was that it pulled hard?

A. Yes, sir, and wore out fast.

Q. Anything the matter with the frame?

A. It was crooked.

Q. Did you ever ask for another?

A. There was one sent to Stone.

Q. Did you ever call there for it.

A. No, sir.

Q. Did you ever try to take advantage or claim your rights under the guarantee from Stone?

A. I told him I would not keep the machine.

Q. You cut grain the first year?

A. Yes, sir.

Q. And the second year?

A. Yes, sir.

Q. And the next year?

A. No, sir.

Q. You rented your farm that year

A. Yes, sir.

The frame of the machine seems to have been twisted, probably from exposure to the weather, so as to be out of line. This caused it to run hard. He continued to use the machine, however, and made no attempt to comply with the only guaranty proved. It will be seen that there was no attempt on the part of the defendant to comply with the conditions of purchase; he continued to use the machine for two years, and when a new frame was sent to him permitted it to remain in the agent's hands. The testimony fails to show good faith on his part or a compliance with the terms of the warranty.

The judgment is against the clear weight of evidence, and is set aside, and a new trial granted and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CHARLES H. MEHAGAN v. L. B. MCMANUS.

[FILED NOVEMBER 10, 1892.]

1. **Action on Note:** PROTEST WAIVED: WEIGHT OF EVIDENCE. Under the issue made by the pleadings and proof, the question in dispute was whether or not the words "protest waived" were written upon the notes when the defendant delivered the same to the plaintiff. *Held*, That a preponderance of the evidence tends to sustain the plaintiff's contention.

2. ———: ARGUMENT OF COUNSEL. Where the attorney for the plaintiff in summing up to the jury used improper language, to which objection was made, whereupon the court said to the jury: "You must not pay any attention to that statement whatever," etc., *held*, that the language used, although improper, did not justify a reversal of the case.

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

C. C. Flansburg, for plaintiff in error.

Morning & Keester, contra.

MAXWELL, CH. J.

This action was brought on two promissory notes as follows:

"$167. ST. JOSEPH, Feb. 8, 1887.

"May 1, 1888, after date we promise to pay to the order of James J. Patton one hundred and sixty-seven dollars, at St. Joseph, Mo., for value received, without defalcation or discount, with interest from date at the rate of ten per cent per annum until paid. M. M. RILEY.

"EMMA A. RILEY."

Indorsements: "Pay Charles H. Mehagan or order. J. J. Patton. Pay John Dawson or order. Protest waived. Charles H. Mehagan. Protest waived. John Dawson."

"$167. ST. JOSEPH, Feb. 8, 1887.

"November 1, 1888, after date I promise to pay to the order of James J. Patton one hundred and sixty-seven dollars, at St. Joseph, Mo., for value received, without defalcation or discount, with interest from date at the rate of ten per cent per annum until paid.

"M. M. RILEY.
"EMMA A. RILEY."

Indorsements: "Pay Charles H. Mehagan or order. J. J. Patton. Pay John Dawson or order. Protest waived. Charles H. Mehagan. Protest waived. John Dawson."

The defendant in his answer admits that the Rileys made the notes and delivered them to J. J. Patton, who indorsed them to Mehagan; and that he indorsed and delivered the same to Dawson, but denies that he wrote the words "protest waived" thereon. Second, that said notes were payable at St. Joseph, Mo., but no demand of payment was made there, whereby Patton was released from liability. Third, that the plaintiff received from Dawson security for said notes, and he thereby secured an extension of the time of payment, to which the defendant did not assent.

On the trial of the cause the jury returned a verdict in favor of the plaintiff below for the sum of $433, upon which, judgment was rendered.

The testimony tends to show that Dawson sold and conveyed to the plaintiff in error a number of town lots for which the latter indorsed the notes and delivered them to Dawson.

The only material question in dispute is in regard to the words "protest waived" being written on the notes when the plaintiff in error indorsed the same. The plaintiff in error contends that the words were not there then, while the defendant in error contends that they were, and, in our view, a preponderance of the evidence establishes the fact that the words were on the notes when they were indorsed and delivered. The proof tends to show that

Dawson was unacquainted with the makers of the notes, and in effect required the plaintiff in error to guarantee the notes. This he did by the indorsements in question. The record also shows the following facts:

"Counsel for plaintiff, in summing up to the jury, said, I suppose the court knows him, and I suppose he could tell you that he is the biggest crank in the United States.

"Counsel for defense object to the statement of the counsel, and ask the court to strike it out.

"By the court: I sustain the objection, and, gentlemen of the jury, you are to pay no heed to it whatever.

"By counsel for plaintiff, in further summing up to the jury: A judgment was obtained in this case in the county court against this defendant and John Dawson.

"Counsel for defense object to the statement of the counsel and move to strike it out.

"By the court: Gentlemen of the jury, you must not pay any attention to that statement whatever, as there is not a particle of evidence to that effect."

The proper course for an attorney in an argument to a jury is to discuss the facts of the case and present them in as favorable an aspect as the truth will justify. An attack upon the character of the adverse party, or his attorney, where such character is not in issue, is almost invariably taken as an indication that he does not expect to convince the jury upon the facts, hence the appeals to their prejudices. The writer believes that a party greatly weakens his argument by that course. If, however, the attorney's sense of propriety will not prevent him from resorting to matters outside of the record, then it is the duty of the court to compel him to do so; and in this case the court did its duty, and the use of the words above set out, condemned as they were, is not sufficient to justify a reversal. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

LYON & HEALY V. R. A. MOORE.

[FILED NOVEMBER 10, 1892.]

Action to Recover Damages for Breach of Warranty on Sale of Piano: WEIGHT OF EVIDENCE. Evidence examined and *held* to sustain the verdict, and there is no material error in the instructions.

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

Marston & Nevius, for plaintiffs in error.

R. A. Moore, pro se.

MAXWELL, CH. J.

The defendant in error brought an action against the plaintiffs in error and set forth his cause of action as follows: "The plaintiff claims of and from the defendants the sum of $325, and for cause thereof alleges that some time during the month of September or October, 1888, he purchased of and from the defendants a piano for the sum of $525, and plaintiff avers that, as an inducement for him to make said purchase, one ———, agent of defendants, represented to him that the piano in question was worth $600, and that he had never sold one for less than $600, and they could not be purchased for less than said amount, and that he had sold one exactly like it to G. B. Finch for $600; that this piano should be as good in every respect; that the piano so bought was a Fischer piano known as the 'Baby Grand'; that the said agent represented to plaintiff that said piano was of a superior make and a much better grade of piano than the Hardman or other pianos; he also represented to the plaintiff that he could take said piano, and if it did not prove entirely satisfactory to plaintiff after trial, they would take it back and furnish

him with another instrument worth the money; that plaintiff was not a judge of pianos and so informed the defendant, and that he would rely on them furnishing him an instrument that was all right and worth the money. The said defendants further represented to plaintiff that they would warrant said instrument for five years; that it should be all right in every particular. Plaintiff avers the fact to be that said instrument was not as represented, in this, that it was not worth more than $200; that the said defendants have been selling said instruments for three or four hundred; that it is not worth more than half as much as the one he sold C. B. Finch; that the said piano is of an inferior grade and not near as good a piano as the Hardman and others of the same kind; that the piano was not satisfactory to plaintiff, and he so informed defendants numerous times and asked them to take it back and furnish him with another instrument worth the amount of money paid by plaintiff; that the plaintiff bought the piano for his daughter upon the express representation that it was of a superior make, and the same has been out of repair for the full year since he bought it; that he has notified the defendants several times that it was out of repair and they have sent an agent several times to fix it, but each time when it was repaired it would not remain in repair more than a few days, and that the same is not worth more than $200; wherefore plaintiff, on account of the matter and things hereinbefore, has been damaged in the sum of $300, no part of which has been paid, with costs of suit."

The defendants below in their answer admit the purchase of the piano and that it was to be as good as the one sold to Finch, and deny all other allegations.

On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of $250, and a motion for a new trial having been overruled, judgment was entered on the verdict.

Two points are relied on for a reversal of the judgment: First, that the verdict is against the weight of evidence, and second, error in the instructions. The proof does clearly establish the fact that the piano in question is not as good as the one sold to Finch, and that there should be a deduction, and in our view the amount allowed by the jury is none too large. The verdict, therefore, conforms to the evidence, and there is no material error in the instructions. The judgment is therefore

AFFIRMED.

THE other judges concur.

DAVID NEHR V. STATE OF NEBRASKA.

[FILED NOVEMBER 10, 1892.]

1. **Property in Dogs.** In this state a dog has a money value which the owner may recover from one who wrongfully and unlawfully kills his dog.

2. **Dogs:** COLLAR. It is the duty of the owner to place upon the neck of his dog "a good and sufficient collar with a metallic plate thereon, on which shall be plainly inscribed the name of the owner." If a dog is found running at large without such collar, no action can be maintained for killing the dog.

3. ——: RUNNING AT LARGE. When a dog leaves the owner's premises or goes upon the public road, no one having control of him being near, he is running at large within the meaning of the statute.

4. ——: NUISANCE. A dog that persistently assails people passing along a public road in a threatening manner is a nuisance, and may be killed by any person so assailed.

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

Hardy & Wasson, for plaintiff in error:

It is lawful for a person to kill any dog found running at large, on whose neck there is no collar, and no action can be maintained for such killing. (Sec. 191, Consolidated Statutes.) The dog was unconfined and unrestrained, and was therefore "running at large." (*Commonwealth v. Dow*, 10 Met. [Mass.], 382; *Woolf v. Chalker*, 31 Conn., 121; *McAneany v. Jewett*, 10 Allen [Mass.], 151.) A dangerous and unruly dog running at large is a nuisance, and the killing of such an animal is justifiable. (*Putnam v. Payne*, 13 Johns. [N. Y.], 312; *Maxwell v. Palmerton*, 21 Wend. [N. Y.], 408.) The dog was of no intrinsic value, and was not such personal property as made it a crime to kill him. (*United States v. Gideon*, 1 Minn., 226; *Jemison v. S. W. R. Co.*, 75 Ga., 444; *State v. Marshall*, 13 Tex., 55.)

George H. Hastings, Attorney General, contra:

Dogs are personal property within the meaning of the statute. (*Hinckley v. Emerson*, 4 Cow. [N. Y.], 351; *Parker v. Mise*, 27 Ala., 481; *Wheatley v. Harris*, 4 Sneed [Tenn.], 468; *Harrington v. Miles*, 11 Kan., 480; *Dunlap v. Snyder*, 17 Barb. [N. Y.], 561; *Brent v. Kimball*, 60 Ill., 211; *Uhlein v. Cromack*, 109 Mass., 273.)

MAXWELL, CH. J.

The plaintiff in error was informed against in the county court of Gage county because he did unlawfully, maliciously, and willfully shoot and kill a certain house dog, the property of John A. Dobbs, of the value of $50. He was found guilty in the county court and appealed to the district court, where he was again found guilty, and the jury also found that the dog was of the value of $1; and the plaintiff in error was sentenced to five days' imprisonment in the county jail and to pay a fine of $2 and the costs.

The prosecution was instituted under section 109 of the

Criminal Code, which is as follows: "If any person shall willfully and maliciously injure or destroy to any amount less than one hundred dollars, any personal property of any description whatsoever, or any building or other structure of any kind, owned by another person, every person so offending shall be imprisoned in the jail of the proper county not exceeding thirty days, and shall, moreover, be fined in double the amount of the damage of the property injured or destroyed."

Section 191, Consolidated Statutes, provides: "It shall be the duty of every owner or owners of any dog or dogs to securely place upon the neck of such dog or dogs a good and sufficient collar with a metallic plate thereon, on which shall be plainly inscribed the name of such owner. It shall be lawful for any person to kill any dog found running at large, on whose neck there is no collar, as aforesaid, and no action shall be maintained for such killing.

"Sec. 192. Every person who shall harbor about his or her premises a collarless dog for the space of ten days shall be taken and held as the owner, and shall be liable for all damages which such dog shall commit.

"Sec. 193. The owner or owners of any dog or dogs who shall permit the same to run at large for ten days after this act shall take effect, without such collar as hereinbefore described being securely placed upon the neck of such dog or dogs, shall be deemed guilty of a misdemeanor and fined in any sum not exceeding twenty-five dollars, which, when collected, shall be paid to the county treasury for the benefit of the school fund of the county in which the fine was imposed."

The testimony shows that Mr. Dobbs's house was about 100 feet from the public road; that there was no fence between the house and the road; that the dog was in the habit of running out on the road when persons or teams were passing, and barking furiously; that he had run out in a belligerent manner nearly every time that the plaintiff

in error had passed along the road and at one time had frightened his team when his wife was driving. Other witnesses testify that their horses had been frightened by the dog. All the witnesses agree that the dog was in the habit of going on the road and barking in a threatening manner at teams or persons as they passed.

Jacob Dell, a witness called by the defendant, testified:

Q. Did you know John Dobbs's dog?

A. Yes, sir.

Q. The one that was shot?

A. Yes, sir.

Q. Tell what you know about his attacking you going by there.

A. Well, when I came past with a team he nearly always came out in a vicious, severe manner, just as though he intended to eat something up if he could get hold of it; first, my team isn't easily scared; he didn't scare the team very much; he always tackled me when I went by on foot, he came out very savagely; he came out within three or four feet of me; I knew the dog was going to bite me; I turned around and kicked at him; he barked and growled; he is as cross as any dog I had to encounter; he followed me three or four rods and then he turned back.

Q. Did he put you in fear?

* * * * * * *

Q. State what effect this attack had upon you and your mind, at this particular time; I allude to the time of the attack.

A. I don't know that it had any effect, only that it scared me.

Q. What were you scared about?

A. I was afraid he was going to bite me.

Other witnesses testify to substantially the same facts.

The testimony also shows that the dog came out on the road when the plaintiff in error was passing that place and commenced barking in a hostile manner, whereupon the plaintiff in error shot and killed the dog.

The first objection is, that a dog has no value, and therefore a prosecution will not lie under the statute in question. We think differently, however. A dog is property and no one can destroy it maliciously without making himself liable. (*Harrington v. Miles*, 11 Kan., 480; *Hinckley v. Emerson*, 4 Cow. [N. Y.], 351; *Uhlein v. Cromack*, 109 Mass., 273; *Brent v. Kimball*, 60 Ill., 211.) The first objection, therefore, is untenable.

Second—The design of the statute is that all dogs shall wear collars, so that it shall be known who the owners are. If a dog is found on the public road without a collar and away from his owner or the person having charge of him, the statute in effect authorizes the destruction of the dog.

But it is said the dog was not running at large when he was killed. The words "running at large," in the connection in which they are used, mean running on the public road or off from the owner's premises without any person claiming an interest in the dog being near at hand.

In *Commonwealth v. Dow*, 10 Met. [Mass.], 382, it was held that a dog is going at large in a town if he is loose and following the person who has charge of him at such a distance that he cannot exercise control over the dog.

In *McAneany v. Jewett*, 10 Allen [Mass.], 151, the dog was on the owner's premises, disturbing no one when the defendant entered thereon and shot the dog, and it was held that the dog was not at large.

In *Loomis v. Terry*, 17 Wend. [N. Y.], 496, it was held that if a person permit a mischievous dog to run at large on his premises and a person is bitten by him in the daytime the owner will be liable for the damages, although the person injured was trespassing on the ground of the owner at the time. It is made the duty of the owner to put a collar on his dog, so that his ownership may be known. If he fails to do so and the dog is killed, off from the owner's premises, there can be no recovery.

Third—The testimony would warrant the jury in find-

ing that the dog was in the constant habit of attacking people passing along the public road and therefore was a nuisance, and justified any person assaulted in killing him.

An attempt was made to show that other dogs attacked people in passing along the roads. Even if proved, it would not aid this case. (*Maxwell v. Palmerton*, 21 Wend. [N. Y.], 408.) In the case cited Chief Justice Nelson says: "If a dog be in fact ferocious, at large, and a terror to the neighborhood, the public would be justified in dispatching him at once." The same statement had previously been made in *Putnam v. Payne*, 13 Johns. [N. Y.], 312, and is no doubt the law.

No person has a right to keep a dog that persistently assails travelers passing peaceably along the public road, and the fact that many persons permit their dogs to do so does not justify the practice. In any view of the case, therefore, the judgment cannot be sustained. The judgment is reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GEORGE K. MOREHOUSE V. STATE OF NEBRASKA.

[FILED NOVEMBER 10, 1892.]

1. **Embezzlement:** FRAUDULENT PLEDGING OF PROPERTY BY COMMISSION AGENT. An agent who, having received property of another to sell on commission on certain prescribed terms, fraudulently, and without the knowledge and consent of the owner thereof, pledges it for money borrowed by the agent for his own use and benefit, with the intent to deprive the owner of his property, is guilty of embezzlement.

2. ——: EVIDENCE in this case examined, and *held* sufficient to warrant a conviction for that offense.

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

George S. Smith, for plaintiff in error.

George H. Hastings, Attorney General, contra.

NORVAL, J.

Plaintiff in error was tried and convicted in the court below upon an information charging him with the embezzlement of six pianos, of the value of $1,370, all being the property of Chickering, Chase Bros. & Co., a Chicago corporation. From the judgment of the court, requiring him to be imprisoned in the penitentiary at hard labor for the term of four years, he prosecutes error to this court.

Numerous errors are assigned in the motion for a new trial, and in the petition in error, but one of which is now relied on for a reversal, namely, that the verdict is against the evidence. It appears from the testimony in the bill of exceptions that plaintiff in error was engaged in the sale of musical instruments in the city of Omaha; that on the 17th day of December, 1890, he entered into a written contract with Chickering, Chase Bros. & Co., a corporation doing business in Chicago, for the sale, on commission, of pianos owned and handled by said corporation, as its agent. By the terms of the contract, all goods furnished by the company were to be held by Morehouse upon consignment and were to be sold on such terms as the company should direct. All moneys, notes, or other property received from the sale of instruments were to belong to the company. All notes and leases for instruments were to be taken on blanks furnished by the company, payable to its order, secured by lien on the instruments sold, and subject to the company's approval. The instruments were to remain the property of the company until they were sold, and instruments taken back from customers on account of default in

payments, or for other causes, and all new or second-hand instruments taken in exchange, or in part payment for instruments consigned by the company were to be regarded as goods consigned, and to be accounted for in the same manner. Morehouse was to report on the first day of each month all instruments received and sold, as well as those remaining on hand unsold, and was to make prompt returns as sales were made. The agency was to be terminated at any time by either party, and all instruments at such time remaining unsold were to be delivered free of charge or expense of any kind to the company upon demand. Morehouse was to receive as commission for his services such sum or sums as he should sell the instruments consigned to him for in excess of the invoice prices.

It further appears that under said contract six pianos of the value of $1,370 were shipped by the company to plaintiff in error in the month of December, 1890, and the same were received by him at his place of business in Omaha. Subsequently, on the 3d day of January, 1891, Morehouse executed and delivered a bill of sale on five of the instruments to one C. F. Orff, to secure the payment of a loan of money. The other piano, No. 3,633, was taken by plaintiff in error to his residence, and afterwards, on the 12th day of January, 1891, he made and delivered to one C. De Roberts a bill of sale thereof to secure a pre-existing indebtedness and the payment of the further sum of $50 at the time borrowed of De Roberts. Each bill of sale was given without the knowledge or consent of the corporation, and it did not receive any of the moneys for the payment of which they were given to secure. Each recited in the body thereof that the property therein described belonged to Morehouse.

It is conceded that after the giving of said bills of sale, and while said agency contract was in full force, Morehouse formed a partnership with one Charles E. Morrill, and for a time the business was carried on under the firm

name of Morehouse & Morrill, although the contract of agency remained unchanged and in the name of Morehouse. With the money received from Morrill for a half interest in the enterprise, Morehouse paid off all the indebtedness for which the pianos had been pledged as security, except the indebtedness to De Roberts, which has never been paid. It also appears from the testimony that on the 5th day of March, 1891, plaintiff in error sold his interest in the partnership to his partner Morrill, and at the time gave him a bill of sale covering the six pianos in controversy and other property, by the terms of which, and as a part consideration for the giving of the same, Morrill agreed and assumed to pay certain specified indebtedness of the firm, amounting to $1,065.85. A portion, if not all, of such indebtedness has since been paid by Morrill. There is no conflict in the testimony as to any of the facts above stated. The state also introduced evidence which tended to show that Morehouse represented to Morrill prior to the giving of the last bill of sale that he was the owner of the pianos and had paid for the same; that he exhibited to Morrill a forged receipted bill of the instruments, which purported to be signed by Chickering, Chase Bros. & Co., and that plaintiff in error also opened an account upon his books with the company, in which he charged himself with the six pianos at $1,370 and credited himself with cash $1,370, although he had never paid any part of said sum. Morrill admits making the receipted bill of the instruments as well as the entry upon his books of the cash payment above mentioned, but claims that he entered the same through mistake; but his explanation is entirely unsatisfactory. He testified that the credit should have read, "goods," instead of "cash," yet upon cross-examination he admits that he had never returned any goods to the company. The evidence shows that five of the pianos, the company, through a compromise with Morrill, has recovered back, but that it has never received the one pledged to

De Roberts, which had been taken by him under his bill of sale, and its whereabouts is unknown to the company.

In the brief of counsel for plaintiff in error it is urged that the bill of sale given to Morrill was obtained by duress and threats made by the latter, but we find no foundation for such claim in the evidence. Morehouse in his testimony makes no claim that he was induced by threats to make the bill of sale, but insists that he gave it for the purpose of placing his property beyond the reach of his creditors, in which statement he is contradicted by Morrill. The evidence contained in the bill of exceptions tends to prove that plaintiff in error claimed to be the absolute owner of the instruments in question; that he received the same as the agent of Chickering, Chase Bros. & Co., and that he converted the property to his own use with a fraudulent intent, by pledging the same for money borrowed, and by transferring the pianos by a bill of sale to Morrill. The fraudulent and wrongful pledging of the instruments by plaintiff in error for money borrowed and to secure the payment of his own indebtedness, without the consent of the owner, amounts in law to embezzlement. (*Commonwealth v. Butterick*, 100 Mass., 1; *Commonwealth v. Tenney*, 97 Id., 50.) The fact that the company finally received back some of the instruments does not relieve the act of its criminal nature. We are of the opinion that the evidence sustains the verdict. The judgment of the district court is

AFFIRMED.

THE other judges concur.

JOHN STABLER ET AL. V. HENRY GUND ET AL.

[FILED NOVEMBER 10, 1892.]

1. **Review:** FAILURE TO FILE BRIEFS: SUBMISSION OF CAUSE WITHOUT ARGUMENT. Where a cause brought to this court upon appeal or petition in error is submitted upon the record and bill of exceptions without either a brief or oral argument, the judgment, ordinarily, will be affirmed without an investigation of the questions presented.

2. **Conditional Order for Payment of Money:** ACTION AGAINST ACCEPTOR: PLEADING. In an action by a payee against the acceptor of a conditional order for the payment of money, the plaintiff must aver and prove that the conditions stipulated in the order have been fulfilled in order to entitle him to recover.

3. **Trial to Court:** HARMLESS ERROR: THE ADMISSION OF ILLEGAL EVIDENCE in a cause tried to a court without a jury is not sufficient ground for the reversal of the judgment.

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

Hall & Patrick, for plaintiffs in error.

Case & McNeny, contra.

NORVAL, J.

Plaintiffs in error were engaged in business under the name of the Nebraska Manufacturing Company, and defendants in error were engaged in the banking business under the name and style of the Webster County Bank. On the 15th day of December, 1884, the firm of Schunk & Mouser, composed of J. Schunk and L. D. Mouser, was indebted to plaintiffs in error for goods, wares, and merchandise sold and delivered, to the amount of several hundred dollars, a part of which indebtedness was evidenced by four promissory notes, and the balance was on

book account. For the purpose of securing the payment of such indebtedness, Schunk & Mouser executed and delivered to plaintiffs the following order:

"BLUE HILL, NEB., Dec. 15, 1884.

"*Webster County Bank, Blue Hill, Neb.*

"Please pay to the Nebraska Manufacturing Co., of Lincoln, Nebraska, the amount we owe them, consisting of the following notes and book account, out of the first collaterals you hold belonging to us, after the amount we owe you is paid. [Here follows a description of the four notes and the account.] Amounting in all with interest to about $598.

SCHUNK & MOUSER.

"J. SCHUNK.

"L. D. MOUSER.

"Witness: E. L. MORSE."

Upon the face of said order is written the following acceptance: "December 15, 1884. Accepted. Webster Co. Bank, E. L. Morse, Asst. Cashier."

Action was brought in the court below upon said acceptance, the plaintiffs alleging that at the time of the giving of said order and the acceptance thereof, defendants had in their possession and under their control a large number of notes, accounts, and securities belonging to the firm of Schunk & Mouser, which were held by the bank as collateral security for money due from said firm to the defendants; that said indebtedness to said bank has since been paid, and that defendants have in their possession a large amount of notes, accounts, and securitiesbelon ging to said Schunk & Mouser, over and above the indebtedness of said firm to the bank. The prayer is for judgment for $498 and interest. The answer to the petition is, in effect, a general denial. There was a trial to the court, with finding and judgment for the defendants.

The cause is submitted to this court upon the record and bill of exceptions, without either brief or oral argument to aid us in reaching a proper conclusion. This court is bur-

dened with business, and counsel bringing cases here for review should file briefs of the points and authorities relied upon for a reversal of the judgment. A case that does not possess sufficient merit to demand the filing of briefs is of too little importance to occupy the time of the court in its consideration, and in the future such cases, ordinarily, will be affirmed without an investigation of the questions presented.

The first assignment in the petition in error, that the judgment is not sustained by sufficient evidence, must be overruled. The order directing the bank to pay the indebtedness of the drawers to plaintiffs was conditional and not absolute. It was to be paid out of the first moneys arising from the collection of the collaterals held by the bank belonging to the drawers after their indebtedness to the bank was liquidated. There is not a syllable of testimony tending to show that any sum has been paid upon the collaterals in excess of the claim of the bank, for the payment of which they were held as security. Clearly such proof was necessary to establish the liability of the defendants. By their acceptance of the order they only agreed to pay the amount collected by them in excess of the sum due them from the drawers. Not only is there a failure of proof, but the petition fails to state a cause of action, in that it contains no averment that anything has been collected upon the collaterals by the bank in excess of the amount due it from Schunk & Mouser.

Complaint is made because the court permitted defendants to prove that they held no collaterals belonging to the drawers of the order at the time the same was given, nor since. We think this testimony was inadmissible because it tended to impeach or contradict the written order, by the acceptance of which defendants admitted that they held in their possession securities owned by Schunk & Mouser. They were estopped to deny the recitals in the order. While the testimony to which we have referred was im-

properly received, the judgment for that reason will not be reversed. Had it been excluded it could not have changed the result, therefore was not prejudicial to the plaintiffs. Again it has been often held by this court that the admission of irrelevant testimony in a cause tried to a court without a jury is not ground for the reversal of the judgment. (*Enyeart v. Davis*, 17 Neb., 228; *Ward v. Parlin*, 30 Id., 376.)

The third ground in the petition in error is "errors of law occurring at the trial duly excepted to." This is too general to be considered. It is a sufficient assignment in a motion for a new trial, because made so by statute, but in a petition in error the grounds upon which it is asked that the judgment be reversed must be specifically stated. The judgment is clearly right and is

AFFIRMED.

THE other judges concur.

DE LANE A. WILLARD V. JENS C. NELSON.

[FILED NOVEMBER 10, 1892.]

1. **Promissory Note:** FRAUD IN PROCURING SIGNATURE: BONA FIDE PURCHASERS. When the signature of an illiterate person is obtained to a promissory note by the payee fraudulently inducing him to believe that he is signing an instrument of an entirely different character, without any fault or negligence of the maker, the note cannot be enforced even in the hands of a *bona fide* holder.

2. **Sufficiency of Evidence.** *Held*, That the instructions fairly presented the case to the jury, and that the verdict is not contrary to the evidence.

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

M. V. Moudy, and *Sullivan & Reeder*, for plaintiff in error.

M. Whitmoyer, *contra*.

NORVAL, J.

This is an action to recover of the defendant in error the amount of a promissory note for the sum of $120, which it is alleged he executed at Columbus, this state, on the 26th day of October, 1887, payable to the order of Cole, Grant & Co. one year after date, with interest at ten per cent, and indorsed by the payees to the plaintiff before maturity.

The answer sets up the illiteracy of the defendant, want of consideration, and that the note was procured by fraud and circumvention practiced upon him by the agent of Cole, Grant & Co. The reply denies the allegations of the answer. The jury found for the defendant, and the plaintiff brings error.

On the trial the plaintiff introduced testimony tending to show that the defendant's genuine signature is attached to the note and that plaintiff purchased it for value before maturity. He also introduced the instrument in evidence, and then rested his case. Thereupon the defendant introduced testimony to the effect that in October, 1881, he met in Columbus a person who represented himself to be the agent of Cole, Grant & Co. in the sale of a certain combition slat and wire fence; and that defendant was induced to and did consent to act as agent for said Cole, Grant & Co. in the sale of such fence in certain townships of Platte county. A commission contract, partly written and partly printed, constituting and appointing the defendant as such agent, was prepared by the agent of Cole, Grant & Co., which was signed by both parties. The defendant further testified that he signed his name but twice on that occasion, and he supposed he was signing duplicate contracts; that he is illiterate and unable to read English; that the stran-

ger read over the contract to him before it was signed; that nothing was said at any time about the defendant giving a note, nor did he know that he had signed one until long after the agent of the payees had left the county. This testimony is undisputed. The uncontradicted proof shows that, while the defendant's genuine name is appended to the note, he never executed and delivered the same, knowing it to be such, but that by some artifice or trick he was duped and defrauded into signing it, supposing it to be an agency contract for the sale of the fence. The note was absolutely without consideration. Only the two parties to the transaction being present when the paper was signed, the defendant was compelled to trust to the reading thereof to the agent of the payees. Whether the defendant was guilty of negligence or not was for the jury to determine from all the facts and circumstances in evidence. If he was free from negligence or fault and was tricked into signing the note, as the jury must have found, and the evidence tends to show, then the plaintiff cannot recover, although he may be a *bona fide* holder. (*First National Bank of Omaha v. Lierman*, 5 Neb., 247; *Dinsmore & Co. v. Stimbert*, 12 Id., 433; *First National Bank of Sturgis v. Deal*, 22 N. W. Rep. [Mich.], 53; *Bowers v. Thomas*, 62 Wis., 480; *Soper v. Peck*, 51 Mich., 563.)

The plaintiff on rebuttal called as a witness one Gus Wilson, and propounded to him the following question:

Q. State if Mr. Willard applied to you, about the time this note was purchased by him, to ascertain if he knew anything about the genuineness of this signature before he purchased.

Objected to, as immaterial and not responsive to the issues, and not rebuttal. Sustained. Exception.

The plaintiff offered to prove by the witness that within four or five days after October 26, 1887, the plaintiff in the action, D. A. Willard, came to the witness at his bank in Genoa, Nebraska, and asked him concerning the note

in suit, and the responsibility of the defendant, and exhibited to the witness the instrument, asking him whether it was all right; that the witness then stated to plaintiff that the signature to the note was genuine and that the defendant was financially solvent. Defendant objected to the offer, which was sustained.

The offered testimony was excluded, and, we think, rightly so, as it was clearly immaterial. The answer admitted the signature to the note, and the jury were so instructed. Besides, it was not competent to prove what the witness said to plaintiff about the note before it was purchased, as such testimony had no bearing upon the issues in the case, and was hearsay.

Several exceptions were taken to the charge of the court as given, and the refusal to give instruction one, requested by the plaintiff. None of these are well taken. Counsel have not pointed out a single objection to the charge of the court, and we are unable to discover any error therein. The instructions are in harmony with the authorities cited above, and the case went to the jury under a charge quite as favorable to the plaintiff as the case would warrant. The verdict has ample support in the evidence, and finding no error in the record the judgment of the district court is

AFFIRMED.

THE other judges concur.

O. D. MONTGOMERY, MODERATOR, v. STATE OF NEBRASKA, EX REL. ELMER E. THOMPSON, COUNTY SUPERINTENDENT.

[FILED NOVEMBER 10, 1892.]

1. **Mandamus:** MODERATOR OF SCHOOL DISTRICT: REFUSAL TO COUNTERSIGN ORDERS. It is the duty of the moderator of a school district to countersign all proper orders drawn by the director on the district treasurer, and if he refuses to countersign such an order, issued in full compliance with the provisions of law, *mandamus* will lie to compel the performance of such duty.

2. ———: ———: RIGHT OF COUNTY SUPERINTENDENT TO APPLY FOR WRIT. A moderator refused to countersign an order properly drawn upon the treasurer and the matter was submitted for adjudication to the county superintendent, who, after investigation, found that the officer refused to sign the order for insufficient reasons. *Held*, That under the statute the county superintendent had the right, on behalf of the district, to apply to the proper court for a writ of *mandamus* to compel the officer to perform his duty.

3. **Employment of Teacher:** VALIDITY OF CONTRACT. A contract of employment of a teacher entered into on behalf of the district by the director and treasurer will bind the district, although the moderator was not consulted concerning the employment.

ERROR to the district court for Hall county. Tried below before HARRISON, J.

Thummel & Platt, for plaintiff in error.

Charles G. Ryan, contra.

NORVAL, J.

This action was brought in the court below by the state, on the relation of the county superintendent of schools of Hall county, for a peremptory *mandamus* to require and compel the plaintiff in error, as moderator of school district

No. 27, of said county, to sign certain school orders drawn by the director of said district upon the school district treasurer in payment of teachers' wages. An alternative writ of *mandamus* was issued, to which the respondent filed a motion to quash on the following grounds:

1. Plaintiff has no legal capacity to sue.
2. Defect of parties plaintiff.
3. The facts alleged are insufficient to entitle the relator to the relief demanded.

The motion being overruled, respondent answered, and upon the hearing the issues were found in favor of relator and a peremptory *mandamus* was granted as prayed. A motion for a new trial was made and denied. To reverse the judgment the cause is brought into this court on error.

The facts alleged and proved are substantially these: On or about the 29th day of July, 1889, James Bly and Nelson Wescott, the director and treasurer respectively of school district 27 of Hall county, entered into a written contract on behalf of said district with one Katie E. Costello, a legally qualified teacher of said county, by which she was employed to teach the school of said district for the period of six months, commencing on the 2d day of September, 1889, at an agreed salary or wages of $37.50 per month, payable at the end of each month.

In pursuance of said contract said Costello taught the school of said district for the full term of six months, and in part payment for the services so rendered as such teacher, the said James Bly, as director of said school district, drew two orders upon the treasurer of said school district in favor of said Costello, one for the sum of $37 and the other for $38. Both of these orders, after being duly signed by said Bly as director, were presented to the respondent, the moderator of the said school district, with a request that he countersign the said orders, which request he refused to comply with. Thereupon the matter of the refusal of the respondent to countersign said orders was

submitted for adjudication to the relator, as county superintendent, who, after investigation, found that the respondent, through contumacy, unreasonably refused to countersign said orders. The respondent still refusing to countersign the same, although the county superintendent presented the orders to him with a request that he sign the same, the relator instituted this action.

Section 16, subdivision 4, chapter 79, Compiled Statutes, provides that the director "shall draw and sign all orders upon the treasurer for all moneys to be disbursed by the district, and all warrants upon the county treasurer for moneys raised for district purposes, or apportioned to the district by the county superintendent, and present the same to the moderator, to be countersigned by him, and no warrant shall be issued until so countersigned. No warrant shall be countersigned by the moderator until the amount for which the warrant is drawn is written upon its face. The moderator shall keep a record, in a book furnished by the district, of the amount, date, purpose for which drawn, and name of person to whom issued, of each warrant countersigned by him."

By the above statutory provision it is made the duty of the moderator of a school district to countersign all proper orders drawn and signed by the director upon the district treasurer for moneys to be disbursed by the district. The treasurer of a school district has no authority to pay out moneys belonging to the district, except upon orders signed by the director and countersigned by the moderator. (Section 5, subdivision 4, of said chapter 79; *State v. Bloom*, 19 Neb., 562.)

It is urged that relator has no capacity to sue, and that there is a defect of parties plaintiff. We think ample authority for bringing the action is conferred upon the relator by section 11, subdivision 3, chapter 79, Compiled Statutes, which provides that "whenever a director or moderator refuses to sign orders on the treasurer, or

the treasurer thinks best to refuse the payment of orders drawn upon him, the difficulty shall be referred for adjudication to the county superintendent, who shall proceed at once to investigate the matter, and if he finds that the officer complained of refuses, through contumacy or for insufficient reasons, it shall be the duty of the superintendent on behalf of the district to apply to the proper court for a writ of *mandamus* to compel the officer to perform his duty."

The language of the section quoted is clear and explicit, and leaves no room for interpretation. In the case at bar the petition, as well as the proof, shows that the matter of the refusal of the respondent to countersign the warrants in question was submitted to the relator as county superintendent, and, upon investigation, he found that respondent refused to countersign the orders without his having any valid ground or excuse therefor. Such being the case, the right of the county superintendent to apply to the court for a *mandamus* to compel the respondent to countersign the orders cannot be doubted. Notwithstanding the power thus conferred upon the county superintendent by the statute, Miss Costello could have brought the action in her own name, yet she was not obliged so to do, nor was it necessary that she should have been joined as a relator herein. The fact that a third party advanced the money on the orders to the payee therein named did not bar the right of the county superintendent to institute the suit, nor was the person so advancing the money a necessary party to the action. It fully appears from the record before us that the application for *mandamus* was brought by the relator on behalf of the school district. This was sufficient.

The objection that relator failed to prove that Miss Costello was a qualified teacher is not sustained by the record. The bill of exceptions shows that during the time she taught the school she held a second grade certificate from the county superintendent of Hall county, authorizing her

to teach school in such county. She therefore possessed a proper certificate of qualification, and the respondent's refusal to countersign the warrants upon that ground is without merit.

Upon the trial some evidence was introduced by respondent tending to show that the moderator took no part in the employment of the teacher, and that he neither had notice of or participated in the meeting of the school district board at which she was employed. The evidence established that the respondent was consulted by the other two members of the board concerning her employment, and that he declined to hire her at a compensation exceeding $30 per month. It is immaterial that there was no formal meeting of the board authorizing her employment or that respondent did not consent to the making of the contract. The employment is not for that reason invalid. As stated by the present chief justice in his opinion in *Russell v. State*, 13 Neb., 68, "the director, with the assent of either the moderator or treasurer, may hire teachers, or if the moderator and treasurer agree upon a teacher they may require the director to employ the person agreed upon, or in case of his refusal undoubtedly may themselves employ such person. In order to secure harmony in the district, it is desirable that all those entrusted with the duty of hiring teachers should agree upon the person to be employed, but it is not necessary to the validity of the contract. The law imposes upon the director the duty of hiring, either at the request of his colleagues or with the assent of one of them. The law having specially authorized the director to perform this duty, it is not necessary to the validity of the contract that there should be a meeting of the school board, or even that all the members thereof should be consulted in relation thereto or notified of the employment." The contract entered into by a majority of the board on behalf of the school district is valid and binding. And as it appears that the respondent failed to perform a plain statutory

duty, the district court did not err in awarding a peremptory writ of *mandamus* to compel him to perform such duty. The judgment is

AFFIRMED.

THE other judges concur.

LEIGH R. FLETCHER V. RANDALL A. BROWN.

[FILED NOVEMBER 10, 1892.]

1. **Joinder of Actions:** EJECTMENT: RENTS AND PROFITS. An action of ejectment, under our practice, may be joined with one to recover rents and profits.

2. **Ejectment:** RENTS AND PROFITS: LIMITATIONS: OCCUPYING CLAIMANTS ACT. Damage for rents and profits may be recovered in an action of ejectment for the statutory period, prior to the service of summons therein. The special provision of the occupying claimants act, ch. 63, Compiled Statutes, applies only to rents and profits subsequent to the service of summons in the ejectment suit.

3. ———: REMEDY FOR RENTS AND PROFITS ACCRUING AFTER SERVICE OF PROCESS. Whether such special provision is exclusive as to damages for rents and profits subsequent to the service of summons in ejectment or concurrent only, *query*.

4. ———: OCCUPYING CLAIMANT: VALUE OF IMPROVEMENTS: EVIDENCE. Where an occupant of real estate, in an action of ejectment, is allowed for valuable and lasting improvements made while in possession under a claim of title, the measure of his recovery is the amount such improvements add to the value of the premises. Evidence of the cost of improvements, irrespective of their effect upon the value of the land, is inadmissible.

5. **Evidence:** TAXES PAID BY THIRD PARTY. Evidence examined, and *held* not sufficient to entitle the plaintiff in error, defendant in an action of ejectment, to recover for taxes paid by third parties.

6. ———: ———. One F. went into possession of property under a title bond executed by L., whereby the latter agreed to convey

by good and sufficient deed upon the payment of the last installment of the purchase money ten years after date. Subsequently, and before payment of the purchase money, B. brought an action of ejectment against F. to recover possession of the premises. *Held*, That F. could not recover against B. for taxes paid by L. in the absence of evidence of a special assignment by the latter.

7. **Occupying Claimants:** EVIDENCE examined, and *held* to sustain the finding of the trial court as to the value of improvements made by plaintiff in error, an occupying claimant.

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

W. H. Eller, for plaintiff in error.

W. C. Walton, and *Charles H. Brown, contra.*

POST, J.

This was an action of ejectment in the district court of Washington county by the defendant in error, Randall R. Brown, to recover possession of the west half of the southeast quarter of section 21, township 19, range 11 east, in said county. The petition is in the usual form in actions of ejectment and praying judgment for damages in the sum of $100. The answer is a denial of title in the plaintiff and an allegation of title in the defendant by virtue of two tax deeds by the treasurer of Washington county; one in favor of R. F. Beal and E. A. Allen, November 30, 1864, and the other to Victor G. Lantry, August 9, 1879. It is also alleged that the defendant and his grantors have paid taxes on the property in controversy since the year 1861, and that he and his immediate grantor, Lantry, have since the year 1876, while in possession thereof, made valuable and lasting improvements thereon, consisting of a dwelling house, stable, out-buildings, orchards, etc., to the value of $2,400. The answer concludes with the prayer for an accounting, in case the title to the premises is found by the court to be in the plaintiff, and that the taxes paid

by the defendant and his grantor may be adjudged to be a lien thereon, and for general relief. The reply is a general denial. The case being called for trial in the district court, the cause of action was confessed by the defendant below so far as the title to the property was concerned, and the following stipulation signed by the respective parties:

"It is hereby stipulated by and between the parties hereto, that at the April term of court this defendant (plaintiff) may take judgment in his favor for possession in this cause, * * * and that the question of rents, and profits, and improvements, and such other things and differences as are set up in defendant's answer or the defendant may have, shall be continued for settlement, or until the next term of this court."

Subsequently the case was sent to a referee with instructions "to take the evidence and report upon the facts and law as to the matters in issue undisposed of by the judgment heretofore rendered in this action, being the question, on the part of the plaintiff, for the recovery of damages for the rents and profits of the land described in his petition, and the question of the recovery by the defendant of damages for taxes paid and improvements made on the same."

At a subsequent term the referee submitted his report as follows:

"1. That defendant took a conveyance of the land from Victor G. Lantry by a bond for a deed, September 30, 1882.

"2. That defendant took possession of the land soon after and enjoyed the rents and profits of the same for the years 1883, 1884, 1885, 1886, and 1887.

"3. That the rental of the land was as follows: Forty-five acres worth $2.00 per acre for each of the years 1883, 1884, 1885, and worth $2.50 per acre for each of the years 1886 and 1887. Twenty-five acres worth 25 cents per acre for each of the years 1883, 1884, 1885, 1886, and 1887. The rest of the land had no rental value.

"4. That defendant placed on the land prior to February 23, 1883, and subsequent to September 30, 1882, lasting and valuable improvements of the value of $825.

"5. That there was placed on the land by Victor G. Lantry, through whom defendant claims, and prior to defendant's purchase of the land, lasting and valuable improvements of the present value of $250.

"6. That defendant placed on the land subsequent to February 23, 1883, lasting and valuable improvements of the present value of $600.

"7. That payments of taxes for the land in controversy have been made, and instruments and documents have been made and delivered, as shown in the schedule hereto attached and made a part of this report, marked 'Exhibit A,' said schedule showing tax deeds, certificates of sale for taxes, quitclaim deeds, payment of taxes, one satisfaction of bond for a deed, one redemption certificate, and one bond for a deed.

"8. That owing to the failure to plead in the answer, or owing to the fact of too much land being covered by a tax deed, or want of proof of power of attorney, or want of proof of proper assignment of interest, defendant's interest in the land in the matter of taxes is not shown clearly, except for the years 1870, 1873, 1883, 1884, 1885, and 1886.

"I make the following conclusions of law:

"1. That plaintiff is entitled for rents and profits:

"For the year 1883 to $96.25, with interest from January 1, 1884.

"For the year 1884 to $96.25, with interest from January 1, 1885.

"For the year 1885 to $96.25, with interest from January 1, 1886.

"For the year 1886 to $118.75, with interest from January 1, 1887.

"For the year 1887 to $118.75, with interest from January 1, 1888.

"2. That defendant is entitled to the sum of $1,075 in payment for lasting and valuable improvements put upon the land by himself and his grantor prior to February 23, 1883.

"3. That defendant is entitled to a lien for the taxes paid for the land for the years 1870, 1873, 1883, 1884, 1885, and 1886, as far as pleaded, with interest."

Exceptions were taken to the above findings and conclusions of law by both parties, which sufficiently appear from the decree of the court as follows:

"This action coming on for hearing on the report of the referee and objections thereto filed by the plaintiff and defendant and arguments of counsel, and the court being advised in the premises, it is ordered that the first, second, and third exceptions of the plaintiff and also the defendant to the referee's finding of fact be, and the same are hereby, overruled, and the court approves the first, second, third, fourth, and fifth findings of fact by the referee; and it is further ordered that the said plaintiff's fourth exception to the referee's first conclusion of law be, and the same is hereby, reformed to the extent that the rents and profits of the land in controversy, amounting to the sum of five hundred and ninety-five dollars and eighteen cents, to the 10th day of April, 1888, and the said finding, as reformed, is hereby approved and confirmed. It is further ordered that the plaintiff's sixth objection to the referee's third conclusion is hereby disallowed and set aside; and it is further ordered that the fifth and seventh exceptions of the plaintiff to the referee's report be, and the same are hereby, overruled; and it is further ordered that the sixth, seventh, and eighth findings of fact by the referee be, and the same are hereby, disallowed and set aside as matters immaterial to the issues involved; and it is further ordered and adjudged that the referee's second conclusion of law be, and the same is hereby, approved and confirmed. It is therefore considered by the court that the plaintiff have and recover of and from the said defendant the possession of the prem-

ises in the petition described, to-wit, the west half of the southeast quarter of section 21, in township 19, range 11 east, in Washington county, Nebraska, and that he have, and the clerk of the court is hereby ordered to issue, a writ of restitution for the possession of said premises upon the paying into the court by the plaintiff of the sum of four hundred seventy-nine dollars and seventy-two cents ($479.72), being the difference between the sum found due the defendant, to-wit, one thousand seventy-five dollars for the improvements and five hundred and ninety-five dollars and eighteen cents rents and profits due the plaintiff, as shown by the report of the referee and its modifications by the court, with interest thereon from the 10th day of April, 1888, within ninety days from the entry of this judgment."

A preliminary inquiry is suggested by briefs of counsel, viz.: Just what issues were presented for trial before the referee? The allegation of the petition with respect to damage is probably too general and would have been so construed had objection been made at a seasonable time. The charge therein is that the plaintiff has sustained damage by the unlawful withholding of possession of said premises, in the sum of $100, etc. Where damage is claimed for rents and profits the petition should contain a statement of the facts upon which such claim is based, although a general allegation is sufficient to support a judgment. (Boone, Code Pleading, 184.) But we must also look to the stipulation set out above and the order of the court for the issues. By them in express terms the whole question of rents and profits on one side and claim for taxes and improvements on the other side is submitted to the referee. Nor is the jurisdiction of the court or the regularity of its proceedings in that respect now called in question. The case therefore, as submitted to the referee for trial involved an accounting between the parties, and each was entitled to such relief as would have been allowed by the district court

as a court of equity had the same questions been presented by the pleadings instead of the stipulations.

The first objection argued in this case is the allowance in favor of the plaintiff below of rent for the year 1883, which was prior to the service of any notice of his claim to the premises. This objection is founded upon the provisions of section 4 of the aot approved February 28, 1883, known as the occupying claimants act. (Compiled Statutes, ch. 63.) By that section it is provided the appraisers contemplated by said act "shall assess the net annual value of the rents and profits which the occupant or claimant has received after having received notice of the successful claimant's title by service of process," etc. Had defendant in error elected to proceed in accordance with the provisions of the occupying claimants act it is clear that the inquiry of the appraisers with respect to rents and profits would have been confined to the period subsequent to the service of the summons. But, as we have already seen, the whole question of rents and profits was by stipulation submitted to the referee. The provision of the act of 1883 with respect to rents and profits is in substance identical with that of the former act on the subject. (Gen. Statutes ch. 51.)

In *Harrall v. Gray*, 12 Neb., 543, it was held that the last named act was not exclusive and that the plaintiff's damage for rents and profits was not limited to the time of the service of summons, but that he might recover in ejectment for such length of time, within four years, as the proofs show him entitled to. At common law the action of trespass for *mesne* profits could be maintained by the plaintiff in an ejectment suit after judgment in his favor, and the actions were so far separate that a judgment for nominal damage in the latter was no bar to a subsequent action for *mesne* profits. (*Van Alen v. Rogers*, 1 Johns. Cases [N. Y.], 281; *Jackson v. Wood*, 24 Wend. [N. Y.], 443.) But under the Code the two causes of action may

be joined. The occupying claimants act, however, makes no provision for assessing of damage for rents and profits *previous* to the service of summons. But that omission does not affect the plaintiff's right of recovery therefor. It is apparent that the act in question was not intended as a restriction upon the right of the plaintiff to recover in the ejectment suit his *mesne* profits up to the time of service of the summons. Whether the special provision in the act aforesaid is exclusive or concurrent only, as to rents and profits subsequent to the service of summons, is a question not presented by the record in this case. There was therefore no error in allowing rents for the year in question.

2. The district court upon the exceptions of both parties reviewed the evidence and reduced the amount of the finding of the referee for improvements to $1,075.72, which action is now assigned as error. It has been settled by repeated decisions of this court that an occupying claimant of land who has made lasting and valuable improvements thereon, under a *bona fide* claim of title derived from lawful public authority, is entitled to compensation therefor. (*Shuman v. Willetts*, 19 Neb., 705; *Page v. Davis*, 26 Id., 670.) In this connection it is important to determine, upon authority, the rule by which to assess the value of improvements in cases of this character. In 3 Sutherland on Damages, 349, 350, the rule is stated in the following language: "The improvements should be estimated in favor of the defendant at such an amount as they add to the market value of the premises." The same rule is stated by Judge Story in different language, viz., "the allowance must be measured by the benefits which the true owner will receive from the improvements." (Story's Eq. Jur., sec. 799; see also 1 Sedgwick, Damages, 258, note; *McMurray v. Day*, 70 Ia., 671; *Fisher v. Edington*, 85 Tenn., 23; *Thomas v. Quarles*, 64 Tex., 491; *Pacquette v. Pickness*, 19 Wis., 219.) Tested by the rule above stated, which we have no doubt is the sound one, there is no error

in the ruling complained of. The referee had, over the objection of the plaintiff below, permitted the defendant to prove the cost of the improvements made by himself and Lantry through whom he claims, irrespective of their effect upon the value of the land. This evidence the court evidently rejected, since the amount allowed is about the average estimate of defendant's witnesses when examined with reference to the value of the land with and without the improvements. The finding of the court is clearly in accordance with the weight of evidence, and no sufficient reason is given for reversing it in this court.

3. The next contention is that the referee and the court erred in rejecting the claim of the defendant below for taxes for the years not enumerated in the referee's conclusions of law. The evidence of title in defendant is:

(1) Treasurer's deed, to Roger T. Beal and Edwin A. Allen, September 30, 1863.

(2) Treasurer's deed, to Roger T. Beal and Edwin A. Allen, November 21, 1864.

(3) Quitclaim deed, Beal and Allen to Victor G. Lantry, April 10, 1875.

(4) Treasurer's deed, to Rice Arnold, August 20, 1878.

(5) Treasurer's deed, to V. G. Lantry, August 9, 1876, for taxes of 1870.

(6) Treasurer's deed, to V. G. Lantry, August 9, 1876, for taxes of 1872.

(7) Quitclaim deed, Rice Arnold to defendant, March 31, 1888.

(8) Bond for a deed, Victor G. Lantry to Leigh R. Fletcher, defendant, dated September 30, 1882.

By the terms of the last named instrument Lantry agrees to sell and convey the property in controversy to the defendant for $1,350, payable as follows: $825 on January 15, 1883, $400 five years after date, and $125 ten years after date, all bearing interest at eight per cent per annum. It appears affirmatively from the evidence in the

bill of exceptions that no conveyance of the title to the property by Lantry to defendant has been attempted, nor is there any pretense that the latter has paid the amount named to entitle him to a deed. There is no evidence whatever of an assignment by Lantry to defendant of any claim for taxes, hence the rights of the latter, whether legal or equitable, must be referred to the title bond. There was therefore no error in rejecting the claim for taxes paid by Lantry. The judgment of the district court, so far as it recognizes the right of defendant to recover under the occupying claimants act, is evidently based upon the tax deed to Arnold, for it is plain that it could be sustained upon no other ground. Whatever may be the rights of Lantry with respect to taxes paid by himself or Beal and Allen, that cause of action, so far as this record discloses, remains his property.

The record discloses that the taxes from 1870 to 1882, inclusive of both years except for the year 1874, were paid by C. P. Lamar, S. S. Smith, and C. McMenemy, but we find in the record no assignment to defendant of the claim of either of the parties named, nor has plaintiff in error in his brief pointed out to us wherein any such privity exists as will entitle him to recover for taxes so paid.

4. It is contended that the referee should have been directed to find the value of the land in September, 1882, at the time defendant entered. The defendant is not prejudiced by the failure to so find for the reason as has already been stated, that he did not elect to proceed under the occupying claimants act, but permitted the trial to proceed as upon an accounting in equity.

5. Counsel for defendant in error in their brief have assailed the rule announced in *Page v. Davis*, 26 Neb., 670, and insist that one who holds only by virtue of a tax title adjudged to be void is not by any fair or reasonable construction of the occupying claimants act entitled to the benefit of its provisions. We have no occasion to discuss

that question, since the case comes into the court upon the petition in error by Fletcher, the defendant below, and the judgment must be affirmed on other grounds. Had Brown, the plaintiff below, desired to have the judgment reviewed he should have filed his petition in error. As it is, he is presumed to be satisfied with the judgment. There being no error in the record prejudicial to the plaintiff in error the judgment of the district court is

AFFIRMED.

THE other judges concur.

ALEXANDER CARTER, JR., V. RANDALL A. BROWN.

[FILED NOVEMBER 10, 1892.]

1. **Ejectment:** RIGHTS OF OCCUPYING CLAIMANT: IMPROVEMENT AND TAXES. To entitle the defendant in ejectment on eviction at the suit of the owner of real estate to recover under the provisions of the occupying claimants act for improvements and taxes paid while in possession, it must appear that such improvements were made or such money paid while he was in good faith claiming title, legal or equitable, to the premises derived from some public office or from the United States or the state of Nebraska.

2. ——: ——: ——. L., whose only title to real estate was derived from certain tax deeds conceded to be void, executed in favor of C. a title bond conditioned that he would convey said property on payment of the consideration, at the expiration of five years. Subsequently B., the owner, recovered judgment for possession thereof in an action of ejectment against C., in which the latter sought to recover under the occupying claimants act for improvements and taxes paid by him. *Held*, in the absence of evidence that C.'s possession, actual or constructive, was by virtue of said bond, or that such money was expended for taxes and improvements, while in good faith relying upon a title acquired thereby, that a judgment for the plaintiff should not be disturbed.

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

W. H. Eller, for plaintiff in error.

W. C. Walton, and *Charles H. Brown*, *contra.*

POST, J.

This was an action of ejectment by the defendant in error in the district court of Washington county to recover possession of the northeast quarter of the southwest quarter of section 21, township 19, range 11 east, in said county. The petition is in the usual form and does not call for especial notice. The answer denies the title of plaintiff and alleges title in the defendant through certain tax deeds and a title bond which will be more particularly described hereafter. At the April, 1886 term the plaintiff's cause of action was confessed so far as his title was concerned, and judgment entered in his favor in pursuance of the following stipulation:

"It is hereby stipulated by and between the parties hereto, that at the April term of court this defendant (plaintiff) may take judgment in his favor for possession in this cause, * * * and that the question of rents and profits, and improvements, and such other things and differences as are set up in defendant's answer or the defendant may have, shall be continued for settlement, or until the next term of this court."

Not being able to agree upon a settlement of the remaining issues, the case was sent to a referee with instructions to hear the evidence and report his findings of fact and conclusions of law upon the question of the plaintiff's claim of damage for rents and profits, and the defendant's claim for taxes and improvements. Subsequently, the referee submitted the following report:

"1. That defendant took a conveyance of the land from Victor G. Lantry by a bond for a deed September 10, 1882.

"2. That defendant took possession of the land and enjoyed the rents and profits of the same for the years 1883, 1884, 1885, 1886, and 1887.

"3. That the rental value of the forty acres of land in controversy during the five years above mentioned was fifty cents per acre for each year.

"4. That defendant, subsequent to February 23, 1883, placed upon the land lasting and valuable improvements of the present value of forty dollars.

"5. That payments of taxes for the land in controversy have been made and instruments and documents concerning the land have been made, and delivered, such as are shown in the schedule hereto attached and made a part of this report, marked 'Exhibit A,' said schedule showing tax deeds, certificates of sale for taxes, quitclaim deeds, powers of attorney, one bond for a deed, and payments of taxes.

"6. That the power of attorney shown in said schedule as to date, June 10, 1881, is defective, in so far as the acknowledgment before the notary fails to show any one personally appearing before him except Alice Marsilla Eaton.

"7. That all of the tax deeds and some of the certificates of sale and tax receipts shown in said schedule are for other lands as well as the lands in controversy.

"I make the following conclusions of law:

"1. That plaintiff is entitled to the sum of $100 as rents and profits.

"2. That defendant is not entitled to pay for the improvements put upon the land.

"3. That defendant is entitled to a lien for the taxes paid with interest, for the years 1882, 1883, 1884, 1885, and 1886, as far as pleaded in his answer, and that he is

entitled to a lien for a part of the taxes paid for each of the following years with interest: 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1870, 1871, 1872, 1873, 1875, 1876, and 1879."

Exceptions were taken to the findings by the respective parties which present the questions herein considered. The first objection to the judgment relied upon by the plaintiff in error in this court is the allowing in favor of the plaintiff below of rents and profits for a period antecedent to the date of notice of the latter's claim of title by service of summons in the ejectment suit. That question was fully considered in the case of *Fletcher v. Brown, ante*, p. 660, decided at this sitting. That case involved precisely the same facts as this, and the conclusion there reached is decisive of the question. The other questions presented by the record are all included in the one inquiry: Is the plaintiff in error on the record of the case entitled to the benefits of the occupying claimants act (ch. 63, Compiled Statutes)? His only title or pretense thereof is a title bond executed in his favor by Victor G. Lantry September 10, 1882, which is conditioned that upon the payment of the consideration therefor, of which $300 matures five years after date, he, Lantry, would convey said premises to plaintiff in error by a good and sufficient deed. It was further provided therein that in case said Lantry was not, at the expiration of five years, able to convey by a perfect title that the damage for the breach of said contract should be the consideration paid without interest. Although plaintiff in error was a witness in his own behalf, there is in the bill of exceptions no evidence of payment by him of the consideration of the land, nor is there any proof whatever of any equity in him aside from the bond for a deed. It is not shown that he made the improvements or paid the taxes for which he claims in good faith, relying upon his title under the bond from Lantry, nor even that he went into possession, either actual or constructive, by

virtue thereof, or even held or claimed to hold under or by virtue of said bond. Lantry's only title or claim was by virtue of certain treasurer's tax deeds admitted to be void and for taxes paid by himself and grantors. There is no evidence that his rights, whatever they may be on account of taxes so paid, have been assigned to the plaintiff in error, hence it is plain the latter cannot recover on that cause of action. (*Fletcher v. Brown, supra.*)

But there is still a more serious objection to his recovery and one which goes not only to the claim for taxes paid by Lantry and his grantors, but to the claim for improvements, and taxes paid by the plaintiff in error, viz., that he is not shown to have any such title to or interest in the premises in controversy as will entitle him to the benefits of occupying claimants act. That law was intended for the protection of those occupants of real estate only who have improved the same or expended money for taxes thereon, while relying in good faith upon such title as is mentioned in the act, and its provisions will not be extended to cases which cannot by a reasonable construction be held to be within their terms. (*King v. Harrington*, 18 Mich., 213; *R. Co. v. Hardenbrook*, 21 Kan., 440.) In the last named case it is said by Judge Valentine that "In order to get the benefits of the occupying claimants act the records must show *prima facie* at least that at the time he made the improvements on the land he had an interest therein, and that such interest was of that high character which may properly and rightfully be denominated in law or equity a title. No interest less than an apparent title would be sufficient." The provision of our statute is: "That in all cases where any person claiming title to real estate, whether in actual possession or not, for which such person can show a plain and connected title in law or equity derived from the records of some public office or from the United States or from this state, or derived from any such person by devise, descent, deed, contract, or bond, such person or persons claiming or holding

as aforesaid shall not be evicted or turned out of possession," etc. What plaintiff in error was required to show was a plain and connected title in law or equity derived from the records of some public office or from another so claiming or holding by contract or bond. It may be conceded that Lantry had such title as would have been a sufficient protection to him as to improvement made in good faith, and that plaintiff in error would also have been within the statute had he taken and held possession under the title bond. But as his possession is not shown to have been under or by virtue of said bond, it follows that there is no such privity between him and Lantry as would entitle him to invoke the protection of the statute as against the owner of the title.

At common law we know the occupant of real estate was without remedy, upon eviction, for improvements. Whatever was annexed to the freehold the law deemed a part of it and inured to the benefit of the owner, and an occupant made improvements at his peril, although in good faith relying upon his own title. Finally, the rule was adopted by courts of equity, following the civil law, that when a *bona fide* occupant of property made improvements thereon in an honest belief of ownership, and the true owner was obliged to invoke the powers of a court of chancery, the court, by an application of the maxim, he who seeks equity must do equity, would compel him to pay for the improvements. (Sugden on Vendors, ch. 22, secs. 54, 55, 57; Story's Eq. Jur., 779*a*, 799*b*.) Courts of law subsequently modified the strict rule of the common law to the extent that in an action for *mesne* profits the *bona fide* occupant might recoup the value of his improvements. (2 Kent, Com., 335, *Jackson v. Loomis*, 4 Cow. [N. Y.], 168.) If the improvements exceed in value the owner's claim for *mesne* profits, the common law affords the occupant no remedy, while the right of the owner to recover his rents does not depend upon the statute. The radical

changes wrought by the statute are, first, that the occupant is not obliged to wait for the owner to sue for *mesne* profits, but may have his right to compensation determined before eviction, and, second, he is not limited to the value of the rents and profits, but under certain conditions is entitled to recover the full value of his improvements. When we consider the law as settled before the adoption of the statute and the wrong it was intended to remedy, we are unable to see any warrant for the exclusion of the element of good faith, which was always essential, as a condition to a recovery for improvements by a stranger to the title. There is a class of cases which hold that where the defendant's possession is under *color of title*, improvements by him will be presumed to have been made in good faith, but we have examined no such case in which the occupant is not shown to have entered and held possession by virtue of a contract or conveyance with one, at least, asserting title. There being no error apparent from the record the judgment is

AFFIRMED.

THE other judges concur.

ED. A. KOEN V. STATE OF NEBRASKA.

[FILED NOVEMBER 16, 1892.]

1. **Libel**: FELONY: MISDEMEANOR. In a prosecution for a false and malicious libel charged to have been published in the *Kansas City Sun*, a newspaper published and of general circulation in Douglas county, Nebraska, *held*, that to charge a felony the paper must be of general circulation and that the limitation to one county merely charged a misdemeanor.

2. ——: NEWSPAPERS: GENERAL CIRCULATION. It is not necessary that the newspaper circulate to any considerable extent,

if at all, out of the state, nor that it circulate in every county in the state, but it must extend beyond the county in which it is published and have a general circulation.

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

Ambrose & Duffie, and *Lindsley & Dick*, for plaintiff in error.

George H. Hastings, Attorney General, and *W. S. Shoemaker, contra.*

MAXWELL, CH. J.

The plaintiff in error was convicted of criminal libel in the district court of Douglas county and sentenced to imprisonment in the penitentiary for three years.

Section 47 of the Criminal Code provides: "If any person shall write, print, or publish any false and malicious libel of, or concerning another, or shall cause or procure any such libel to be written or published, every person so offending shall, upon conviction thereof, be fined in any sum not exceeding $500, or be imprisoned in the county jail not exceeding six months, or both, at the discretion of the court, and, moreover, be liable to the party injured; *Provided*, That if said libel is published in a newspaper having a general circulation, the person so offending shall be punished by imprisonment in the penitentiary not less than one nor more than three years." The charge in the indictment is "that Ed. A. Koen, unlawfully, maliciously, and feloniously, did compose, write, and publish, and cause to be composed, written, and published, in a certain newspaper called *The Kansas City Sun*, published and of general circulation in the county of Douglas, in the state of Nebraska, a certain false, scandalous, malicious, and defamatory libel of and concerning the said Nettie Wilson." It will be observed that the charge is that the libel was published in *The Kan-*

sas City Sun, published and of general circulation in the county of Douglas, in the state of Nebraska. It will be seen that the statute provides for two classes of cases: First, for printing, publishing, etc., a libel. This no doubt applies to ordinary cases. Where there is a conviction under such circumstances the person found guilty may be imprisoned in the county jail or fined, or the court may impose both fine and imprisonment. The statute is based upon the theory that one who prints and publishes a false and malicious libel against another—one calculated to injure his good name and reputation and injure or destroy his influence—should be branded as a violator of the law at least, if not as a criminal.

Every person is entitled to protection in the peaceful enjoyment of his property, good name and fame. The wise man said, "A good name is rather to be chosen than great riches, and loving favor rather than silver and gold" (Prov. 22:1); and his words are as applicable to-day as when uttered. A person who willfully and maliciously violates the law by a publication of the kind named has no just cause of complaint if the law is vindicated by punishing him for the offense. The law, however, increases the penalty in proportion to the injury. If the libel is published in a newspaper of general circulation, then the punishment is by imprisonment in the penitentiary. The fourth and fifth definitions given by Webster of the word "general" as an adjective are as follows: "Common to many, or the greatest number; widely spread; prevalent; extensive, though not universal; as, a *general* opinion; a *general* custom. * * * 5. Having a relation to all; common to the whole; as, Adam, our *general* sire. Milton." And the synonyms as follows: "*Common* denotes primarily that in which many share; and hence, that which is often met with. *General* is stronger, denoting that which pertains to a majority of the individuals which compose a genus, or whole. *Universal,* that which pertains to all without

exception. To be able to read and write is so *common* an attainment in this country that we may pronounce it *general*, though by no means *universal*." The word is in common use in designating general and local laws. Thus, in *Kelley v. State*, 6 O. St., 269, the constitution required all laws of a general nature to be uniform in their operation throughout the state. An act was passed giving to the court of common pleas jurisdiction of certain criminal cases in some of the counties but not in all, and the act was held to be in conflict with the constitution. There was no dispute as to the meaning of the word "general," but two of the judges were of the opinion that the case was within certain exceptions named.

In *State v. Anderson*, 44 O. St., 247, an act had been passed which applied to the city of Akron alone, and it was held to be a special act, although it purported to be general in its nature, and the same doctrine was declared in *State v. Winch*, 45 O. St., 663, and *State v. Ellet*, 47 Id., 90. In *State v. Hawkins*, 44 O. St., 98, and *State v. Hudson*, Id., 137, the distinction between a general and special statute is very clearly defined. These rules have been recognized by this court. Thus, in *School District v. Clegg*, 8 Neb., 178, it was held that an act authorizing a certain school district to issue bonds was special legislation. So an act declaring a certain ordinance of the city of Lincoln valid was held to be special legislation. (*Hallo v. Helmer*, 12 Neb., 87.) And an act to authorize Falls City precinct to issue bonds was held to be special, and therefore invalid. (*Dundy v. Richardson Co.*, 8 Neb., 508.)

In *McClay v. City of Lincoln*, 32 Neb., 412, it was held that a law framed in general terms, restricted to no locality and operating equally upon all of a group of objects, is not a special law.

In *State v. Berka*, 20 Neb., 379, it is said: "If a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are

brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation. (*McAunich v. R. Co.*, 20 Ia., 338; *Haskel v. City of Burlington*, 30 Id., 232; *R. Co. v. Soper*, 39 Id., 112; *State v. Graham*, 16 Neb., 76; Cooley, Const. Lim., sec. 390.)"

Judge Sutherland in his work on Statutory Construction, sec. 116, says: "Laws of a general nature are those which relate to subjects of that nature, and deal generally with them. The requirement involves the question, What is such a subject, and how comprehensively it must be treated in legislative acts? Laws to which the requirement is applicable must be so framed as to have a uniform operation throughout the state."

Judge Dillon in his valuable work on Municipal Corporations, sec. 20, in speaking of general laws creating municipal corporations, says: "Within a period comparatively recent the legislatures of a number of the states, following the example of the English municipal corporations act of 5 and 6 Will. IV, cap. LXXVI, heretofore mentioned, have passed *general acts* respecting municipal corporations. These acts abolish all special charters, or all with enumerated exceptions, and enact general provisions for the incorporation, regulation, and government of municipal corporations. The usual scheme is to grade corporations into classes according to their size, as into cities of the first class, cities in the second class, and towns or villages, and to bestow upon each class such powers as the legislature deems expedient; but the powers and mode of organization of corporations of each class are uniform. General incorporation acts, rather than special charters, would seem clearly to be the best method of creating and organizing municipal corporations. First—It tends to prevent favoritism and abuse in procuring extraordinary grants of special powers. Second—It secures uniformity of rule and construction. Third—All being created and

endowed alike, real wants are the sooner felt and provided for, and real grievances the sooner redressed."

Many other cases to the same effect might be cited. Section 251 of the Criminal Code provides that "no person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit."

Now will any one contend that a statute applicable to Douglas county alone is a general law? The authorities, without an exception so far as I have observed after a pretty careful research, hold that such an act is not general but special.

Let us apply these rules to the case at bar.

The statute provides that a person who publishes a false and malicious libel against another in a newspaper of general circulation shall be punished by imprisonment in the penitentiary for not less than one nor more than three years. Here the highest term of imprisonment is six times as great as in an ordinary case, together with the brand of infamy and the loss of civil rights from conviction. Is this severe punishment to be inflicted unless the offense was committed in the manner indicated; that is, in a newspaper of general circulation? If the circulation of a paper in one county is a general circulation, then why is not the same true if it circulates in a village, township, or other subdivision of a county? If the circulation in any of these subdivisions, or the county itself, constitutes a general circulation, then the court will find it impossible to distinguish between the cases where the punishment is imprisonment in the county jail and those of imprisonment in the penitentiary. It is not necessary that the newspaper circulate to any considerable extent, if at all, out of the state, nor that it circulate in every county of the state, but it must extend beyond the county where it is published and have a general circulation.

It may be said that the party who first publishes the

libel, and thus puts it in the power of others, whether intentionally or not, to further injure the plaintiff by a further publication, should be punished to the full extent of the law. The answer to this is that persons must beware what they publish at second-hand, and because one party has made a false and malicious statement in regard to another the second publisher must ascertain its truth before he gives it his indorsement by publishing the same. But to constitute a penitentiary offense the publication must be in a newspaper in general circulation. By that we understand a paper not restricted to one county, nor necessarily to the state itself. In charging the offense, therefore, it should be done in the language of the statute, without limitation to a particular county. The pleader, after stating the general circulation of the paper, may then allege that it was published in a certain county, so as to give the courts of that county jurisdiction.

The indictment fails to state a felony, therefore, and the judgment must be reversed. The charge alleged being merely a misdemeanor, the plaintiff in error should not have been sentenced to the penitentiary; but it is evident that he was rightfully convicted of a misdemeanor, and the cause is remanded to the district court of Douglas county to impose a proper sentence for that offense.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CRANE BROS. MANUFACTURING CO., APPELLANT, V. SAMANTHA KECK ET AL., APPELLEES.

[FILED NOVEMBER 16, 1892.]

1. **Bill of Exceptions:** SERVICE ON ONE OF APPELLEES. Where there are two or more principal defendants against whom the plaintiff is seeking to enforce a claim, there being no particular controversy between them, service of the bill of exceptions upon one of such defendants or his attorney within the time fixed by statute will be sufficient.
2. ———: MOTION TO QUASH: TIME OF FILING: WAIVER. Where a defendant fails to file a motion to quash until after briefs upon the merits have been made and served the court will consider the objection waived.
3. **Application of Payments:** RIGHTS OF THIRD PARTIES. While as between the debtor owing several debts and his creditor where the former, at the time of payment of a sum of money, fails to designate the debt on which it is to be applied, the latter may do so, yet there is an exception to this rule, as, where the money was received by the debtor from a third party whose property would be liable for the debt in case the money was not applied upon the third party's liability.
4. **Construction of Instruments:** ORDER. The instrument set out in the opinion is an order which, as the drawee refused to accept the same, the plaintiff was not bound to furnish the material mentioned therein.

APPEAL from the district court for Buffalo county. Heard below before HAMER, J.

Brown & Brown, and *Jeffrey & Rich*, for appellant.

Calkins & Pratt, for appellee Samantha Keck.

R. A. Moore, for appellee Joseph Walther.

MAXWELL, CH. J.

This is an action by material-men to foreclose a mechanic's lien upon a hotel in the city of Kearney.

On the trial of the cause the court below found that the whole value of the material furnished by the plaintiff was the sum of $643, and that the defendants had paid thereon the sum of $450, and that the defendant Keck had sustained damages by reason of the delay of the defendants in furnishing the material, in the sum of $193. The court thereupon found for the defendants and dismissed the action. The plaintiff appeals.

A motion is now made on behalf of Walther to quash the bill of exceptions as to him because it was not presented to him within eighty days from the rising of the court. The cause was tried on the 3d day of May, 1890, and judgment entered at that time. A bill of exceptions was thereupon duly prepared and submitted to the attorneys for Samantha Keck. Notice was given the attorney of Walther that the bill was in their hands for examination and amendment. The bill seems to have been retained by such attorneys much beyond the ten days allowed by law. When it was returned, however, it was presented to the attorney for Walther, who refused to examine the same and make any corrections thereon. The bill was thereupon presented to the judge, who signed the same. In this case, while the rights of the defendants are so far separate and distinct that a joint judgment is not sought against them, as against Walther a judgment is asked for the amount of the debt, and it is sought to enforce the same against the property of his co-defendant Keck, yet there is no diversity of interest between them as against the plaintiff and they are so far joint that service of the bill upon the attorneys of either will justify the judge in signing the same. Where there are many defendants, who appear by separate attorneys, it is impossible to serve the same bill upon all within forty, or even eighty days, and in fact is not contemplated by statute. A service upon the principal defendants is all that is required. Ordinarily, this will bring up the case as to all. The service therefore was sufficient.

The bill and transcript were filed in this court on the 3d day of November, 1890, and the motion to quash was not filed until after the briefs upon the merits had been filed. This is too late. The motion must therefore be overruled.

It appears from the record that Walther had purchased a considerable quantity of plumbing material from the plaintiff; that he paid the plaintiff $100, and $150 money paid to him upon this account by his co-defendant Keck. This money was paid without directions as to its application, and the plaintiff sought to apply it to another debt and now claims the right to do so. As between the debtor and creditor, there is no doubt of the rule that where the debtor fails to designate the debt, where there are several debts upon which the payment may be applied, the creditor may apply it. Where, however, the rights of third parties intervene, the rule does not apply. Thus, where A was a creditor of a firm and also of a surviving partner thereof individually, and the latter made a payment out of funds belonging to the firm without designating the debt on which it should be applied, it was held that as the funds belonged to the firm they must be applied to the partnership debt. (*Weisenfeld v. Byrd*, 17 S. Car., 106; *Thompson v. Brown*, 1 Moody & M. [Eng.], 40; 18 Am. & Eng. Ency. of Law, 240.)

This rule was applied in *Coms. v. Springfield*, 36 O. St., 643, where the county treasurer was *ex officio* treasurer of the city and its board of education, and also treasurer of the township of S. and its board of education. He received and mingled the moneys of these various corporations together. On a settlement with the county board he was unable to pay the amounts due the several corporations above named, but there was sufficient to satisfy the amount owing to the county, which the county board directed to be placed to the credit of the county and appropriated to county purposes. The money was appropriated as directed,

but it was held that the county was liable in equity to account to the other corporations for their proportionate share of the fund so appropriated. It is said: "The question then is whether the county of Clark is liable to the city of Springfield and its board of education, and the township of Springfield and its board of education, for *pro rata* shares of the moneys in the treasury, $61,860.26, appropriated, under direction of the commissioners, to the use of the county. That the moneys of these various corporations were mingled, and that the embezzlement was from the mass, cannot be denied; and it must be further admitted that the amount appropriated to the use of the county, under direction of the commissioners, was the exact sum due to the county from Wick, but neither mingling the money, the embezzlement, nor the appropriation by the county had the effect of destroying the interest of the city, township, and school boards in the sum which was in the treasury at the time of the settlement. Equity will make it available to them by fastening a liability on the county. This would clearly be the rule as applied to individuals under such circumstances, and there is no reason for saying the same rule does not apply to public corporations. (*Van Alen v. American National Bank*, 52 N. Y., 1; *Matter of Van Duzer's Estate*, 51 How. Pr., 410; *Farmers, etc., Bank v. King*, 57 Pa. St., 202; *Pennell v. Deffell*, 4 De G., M. & G. [Eng.], 372; *Cook v. Tullis*, 18 Wall., 332; *Bayne v. United States*, 93 U. S., 642; *United States v. State Bank*, 96 Id., 30.)"

The following is the alleged contract:

"KEARNEY, NEB., October 1, 1887.

"Received from Jos. Walther the sum of $650 in cash on account, and the amount of $348.49 in goods returned on account, which are held by him on storage subject to our orders, and also received from him an order on Samantha Keck for $500, which amount, when paid by said Samantha Keck to us, we agree to credit to his account, on

account of goods shipped by us to be used in the Keck building, and the goods ordered, which we are to ship for completing the plumbing work on said Keck building.

"CRANE BROS. MANFG. CO.,
"By MONTGOMERY & JEFFREY,
"*Their Attorneys.*"

This instrument, while not expressed in a very artistic manner, is clearly shown to be an order, which the drawee refused to accept.

J. L. Keck, who seems to have transacted all the business for Samantha Keck, testifies:

A. He [the agent of plaintiff] said that they had sent some goods, more goods than they had received value for, and that he had come to see Joe and me about it. I told him to see Mr. Frank about it, but that under no circumstances would Joe get any more money; that I was going to Cincinnati and nobody could get any money until I got back. Whatever was due them, I would see that they got their proportion of it. Then I had a conversation with another representative of Crane Bros. Manufacturing Company; that was along about the 5th day of October on my return from Cincinnati.

Q. You may state whether anything was said about how much money they had received at that time; did they state that they had received any?

A. No, sir; I am not clear now that they stated the amount they had received, but he stated that they had delivered more goods than what they were entitled to pay, and that they would not or did not want to deliver any more goods until they were paid some money or had it secured. I was just on the eve of going to the train and I told him to see Mr. Frank, that under no circumstances would anybody be paid more money, because Frank, within the next three or four days, was to start for Europe, and I was to come right back from Cincinnati.

Q. When did you return from Cincinnati?

A. About the 5th of October.

Q. Did you then see or meet a representative of the plaintiff?

A. Yes, sir.

Q. What was the conversation?

A. The representative of the Crane Bros. Manufacturing Company was Mr. Samuel Nevius. He wanted to know if I owed Joe Walther any balance. I told him I did. He wanted to know how much. I said I could not tell; that I hadn't the account with me and I did not exactly know for I did not know how much work was done. There was some material in the house but there was a good deal of it that was not put up. He said that he had an order from Mr. Walther on me for $500. He showed it to me and wanted to know if I would have any objection to accepting it. I said, "yes, I had."

Q. Previous to this conversation had you been informed by Mr. Walther that he had made arrangements for them to ship the goods?

A. Yes, sir.

Q. Go on and state what was said.

A. I said to Mr. Nevius that I declined to accept an order of $500 for material that was yet to be delivered. I would say, that if that material was delivered and that it was put up in the house in accordance with the contract, I would pay that amount of money, because there would be that amount and more due Mr. Walther, but I respectfully decline to accept an order for material not yet furnished. He said that Crane Bros. Manufacturing Company and Walther had had a settlement and there would be no question about everything being all right. I said: There has been a question. Material has been coming for this contract and was to be here long before this; that I had been to Joe to get him to write or telegraph to Crane Bros. Manufacturing Company for these things. * * *

Witness: I said I would just positively decline to pay

for anything in advance; that upon the receipt of the goods and put up in the house according to the contract, I would guarantee that they would get their money, but I would not pay anybody a dollar until the work had been completed. He said that that would be perfectly satisfactory to them. Within a week or ten days from that time he came back and said that Crane Bros. Manufacturing Company had returned the order and required an unqualified acceptance. I said unqualifiedly that I would not do it and I did not.

The testimony clearly shows that Walther was indebted to the plaintiff in a considerable amount; that this account had been running for a considerable time, and that the plaintiff refused to furnish the goods in question unless it had security. Therefore, when Mr. Keck refused to accept the order the proposition fell through. It is very clear that the court erred in its findings and judgment. The judgment is therefore reversed and the cause will be remanded to the district court to render judgment in accordance with this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

LEE, FRIED & CO. v. JOHN WALKER ET AL.

[FILED NOVEMBER 16, 1892.]

Appeal from Justice's Court: ISSUES IN APPELLATE COURT.

A cause appealed from a justice of the peace to the district court must be tried upon substantially the same issues in the appellate court as were presented to the justice of the peace, unless some matter such as payment, release, etc., has arisen since the former trial.

ERROR to the district court for Custer county. Tried below before HAMER, J.

Henry M. Kidder, for plaintiffs in error.

J. C. Porter, and *M. McSherry*, *contra*.

MAXWELL, CH. J.

This action was brought before a justice of the peace by the plaintiffs against John Walker and Robert Walker upon a promissory note. The defendants in their answer admitted the execution of the note, but claimed a set-off of $125 for services rendered by Robert Walker for the plaintiffs. On the trial of the cause, the justice found for the defendants and dismissed the action. The plaintiffs then appealed to the district court, where they filed a petition to which the defendant, John Walker, filed an amended answer as follows:

"Comes now John Walker and answering for himself alone, and in answer to the petition of the plaintiffs, admits the making, execution and delivery of the promissory note described in said petition.

"Defendant further answering said petition alleges that he has no knowledge whereof to form an opinion, and therefore denies each and every other allegation, and requires that strict proof may be had as to the truth of said allegations.

"Defendant further answering and by way of defense alleges the fact to be that this defendant signed said note at the request and instance of the payee thereof, to-wit, John C. Fitzen, and that said note was given without any consideration of any kind or character and that this defendant never received or derived any consideration or benefit whatever from the signing of said note. Wherefore defendant prays judgment that he may go hence without day and find his costs."

The plaintiffs thereupon moved to strike out of the answer the first six and the last seven lines "for the reason" that that portion of said answer raises a new issue in this cause and such issue was not raised in the court below. This motion was overruled.

Robert Walker filed a separate answer and claimed a set-off as follows:

"Defendant further answering plaintiffs' petition and by way of cross action alleges the fact to be that the plaintiffs herein are indebted to this defendant in the sum of $400 as follows: To services as sole owner and manager from November 11, 1887, to March 11, 1888, four months, at $100 per month, and that said services were performed for the plaintiffs at plaintiffs' request and at the agreed price of $100 per month, and that said services were reasonably worth the said sum of $400. Wherefore defendant prays judgment against the plaintiffs in the sum of $400 with interest at the rate of seven per cent from March 11, 1888, and for the costs of this action."

On the trial of the cause the jury returned a verdict as follows:

"We, the jury in this case, being duly impaneled and sworn, and after due deliberation, do find and say that there is due to the defendant, Robert Walker, the sum of $355.80, and we do further find that there is no cause of action as against the defendant, John Walker.

"JAMES DINWIDDIE,
"*Foreman.*"

There is also a plea of payment.

It is very clear that the judgment cannot be sustained.

This court, by an unbroken line of decisions, has held that "cases are to be tried upon substantially the same issues in the appellate court as in the court of original jurisdiction." (*O'Leary v. Iskey*, 12 Neb., 136; *Courtnay v. Price*, Id., 192; *U. P. Ry. v. Ogilvy*, 18 Id., 638; *Fuller v. Schroeder*, 20 Id., 631.) Otherwise the appeal, instead

of being a retrial of the cause presented to the court of original jurisdiction where the prevailing party would be entitled to costs, might by presenting new issues in the appellate court make an entirely different case from that tried in the court below and thus in effect be an original action. Thus the prevailing party who had rightfully recovered a judgment in the inferior court and his costs, might be placed in the wrong and lose both his judgment and costs without a new trial. Where an appeal is taken to an appellate court, the same case substantially is to be tried as in the court below. Any other rule makes the trial in the inferior court a farce, and the judgment, although it may conform to the pleadings and proof, a thing of no importance—a needless performance to evade the law and recover costs, if the judgment in a party's favor is less than $200. This cannot be permitted. There was an entire disregard of these decisions in this case.

The question whether the set-off is proper is not raised and therefore is not before us.

On the trial in both courts there appears to have been a superabundance of motions—a practice which should not be encouraged.

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

REVERSED AND REMANDED.

THE other judges concur.

HENRY T. CLARKE V. ROBERT WALKER ET AL.

[FILED NOVEMBER 16, 1892.]

ERROR to the district court for Custer county. Tried below before HAMER, J.

Henry M. Kidder, for plaintiff in error.

J. C. Porter, and *M. McSherry*, *contra*.

MAXWELL, CH. J.

The questions involved in this case are substantially the same as in the case of *Lee, Fried & Co. v. Walker*, *ante*, p. 689, just decided, and the same decision will be rendered in this case as in that. The judgment is reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOHN L. MEANS ET AL. V. DANIEL KENDALL, ADMINISTRATOR.

[FILED NOVEMBER 16, 1892.]

Negotiable Instruments: ACTION ON LOST NOTE: INDEMNITY BOND. Where a negotiable note is lost before it becomes due the court will require the plaintiff to give an indemnifying bond to the maker as a condition of recovering judgment, but where the instrument is lost after it becomes due no bond ordinarily will be required.

ERROR to the district court for Hall county. Tried below before HARRISON, J.

Abbott & Caldwell, for plaintiffs in error.

Thummel & Platt, contra.

MAXWELL, CH. J.

On the 27th of October, 1887, John L. Means borrowed from John Kendall the sum of $2,000, at nine per cent interest, and gave his note therefor signed by S. N. Wolbach as surety. On the 15th of October, 1888, Means sent a check to Kendall for $180 with a request for an extension of time of payment. To this Kendall replied as follows:

"Received check for $180 to apply on interest on your note for $2,000, dated October 17, 1888. Have credited said note with the same. The note is all right, let it run.

"Yours truly, JOHN KENDALL."

Within a few months after the above transaction Kendall died, and the defendant in error was appointed administrator of his estate, and brought an action on the note in question and recovered judgment thereon for the principal and interest. The note, it appears, is lost, and the plaintiffs in error insist that they should be protected by a bond of indemnity. Where a negotiable note is lost before maturity, a court ordinarily will require a bond of indemnity to be given, because the note may have passed into the hands of an innocent holder, and thus the maker be subjected to loss; but if the instrument when lost was already past due, no person could become an innocent purchaser so as to be protected as against the real owner. Therefore in the latter case no bond is necessary. (*Mowery v. Mast*, 14 Neb., 510; *Thayer v. King*, 15 O., 242; Story's Eq. Juris., sec. 86*a*.) The proof fails to show a transfer of

the note, or any fact to excite suspicion that the note in question is not the property of the estate. The judgment is right and is

AFFIRMED.

THE other judges concur.

H. A. DARNER V. DANIEL DAGGETT.

[FILED NOVEMBER 16, 1892.]

1. **Appeal from County Court:** ISSUES IN APPELLATE COURT. It is the settled law of this state that, when an appeal is taken from the county court to the district court, the cause is to be tried in the latter court upon the same issues that were presented in the court from which the appeal was taken, with the exception of new matter arising after the trial.

2. **Allegata et Probata.** The testimony in a case should be confined to the issues formed by the pleadings.

3. **Admission of Incompetent Testimony.** In a cause tried to a jury, the admission of evidence which has no legitimate bearing on any matter put in issue by the pleadings, and which is prejudicial to the party complaining, is good ground for reversal of the judgment.

4. **Assignments of Error.** An assignment of error in a motion for a new trial, and in a petition in error, that "the court erred in admitting the evidence of witnesses for plaintiff and excluding the evidence offered by defendant, as shown by pages 5 and 6 of the record furnished by the official reporter, and made a part of the record by the bill of exceptions herein," is sufficient to entitle the party to review the rulings of the trial court on the admission and rejection of testimony, recorded on said pages of the transcript of the evidence.

5. **Trial:** READING REPORTER'S NOTES TO JURY. The jury, after retiring for deliberation, returned into court, announced that they were unable to agree, and requested to have a portion of the testimony of the defendant read to them by the official stenographic reporter, which was done in the presence of the attorneys for the respective parties. *Held*, Not reversible error.

6. **Instructions:** EXCEPTIONS: REVIEW. An exception must be taken to the giving of instructions in a civil case in order to review them in this court.

ERROR to the district court for Dawson county. Tried below before HAMER, J.

C. W. McNamar, and *G. W. Fox*, for plaintiff in error.

H. M. Sinclair, *contra*.

NORVAL, J.

Defendant in error brought this action in the county court, alleging in his petition filed therein, in substance, that the defendant sold him a stock of hardware, for which Daggett was to pay the Chicago market prices of said classes of goods; that defendant furnished plaintiff an invoice of said goods, and falsely and fraudulently represented to plaintiff that the same was correct and based upon said market, which invoice amounted to the sum of $3,997.65, which amount plaintiff, relying on said representations, paid; that said invoice was not correct and was not based upon the Chicago market as agreed upon; that it was incorrectly added up, so that it was $99 more than it should have been; that the invoice price so furnished was in excess of the Chicago market to the amount of $450, and that there was a shortage of goods, the same being charged on said invoice and paid for by plaintiff to the amount of $400, with prayer for judgment against the defendant for $949, with interest thereon.

The defendant answered by a general denial.

Upon the trial the plaintiff recovered a judgment, and the defendant appealed therefrom to the district court, where the plaintiff obtained a verdict for $635, for which sum judgment was rendered.

The first error complained of relates to the ruling of the court below in sustaining plaintiff's motion to strike

out all of the defendant's answer excepting the general denial. The petition in the county and district courts was the same. In the appellate court the defendant filed an answer alleging, in effect, that plaintiff represented he was the owner of a valuable farm in Dawson county worth $2,700, free from incumbrance excepting a mortgage for $1,300, which plaintiff proposed to trade for said stock of goods; that defendant, relying on said statements and representations, traded said stock for said farm, and took plaintiff's notes for the difference between the farm, as so represented, and the price of said stock as invoiced; that in truth said farm was not worth more than $1,800; that defendant, relying on said representations of the plaintiff as to the value of said farm, did not go to see it, and did not examine the mortgage records until long after said trade; that there was an additional mortgage on said farm at the time for $130.50, which plaintiff concealed from defendant, which mortgage defendant was obliged to and did pay, to his damage in the sum of $130.50. The defendant, further answering, denied each and every allegation of the petition not by him specifically denied, and asked judgment for said sum of $130.50.

It is obvious that the court did not err in striking out of the answer the allegations therein relating to the representations of the plaintiff as to the value of the farm and the incumbrances thereon, for the reason that no such issue was presented in the county court. As already stated, the answer in that court was simply a general denial. Defendant should have set up in his first answer his counter-claim for damages; not having done so, he could not present it for the first time in the district court on the trial of his appeal. It is firmly settled in this state that a cause is to be tried in the district court upon appeal upon the same issues as in the court from which the appeal was taken, with the exception of new matter arising after the first trial. (*O'Leary v. Iskey*, 12 Neb., 136; *Baier v. Humpall*, 16 Id., 127;

U. P. R. Co. v. Ogilvy, 18 Id., 636; *Fuller v. Schroeder*, 20 Id., 631; *Lamb v. Thompson*, 31 Id., 448; *Bishop v. Stevens*, Id., 786.)

Complaint is made of the ruling of the court below on the admission of testimony. The defendant in error was sworn as a witness in his own behalf and, after having testified that plaintiff in error represented the goods were of a good quality, that he had never seen them prior to the purchase, but relied upon the representations of plaintiff in error, and that the goods were not merchantable, but mostly were old-fashioned, many of the stoves were broken, some were second-hand stoves and others were wood stoves of no use, was asked this question: "What was the difference, as near as you can estimate it, in value, between the stock of goods in the condition in which you received it and what the stock of goods would have been had it been as represented?" This question was objected to by plaintiff in error as speculative and immaterial. The court overruled the objection, an exception was taken to the ruling, and the witness answered, "$1,500." In this we think there was error. The testimony did not tend to prove any issue raised by the pleadings. The petition does not charge that the defendant below made any false representations as to the quality of the goods. The gist of the action is to recover damages for falsely representing that the invoice of the stock was based upon the Chicago market, errors in the footings of the invoice, and shortage of goods. In order to recover damages on the ground that the stock was not as represented, and that the goods were unsalable and in bad condition, plaintiff should have pleaded the facts in his petition. Even had the petition been thus framed, the testimony would have been incompetent. In such a case it would be manifestly improper for a witness to state his opinion as to the difference between the value of the goods in the condition received and what they would have been had they been as represented. That is for the jury

to determine from the entire testimony. Witnesses should, as a general rule, state the facts, leaving it to the jury to draw the proper conclusions therefrom.

It is urged by defendant in error that the above ruling in regard to the admission of testimony should not be considered by this court, for the reason that the same is not sufficiently raised by the motion for a new trial or in the petition in error. The second assignment in the motion, as well as in the petition in error, is in the following language: "The court erred in admitting the evidence of witnesses for plaintiff, and excluding the evidence offered by defendant as shown on pages 5, 6, 11, 13, 14, 43, and 43½ of the record furnished by the official reporter and made a part of the record by the bill of exceptions herein." The question and answer objected to, which are quoted above, are found on page 5 of the transcript of the testimony. The ruling complained of was, with sufficient definiteness, pointed out in the motion for a new trial. The attention of the trial court was as specifically challenged to its ruling on the admission of the testimony complained of as if the testimony of the witness had been set out in the motion, for to no other question on page 5 of the transcript was an objection made or an exception taken. For the same reason, we think the assignment in the petition in error is not too general to be considered.

Plaintiff in error also presents the point that the court below erred in permitting the official stenographer to read to the jury a portion of the testimony of the plaintiff in error. The record discloses that after the jury had retired to consider of their verdict, they came into court and asked to have a portion of the testimony of the defendant Darner read by the reporter. Counsel for defendant objected. The objection was overruled, an exception was taken, and the testimony called for was read. We are unable to see how plaintiff in error was in the least prejudiced by the reading of the reporter's notes. It does not appear what

portion of Darner's testimony was read to the jury. For aught that appears it was that part which was most favorable to his side of the case. If such were true, the reading was to his benefit. Again, as was said by this court in *Jameson v. State*, 25 Neb., 185, while the practice of allowing an official stenographer to read to the jury his notes of the testimony of a witness, upon the request of the jury, should not be encouraged, a judgment will not be reversed for that cause. Under the provisions of section 287 of the Civil Code, where a jury, after retiring for deliberation, disagree as to any part of the testimony, the court is authorized to give its recollection as to the testimony on the point of dispute. The reading by the official reporter of the testimony of a witness examined on the trial is certainly within the spirit if not within the letter of the statute. The stenographic reporter's notes of the testimony are liable to be more accurate than the judge's recollection of what was testified to.

It is next insisted that the court erred in giving the following instruction: "1. You will determine whether there was a shortage, and if you find that there was, you will allow the plaintiff the market value of the articles which the defendant failed to furnish, and you will be careful not to make too high an estimate. To this you may add the amount of the alleged error in computation, if you find the error and amount proven." No foundation was laid for a review of this instruction, for the reason no exception was taken to the giving of the same. This was necessary in order to review the alleged error. (*Scofield v. Brown*, 7 Neb., 222.)

As there must be a new trial it is not deemed necessary to pass upon the sufficiency of the evidence to support the verdict. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

HANOVER FIRE INSURANCE COMPANY ET AL. V. MARTIN SCHELLAK ET AL.

[FILED NOVEMBER 16, 1892.]

1. **Review on Error**: MOTION FOR NEW TRIAL: OBJECTIONS TO INSTRUCTIONS to the jury must be made in the motion for a new trial, in order to have them reviewed by the supreme court.
2. **Evidence**: OBJECTIONS TO THE REJECTION of certain testimony considered and overruled.
3. **The evidence** in the case examined and considered, and *held*, that the damages assessed by the jury are not excessive.
4. **Sufficiency of Petition.** *Held*, That the petition states a cause of action.

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

Bartlett, Crane & Baldrige, for plaintiffs in error.

Bowen & Bowen, contra.

NORVAL, J.

Defendants in error recovered two judgments in the court below on a policy of fire insurance; one against the plaintiff in error, the Hanover Fire Insurance Company, in the sum of $2,533.33⅓, and the other against the plaintiff in error, the Citizens Insurance Company, for the sum of $1,266.66⅔. The policy was for the sum of $4,000; two-thirds of said amount being insured by the Hanover Fire Insurance Company and the other one third of said sum being insured by the Citizens Insurance Company. The property insured was a two-story frame roof brewery and a two-story tin roof stone and frame ice house and beer vault, used by the assured for brewing purposes. There was $3,000 additional insurance upon the property. The buildings were totally destroyed by fire.

Complaint is made in the petition in error, as well as the brief of counsel, of the giving of several paragraphs of the court's instructions to the jury. We are unable to review the alleged errors in the instructions for the reason no objection to the charge of the court was made in the motion for a new trial. (*Cleveland Paper Co. v. Banks*, 15 Neb., 23; *H. & G. I. R. Co. v. Ingalls*, Id., 123; *O. & R. V. R. Co. v. Walker*, 17 Id., 432; *Weir v. B. & M. R. Co.*, 19 Id., 212; *Nyce v. Shaffer*, 20 Id., 502; *O., N. & B. H. R. Co. v. O'Donnell*, 22 Id., 475; *Planck v. Bishop*, 26 Id., 593.)

It is claimed that the court erred in not permitting the witness, Theodore Bauersach, to answer the following questions propounded to him on cross-examination by plaintiffs in error:

"State when the malt house and the house extending west of it was built.

"How far is it from the south line of the original building to the north line of the malt house?"

It is contended that the purpose of these questions was to show that the policy had been invalidated by the unauthorized increase of the risk after the insurance was written, by the erection of a structure near the insured premises. There is certainly nothing in the second question, standing alone, or when read in connection with the testimony which had been previously given, which, in any manner, tended to establish that the hazard had been increased. Had the witness answered, and the same had been the most favorable to the parties complaining, we are unable to perceive how it could have thrown any light on the question in controversy. It was quite immaterial when the malt-house was erected. There is no dispute but what it was built before the policy thereon was written. If the plaintiffs in error desired to prove that the structure extending west of the malt house was built after the contract of insurance was written, they should have so framed their

question. As the first part of the interrogatory related to an immaterial matter, the objection to the whole was properly sustained. There is another reason why the refusing to allow the witnesses to answer these questions is not ground for reversal. Plaintiffs in error, by pleading in their answers an arbitration between the parties of the damages sustained under the policy, in effect admit that the policy was in force at the time of the fire.

There was testimony before the jury tending to prove that there was no increase of the risk after the policy was written. This phase of the case was submitted to them by the court upon proper instructions, and their findings ought not to be molested. So, also, was the question of arbitration properly submitted to the jury, and their finding was against plaintiffs in error.

It is next insisted that the verdict is excessive. We find in the record evidence tending to prove that the premises insured at the time of the fire were of the value of $8,000 or over. There was a total destruction of the property, except the foundation, which was worth about $200. The total insurance was $7,000, of which sum $3,000 was in companies other than the plaintiffs in error. As the total amount of the policies did not exceed the entire loss, the jury would have been justified, under the proofs, in assessing damages against plaintiffs in error for the full amount of the policy. True there was evidence before the jury from which they could have found that the total loss was less than $4,000, but they believed plaintiffs' witnesses on the question of value, and we are not able to say that they were not justified in doing so.

It is finally insisted that the petition does not state a cause of action, because it does not allege that the losses are unpaid. The petition, after setting up the execution and delivery of the policy, and the total destruction of the buildings by fire, alleges that plaintiffs, by reason of said fire and the burning of said buildings, have sustained loss

in the sum of $10,000; that said fire did not occur by reason of any act or negligence or procurement of the plaintiffs or either of them, and that they have performed all the conditions of said policy to be performed by them. This was sufficient without averring that the damages had not been paid. Payment was a matter of defense to be pleaded and proved by the defendants. Plaintiffs were not required to either allege or prove that the losses had not been paid. The judgment is

AFFIRMED.

THE other judges concur.

CHARLES A. KAISER V. STATE OF NEBRASKA.

[FILED NOVEMBER 16, 1892.]

1. **Criminal Law:** CONVICTION ON CIRCUMSTANTIAL EVIDENCE. In order to warrant a conviction on circumstantial evidence, the evidence must be of so conclusive a character as to prove beyond a reasonable doubt that the accused, and no other person, committed the offense charged.
2. **Larceny:** SUFFICIENCY OF EVIDENCE. Evidence examined, and *held*, not to sustain a judgment of conviction for larceny.

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

Frank J. Kelley, for plaintiff in error.

George H. Hastings, Attorney General, contra.

POST, J.

The plaintiff in error was convicted in the district court of Lancaster county on the charge of larceny and sentenced to imprisonment in the penitentiary for the period of

eighteen months. He subsequently filed a petition in error in this court in which he alleges as grounds for a reversal thereof: First, the evidence does not sustain the charge of the information and is not sufficient to sustain a conviction; second, misconduct on the part of the county attorney in his closing address to the jury; and, third, that the court erred in its instruction defining a reasonable doubt.

According to the view we take of the case it will be necessary to notice the first objection only. The facts, briefly stated, are these: On the afternoon of December 25, 1891, one Michael Gallagher, in company with several friends, visited Carr's saloon in the city of Lincoln. After drinking at the bar and paying a bill to the barkeeper he placed his money, about $90, mostly in gold, in his inside vest pocket. He remained in the saloon aforesaid from about 1 o'clock until 7 o'clock P. M., when he visited another saloon and from thence went to his lodging house, where he first discovered that his money was gone. The plaintiff in error had been engaged in conducting a restaurant or lunch counter in the basement of the building, and assisting the proprietor of the saloon, for which he was accustomed to receive pay from time to time in change amounting to about $10 per month. The night in question he is shown to have spent $13 at a house of prostitution, and to have two twenty-dollar gold pieces the next morning, and although it is not clearly established, the inference from the facts in evidence is, that he was not possessed of any such a sum of money the day previous, while the explanation thereof given by him is not satisfactory and apparently false. On the other hand, it does not appear from the evidence that the plaintiff in error had any opportunity to steal the money while in the saloon, and it is not claimed by the state that the parties met at any other place that day. It appears that the saloon was well patronized that afternoon and that customers were constantly coming and going, while Gallagher sat there apparently unconscious and certainly

intoxicated. The latter does not recollect meeting plaintiff in error that afternoon, while Lawrence Carr, the barkeeper, who was called by the state, testified on cross-examination as follows:

Q. You did not see him (plaintiff in error) and Gallagher together on Christmas day?

A. No, sir; they were not together, not that I saw; I don't recollect; I could not remember; I know they were not together. They might have spoken, but they were not together; Gallagher came in with his friends.

No attempt was made by the state to identify the money found in the possession of the accused as that lost by Gallagher, further than as stated above. The case, therefore, is this: Gallagher, while intoxicated, lost a sum of money. Soon thereafter the plaintiff in error is proven to have been in possession of a sum of money corresponding in kind to that lost by Gallagher, and under circumstances tending to show that he did not come by it honestly. Circumstantial evidence to warrant a conviction should be of such a convincing character as to prove beyond a reasonable doubt that the accused, and no other person, committed the crime with which he is charged. (*Walbridge v. State*, 13 Neb., 236; *Bradshaw v. State*, 17 Id., 147.) Here, aside from the possession by the plaintiff in error of an unusual sum of money, there is no proof whatever to connect him with the larceny, if we assume that the money was in fact stolen from Gallagher, an assumption not fully warranted by the evidence. Not only is there a failure to show an opportunity for the commission of the crime charged, but it affirmatively appears from the testimony of the witnesses for the state that the plaintiff in error was not at any time in company with Gallagher while the latter was in the saloon. While the evidence was admissible as tending to establish the guilt of the accused, and while it may be said to raise a strong presumption that he did not come by the money honestly, it is certainly insufficient to exclude the

theory of his innocence of the crime of larceny and to establish his guilt thereof beyond a reasonable doubt. The judgment of the district court is reversed and the case remanded for further proceedings therein.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. HENRY MCCLOSKY ET AL., V. GEORGE W. DOANE, JUDGE.

[FILED NOVEMBER 16, 1892.]

Foreclosure Sale: FAILURE TO FILE EXCEPTIONS TO CONFIRMATION: REVIEW: MANDAMUS TO DISTRICT JUDGE TO FIX AMOUNT OF APPEAL BOND. Where, on the return of an order of sale in a foreclosure proceeding, the defendant has notice of an order to show cause against the confirmation of a sale of the mortgaged property, but allows the sale to be confirmed without exception, he is without a remedy in this court, and a writ of *mandamus* will not be allowed to compel the district judge to fix the amount of an undertaking in appeal in order to enable the defendant to have the order of confirmation reviewed in this court.

ORIGINAL application for *mandamus*.

Chas. F. Tuttle, and *Pound & Burr*, for relators.

Lake, Hamilton & Maxwell, and *W. W. Morsman*, *contra*.

POST, J.

This is an original application for a writ of *mandamus* to compel the respondent, one of the judges of the fourth judicial district, to fix the amount of an appeal bond. The material facts are as follows: W. W. Morsman obtained a decree of foreclosure in the district court of Douglas county

against certain real estate in the city of Omaha. Thereafter the relator, Henry McClosky, owner of the equity of redemption, filed a written request for a stay, and the execution of said decree was accordingly stayed for the period of nine months. At the expiration of the stay an order of sale was issued, by virtue of which the mortgaged property was in due form advertised for sale and sold to the plaintiff Morsman. On the 24th day of September, 1892, return of said order of sale having been made, the district court made and entered of record an order to show cause by the 1st day of October following, why said sale should not be confirmed. Mr. Tuttle, attorney for the defendants therein, notified the plaintiff that he was about to object to confirmation of the sale on behalf of said defendants. Plaintiff in reply informed him that if he would make any such showing as would place the defendant Henry McClosky on record so that he would be bound by the order of court with respect to a deficiency judgment he (plaintiff) would consent to have said sale set aside and a new sale ordered. Defendants, although notified of the order to show cause against a confirmation of the sale, made no motion to set aside the sale or other objections thereto. After the court had examined the return and entered the order of confirmation, defendants, by their said attorney, requested the court to fix the amount of an appeal bond, saying that they desired to appeal from said order to this court. In reply to a question by the court if any cause had been shown against the confirmation and for a deficiency judgment said attorney answered that there was no objection to the confirmation, but that defendants wished to appeal. It was further stated by said attorney in open court that the reason no motion was made to set aside the sale was that the defendants feared that plaintiff Morsman would confess such a motion and that the property would not bring as much on a second sale by $4,000 or $5,000, thereby increasing by that amount the deficiency judgment.

The request to fix the amount of an appeal undertaking was denied by the court, whereupon this proceeding was instituted by the defendant McClosky. It is claimed by him that the order of confirmation is a final order from which an appeal will lie to this court. (See *Bank v. Green*, 8 Neb., 297; *Berkley v. Lamb*, Id., 392.)

We are also referred to the third subdivision of section 677 of the Code of Civil Procedure, which provides that "when the judgment, decree, or order directs the sale, delivery, or possession of real estate, the bond shall be in such sum as the court or judge thereof in vacation shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay and will not, during the pendency of such appeal, commit, or suffer to be committed, any waste upon such real estate." Under the above provision it is claimed by the relator that he is entitled, as a matter of right, not only to an appeal from the order of confirmation, but also to have execution of the deed to the purchaser and the delivery of possession thereunder stayed during the pendency of his appeal, and to that end it is the duty of the district court to fix the amount of his appeal undertaking. It is true that under our practice an appeal will lie from a final order in an equitable proceeding, as, for instance, an order of confirmation. But what is the force and effect of an appeal from such an order under our practice and how is it to be tried in this court? An examination of this question is attended with much confusion, owing to the fact that in some states all appellate proceedings are denominated appeals, while in others the distinction between appeals in equity and review upon petition in error is strictly adhered to. Ours appears to be a modified form of the old practice, and although the distinction between appeals and proceedings in error is maintained, the difference in cases like this exists in name rather than in fact. An appeal, strictly speaking, is the removal of a cause from a lower to the appellate court for trial *de novo*. Mr. Powell,

in his work on Appellate Proceeding, sec. 4, ch. 6, says: "Although the various modes of proceedings are prosecuted in different ways and called by different appellations, as appeal, review, error, and the like, and these names often confounded and misapplied, yet the object to be obtained is one or the other of two results: either by an appeal to obtain a rehearing and new trial of the case upon its facts and merits, or a review of alleged errors in law in the record of the judgment and proceedings which will result either in the reversal or affirming of the judgment; which are properly called proceedings in error. By the first, the appeal, when perfected in accordance with the statute and the rules of the court, the whole case, with its record and proceedings, is taken from the court below into the appellate court, there to be again tried upon the issues between the parties, as though the case originated in such appellate court; which appeal has the effect to set aside and vacate the original verdict and judgment in the case, and the result remains wholly dependent on the future judgment which may be rendered in the case upon the appeal and new trial. By the second proceeding, review and error, the result depends entirely upon the question whether the appellate court finds the alleged error in the record of the judgment and proceedings of the court below." The practice in this state is evidently modeled after the practice in the English chancery courts, wherein the purchaser at judicial sale was required to procure at his own expense a copy of the report from the master showing that he was the best bidder. After the report had been filed, the purchaser was required to apply to the court by motion for an order of confirmation. Upon such motion an order *nisi* was entered, *i. e.*, that a confirmation absolute would be entered unless cause was shown against it within eight days. If no cause was shown within the time specified the sale was confirmed as a matter of course. (2 Daniel's Ch., 1274, 1275; 1 Sugden on Vendors, 82.)

If the defendants in the foreclosure suit are entitled to an appeal from the order of confirmation, it is apparent that such appeal must be heard in this court upon the record as made up in the district court. It is not therefore an appeal within the ordinary meaning of the term, but rather a proceeding for the purpose of having the order of confirmation reviewed as upon petition in error, but which comes into this court in the manner provided for appeals. And inasmuch as no exception or objection was made to the report of the sale, but, on the contrary, the relator professed to be fully satisfied with the proceedings of the district court, it is apparent that he has now no reason to complain because the court took him at his word and refused to fix the amount of an appeal bond. A defendant who is personally served and is shown to have notice of the order to show cause against confirmation of the sale, but allows it to be confirmed without objection, does not occupy a particularly favorable attitude in this court, whether he comes here by appeal or petition in error. He has had his day in court, and has himself only to blame for being practically without a remedy. The writ is denied and the action dismissed.

WRIT OF MANDAMUS DENIED.

THE other judges concur.

MARY E. GANDY V. JOLLY, SWAN, DEW & HARDIN.

[FILED NOVEMBER 23, 1892.]

1. **Process:** IRREGULARITY OF SERVICE: WAIVER OF DEFECT. Where there is actual personal service of process upon a defendant, as by reading the summons to him in place of serving a copy of the same, and the defendant does not appear and object

on that ground, and judgment is rendered against him, it is not open to collateral attack, as the judgment is not void but voidable.

2. ——: ——: ——. If there is any irregularity in the manner of service on the defendant of valid process, he must take advantage of such irregularity by motion or other proceeding in the court where the action is pending.

3. ——: SERVICE IN ANOTHER COUNTY. Where an action is instituted by attachment against an absconding debtor in the county from which he absconded, process may be served upon him in any other county of the state, and a judgment rendered on such service will be valid unless he appears and contests the right to maintain the action there.

MOTION for rehearing of case reported in 34 Neb., 536.

Daniel F. Osgood, and *E. W. Thomas*, for the motion.

MAXWELL, CH. J.

An opinion was filed in this case which is reported in 34 Neb., 536. A motion for a rehearing has been filed in this case and as the questions involved are of considerable importance we have deemed it proper to present the reasons for our ruling in the form of an opinion.

Briefly stated, the defendants in error are partners, and in April, 1888, brought an action by attachment in the county court of Richardson county against one Charles U. Richardson, and the plaintiff in error was served with notice as garnishee. She answered that she had about 2,000 bushels of wheat of Richardson's subject to her chattel mortgage lien thereon for a loan of money. Afterwards judgment was taken by default against Richardson in favor of the defendants in error for the sum of $145, and costs taxed at $33.50, and the plaintiff in error was ordered to pay into court the surplus of wheat held upon her chattel mortgage. This not being done the defendants in error brought an action against the plaintiff in error for the value of said property. In her answer she denied that the

defendants in error had recovered judgment against Richardson. On the trial the defendant in error recovered judgment in the district court against the plaintiff in error, and she now brings the cause into this court; the defense being that there is no valid judgment against Richardson.

The grounds upon which the plaintiff in error bases her claim are that the action was brought in the wrong county and that service is shown to have been made upon Richardson by reading the summons to him. Do these defects render the judgment void?

In *Newlove v. Woodward*, 9 Neb., 502, in a direct attack upon the judgment based on such service, this court held it insufficient. That case has been followed in one or two other cases and no doubt is correct, where objection is made in a proceeding to correct the judgment. But suppose a judgment has been rendered, as in this case, upon such service, is the judgment void? We must bear in mind that the *nisi prius* court has held it sufficient and the question is did that court err?

In Black on Judgments, sec. 224, it is said: "Although the service of process in an action may have been characterized by some defect or irregularity, it does not necessarily follow that the ensuing judgment will be void. For if the party would take advantage of such a matter, he must do so in the action itself by some proper motion or proceeding. It is only when the attempted service is so irregular as to amount to no service at all that there can be said to be a want of jurisdiction. In any other case there may be error in the subsequent proceedings, but they will be sustained against a collateral attack. But a judgment recovered by default, upon service of the summons by delivery of a copy to a third person who is not a resident at the 'house of defendant's usual abode,' is void for want of jurisdiction. And so a citation addressed to and served upon a stranger, although he is the authorized agent of the defendant, is not binding upon the latter, and

will not authorize a judgment against him. So a judgment by default is void when the service had upon the defendant consisted only of the handing to him, by plaintiff's attorney, of a copy of the declaration on the day before the original declaration was filed. And the same consequences were held to result in a case where the return to the summons was made in the name of a deputy sheriff, instead of in the name of the sheriff himself. And it is said that where the sheriff, who serves the writ, is himself the plaintiff, the judgment in the suit so begun is a nullity, and the defendant may restrain it by injunction."

In Freeman on Judgments, sec. 126, the matter is stated very clearly. It is said: "From the moment of the service of process, the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void. If there is any irregularity in the process, or in the manner of its service, the defendant must take advantage of such irregularity by some motion or proceeding in the court where the action is pending. The fact that defendant is not given all the time allowed him by law to plead, or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process, on account of which a judgment by default would be reversed upon appeal, will not, ordinarily, make the judgment vulnerable to a collateral attack. In case of an attempted service of process, the presumption exists that the court considered and determined the question, whether the acts done were sufficient or insufficient. If so, the conclusion reached by the court, being derived from hearing and deliberating upon a matter which, by law, it was authorized to hear and decide, though erroneous, cannot be void."

As applied to this case, if we take the statement of the plaintiff in error, there was an attempt to serve a valid summons on Richardson. He was notified that an action had been instituted against him and that it was his duty to

answer at a definite time. It is true the service as shown by the return was not by copy as the statute requires, but it was not void. Had Richardson appeared and objected to the service, it would have been set aside as defective and irregular, and the court would have required new service before proceeding to render judgment. No objections were made, however, and the court, in rendering judgment against Richardson, held it sufficient, and as it was not void but voidable, it was not subject to collateral attack, and therefore the objections of the plaintiff in error are overruled.

The action was instituted in Richardson county where the defendant appears to have resided. It is charged in the affidavit for an attachment that he had absconded with the intent to defraud his creditors. If this were true it would be sufficient to sustain the attachment, although it afterwards appeared that he had not left the state. Ordinarily, it could not, in such case, be known whether he had left the state or not, or that he had clandestinely removed to another county, if such was the case, and it is sufficient to bring the action in the county where he formerly resided, and even if his residence is afterwards discovered in the state and service made upon him there, it will be sufficient, unless he appears and contests the right of the creditor to maintain the action. There is no cause for a rehearing and the motion is overruled.

MOTION OVERRULED.

THE other judges concur.

RECTOR-WILHELMY COMPANY V. PETER C. NISSEN ET AL.

[FILED NOVEMBER 23, 1892.]

1. **Chattel Mortgages:** CONDITION THAT MORTGAGEE MAY TAKE POSSESSION, CONSTRUED. A chattel mortgage upon a stock of goods to secure the payment of four notes of $200 each, payable respectively in thirty, sixty, ninety, and one hundred and twenty days from date, contained these words: "That in case of default made in the payment of the above mentioned promissory notes, or in case of attempting to dispose of or remove from said county of Douglas the aforesaid goods and chattels or any part thereof, or if at any time the said mortgagee, or its successor or assigns, should feel unsafe or insecure, then, and in that case, the said mortgagee," etc., "may take immediate possession of said goods," etc. *Held*, That the mortgagors must be in default or be about to do or have done some act which tends to impair the security, to authorize the mortgagee to take possession before the maturity of the notes.

2. **Conversion:** JUSTIFICATION UNDER MORTGAGE: EVIDENCE. While a mortgagee may prove any facts tending to show the conduct of the mortgagors in regard to the mortgaged property, he cannot be permitted to prove mere rumors or reports in regard to the same.

3. **Instructions** examined, and *held*, to state the law correctly.

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

Bradley & De Lamatre, for plaintiff in error.

Hall, McCulloch & English, contra.

MAXWELL, CH. J.

The pleadings in this case are as follows:

"Plaintiffs for cause of action against the defendant say: That said defendant is a corporation organized and doing business in the county of Douglas and state of Ne-

braska; that on and prior to the 22d day of June, 1888, said plaintiffs were engaged in the retail hardware business in the city of Omaha, Nebraska, and on said day had a stock of hardware, tinware, cutlery, and such other items of stock as are usually found in a retail hardware store, which said stock was of the value of $3,000; that they were indebted on said last mentioned date to said defendant in the sum of $800, and that the only other indebtedness said plaintiffs had at said date, or subsequent thereto, was as follows: To Lee-Clark-Andressen Hardware Company, $150; to Simmons Hardware Company, $132; that on said 22d day of June, 1888, said defendant prevailed upon said plaintiffs to, and said plaintiffs did, give to said defendant a chattel mortgage upon said stock of goods, to secure to them the payment of said indebtedness; * * * that by said mortgage said indebtedness was made payable as follows: $200 in thirty days from date of mortgage, $200 in sixty days, $200 in ninety days, and $200 in four months, said amounts being evidenced by promissory notes as described in said mortgage; that when said mortgage was given, and contemporaneous therewith, said defendant agreed with said plaintiffs that said mortgage should not be placed on record unless default was made in the payment of said notes mentioned in said mortgage, or some condition of said mortgage violated, and that said plaintiffs would be allowed to conduct their said business as before, and pay said notes out of the proceeds of said business; that long prior to the maturity of the first of said notes so secured, viz., on the 2d day of July, 1888, said defendant, without cause, and without any default made in the conditions of said mortgage by these plaintiffs, and in violation of their said contemporaneous agreement, and contrary to the terms of said mortgage, forcibly took possession of said stock of hardware and converted the same to its own use, against the protest of these plaintiffs, said defendant pretending to act under its said

mortgage; that after giving said mortgage they did no act, nor were they at the time said property was seized as aforesaid about to do any act, nor had they in contemplation the doing of any act which would tend in any manner to impair the security of said mortgage, but on the contrary were using their utmost endeavors to be ready and would have been ready and able to meet said notes as they became due; that the stock so as aforesaid seized and controlled by defendant was, at the time of said seizure and conversion, of the value of $3,000, and that no part of the same has been returned by said defendant to these plaintiffs, nor to any one for them, nor has any payment been made therefor, and that by reason of said unlawful seizure and conversion these plaintiffs have been damaged in the sum of $3,000, the value of said stock of goods, and said defendant by reason thereof has become and is indebted to these plaintiffs in the sum of $3,000, no part of which has been paid.

"Wherefore plaintiffs pray judgment against the defendant in the sum of $3,000 with interest from July 2, 1888, and for costs of suit."

A copy of the contract of partnership is set out, which need not be noticed.

The answer of the Rector-Wilhelmy Company is as follows:

"Now comes the defendant and for answer to the plaintiffs' petition says it admits that it is a corporation duly organized under the laws of the state of Nebraska, and doing business in the county of Douglas, state of Nebraska; admits that on the day alleged in plaintiffs' petition plaintiffs had a stock of hardware, etc., as set out in their petition, but denies that it was worth the sum of $3,000; admits that plaintiffs were indebted in the various amounts to the parties set out in their petition, but denies that those amounts were their only indebtedness and alleges that they were indebted for the purchase price of their stock of goods

to one firm in the amount of $1,400 and that about $200 of this became due on the 1st day of July, 1888, and $200 every two months thereafter, and that plaintiffs, at the time of the filing of the said mortgage, were in default of their said July payment of $200; alleges that plaintiffs at said time of filing said mortgage were insolvent; admits that about the time mentioned in plaintiffs' petition plaintiffs gave defendant a chattel mortgage upon their said stock of goods as security for their said indebtedness to defendant; admits that the notes were made payable as set out in plaintiffs' petition.

"Defendant denies that when said mortgage was given there was any contemporaneous agreement that said mortgage would not be placed on record, but alleges that it was represented to defendant by plaintiffs that William H. Alford, one of the plaintiffs herein, had $1,000 due him from the old country which he expected daily to receive, and that so soon as he received this, which would not be more than a few days, he would pay off the entire indebtedness of plaintiffs to defendant; that after two or three days from the giving of said mortgage the said Peter C. Nissen told this defendant that he had no faith in Alford's ever receiving any money from the old country, and informed defendant that there were several judgments in the Cedar county (Nebraska) district court, and in the justice courts of Cedar county against him, and soon after the giving of said mortgage, and before the same was recorded, defendant was informed that one certain person from Wyoming was about to attach the entire stock of Nissen, Alford & Co., and at the same time defendant also learned that plaintiffs were endeavoring to sell their said stock of goods to the Omaha Repair Stove Works, and also, one Bonniwell, and defendant knowing of the large indebtedness of plaintiffs and of their insolvency and being advised that its mortgage would not secure its interest against any attachments if not recorded, and possession taken under it,

and feeling insecure in that behalf did on the 2d day of July, 1888, put said mortgage on record and take possession of said stock of hardware, and defendant denies that said possession was taken without cause; denies that it was taken without any default on the part of plaintiffs; denies that it was contrary to the terms of the said mortgage; denies that it took forcible possession; denies that it converted the goods to its own use; denies that it was against the protests of plaintiffs, and alleges that defendant took possession of said stock by and with the full consent and approval of the plaintiffs; defendant denies that plaintiffs did no act, or were about to do any act, tending to impair the security of the defendant; denies that plaintiffs were using their best endeavors to, and would have been ready to meet and pay the said notes as they became due.

"Defendant denies that the stock of plaintiffs was of the value of $3,000, but alleges that its value was about $998.40; that the property taken under the said chattel mortgage was duly advertised for sale, and sold according to law, and that it brought the sum of $998.40, and that defendant, by direction and with consent of plaintiffs, after satisfying its own claim and the necessary expenses of advertising, foreclosing, storage, rent, etc., turned over the balance to the Lee-Clarke-Andressen Hardware Company, of Omaha, Nebraska, to whom plaintiffs had given a second chattel mortgage on their stock of goods on the 2d day of July, 1888, and filed for record on the 3d day of July, 1888."

The reply and other pleadings need not be noticed.

On the trial of the cause the jury returned a verdict in favor of the plaintiffs for the sum of $1,771.78, and judgment was rendered in September for the sum of $1,923.71.

It appears from the evidence that the stock of the plaintiffs below invoiced, when taken possession of by the defendant below, the sum of $2,571.78.

The first error assigned is the refusal of the court below

to permit the defendant below to introduce in evidence rumors brought to it as to the insolvency of the plaintiffs below, and also as to what they had done and were about to do with their goods. These rumors were properly excluded. The defendant below had a right to show the facts as to what its debtors had done or were about to do with their goods, but mere reports as to their condition not based on facts are not admissible.

Second—It is claimed that the mortgagee had the right to take possession under the following clause in the mortgage: "And we, the said Nissen, Alford & Co., do hereby covenant and agree to and with the said Rector-Wilhelmy Company that in case of default made in the payment of the above mentioned promissory notes, or in case of our attempting to dispose of or remove from said county of Douglas the aforesaid goods and chattels, or any part thereof, or if at any time the said mortgagee or its successors should feel unsafe or insecure, then, and in that case, it shall be lawful for the said mortgagee, or its successors or assigns, by itself or agent, to take immediate possession of said goods and chattels wherever found, the possession of these presents being sufficient authority therefor, and to sell the same at public auction, or so much thereof as shall be sufficient to pay the amount due, or to become due, as the case may be, with all reasonable costs pertaining to the taking, keeping, advertising, and selling of said property, together with a reasonable sum for attorney's fees, the money remaining after paying said sum, if any, to be paid on demand to the party of the first part." It is claimed that under this provision the mortgagee might take possession at any time when it felt disposed to do so. We think not, however. The mortgage was given under an agreement that the mortgagors were to remain in possession and sell goods to be applied on the debt. It is true there is a provision that if the mortgagee felt insecure at any time it might take possession, etc. This, however, is

not an arbitrary power to be exercised unless there has been some act done by the mortgagors, or such act is about to be done by them, the effect of which will be to weaken the security. (*Newlean v. Olson*, 22 Neb., 717.)

In the case cited it is said: "A chattel mortgage, like any other contract, is to be construed together, and the object is to ascertain with precision the mutual understanding of the parties. The whole instrument is to be viewed and compared in all its parts so that every part of it may be made consistent and effectual (2 Kent's Com., 555; *People v. Gosper*, 3 Neb., 285; *Barton v. Fitzgerald*, 15 East [Eng.], 541; *Merrill v. Gore*, 29 Me., 346), and the court in construing the contract should give effect to the provisions which carry out the evident intent of the parties. Here we find in this case credit was given, interest provided for in favor of the mortgagee, and an implied agreement on his part that if the mortgagor did not impair the security, he should be entitled to retain possession of the property until the money became due. This clearly was the contract and the intent of the parties, and the mortgagee should not be permitted to violate it. The words 'if the mortgagee shall at any time feel unsafe or insecure' do not mean that he may arbitrarily and without cause declare that he feels unsafe or insecure. If this were so a mortgagee might induce a mortgagor amply to secure a debt upon the implied promise that credit for a certain length of time would be given, and the instant after receiving the mortgage declare that he felt unsafe and insecure and proceed at once to foreclose the mortgage. Such a rule would place the mortgagor entirely at the mercy of the mortgagee, and in many, if not most cases, deprive the mortgagor of the very means by which he could pay the debt. To justify the mortgagee, therefore, in his action in declaring that he feels unsafe and insecure, where there is an implied contract that the mortgagor shall remain in possession, the mortgagor must be about to commit, or has committed, some act

which tends to impair the security; and unless such facts exist, the right does not become operative." What is said in that case seems applicable to this.

Third—It is claimed that the court erred in giving the following instructions:

"1. The chattel mortgage, as between the parties, was valid, but under the terms thereof the plaintiffs were entitled to retain possession of the property until default in the payment of some of the notes secured by the mortgage, or until defendant was justified in taking possession of the same as defined in the next instruction.

"2. To justify defendant in taking possession of the property before default in the payment of any of the notes secured by the mortgage one of these facts must have existed: First, that the plaintiffs were about to dispose of, or remove from this county, the mortgaged property, or some part thereof, without the consent of the defendant, or attempt so to do; or, second, that the plaintiffs had done, or were about to do, since the giving of the mortgage, some act without the consent of defendant, or that there had occurred some change in the affairs of plaintiffs, which act or change, in the judgment of a cautious, prudent man, situated as was defendant and in the same circumstances, would tend to impair the security of said mortgage and render the defendant unsafe in permitting plaintiffs to retain possession of said property.

"3. The burden is on the defendant to show one or the other of the facts named in the preceding instruction by a fair preponderance of the testimony. If you should believe from the testimony that either of said facts existed at the time of the taking of said property by defendant, your verdict must be for defendant, notwithstanding none of the notes were due at the time. In case you do not find either of said facts to have existed at that time, then the defendant has failed to show a justification for its act in taking the mortgaged goods, and your verdict should be for the plaintiffs.

"4. In case you find for the plaintiffs, the measure of plaintiffs' damages is the value of their interest in the property on the 2d of July, 1888, with seven per cent interest from that day to September 23, 1889. In arriving at the said value you will take the value of the property as it was on the said day before defendant took possession, and from that value deduct the amount of defendant's lien by virtue of the mortgage, and the remainder will be the value of plaintiffs' interest on that day.

"5. In arriving at the value of the property you will disregard the evidence of what it sold for and arrive at its value from the evidence of the witnesses who testified in relation thereto, and from this testimony determine its fair market value in the city of Omaha on the day named."

These instructions, in our view, state the law correctly, and there was no error in giving the same. A party in obtaining a chattel mortgage on the promise, both in the mortgage itself and verbally, that all that is wanted is security for the debt, and time will be given to pay the claim, must act in good faith with the mortgagor, otherwise the mortgage would be obtained under false pretenses and the mortgagee, as soon as he had obtained it, could claim the possession. One or two cases of that kind have come to our notice in this court. The mortgage in this case seems to have been given in good faith and the mortgagors were endeavoring to comply with its terms, when the mortgagee before the debt was due, took possession and sold the goods. In such case the mortgagors were entitled to the full value of the goods, and the amount that they sold for at forced sale is no criterion to determine their value. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

TOLERTON & STETSON COMPANY ET AL., APPELLEES, V. GEORGE W. MCLAIN ET AL., APPELLEES, IMPLEADED WITH GERMAN-AMERICAN SAVINGS BANK OF LE MARS, IOWA, APPELLANT.

[FILED NOVEMBER 23, 1892.]

Creditor's Bill: COLLATERAL PLEDGE OF PARTNERSHIP NOTES TO SECURE INDIVIDUAL DEBT: RIGHTS OF FIRM CREDITORS AGAINST PLEDGEE WITH NOTICE. M. and H., doing business at C. under the name of M., sold their business and stock, taking the notes of the purchasers payable to M. M. sold one of the notes to a bank and indorsed the same. He also delivered to the bank other firm notes to secure his private indebtedness. In a creditor's bill by creditors of the firm to subject the latter notes to payment of the firm debts, *held*, that the proof clearly showed that the officer of the bank taking the notes as security for a personal debt of M., a member of the firm, knew that they belonged to the partnership and that the creditors of the firm were entitled to the proceeds of such notes.

APPEAL from the district court for Dawes county. Heard below before KINKAID, J.

Ira T. Martin, Barnes & Tyler, and *Jenckes & Bane*, for appellant.

Alfred Bartow, Spargur & Fisher, W. H. Fanning, E. S. Ricker, and *A. W. Crites*, for appellees.

MAXWELL, CH. J.

It is claimed that on or about the 1st of April, 1890, one G. W. McLain borrowed from the German-American Savings Bank of Le Mars, Iowa, the sum of $600. As security for such loan he pledged and delivered to the bank certain promissory notes, executed by other persons, which on their face were payable to him, amounting to about $1,000. Afterwards, and during the month of June of the

same year, McLain again obtained from appellant $665, $1,200, and $1,702.50, executing his several notes for the above mentioned sums, and as security therefor, and for the payment of some notes of his which had been executed prior to that date, pledged certain promissory notes executed by Manning & Gorton, payable to the order of said G. W. McLain, at the Bank of Crawford, at Crawford, Neb. At the same time he sold one of the Manning & Gorton notes to the bank outright. All of the above security notes were duly indorsed by him and delivered to the appellant herein. When the notes became due, on or about October, 1890, the appellant forwarded the same by way of the Wells, Fargo & Co.'s Express to the Bank of Crawford for collection. Thereupon the appellees, The Tolerton & Stetson Company and others, commenced actions in the several courts of Dawes county against G. W. McLain, at the same time suing out writs of attachment and causing the Wells, Fargo & Co.'s Express to be served with notices of garnishment. Such proceedings were had in the several cases that judgments were obtained against G. W. McLain, and the answer of the garnishee was taken.

On or about the 1st day of November, 1890, all of the appellees joined in a suit in the nature of a creditor's bill against G. W. McLain, Henry Henrichs, The Wells, Fargo & Co.'s Express, The German-American Savings Bank of Le Mars, Iowa, appellant herein, and T. E. Bradway, and filed their petition in the district court of Dawes county, alleging, in substance, that G. W. McLain and Henry Henrichs prior to that time had been doing business at Crawford, Nebraska, as copartners; that the several judgments which the plaintiffs had obtained as above stated were against the said firm of G. W. McLain and Henry Henrichs; that the said firm was insolvent and that executions on said judgments had been returned unsatisfied; that the notes pledged by the said G. W. McLain as collateral se-

curity to the appellant, The German-American Savings Bank, were the property of the said firm of G. W. McLain and Henry Henrichs; that the same were taken by the bank without authority and in fraud of the rights of such firm and of the plaintiffs, with full knowledge of said facts on the part of the bank; that the same were subject to the attachment liens of the plaintiffs and the lien of the bank was subsequent and inferior thereto; that the same ought to be applied to the satisfaction of their said judgments, which petition concluded with the proper prayer for such relief. The German-American Savings Bank thereupon filed its answer to the said petition, denying the material allegations thereof; alleging that it took the notes in question as collateral security for the money borrowed by G. W. McLain without any knowledge or information that any one else had any interest in them whatsoever; that it purchased one of the notes in question and paid for the same the sum of $2,000 outright, and concluding with a prayer that the proceeds of the notes be held subject first to their lien and applied to the payment thereof; that they recover their costs and for general equitable relief. No answer was filed by G. W. McLain, but Henry Henrichs filed an answer in which he alleges that the notes in question were the property of such firm; that they had been pledged without his knowledge or consent; that they ought to be applied to the satisfaction of the judgments to the exclusion of the rights of the appellant, and that he ought to have the balance of the proceeds of the notes for himself. Upon these issues the case was tried to the court and a decree rendered as follows:

"Said cause coming on to a hearing upon the petitions of the plaintiffs, the answers of the defendants, The German-American Savings Bank of Le Mars and Henry Henrichs, and the reply of the defendant The German-American Savings Bank of Le Mars, Iowa, and the evidence adduced and taken in open court upon the hearing

by and in behalf of the respective parties, and the court being fully advised in the premises, now here finds that all the facts stated in the said petitions of the plaintiffs are true, and that they are entitled to the relief prayed in their said petitions; and that the facts stated in the answer of the defendant Henry Henrichs are true, and that he is entitled to the relief prayed in his said answer; and that the court finds that the defendant The German-American Savings Bank of Le Mars, Iowa, has a first lien upon the notes and securities and the proceeds thereof, described in the pleadings herein, for the sum of $2,800, with eight per cent interest per annum thereon from the 10th of October, A. D. 1890, and is entitled to be first paid this aforesaid sum and interest due out of such proceeds; that the said plaintiffs are entitled to specific liens upon rest and residue of such notes and proceeds for the amount of their said several judgments and claims, with interest thereon from the date of such judgments, as therein provided, in the order of priority alleged and set forth in said petitions; that the plaintiff The First National Bank of Chicago, Illinois, had a specific lien upon such proceeds, by virtue of its attachment and garnishment, but which said action is still pending and undetermined; that after the payment of the aforesaid several sums of money out of the proceeds of such notes, the rest and residue of such proceeds, if any such there be, shall be divided between the defendant Henry Henrichs and the defendant Geo. W. McLain, or his representatives or assigns, in the proportion of $\frac{41}{89}$ to $\frac{48}{89}$, which said last named fractional proportion of such last named residue so belonging to the said George W. McLain, or his assigns, is hereby adjudged to be paid to the defendant The German-American Savings Bank of Le Mars, as its interest may appear. It is, therefore, now here ordered, adjudged, and decreed by the court that James C. Dahlman, the receiver heretofore appointed herein, shall first pay the costs of this suit, taxed at $——,

out of the proceeds of such said notes; that he next pay out of such proceeds the said sum of $2,800, with eight per cent interest thereon from the 10th day of October, to the defendant The German-American Savings Bank of Le Mars; that he next pay out of such proceeds to the plaintiff The Tolerton-Stetson Company the sum of $710.81, their judgment, together with the sum of $33.58, their costs expended in obtaining the same, together with interest on the sum of $354.31 thereof at the rate of seven per cent per annum from the 30th day of January, 1891, and on $355.30 thereof at the rate of ten per cent per annum from said 30th day of January, 1891; that the said receiver do forthwith, out of the proceeds of said notes, pay over to the plaintiff James H. Walker the sum of $648.45, his judgment, and further sum of $18.65, his costs therein expended, together with interest thereon at the rate of —— per cent from the 1st day of December, 1890; that the said receiver do forthwith, out of the proceeds of such notes, pay over to the J. T. Robinson Notion Company, the sum of $110.25, its judgment, and the sum of $14.65, its costs therein expended, together with seven per cent interest thereon from the 22d day of November, 1890; that the said receiver do retain in his hands, until the further order of the court, sufficient of such proceeds to pay the sum of $652.46 claimed by the plaintiff The First National Bank of Chicago, together with seven per cent interest thereon, from the 22d day of June, 1890, $50 probable costs; that the said receiver do forthwith pay over to the plaintiffs Finch, Van Slick & Co., out of such proceeds, the sum of $509.21, their judgment, together with their costs therein expended taxed at $22.83, with interest thereon at the rate of seven per cent per annum from the 30th day of January, 1891; that the said receiver do forthwith pay over to the plaintiff John T. Pirie, out of such proceeds, the sum of $1,124.16, the total amount of his two judgments, and the further sum of $30, his costs therein ex-

pended, together with interest thereon at the rate of eight per cent per annum from the 4th day of November, 1890, on $500, and eight per cent per annum from the 11th day of November, 1890, on $500, and seven per cent interest from the 11th day of November, 1890, on $124.16; that the said receiver do forthwith pay over to the plaintiffs C. M. Henderson & Co., out of such proceeds, the sum of $176, their judgment, together with the sum of $——, their costs therein expended, with interest thereon from the 30th day of October, 1890; that the said receiver do forthwith pay over to the plaintiffs C. Cotzian & Co., out of such proceeds, the sum of $254.74, their judgment, together with $14.20, their costs expended therein, with seven per cent interest thereon, from the 8th day of November, 1890; that the said receiver do forthwith pay over to the plaintiffs Sweet, Dempster & Co., out of such proceeds, the sum of $454.60, their judgment, and the further sum of $31.40, their costs therein expended, with seven per cent interest thereon from the 9th day of November, 1890; that the said receiver do forthwith pay over to said plaintiffs Sprague, Warner & Co., out of such proceeds, the sum of $291.31, their judgment, together with the further sum of $11.80, their costs therein expended, with seven per cent interest thereon from the 1st day of December, 1890; that the said receiver do forthwith pay over to the plaintiff Leroy Hall the sum of $1,206.90, his judgment, together with the costs thereof taxed at $27.78, with interest on $687.25 thereof at the rate of seven per cent per annum from January 30, 1891, and on $519.65 thereof at the rate of ten per cent per annum from January 30, 1891; that the said receiver do forthwith pay over to the Loak Glove Manufacturing Company, one of the creditors of the firm of G. W. McLain, the sum of $73.25, with seven per cent interest thereon from December 20, 1890; that if, after making the payment of the said several sums out of such proceeds, there shall remain any residue thereof, the said

receiver shall forthwith pay out said residue as follows: $\frac{41}{89}$ thereof to the defendant Henry Henrichs, and $\frac{43}{89}$ thereof to the defendant The German-American Savings Bank of Le Mars; and it is further ordered, adjudged, and decreed by the court that the said receiver do forthwith proceed to collect, by process of law or otherwise, all of the promissory notes and securities mentioned in the pleadings herein as belonging to the firm of G. W. McLain, and to dispose of the proceeds thereof in the order as above decreed, and that if any of said notes or any judgment recovered thereof shall prove to be uncollectible, said receiver is hereby ordered and directed to forthwith advertise and sell the same, after giving such notice of such sale as shall be required by law, and the proceeds of such sale shall be applied as hereinbefore specified."

The principal question in the case is the good faith of the German-American Savings Bank, of Le Mars, Iowa, in taking the notes in question.

Mr. Meyer, the president of the bank, testified as follows:

Q. Now, what was said, the exact agreement between you and George W. McLain, at the time that he deposited these notes as collateral in relation to your holding them for that purpose?

A. When we made the loan Mr. McLain offered these notes as collateral security for all the notes he was owing at the time.

Q. And what was the consideration which you have made to the bank to advance this additional money for McLain and take these collateral notes?

* * * * * * *

A. The consideration was, that if McLain would leave these notes as collateral security for all of his indebtedness to the bank we would make these additional advances.

Q. Yes, the advances that were made in May and June?

A. In June.

FISHER: Ask him what advances.

A. Those advances made in June.

Q. When was the paper left at your bank by Mr. McLain?

A. The 28th day of June.

Q. To whom was this payable?

* * * * * * *

Q. What, if any, notice or knowledge did you have of any claim or interest of any other person in this paper, other than George W. McLain?

A. Had no notice whatever that any other party had the least claim to this paper.

On cross-examination he testified:

Q. You think that he, McLain, told you they were given for the purchase price of the stock of goods at Crawford?

A. Yes, sir; I think he told me that.

Q. Did he tell you any of the circumstances as to the sale?

A. He told me how much money was paid and how many notes he had.

Q. What induced him to sell?

A. No, we didn't enter into further conversation, I don't think; don't remember anything about it.

Q. And you knew that they were a portion of the proceeds of the stock of goods at Crawford?

A. Yes, sir.

Q. Now I will ask you to state, Mr. Meyer, if you didn't know that this store, this general merchandise stock at Crawford, was the only business which G. W. McLain had at that place?

Witness: This what?

Q. This stock of goods.

Witness: Oh! the stock of goods at Crawford?

Q. Stock of goods at Crawford. You knew that was all the business he had at that place?

A. That and his cold storage business there.

Q. I will ask you to state, Mr. Meyer, if you were present at a conversation in your banking establishment at Le Mars, Iowa, between George W. McLain and Mr. Henrichs, relative to this cold storage business and the incorporation of their business?

* * * * * * *

A. Yes, sir.

Q. You may state what that conversation was?

* * * * * * *

A. In the month of April, 1890.

Q. What time in the month of April? Any time to which you refer by saying that you were present?

A. Yes, I was present at a conversation at that time.

* * * * * * *

A. Why, we had a general talk about matters and things about their business, about the cold storage business, and what it would result in, and what they would make on a dozen eggs by carrying them from spring until fall, and about their incorporating and making a kind of incorporation.

Q. This conversation was engaged in by McLain, Henrichs and yourself, was it?

A. Yes, sir.

Q. At that time was there, or did they not rather agree as to the advisability of mortgaging their stock at Crawford, their stock of merchandise, and getting some money from you to put into their cold storage business?

* * * * * * *

A. They talked about borrowing some money.

Q. What security were they going to offer?

A. Well, now, I don't recollect just what security they were going to offer.

Q. I will ask you to state if they did not discuss the advisability of their still continuing in the general mer-

chandise business at Crawford, as well as their cold storage business?

* * * * * * *

A. I think they did.

Q. Was it not suggested in this conversation that they would incorporate the cold storage business and would deposit their stock in the cold storage corporation with you as collateral as advanced by you, the money to be used in the cold storage business, as well as continuing in the general merchandise business?

* * * * * * *

A. Yes, sir; so far as the mercantile business was concerned, I think there was some talk of that kind.

Q. Was there not some talk at that time of incorporating their cold storage business, and their general merchandise business, under the corporate name of the United States Merchandise Company, and borrowing some money from you, pledging to you all their issues of stock or stock certificates in this corporation.

* * * * * * *

A. Why, there was some talk of that kind.

Q. Now, you say their business; whose business do you mean by their business?

A. That is something that Mr. McLain and Mr. Henrichs were talking about their going to do in the future, and there was some talk about their incorporating a merchandise business and issuing stock, and they talked more about it, and wanted to know something about what chance there would be in getting a little money on this stock and leave it in the bank, providing they incorporated; providing they changed their business to an incorporation.

Q. Whose business were they going to change?

A. That's something I don't know anything about.

Q. The other stock that they were going to change, whose stock do you mean by that?

A. I did not understand that they were going to incorporate their stock of goods.

Q. You say that that stock of goods that they talked some of organizing?

A. And their cold storage business I am talking about.

Q. And their cold storage stock of goods?

A. I don't know anything about that.

Q. What stock of goods do you refer to when you state that they intended to change their business and incorporate their stock of goods with the cold storage business?

A. Well, I didn't intend to say that they were going to change their stock of goods into a cold storage business. I do not think I said so.

From other portions of his testimony it clearly appears that he knew Henrichs was a partner with McLain in the business at Crawford, although the business was conducted in the name of McLain. He also knew that they had sold out their business to Manning & Gorton, and that the notes he received to secure the personal debts of McLain were in fact partnership property of McLain and Henrichs. This being the case he is not an innocent holder and the rights of the firm creditors were superior to his. It is unnecessary to consider the other questions in the case as this is decisive of the rights of the parties. The judgment appears to be based upon the testimony and is right and is

AFFIRMED.

THE other judges concur.

LEVI CLAY V. H. A. GREENWOOD ET AL.

[FILED NOVEMBER 23, 1892.]

1. **Chattel Mortgages:** PARTNERSHIP PROPERTY: RIGHT OF ONE PARTNER TO MORTGAGE FOR PURCHASE MONEY. B. and C. purchased a stallion for $625, giving their notes therefor, signed by two sureties, and due in eighteen and thirty months. After some delay the first note was paid by C., as was claimed, largely from money derived from the horse. The sureties insisted on the payment of both notes and the testimony shows that B., in his own name, with the assent of C., mortgaged the horse to G., to obtain money to pay the second note and the money was so applied. *Held*, That G. had a lien upon the horse for the amount of said loan and interest.

2. **Review:** OBJECTIONS TO THE FORM OF THE PLEADINGS must be made in the trial court to be available in the supreme court.

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

Hugh J. Dobbs, for plaintiff in error:

A mortgage of personal property by one partner in his individual name passes no title. (Parsons, Partnership, sec. 95; *Clark v. Houghton*, 12 Gray [Mass.], 38; *Butterfield v. Hemsely*, Id., 226; *Cummings v. Parish*, 39 Miss., 412; *Lockwood v. Beckwith*, 6 Mich., 168; *Chapman v. Devereux*, 32 Vt., 616; *Gates v. Watson*, 54 Mo , 585.)

Winter & Kauffman, and *A. D. McCandless, contra:*

The mortgage was given to secure a partnership debt, and is valid, though executed by one partner only. (*Gernon v. Hoyt*, 90 N. Y., 631; *Getchell v. Foster*, 106 Mass., 42; *Winship v. Bank*, 5 Pet. [U. S.], 529-532; *Theilen v. Hann*, 27 Kan., 778; *U. S. Bank v. Binney*, 5 Mason [U. S.], 176; *National Bank v. Ingraham*, 58 Barb. [N. Y.], 290.)

MAXWELL, CH. J.

This is an action of replevin brought by Greenwood against Clay and Blake to recover possession of a stallion. The testimony tends to show the following facts:

On the 26th day of March, 1889, Levi Clay and M. C. Blake purchased in partnership a three-year old stallion of E. L. Williams, at Axtell, Kansas, for $625, for which they gave two promissory notes, due respectively in eighteen and thirty months. The notes were signed by Levi Clay and M. C. Blake as principals and Ed. Oates and Peter Weir as sureties. To indemnify the sureties Clay gave them a chattel mortgage on some mules. Afterwards Blake and Clay gave a chattel mortgage to Wilson as additional security for the two original purchase notes. The horse was taken to Barneston, Nebraska, and kept in Clay's barn and bred to mares in regular course of business, during the season of 1889 and 1890. Clay managed the horse, collecting service money. In the fall of 1890 feed was scarce and Clay turned the horse over to Blake, who wintered him. Sometime after Clay gave a chattel mortgage to the sureties Oates and Weir, he gave another first mortgage on the same mules to Greenwood, and afterward, in conjunction with Greenwood, shipped the mules to Chicago and sold them; all without the knowledge and consent of Oates and Weir, who held the first mortgage. This alarmed them and they threatened to prosecute Clay for disposing of mortgaged chattels, and they insisted that the notes be paid at once and release them from liability thereon, although one note was not due until September 26, 1891. Clay turned over to these sureties money derived from the sale of the mules, nearly enough to pay the first note, and they so applied it, but required that the other note be paid also. Blake and Clay agreed that the money should be raised by mortgaging the horse, and pay off the notes and mortgage to Wilson, and release the

sureties. In pursuance of this agreement, and for the purpose of relieving Clay from his entanglement with the sureties, Blake went to Greenwood and borrowed $324 and gave him a chattel mortgage on the horse, signed by himself only, but represented to Greenwood that the money was to be used in paying off the notes and mortgage then on the horse, and it was so applied. About the 1st of April, 1891, in default of payment, Greenwood commenced foreclosure proceedings; took nominal possession of the horse and advertised him for sale on foreclosure, but agreed to leave the horse in the possession of Blake and Clay during the time of advertising, and arranged with Blake to hire some one to keep him during that time, and $25 out of the money realized on the sale was to be paid for such keeping. Blake told Clay that if he would keep him he could have the $25, and under this arrangement Clay took possession of the horse and when the day of sale arrived refused to give him up. Greenwood thereupon commenced this suit in justice court and by the justice it was certified to the district court, and there tried to the court without a jury. The court found for the plaintiff Greenwood and rendered judgment in his favor.

The principal contention on behalf of the plaintiff in error is, that the mortgage being signed by but one partner, does not pass the legal title, and therefore that Greenwood cannot recover. There is testimony in the record tending to show that the money was borrowed for the firm, and that the plaintiff in error assented to the execution of the mortgage; but however this may be, there is no doubt that Greenwood furnished the money to pay the second of the partnership notes and has a claim upon the property for that amount, for which with interest he is entitled to a lien on the property. It is impossible in this action to adjust the accounts between Clay and Blake, as a considerable part of the proof was directed to that purpose.

Some objection is made to the form of the pleadings, but

it should have been urged in the court below to be available in this court. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

ERASTUS A. DEMING, APPELLEE, v. WILLIAM H. MILES ET AL., APPELLANTS.

[FILED NOVEMBER 23, 1892.]

1. **Registration:** FILING DEED OPERATES AS CONSTRUCTIVE NOTICE: GRANTEE UNAFFECTED BY NEGLECT OF OFFICER TO RECORD. Where a party files a deed properly executed and acknowledged for record with the proper officer, he is not bound to see that the officer performs his duty by actually recording it, nor is he responsible to other parties for the officer's neglect of his duty. The proper filing of such deed for record operates as constructive notice to all subsequent purchasers and mortgagees, although the officer may fail to comply with the requirements of the statute with respect to the recording of the instrument.

2. ———: ———: DESTRUCTION OF RECORDS BY FIRE. Where a deed properly executed and acknowledged is filed and recorded in the proper office, it is thenceforth notice to all the world, even though the record book containing it may be totally destroyed by fire.

3. **Real Estate:** LIFE ESTATE OF HUSBAND BY CURTESY MAY BE CONVEYED, OR SOLD ON EXECUTION. The life estate of a husband as tenant by the curtesy is subject to seizure and sale on execution against him. A tenant by the curtesy may likewise convey his title by deed or mortgage.

4. ———: DESCENT. *Held*, That on the death of Mrs. L. A. M., in 1880, all the real estate of which she died seized descended, subject to W. H. M.'s right to an estate by curtesy therein, to their daughter L. M.

APPEAL from the district court for Frontier county. Heard below before COCHRAN, J.

J. L. White, and *A. S. Sands*, for appellants.

R. M. Snavely, *contra*.

NORVAL, J.

This action was brought in the court below by appellee against William H. Miles and Nellie E. Miles, to foreclose a mortgage executed by them upon the west half of the southeast quarter and the east half of the southwest quarter of section 1, town 7 north, of range 28 west of the sixth principal meridian. The district court permitted Laura Miles, the minor child of the said William H. Miles by a former wife to intervene in the action. A guardian *ad litem* was appointed for the minor, who filed an answer setting up therein that at the time of the execution of the mortgage, the said Laura Miles was the sole owner in fee-simple of the land in controversy, having acquired title thereto by inheritance from her mother; that said mortgage conveyed no interest in the lands therein described, and is a cloud upon her title to said premises. The answer closes with prayer that the mortgage be canceled and that the title to the real estate be quieted in said minor. A reply was filed by the plaintiff. Upon the trial the court found that at the time of the execution of the mortgage, said William H. Miles was the owner in fee-simple of said real estate; that the mortgage was valid and binding, and a decree of foreclosure and sale was entered for $628.09. For and on behalf of the said minor this appeal is prosecuted.

The record before us shows that on the 11th day of January, 1879, the defendant William H. Miles was the owner in fee-simple of the real estate covered by the mortgage, and on said day, by deed of general warranty, he

conveyed the same to one Laura C. Murphy, which deed appellant contends was duly recorded on the 4th day of March, 1879; that on the 13th day of said month the said William H. Miles was married to said Laura C. Murphy; that on the 22d day of January, 1880, the appellant Laura Miles was born as the lawful issue of said marriage, and that on the 27th day of the same month said Laura C. died intestate, leaving surviving her, as her sole and only heir, the said minor. Subsequently, the said William H. Miles was married to one Nellie E. Murphy, and they, on the 16th day of August, 1883, executed, acknowledged, and delivered the mortgage in suit to secure a loan of $500, which mortgage was recorded on the 18th day of September, 1883, in the mortgage records of Frontier county.

Appellant contends that the said deed of January 11, 1879, from Miles to Murphy, was duly filed and recorded on the 4th day of March, 1879, in the office of the county clerk of the county where the lands therein described are situated. It is undisputed that in the early part of the year 1883 the court house and records of Frontier county were entirely destroyed by fire. Subsequently, but prior to the making and recording of the mortgage for the foreclosure of which this action was instituted, the records with reference to the lands covered by said mortgage were so restored as to show that the title to the lands stood in the name of William H. Miles. The said deed from Miles to Laura C. Murphy at that time did not appear of record, and appellee insists it was not established that it was ever on record prior to the making of the mortgage. Upon the trial the original deed was produced and put in evidence with the indorsements thereon. Upon the back of the instrument is to be found the following certificate:

"Filed for record this 4th day of March, A. D. 1879, eleven o'clock A. M., and entered in numerical index of deeds. Recorded this 4th day of March, 1879.

"A. L. MORGAN,
"*County Clerk.*"

It was also proven by Mr. Morgan, who was the county clerk of Frontier county in 1879, that the above certificate is in his handwriting and was made while he was such clerk. Mr. Morgan further testified, in answer to the question, "You may state whether you received that deed for record at the time stated, and whether you spread it at large upon the records of the county?" that "It was undoubtedly received then according to the indorsement as filed, but I see there is no page mentioned or the number of the deed record, and I cannot say positively whether it was recorded or not. I was just commencing with the business and not very well acquainted with it at the time. It was not customary to place 'recorded this day,' etc., until after the record was done, and then place the name of the record and page; but I see the page is not mentioned here. Whether it was recorded I do not know; I cannot say positively whether it was or not."

Although Mr. Morgan's testimony does not show that the deed was in fact spread upon the deed records of the county, the fact of its being delivered to the county clerk for such purpose clearly appears from the testimony of the witness as well as by the indorsement upon the back of the instrument.

By section 15 of chapter 73 of the Compiled Statutes, entitled "Real Estate," it is provided that "every deed entitled by law to be recorded shall be recorded in the order and as of the time when the same shall be delivered to the clerk for that purpose, and shall be considered recorded from the time of such delivery." Whether the deed in question was in fact recorded is quite immaterial so far as the rights of appellant are concerned. Where a party files a deed or mortgage, properly executed and acknowledged, for record with the proper officer he has complied with the law, and he is not bound to see that the officer performs his duty by actually recording it, nor will the law hold him responsible to the parties for the omission or neg-

lect of the officer to discharge his duty. The proper filing of the deed for record operated as constructive notice to all subsequent purchasers and mortgagees. (*Perkins v. Strong*, 22 Neb., 725.)

We are, however, satisfied from other testimony contained in the bill of exceptions that the deed was actually recorded. It appears from the testimony of W. L. McClay, who was the county clerk of Frontier county during the year 1882, that between the 15th and 25th days of December of that year, at the request of Burton & Harvey, of Orleans, he examined the records of his office for the purpose of ascertaining what property, real as well as personal, was owned by said W. H. Miles; that upon such examination he found that the title to the land in litigation stood of record in the name of Laura C. Murphy, which was the maiden name of Mr. Miles's first wife. No testimony was introduced by appellee to controvert the fact of the recording of the deed, but he insists that the evidence introduced by appellant is insufficent to establish that the instrument was ever recorded. His contention must be overruled. The fact that the record of this deed was destroyed does not affect the rights of appellant. There can be no doubt that where a deed, properly executed and acknowledged, is duly filed and recorded, it is thenceforth notice to all the world, although the record may be totally destroyed by fire. Such is the uniform adjudication in this country. (Wade on Notice, sec. 157; *Alvis v. Morrison*, 63 Ill., 181; *Shannon v. Hall*, 72 Id., 354; *Gammon v. Hodges*, 73 Id., 140; *Myers v. Buchanan*, 46 Miss., 397.)

To our mind it is perfectly plain that the mother of appellant at the time of her death was the owner in fee simple of the real estate involved in this litigation. Under the law in force at the time of the death of the mother the husband, William H. Miles, took only a life estate in the lands, and, subject to his right of curtesy, they descended to appellant as the sole and only heir at law of Laura C.

Miles, deceased. The mortgage did not convey the fee-simple title, and the district court erred in so finding and in entering the decree it did, for the reason that William H. Miles only owned an estate by the curtesy. The life estate of a husband as tenant by the curtesy in the real property of his wife of which she died seized is subject to seizure and sale on execution against him. Likewise a tenant by curtesy may convey his title by deed or mortgage. (*Forbes v. Sweesey*, 8 Neb., 525; *Lessee of Canby v. Porter*, 12 O. St., 79; *Shortall v. Hinckley*, 31 Ill., 219; *Rose v. Sanderson*, 38 Id., 247; *Lang v. Hitchcock*, 99 Id., 550; *Bozarth v. Largent*, 128 Id., 95; *Edmunds v. Leavell*, 3 S. W. Rep. [Ky.], 134.) It is clear from the foregoing authorities that the mortgage covered the interest of the mortgagor in the premises. Appellee is entitled to a foreclosure and sale only of the life estate of the defendant William H. Miles.

It is claimed that the mortgage is invalid for the reason that at the time of the death of Laura C. Miles the premises were occupied by her and her husband as a family homestead, and the husband therefore could not incumber the same. As no such issue is tendered by the pleadings in the case we will not take the time to consider the point raised in the brief of counsel.

Lastly, it is urged that William H. Miles has no estate by the curtesy in the premises for the reason appellant's mother acquired title thereto directly from him by a deed of general warranty, and the cases of *McCulloch v. Valentine*, 24 Neb., 215, and *Pool v. Blakie*, 53 Ill., 495, are cited in the brief of counsel in support of the proposition. An examination of these authorities will show that they are not in point. In the case in our own reports one Ebenezer McCulloch, by his last will and testament, provided that a certain farm owned by the testator should be sold by his executors and the money arising therefrom be equally divided among his daughters, stipulating that the share going to his daughter, Elizabeth Pemberton, should be re-

tained by his sons, Ebenezer Z. and George C., who were by the will appointed trustees for that purpose, and who were "to retain the same in trust for the benefit of said Elizabeth Pemberton and her children, her husband to have no control over the same, but that the said trustees might, with the consent of said Elizabeth Pemberton invest the same as they should deem best, so that the daughter and her children shall have the benefit of the same without the control of her husband." The farm was sold in accordance with the provisions of the will and with the share of the funds intended for Elizabeth Pemberton the trustees purchased a quarter section of land in Hamilton county in this state, and a deed therefor was taken in their own names as trustees, the *habendum* clause of the deed reading, "To have and to hold the said real estate, with the appurtenances, to the said second parties as trustees of said Elizabeth Pemberton, they being appointed as trustees by the will of their father, * * * for her sole and separate use and benefit so long as she may live, and after her death for the use and benefit of her children, the said trustees having the power to sell and convey said land, or any part thereof, on the written request of said Elizabeth Pemberton, and her joining with them in any such conveyance." Subsequently Elizabeth Pemberton died intestate, leaving her husband and their three children surviving her. Afterwards it was sought to sell the lands under an execution against the husband. This court held that he took no estate in the lands as tenant by the curtesy. The Illinois case is quite similar to the one reported in 24 Nebraska. In each case the instrument construed specified in effect that the property therein described was for the sole and separate use and benefit of the wife, and that the husband should have no interest and title in or control over the same. But the deed under consideration in the case at bar contains no limitations whatever. The fact that William H. Miles was the grantor in the deed does not bar his right to an estate

by curtesy, since such right was not limited by the conveyance. (*Robie v. Chapman*, 59 N. H., 41; *Soltan v. Soltan*, 6 S. W. Rep. [Mo.], 95.)

The decree of the district court is reversed and the cause is remanded to said court with instructions to enter a decree of foreclosure and sale only of the life estate of the defendant William H. Miles in the mortgaged premises and quieting the title to the property in the appellant Laura Miles, subject to said estate by the curtesy.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CARY A. MANKER v. L. P. SINE.

[FILED NOVEMBER 23, 1892.]

1. **Replevin:** JUDGMENT: ALTERNATIVE FORM. In an action of replevin, where the property has been delivered to the plaintiff, in case a verdict is returned in favor of the defendant, the judgment must be in the alternative for a return of the property, or the value thereof, in case a return cannot be had, or the value of the possession of the same, and for damages for the unlawful detention. The statute requiring the judgment to be in the alternative form is imperative.
2. **Instructions:** SUFFICIENCY OF EVIDENCE. *Held*, That the cause was submitted to the jury under proper instructions; that the instruction as requested by plaintiff was not applicable to the case, and that the evidence sustains the verdict.
3. **Direction for Alternative Judgment.** The judgment not being in the alternative form, the cause is remanded to the court below to render the proper judgment upon the verdict returned by the jury.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

A. N. Sullivan, for plaintiff in error.

Wooley & Gibson, contra.

NORVAL, J.

This was an action of replevin instituted by plaintiff in error to recover the possession of a newspaper printing outfit. The property was taken under the replevin writ, and the possession thereof delivered to the plaintiff. There was a trial to a jury, who returned a verdict finding the right of property and right of possession of an undivided half interest of the property in the defendant at the commencement of the action, and assessed the value of his said interest at the sum of $175, with damages at $1 for the unlawful detention. Plaintiff filed a motion for a new trial, which was overruled by the court, and thereupon the following judgment was rendered:

"It is therefore considered and adjudged by the court that the said defendant recover of and from the said plaintiff the sum of $175 as heretofore by the verdict of the jury found due him as the value of the property in controversy, and also the sum of $1 as damages for the unlawful detention of the same, and his costs in and about this suit in that behalf expended, taxed at $46.33, for which execution is awarded."

A reversal is asked on the ground that the verdict is not sustained by sufficient evidence.

On the 24th day of May, 1889, the property was owned by the plaintiff and one L. P. Sine, each owning an undivided one-half thereof. On that day defendant purchased Mr. Sine's interest for the sum of $250, the plaintiff furnishing defendant the money for that purpose. The defendant also gave plaintiff at said time his promissory note for the said sum of $250, payable $10 each month, with interest at ten per cent. To secure the payment of the note defendant executed and delivered to plaintiff a written instrument which is, in effect, a chattel mortgage upon his interest in the property, by the terms of which plaintiff had the right

to take possession of the property whenever he should feel unsafe or insecure, or in case defendant failed to make the payments as agreed. Plaintiff did not upon the trial claim the right of possession under the terms of the mortgage, but insisted that on the 29th day of October, 1889, by mutual agreement between the parties, plaintiff took the property in settlement of subsequent payments on the note, and that all past due payments were to be paid by defendant, and that afterwards defendant retook possession of the property and then refused to surrender the same. The testimony introduced by the plaintiff upon the trial tended to sustain this theory of settlement. The defendant's testimony is to the effect that no such settlement was made, but that, on the date last stated, he paid plaintiff all sums past due upon the note, which had not been previously paid. Plaintiff contends, and so testified, there was then past due $17.12, while defendant testified that plaintiff had failed to give him credit for all moneys paid; that in fact there was then only due the sum of $11.76, and that he at that time gave plaintiff $18.75, and requested that he be given credit on the note for the amount past due thereon, and that the remainder be applied on his other indebtedness to him. Plaintiff admits receiving the $18.75, but claims that he was directed to apply $3.50 on account for a mattress, $3 as a balance due on a $15 note, and the balance on the $250 note above referred to. By the first instruction the jury were told that if they found from the evidence that the defendant surrendered the property to the plaintiff upon the agreement that he was to be released from further liability on his indebtedness to the plaintiff, then they should return a verdict finding that the plaintiff was entitled to the possession of the property. The conflicting evidence was fairly submitted to the jury by the court, and the verdict being supported by competent legal evidence, and not being against the weight thereof, will not be set aside.

It is conceded that the value of the undivided one-half of the property was $175, the amount assessed by the verdict as being the value of the defendant's interest therein. The fact that plaintiff had a mortgage upon the property for more than the value thereof is no reason why defendant's interest in the property should have been assessed at less than what the property was actually worth. It is not the law, that when a mortgagee replevies the property from the mortgagor before any conditions of the mortgage have been broken entitling the former to the possession of the same in case of the verdict in favor of the defendant in the replevin suit, the amount of a mortgage debt must be deducted from the value of the property in determining the interest of the defendant. It is obvious that such a rule would enable the mortgagee to collect his debt before the same becomes due.

Complaint is made that the second instruction given by the court on its own motion is erroneous, in that it ignored the proposition that if the defendant had not made the payments as required by the terms of the mortgage, or that the plaintiff deemed himself unsafe and insecure, then plaintiff was entitled to the possession of the property. There was no error in failing to so charge the jury, since plaintiff, neither in his petition nor upon the trial, claimed the right of possession by reason of the mortgage, but as the absolute owner of the property. In his petition he alleges that he is the owner of the property, and upon that theory the case was tried.

Error is assigned because the court refused to give the following instruction to the jury, requested by the plaintiff: "The court instructs the jury, as a matter of law, that a sale and delivery of goods on conditions, such as are contained in the bill of sale, or lease offered in evidence, to-wit, that the property is not to vest until the purchase money is paid, does not pass the title to the vendee until the condition is performed, and a vendor, in case the condi-

tion is not fulfilled, has a right to repossess himself of the goods against the vendee; and in this case the court instructs you that by the terms and conditions contained in said bill of sale or lease the title and ownership of the property in controversy did not pass until the payment of the purchase price." Conceding that the above request is correct as a legal proposition, yet there was no error in refusing to so charge the jury, for the reason that it was not applicable to the facts proven. The evidence shows that the transaction was not a conditional sale, but that the instrument given by defendant to plaintiff was, in effect, a chattel mortgage to secure the payment of the money borrowed by the former of the latter. Defendant did not purchase the property of plaintiff, but from Sine, so that we are unable to perceive upon what the plaintiff bases his claim that the property was sold and delivered by him to defendant upon conditions that the title and ownership thereof should not pass until the purchase price was paid. The only inference that can be drawn from the evidence is that the property was pledged to the plaintiff as security.

The judgment is erroneous because it was rendered for money absolutely, and was not in the alternative, for a return of the property, or the value thereof in case a return could not be had, as required by section 191*a* of the Code. The statute is imperative, that where the property has been delivered to the plaintiff in replevin, in case a verdict is returned for the defendant, the judgment must be for the return of the property, or its value in case it cannot be returned, or the value of the defendant's possession. This statutory provision is mandatory. (*Hooker v. Hammill*, 7 Neb., 231; *Lee v. Hastings*, 13 Id., 508.) In the last case cited there was a stipulation that the property could not be returned, and yet the court held that it did not preclude the necessity of an alternative judgment.

It is argued by counsel for defendant that the statutory provision for alternative judgment is for the benefit of the

defendant alone, and that he has the right to waive a return, and take judgment for the value. Even if this were the true interpretation of the statute, which we do not concede, the record does not disclose that the defendant waived in the court below a return of the property, while it appears that he did pray a return of the property in his answer. Having requested that, the plaintiff had a right to expect, in case the verdict was against him, that the judgment would be in the statutory form. It does not appear that the property replevied cannot be returned. We cannot say that the judgment in the case at bar was to plaintiff's benefit. For aught that appears it might be to his injury to pay for the property instead of returning it. We think the plaintiff has the right to insist that the judgment shall be in the alternative. (*Singer Mfg. Co. v. Dunham*, 33 Neb., 686, 690; *Glann v. Younglove*, 27 Barb. [N. Y.], 484; *Fitzhugh v. Wiman*, 9 N. Y., 559; *Wood v. Orser*, 25 Id., 348; *Hall v. Jenness*, 6 Kan., 356.) We are aware that there are cases in other states which hold that the provisions of the statutes requiring a judgment in the alternative in replevin are exclusive for the benefit of the defendant, and that he may waive a return of the property and take judgment merely for the value thereof if he chooses; but such decisions are based upon statutory provisions materially different from our own, and are therefore not entitled to weight as authorities in this state.

The error in the form of the judgment in the case at bar will not necessitate a new trial, but a proper judgment may be rendered upon the verdict. The judgment is therefore reversed and the cause remanded with instructions to the court below to enter a judgment in the alternative for a return of the property or the value thereof found by the jury, in case no return can be had, and for the damages assessed by the jury for the unlawful detention, with costs.

REVERSED AND REMANDED.

THE other judges concur.

GERMAN INSURANCE COMPANY OF FREEPORT, ILLINOIS, V. S. P. ROUNDS, JR.

[FILED NOVEMBER 23, 1892.]

1. **Fire Insurance:** AUTHORITY OF AGENT: AGENT'S CLERK. An agent for an insurance company, possessing the power to contract for risks, write and deliver policies, collect premiums, and make indorsements upon policies, employed a clerk and authorized him to transact the business for him in the agent's name. The clerk, in the line of his employment, wrote the policy in suit, signing the agent's name thereto, and the risk was reported to and approved by the company. Afterwards the agent indorsed upon the policy his approval of the assignment thereof by the insured to the purchaser of the property. Subsequently the clerk indorsed upon the policy, permission for additional concurrent insurance, for the discontinuance of the night watchman and watchman's clock, and any loss under the policy was made payable to the mortgagees, which indorsement was reported to the company in the agent's name, and the attention of the latter was called thereto, who acquiesced in the same. In an action on the policy it was *held*, that the act of the clerk in making the indorsement was the act of the agent and was binding upon the company to the same extent as if the same had been made by the agent personally.

2. ———: ———. A local agent of an insurance company, who has the power to make a contract of insurance, has authority to consent to additional insurance and to accept notice of a change in the risk and of the placing of incumbrances on the property, unless there is some provision in the policy to the contrary.

3. ———: ———: ASSIGNMENT OF POLICY. The indorsement upon a policy by such an agent of his approval of the assignment of a policy is binding upon the company, where the policy contains a clause that "no assignment thereof shall be valid unless the same is indorsed thereon and approved by the company, or its regular agent, in writing."

4. ———: CANCELLATION OF INSURANCE. In an action on an insurance policy which contained a stipulation reserving to the company the right to cancel the risk at any time by returning the premium *pro rata* for the unexpired term, or tendering it to the representative of the insured, it was *held*, that to rescind the policy the company must notify the assured of the cancellation, and pay or tender to him the amount of the unearned premium.

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

James R. Wash, Adams & Scott, and *I. W. Lansing,* for plaintiff in error:

Local agent is without authority to waive conditions of insurance policy after issue, when he is simply empowered to fix rates, countersign and deliver policies, and collect premiums. (*Bowlin v. Hekla Fire Ins. Co.,* 31 N. W. Rep. [Minn.], 859; *Kyte v. Commercial Union Assurance Co.,* 10 N. E. Rep. [Mass.], 518; *Hankins v. Rockford Ins. Co.,* 35 N. W. Rep. [Ill.], 34; *Strickland v. Council Bluffs Ins. Co.,* 66 Ia., 466; *Gladding v. California, etc., Ins. Co.,* 66 Cal., 6; *Enos v. Sun Ins. Co.,* 67 Id., 621; *Hamilton v. Aurora Ins. Co.,* 15 Mo. App., 59; *Leonard v. Michigan Ins. Co.,* 97 Ind., 299.) Company is not required, on being informed of insurance without its consent in another company contrary to policy, to return the premium. (*Phœnix Ins. Co. v. Stevenson,* 8 Ky., 150.)

Tibbets, Morey & Ferris, and *S. S. Parks, contra:*

General agents of insurance companies, authorized to contract for risks, receive and collect premiums, and deliver policies, may confer upon a clerk, or subordinate, authority to exercise the same powers. (*Duluth Nat. Bank v. Fire Ins. Co.,* 85 Tenn., 76; *Bodine v. Ins. Co.,* 51 N. Y., 117; *Eclectic Life Ins. Co. v. Fahrenkrug,* 68 Ill., 463; *Cont. Ins. Co. v. Ruckman,* 127 Ill., 364.) Notice of the intention to cancel must be given by the insurer to the insured. (*Chadbourne v. German Ins. Co.,* 31 Fed. Rep., 533; *Farnum v. Phenix Ins. Co.,* 23 Pac. Rep. [Cal.], 872.) Until proportionate part of the premium be returned or tendered to the insured, the policy remains in force. (May, Insurance [3d ed.], sec. 67; *Franklin Ins. Co. v. Massey,* 33 Pa. St., 221; *Peoria, etc., Ins. Co. v. Botto,* 47 Ill., 516;

White v. Conn. Ins. Co., 120 Mass., 330; *Lattan v. Royal Ins. Co.*, 45 N. J. L., 453; *Home Ins. Co. v. Curtis*, 32 Mich., 402; *Albany City Ins. Co. v. Keating*, 46 Ill., 395; *Van Valkenburgh v. Lenox Ins. Co.*, 51 N. Y., 465; *Griffey v. N. Y. Cent. Ins. Co.*, 100 Id., 417.)

NORVAL, J.

This action was brought upon a fire insurance policy issued by the plaintiff in error, April 16, 1889, to the Gazette-Journal Company, of Hastings, whereby it insured said company to the amount of $1,000 on its printing outfit for the term of one year. After the issuing of the policy the property was sold to S. P. Rounds, Jr., and the policy was assigned to him on June 1, 1889. The property was destroyed by fire on the 29th day of July, 1889. The defense was that the insured had violated certain conditions of the policy, whereby the policy became void. Plaintiff below recovered a judgment for $650, and the defendant company prosecutes a petition in error to this court. It is conceded that the judgment is for the proper amount, if plaintiff below is entitled to recover anything. The policy contained, among others, the following stipulations:

"1. If the insured shall cause the building, goods, or other property, to be described in this policy otherwise than as they really are, or make any false representations as to the character of the hazard, this policy shall be void; or if the risk shall be increased from any cause whatever within the knowledge of the insured during the continuance of this policy, unless notice thereof be given to this company, and consent to such increased hazard be indorsed hereon upon the payment of proper additional premium therefor, this policy shall be of no force.

"3. No assignment of this policy shall be valid until the assignment is indorsed hereon and approved by this company, or its regular agent, in writing, and this company

reserves the right to approve the transfer or not; and in case of such assignment or transfer of this policy, or of any interest in it, without such consent, this policy shall immediately cease.

"5. When property insured by this policy, or any part thereof, shall be alienated, or incumbered, or in case of any transfer or change of title to the property insured or any part thereof, or of any interest therein, without the consent of the company indorsed hereon, or if the property hereby insured be levied upon or taken into possession or custody under any legal process, or if the title or possession be disputed in any proceedings at law or equity, or if the property be advertised for sale under a deed of trust or mortgage, or if a suit be commenced to foreclose a mortgage on the property insured, or if voluntary or involuntary proceedings in bankruptcy by or against the insured be commenced, this policy shall at once cease to be binding upon this company.

"9. The insured under this policy must obtain consent of this company for all additional insurance or policies, valid or invalid, made or taken before or after the issue of this policy on the property hereby insured, and for all changes that may be made in such additional insurance and have such consent indorsed on this policy, otherwise the insured shall not recover in case of loss; and in case of any other policies, whether made prior or subsequent to the date of this policy, the insured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby bears to the whole amount of policies thereon; and in case of the insured holding any other policy in this or any other company on the property insured subject to the conditions of average or co-insurance, this policy shall be subject to average and co-insurance in like manner, at the option of this company."

It is contended that the policy was invalid because the Gazette-Journal Company sold the property insured to the

defendant in error without the written consent of the insurer, and for the further reason that defendant in error took out other insurance without the written consent of the company indorsed on the policy. The policy, when issued, authorized concurrent insurance to the amount of $8,000, and policies aggregating that sum were in force at the time defendant in error purchased the property. Subsequently he placed $2,000 additional insurance. Prior to doing so, the policy in suit was taken to the office of L. M. Campbell, the local agent of the company at Hastings, for the purpose of having indorsements made thereon. Mr. Campbell being out of the city, the policy was left with one Winslow, a clerk of Mr. Campbell, to make the indorsements, who, on July 1, 1889, wrote upon the face of the policy the following: "Night watchman and watchman's clock discontinued; $10,000 total concurrent insurance permitted. Loss payable, first, to the Nebraska Loan & Trust Company; second, to Wigton & Evans. L. M. Campbell." Counsel for plaintiff in error dispute the authority of Mr. Winslow to make the indorsements. The proofs show that he had, prior to this transaction, performed considerable work for Mr. Campbell in the insurance business; that he signed Mr. Campbell's name to the policy in suit; that a copy of the indorsement in question was forwarded to the company, and it recognized the same as being the act of its agent by the secretary of the company writing Mr. Campbell in reference thereto the following letter under date of July 17, 1889:

"*L. M. Campbell Esq., Hastings, Neb.*—DEAR SIR: We have *your* indorsement, dated July 1st, on policy No. 379, Gazette-Journal Company. We say to you very frankly that we do not propose to accept *your* indorsement, and if you will consult our prohibited list you will see that we do not write personal property mortgaged or incumbered. We must ask you to immediately cancel this policy.

Please do not stop to argue the question in this instance, but let us have the policy with as little delay as possible.

"Yours truly, WM. TREMBOR,

"*Secretary.*"

While the company declined to accept the indorsement, its refusal so to do was not because Winslow signed the name of L. M. Campbell thereto, but solely on the ground that the property covered by the policy was incumbered. If Mr. Winslow could bind the insurer by signing Mr. Campbell's name to the policy in suit, it ought to be bound by the indorsement in question, to the same extent as if it had been made by Mr. Campbell personally. It was, in effect, his act. It was within the scope of the authority conferred by Campbell, and after the indorsement was made, Mr. Campbell recognized the same, and never repudiated the act. (*Duluth Nat. Bank v. Fire Ins. Co.*, 4 Am. St. Rep., 747, 85 Tenn., 76; *Bodine v. Ins. Co.*, 51 N. Y., 117; *Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill., 463; May, Insurance, sec. 154; Wood, Insurance, sec. 409.)

It is urged that the indorsement was not binding until approved by the company, and that it, immediately after receiving notice thereof, rejected it and ordered the policy canceled. There is no provision of the policy which requires that such an indorsement should be made by any particular officer of the company, or that the policy must be sent to the home office of the company for such purpose. It only specifies that the policy shall be void when the property insured is alienated or incumbered, unless the consent of the company is indorsed on the policy. A local agent having the power to make a contract of insurance has authority to make indorsements upon a policy of insurance like the one in question, and when so made, the company will be bound thereby. If the policy was invalidated by the placing of the mortgages upon the property, why did the company order the agent to cancel the risk? By so doing, it recognized that the policy was still in force. While

the company declined to approve of the indorsement, the insured was not notified of such fact until after the fire. The indorsement was binding upon the company until the insured received notice of rejection. As no such notice was ever received by defendant in error before the loss, the incumbering of the property did not invalidate the contract.

The assignment of the policy was a sufficient approval of the transfer of the property by the Gazette-Journal Company to defendant in error. The assignment was made upon the back of the policy and was approved by Mr. Campbell, the local agent of the company. It is claimed that the secretary was the proper person to approve of the transfer, and that defendant in error had notice of that fact, inasmuch as in the blank form of approval printed on the policy, at the end of the line left for the signature of the person approving it, appears the abbreviation, "Sec'y." Doubtless the secretary of the company could have approved of the assignment in question, but we are unwilling to concede that he was the only person possessing such authority. On the blank assignment printed on the policy, appears these words: "Local agents will enter at once on the policy register all assignments *approved* by them, and report the same to the company." In addition to this it is expressly stipulated in the body of the policy that "no assignment of this policy shall be valid unless the assignment is indorsed hereon and approved by this company, or *its regular agent*, in writing," etc., thus making it clear that a regular agent of the company is empowered to approve of the transfer of the policy. The assignment in the case was made by the proper person and a report thereof was duly sent to the home office of the company. No objection or protest was made to the insured against the transfer, until after the loss in question, and it cannot now be heard to insist that the assignment was unauthorized.

Counsel for plaintiff in error insist that, inasmuch as Mr. Rounds took out other insurance on the property, the policy in suit was thereby invalidated. The indorsement made upon the policy, to which reference has already been made, was sufficient authority for the placing of the additional insurance. Written consent was given for $10,000 concurrent insurance, and the total amount covered by policies in force did not exceed that sum; so that the increased insurance was not in violation of the terms of the contract, and did not avoid the policy.

The plaintiff in error insists that the contract is void because the night watchman and the watchman's clock were discontinued. There are several answers to this contention: First, consent for their being withdrawn was indorsed upon the policy; second, there is no evidence to show that they were in fact ever withdrawn; third, it does not appear that either a watchman or a watchman's clock was in the building at the time the insurance was written. The policy stipulates that the increase of the risk from any cause during the continuance of the insurance invalidates the policy, unless notice thereof is given to the company and consent to such increased hazard is indorsed on the policy. It requires no argument to show that if there was no watchman or clock kept in the building when the contract of insurance was entered into, the placing of them therein afterwards, and their subsequent withdrawal, would not be increasing the risk, within the meaning of the terms of the policy. To constitute a violation of the contract the hazard must have been greater than it was when the policy was issued.

It is finally urged that the company is not liable because the contract was canceled before the fire. We do not yield assent to the proposition that the risk was canceled, within the meaning of the policy. It is true the company wrote to Mr. Campbell, its local agent at Hastings, ordering the cancellation of the policy, and the latter, before the

fire, sent the policy to the company, but no notice was ever given Mr. Rounds of the intention of the company to cancel the risk, or that it desired so to do; nor was the unearned premium ever paid or tendered to the assured. The policy was never delivered to the agent for cancellation, but had been left in his hands for the purpose of having the indorsements above referred to entered thereon, and was never returned to the insured. The third stipulation in the policy reads as follows: "This company may cancel this policy at any time by returning the premium *pro rata* for the unexpired time, or by tendering it to the representative of the insured." The company had no power or authority to terminate the insurance without complying with the above provision by refunding or tendering back a ratable proportion of the premium for the unexpired term. Since this was not done, the policy remained in force and was binding upon the company. (May, Insurance, sec. 67; *Franklin Ins. Co. v. Massey*, 33 Pa. St., 221; *Ins. Co. v. Botto*, 47 Ill., 516; *White v. Ins. Co.*, 120 Mass., 330; *Lattan v. Royal Ins. Co.*, 45 N. J. L., 453; *Home Ins. Co. v. Curtis*, 32 Mich., 402; *Albany Ins. Co. v. Keating*, 46 Ill., 395; *Van Valkenburgh v. Lenox Ins. Co.*, 51 N. Y., 465; *Griffey v. Ins. Co.*, 100 Id., 417; *Farnum v. Phenix Ins. Co.*, 23 Pac. Rep. [Cal.], 872.)

There being no error in the record the judgment is affirmed with costs.

AFFIRMED.

THE other judges concur.

ANTHONY A. BICKEL ET AL., APPELLEES, V. WARREN DUTCHER ET AL., APPELLEES, IMPLEADED WITH THEODORE GALLIGHER ET AL., APPELLANTS.

[FILED NOVEMBER 23, 1892.]

1. **Bill of Exceptions:** MOTION TO SUPPLY EXHIBITS. This court will not, on the motion of an appellant, require the appellee to supply exhibits claimed by the former to have been introduced in evidence in the district court, when such exhibits have never been attached to or made a part of the bill of exceptions.

2. ———: ———. The appellant, on presenting his bill of exceptions for settlement and allowance, objected to certain exhibits attached thereto by the official stenographer on the ground that they were not true copies of the original, whereupon they were stricken out by order of the trial judge and the bill of exceptions allowed without them. *Held*, That this court will not entertain a motion by appellant to require appellee to supply such exhibits.

3. **Appeal:** LIMITATIONS AS TO TIME. The time within which an appeal may be taken from a decree of the district court does not begin to run until such decree has been entered of record, so that it is within the power of the appellant to comply with the statute regulating appeals, by filing in this court a certified transcript of the proceedings of the district court.

4. The case of *Horn v. Miller*, 20 Neb., 98, overruled.

MOTION by appellants to require appellees to supply certain exhibits used in the court below, which were not made a part of the bill of exceptions, and motion by appellees to dismiss appeal from the decree of the district court for Douglas county. *Motions overruled.*

David Van Etten, for appellants.

Howard B. Smith, and *G. W. Covell*, for appellees.

POST, J.

This is an appeal by the defendants Galligher and wife from a decree of the district court of Douglas county fore-

closing certain mortgages and mechanics' liens, and for the sale of the property in controversy in satisfaction thereof. The questions submitted for consideration at this time are presented by the motion of appellants to require appellees to supply certain exhibits which they allege were introduced in evidence before the district court and which are not included in the bill of exceptions filed in this court, and the motion of appellees to dismiss the appeal for the reason that it was not taken within the time allowed therefor by law. It is alleged in appellants' motion that Exhibits C and D, the plans and specifications for the building which is the subject of the controversy, were introduced in evidence, "which exhibits have disappeared from said records and have never been attached to said bill of exceptions as such, notwithstanding appellants' written objections attached thereto, and appellants move the court that appellees be required severally to produce said exhibits to be attached to the bill of exceptions," etc. Numerous affidavits have been filed by the respective parties in support of and against the motion, from which it appears that when the bill of exceptions was prepared by the official stenographer at the request of appellants the two exhibits in question could not be found. The stenographer thereupon procured from one of the appellees the original plans and specifications, of which the exhibits in question were duplicates, and attached them to the bill of exceptions. Objection being made by Mr. Van Etten, attorney for appellants, to such copies, they were excluded by the trial judge, Hon. E. Wakeley, and the bill of exceptions allowed and signed without such exhibits having been attached thereto. The motion of appellants is without merit. The exhibits were a part of the evidence in the district court, and if the copies furnished by the court reporter were incorrect, appellants should have had them corrected in that court or before the trial judge. They appear to overlook the fact that it was their own bill of exceptions and that it was their duty to present

for allowance a true bill. If the missing papers had been introduced in evidence by appellees and remained in their possession, or under their control, we have no doubt the district court would have required them to be supplied upon motion of appellants. It is alleged by appellants that Exhibits C and D were introduced in evidence by them and left in the custody of the stenographer, but the part of the record to which we have been referred contains no reference to them except that they were identified by the witness Finley and marked by the stenographer. Nor are we able, after a careful examination of the voluminous record, to discover that they were ever offered in evidence. But in no event is it the province of this court to correct the bill of exceptions, and the motion of appellants should be denied.

2. The question presented by appellees' motion to dismiss the appeal is attended with more embarrassment, in view of the conclusion of the majority of the court in *Horn v. Miller*, 20 Neb., 98. Before making further reference to that case let us examine the facts disclosed by the record in this. The decree begins with the following recital: "Afterwards, at the May term of said court and on the 30th day of July, 1891, a decree was rendered herein as follows." At the end of the decree, and immediately above the clerk's certificate thereto, appears the following: "Dated July 27, 1891." The only other record evidence on the subject is an entry in the appearance docket indicating that the decree was entered on the 1st day of August, 1891. The clerk of the district court testifies that the decree was filed in his office July 30. From the affidavits of appellees it appears that on the 14th day of July, Judge Wakeley from the bench publicly announced his findings of fact and conclusions of law, or, in the language of the affidavits, "his findings and judgment," and that Mr. Smith, of counsel for appellees, was directed to draft a decree in accordance with the opinion so announced; that a decree was prepared

and submitted to the attorney for appellants, by whom it was returned to Mr. Smith on the 22d day of July with written objections to the form thereof. Subsequently it was approved by the judge over the objections of appellants and filed with the clerk July 30. It does not appear that any notes were made by the district judge at the time of the announcement of his conclusion, or any entry in the trial docket or other record or entry of the decree, until it was approved by the judge presumably on the 27th. The question therefore is, When did the time allowed for appeal begin to run against appellants? If from the time of the delivery of the opinion of the judge on the 14th, the time had expired before the appeal was taken; but, if it is to be reckoned from the date of the approval, to the decree on the 27th, or from the date it was filed with the clerk on the 30th, it is clear that the appeal was taken in time and the motion to dismiss should be denied.

This case might be distinguished from *Horn v. Miller* on the facts, since here there is no record evidence whatever that the decree was entered on the 14th; hence the effect of the affidavits of appellees is to impeach or contradict their own judgment. We have, however, re-examined the question and the conclusion reached is in accordance with the views expressed in that case in the dissenting opinion of the present chief justice. We can agree with the learned author of the majority opinion, that for some, perhaps most, purposes the date of a judgment is the time when the decision was made and announced by the court, rather than the time when it was entered upon the records. But in most, we believe all, of the cases cited in the opinions and text-books in support of that proposition the judgment was subsequently entered in conformity with the decision, and that in none of them was the testimony of witnesses received by the appellate court to prove that the judgment or decree was wrong in fact and was entered at a time other than that shown by the record. According to the practice in the chancery

courts, the enrollment or entry of a decree was necessary before a bill of review would lie (Story's Eq. Pleading [9th ed.], sec. 403; Daniel's Ch., 1576, 1581), and following that practice the rule has prevailed both in courts of common law and of equity in this country where the distinction has been maintained, that there must be an entry of the judgment or decree before an appeal will lie. By this it is not meant that it must in all cases be actually spread upon the records of the court, for, as said in *Horn v. Miller*, in some states no such formal entry is required. But that the judgment must be made a matter of record in order to limit the time for appeal is a proposition well sustained by authority. (*Humphrey v. Havens*, 9 Minn., 318; *Hostetter v. Alexander*, 22 Id., 559; *Exley v. Berryhill*, 36 Id., 117; *Hazeltine v. Simpson*, 61 Wis., 427; *Milwaukee v. Pabst*, 64 Id., 244; *Rubber Co. v. Goodyear*, 6 Wall. [U. S.], 153.)

It is said by Judge Elliott in his recent valuable work on Appellate Procedure, sec. 118: "The general rule is that there must be an entry of judgment before an appeal can be taken, and it must follow that until the judgment is entered the time within which an appeal must be taken does not begin to run. As an appeal taken before an entry of judgment is premature, it may be dismissed on motion. There is some conflict in the adjudged cases, but the decided weight of authority supports the rule we have stated. It seems clear upon principle that the rule stated must be the correct one, for until there is an entry of judgment there is no authentic record evidence of a final disposition of the case, and that there is a final judgment must, as a general rule, appear from the record." And again, sec. 119, the same author says: "The right to appeal, as a general rule, dates from the time that a complete judgment is rendered and recorded."

The rule which, in our opinion, has the sanction of authority, and which is commended by considerations of

justice and equity, is that the time for appeal begins to run against the appellant from the time it is within his power to comply with the provisions of the statute regulating appeals by filing in the court a transcript of the proceedings of the district court, and not before. The motions to require appellees to supply the exhibits mentioned therein, and to dismiss the appeal are overruled.

MOTIONS OVERRULED.

THE other judges concur.

WILLIAM HAYNES V. UNION INVESTMENT COMPANY ET AL.

[FILED DECEMBER 16, 1892.]

1. **Landlord and Tenant:** LEASE: COVENANT OF LESSOR TO PAY FOR IMPROVEMENTS: FORFEITURE: EQUITABLE RELIEF. A lease contained this provision: "Upon the expiration of this lease, and before the surrender of said premises by said parties of the second part, said party of the first part shall purchase and pay for all the furniture, pictures, and fixtures put into said premises by parties of the second part. If said parties cannot agree upon price of said furniture, then party of the first part shall select one man and the parties of the second part shall select one man, and the men chosen shall select a third, and said three men shall act as arbitrators and determine the price of said furniture, pictures, and fixtures, and said first party shall pay the price so determined and fixed. The family pictures and furniture belonging to the families of said parties of the second part are excepted according to inventory to be attached to this lease, and all the furniture and fixtures put into said premises by the said parties of the second part, except family pictures and furniture, shall be and are hereby pledged for the payment of rent, and said party of first part shall have a lien thereon for rent." *Held*, That the tenant could not be ejected without payment of the furniture, etc. That a court of equity will

protect the tenant in possession of the property until he is paid for the value of such furniture and fixtures.

2. ———: FORFEITURE: NON-PAYMENT OF RENT: DEMAND. In order to work a forfeiture of a lease for non-payment of rent there must be a demand on the tenant for the rent, although such demand may be in the form of a notice to quit.

3. ———: CONTROVERSIES BETWEEN LESSOR AND LESSEE: EQUITABLE JURISDICTION TO PREVENT MULTIPLICITY OF SUITS. Where many questions are in dispute between a lessor and lessee beside the mere right of possession of the property, a court of equity will entertain jurisdiction and thus settle all matters between the parties relating to the subject in one action, and prevent a multiplicity of suits.

ERROR to the district court for Hall county. Tried below before HARRISON, J.

Abbott & Caldwell, for plaintiff in error:

Demand for performance must be made before a forfeiture can be adjudged. (*Merrifield v. Cobleigh*, 4 Cush. [Mass.], 182; *Bowman v. Foote*, 1 Am. Law Reg., n. s. [Conn.], 360; *McQuesten v. Morgan*, 34 N. H., 400.) Payment of furniture, fixtures, and pictures by the landlord is, by terms of the lease, a condition precedent to recovery of possession of the premises. (*Hopkins v. Gilman*, 22 Wis., 476, and 47 Id., 581; *Ecke v. Fetzer*, 65 Id., 55.) The cases last named were also cited to the point that the cause is a proper one for the intervention of a court of equity to protect the tenant in his possession till payment is made for improvements, and all matters in controversy between lessor and lessee are determined.

W. A. Prince, and *Thompson Bros.*, *contra*.

MAXWELL, CH. J.

This is an action somewhat in the nature of a bill of peace. It is alleged, in substance, in the petition that William Haynes is the assignee of a lease made between

C. W. Scarff and Eno & Moulton; that the Union Investment Company is the owner of the premises under a deed from C. W. Scarff, made after the execution and delivery of the lease; that John D. Moore is trustee for the purpose of collecting rents of the property in question, which is hotel property, known as the Palmer House, in the city of Grand Island; that the lease, by its terms, provided that possession of the premises would be given to the lessees June 1, A. D. 1887; the rent should be payable in monthly installments on the 15th of each month; a copy of the lease is attached to plaintiff's petition and made a part thereof. The building, at the time of the execution of the lease, was in course of erection, and was not completed and possession given under it until June 20, 1888. Haynes purchased Eno & Moulton's leasehold interest and certain personal property in the hotel on the 20th day of June, 1890, and took immediate possession, paying $28,000 therefor.

The lease provides that the lessor or assigns should keep the premises in repair; and that on the expiration of the lease and before surrender of possession the lessor should purchase and pay for all furniture, fixtures, and pictures put in the premises by the lessee; and in the event of a dispute as to the value thereof the lease provided for the selection of arbitrators to determine such value. The exact words of this provision are as follows:

"Upon the expiration of this lease, and before the surrender of the possession of said premises by said parties of the second part, said party of the first part shall purchase and pay for all the furniture, pictures, and fixtures put into said premises by parties of the second part. If said parties cannot agree upon price of said furniture, then party of the first part shall select one man and the parties of the second part shall select one man, and the men chosen shall select a third, and said three men shall act as arbitrators, and determine the price of said furniture, pictures, and

fixtures, and said first party shall pay the price so determined and fixed. The family pictures and furniture belonging to the families of said parties of second part are excepted according to inventory to be attached to this lease, and all the furniture and fixtures put into said premises by the said parties of the second part, except family pictures and furniture, shall be and are hereby pledged for the payment of rent, and said party of the first part shall have a lien thereon for rent."

The value of this property is alleged in the petition at $28,000. The petition alleges failure to repair, after repeated demands for making such repairs; that plaintiff had made repairs to the value of $14.88; that other repairs were then needed; and that plaintiff was damaged by failure of lessors to make the same to the amount of $500; that on or about July 20, 1890, he offered to pay rent for the month ending July 20, less the amount so paid for repairs, and was informed by Moore, trustee, that a Mr. Marsh, whose business it was to look after repairs, was absent from the city, and requested the plaintiff to wait until his return. On the 20th day of August he called again on Moore, tendered and offered to pay $400 more, being rent due for the month ending August 20, 1890, when he was informed by the trustee that he had been instructed to receive no more rent from the plaintiff.

The petition further alleges that Marsh not having returned to the city, and that plaintiff being in doubt as to his legal rights in the premises, then tendered to said Moore $800, being rent in full for the months ending July 20 and August 20, 1890, which was also refused. Notice to quit was served upon the plaintiff on the same day, signed by the defendants by their attorney.

The petition also alleges that no demand was made on the plaintiff for any rent at any time; that no offer was ever made to pay for the property in the hotel according to the terms of the lease, nor any offer to arbitrate as to the

price or value thereof, nor did they offer to make the necessary repairs upon the building, or to pay for those already made by the plaintiff; that suit was commenced in the county court of Hall county, on August 30, by defendants to recover possession of the premises, and was then pending. This suit was instituted in the district court of Hall county September 6, 1890, and $800 deposited with the clerk of the court, and contains also an offer to pay $400 to the clerk on the 20th day of each month thereafter for the use and benefit of the defendants during the pendency of the suit.

The petition also alleges a conspiracy on the part of the Union Investment Company and Moore to injure the plaintiff in his financial reputation and standing; that the suit was instituted for the sole purpose of harassing and annoying the plaintiff; and alleging that the plaintiff had no adequate remedy at law in the premises; that if the suit in the county court was allowed to proceed it would result in the prosecution of numerous suits to ascertain the value of the property in the hotel, to ascertain the amount of plaintiff's damage in the premises from defendants' failure to repair, and value of repairs already made, and praying a temporary order of injunction; and that in the event the plaintiff's right to the possession had been forfeited, that the value of the furniture, fixtures, and pictures might be ascertained by the court, and the defendants compelled to pay for the same before possession should be surrendered by the plaintiff; that his damages by reason of the failure to make the repairs might be ascertained and defendants compelled to pay the same; that he might also recover cost and value of all repairs made by him, and that on the final hearing the suit in the county court might be forever enjoined; and praying for general relief.

A general demurrer was sustained to the petition in the court below, and the plaintiff not desiring to amend, the action was dismissed.

In our view the petition states a cause of action. The general rule is that where a lessor is by contract liable to pay his tenant for improvements made on the leased premises during the tenancy, the tenant will be allowed to retain possession of the leased property until such payment be made, unless there be a special contract compelling the tenant to deliver possession without such payment. The tenant is treated as having an equitable lien upon the premises for his improvements and to retain possession in order to enforce his lien. (*Ecke v. Fetzer*, 65 Wis., 55; *Hopkins v. Gilman*, 22 Id., 476, and 47 Id., 581.)

In *Hopkins v. Gilman*, *supra*, Gilman, although known to be a man of great wealth, was not permitted to recover possession of the premises until he had paid for the improvements which, on the termination of the lease, he had agreed to pay for. The same rule applies where the lessor agrees to purchase and pay for the furniture, fixtures, etc., of the lessee. This is a part of the contract which, in order to justify ejectment, must be fulfilled on the part of the lessor. In the last case cited from Wisconsin it was held that a court of equity will protect the lessee in possession of the property until he is paid for the value of the improvements. So in the case at bar, equity will protect the lessee in possession until the property which the defendant agreed to purchase is paid for.

It is alleged in the petition that no demand for rent has been made, and this is admitted, for the purpose of the action, by the demurrer. Such demand is necessary in order to predicate forfeiture on the failure to pay. Under the decisions of this court a demand may be made by a notice to quit. (*Hendrickson v. Beeson*, 21 Neb., 61.) If this is a sufficient demand it is probable that a tender of payment at that time would defeat a recovery.

It is claimed that a court of equity has no jurisdiction. In our view this position is untenable. Many other questions are in dispute beside the mere naked right to pos-

session of the property, and these can only be adequately adjusted in a court of equity, and thus in one action settle all matters in controversy and prevent a multiplicity of suits. It is apparent that the court erred in sustaining the demurrer. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

WORK BROS. & CO. V. OLIVER JACOBS & CO., ET AL.

[FILED DECEMBER 16, 1892.]

Sales: OBTAINING CREDIT BY MISSTATEMENT OF FINANCIAL CONDITION: FRAUD: RESCISSION. Where an insolvent purchaser of goods makes representations as to his financial condition which he knows do not represent the true condition of his affairs, by reason of which a seller is induced to part with his goods on credit on the faith of such statements, the transaction is fraudulent and the seller may, upon discovering the fraud, rescind the sale and reclaim the goods.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

Lamb, Ricketts & Wilson, for plaintiffs in error.

Wooley & Gibson, and *E. P. Holmes, contra.*

MAXWELL, CH. J.

This is an action of replevin instituted by the plaintiffs against the defendants to recover "137 suits of ready made clothing and 126 pairs of pantaloons, ready made, and two coats and two vests, of the value of $1,632.63,

being all the ready made clothing in the general stock of said Jacobs & Co., at Wabash, Nebraska. Plummer, Perry & Co. answer that they have a special interest in the property by virtue of a chattel mortgage. The answer of Jacobs & Co. is as follows:

"Come now the above named defendants, Oliver Jacobs, Paulina A. Horton, and Joseph Emery, partners doing business in the firm name of Oliver Jacobs & Co., and for separate answer to plaintiffs' petition deny each and every allegation, averment, and statement therein contained.

"Second—These defendants further answering allege that on and prior to about the 20th day of August, 1889, these defendants were the owners, absolutely, of the goods and chattels described in plaintiffs' petition; that on or about said date these defendants executed and delivered to the said Eli Plummer, Roscoe Perry, and John Fitzgerald, partners doing business as Plummer, Perry & Co., a chattel mortgage upon said described goods to secure *bona fide* indebtedness in the sum of $2,500.

"Third—That under and by virtue of said chattel mortgage the said defendants Plummer, Perry & Co. took possession of said goods and chattels, and so held possession at the time said goods were taken by the writ of replevin by the plaintiffs.

"Fourth—That the said defendants Plummer, Perry & Co., under and by virtue of said chattel mortgage, were seized of a special ownership in said goods and chattels, and were entitled to the possession of the same.

"Fifth—That these defendants have no title or ownership in said chattel property, unless there should be a surplus over and above the amount necessary to pay the claim of said Plummer, Perry & Co.

"Sixth—Wherefore these defendants pray that they may go hence and recover their costs, and that the possession of said property be awarded the said Plummer, Perry & Co., mortgagees as aforesaid."

The parties entered into a stipulation as to the facts as follows:

"It is hereby stipulated and agreed that this cause shall be, and the same hereby is, submitted to the above entitled court for determination on the following agreed facts:

"First—That the plaintiffs are wholesale dealers at Chicago, Illinois.

"Second—That defendants Oliver Jacobs & Co., at all times herein mentioned and up to the 19th day of August, 1889, were dealing in general merchandise at Wabash, Nebraska, under the firm name of Oliver Jacobs & Co., which firm was composed of Oliver Jacobs, Paulina A. Horton, and Joseph Emery.

"Third—That at all times herein mentioned the defendants Plummer, Perry & Co. were and still are wholesale grocers at Lincoln, Nebraska.

"Fourth—That on the 11th day of March, 1889, the defendant Oliver Jacobs & Co., through Oliver Jacobs, for the purpose of obtaining credit from plaintiffs, and for the purpose of buying goods from them on credit, made to plaintiffs a statement of the resources and liabilities of said firm, and the individual members thereof, which statement was as follows:

RESOURCES AND LIABILITIES OF THE FIRM OF OLIVER JACOBS & CO.

Resources.

Three hundred acres of land adjoining the town of Wabash	$13,500 00
Four town lots	400 00
Live stock	1,400 00
Grain	300 00
Outstanding accounts	4,000 00
Insurance due on loss	5,000 00
	$24,600 00

Liabilities.

Real estate mortgage on above 300 acres of land	$5,000 00	
Total other indebtedness	4,000 00	
		$9,000 00
Net worth		$15,600 00
Individual property of Oliver Jacobs:		
Real estate		$1,500 00
Individual property of Mrs. P. A. Horton:		
160 acres of land near Elmwood	$4,800 00	
Bills receivable	3,000 00	
		$7,800 00
Liabilities:		
Real estate mortgage on above farm		2,300 00
Net worth		$5,500 00
Individual property of Joseph Emery:		
Real estate, Page county, Iowa		$7,200 00
Live stock		2,100 00
Grain		300 00

Which statement was made to all creditors and including Plummer, Perry & Co.

"Fourth—That at the time of making the above statement the said firm of Oliver Jacobs & Co. in truth and in fact owned no part of said 300 acres of land mentioned in the above statement, save by the contract attached hereto, marked Exhibit B, no part of the consideration therein mentioned having been paid, but they had given their notes for the same, which notes Horton now holds; that there was due on loss covered by insurance only $4,250, instead of $5,000, and that said firm was indebted on unsecured claims $9,132.10, instead of $4,000; that the individual property of Oliver Jacobs was at that time mortgaged in the sum of $200 instead of unincumbered; that at that time the 160 acres owned by Mrs. P. A. Horton,

near Elmwood, listed above, was incumbered $2,475 instead of $2,300, as stated in said statement.

"Fifth—That Oliver Jacobs knew all the facts when he made said above mentioned statement.

"Sixth—That plaintiff, relying on the truth and correctness of said statement so made to them by said Jacobs & Co., and believing the same to be correct and true, sold and shipped to said Jacobs & Co. the goods herein in controversy, in the month of March, 1889.

"Seventh—That said Jacobs & Co. have never paid for the goods in controversy or any part thereof.

"Eighth—That on the 19th day of August, 1889, and while said Oliver Jacobs & Co. were in the possession of a stock of goods at Wabash, Nebraska, including the goods in controversy, they executed and delivered in due form of law to one George Smith and Joe McKeag a chattel mortgage for the sum of $300 and $200 to secure a *bona fide* and unpaid debt, then and theretofore owing by said Jacobs & Co. to said Smith & McKeag; also a chattel mortgage for $1,500 to defendants Plummer, Perry & Co., to secure a *bona fide* and unpaid debt owing to them from said Jacobs & Co., for goods and merchandise theretofore sold and delivered by Plummer, Perry & Co. to said Oliver Jacobs & Co., and said Jacobs & Co. turned possession of said stock of goods, including those in controversy, over to said Smith & McKeag, who held possession of the same until the 21st day of August, 1889, when said Smith & McKeag sold, assigned, and transferred the said mortgages, and all their rights thereunder, to said Plummer, Perry & Co., for a valuable consideration, by the execution and delivery to them of Exhibits A and B, hereto attached and made a part of this stipulation, and turned his possession over to them, and then said Plummer, Perry & Co. continued in possession from that time until the levy of the writ in this case; and that on the 20th day of August, 1889, said Jacobs & Co. executed to said

Plummer, Perry & Co. a chattel mortgage, in due form of law, for $2,000 to secure the debt of that amount for goods theretofore sold and delivered to Jacobs & Co. by said Plummer, Perry & Co.

"Ninth—That at the time of the levy of the writ in this case the defendants Plummer, Perry & Co. were in possession of all the said stocks of goods, including the goods in controversy, under and by virtue of the three chattel mortgages heretofore herein mentioned, and with no other right thereto than by said mortgage conferred.

"Tenth—That said indebtedness of said Jacobs & Co. to Plummer, Perry & Co. and George Smith and Joe McKeag was *bona fide*, and was for goods theretofore sold and delivered to said Jacobs & Co. by said Plummer, Perry & Co., and Smith & McKeag was wholly unpaid.

"Eleventh—That said goods so taken under this writ in this case are now in the possession of the plaintiff and have been since levy and writ of replevin.

"Twelfth—That the value of goods in controversy in this case at the time they were taken, was $1,000.

"Thirteenth—That five cents is the amount of damages sustained by the defendants Plummer, Perry & Co. for the detention of these goods.

"Fourteenth—That plaintiffs did not know the facts above mentioned as to resources and liabilities of said Oliver Jacobs & Co. until the day before this suit was brought.

"Fifteenth—That said Plummer, Perry & Co. sold the remainder of said stock after the replevin of the goods in controversy for the sum of $1,953.22 and applied in the payment of the mortgages so held by them, and there is still due thereon $2,128.58.

"Sixteenth—That said firm of Oliver Jacobs & Co. and Oliver Jacobs, Paulina A. Horton, and Joseph Emery are, and since August 19, 1889, have been, insolvent.

"Seventeenth—That the interest of Plummer, Perry &

Co. in the goods in controversy, if any, is the amount of the unpaid balance of their claim, which is $2,128.58, as shown by the statement hereto attached and made a part of this stipulation, and marked Exhibit C."

The court below found in favor of the defendants and rendered judgment accordingly.

It will be observed that it is agreed that Jacobs & Co. were insolvent when the goods in question were purchased from the plaintiffs, and that Jacobs & Co., when purchasing the same, led the plaintiffs to believe that they were solvent and able to pay their debts, and it is clearly shown that Plummer, Perry & Co. gave no new consideration when taking the chattel mortgage. This being so, the right of the plaintiffs, the owners of the goods, is superior to theirs. This question is considered by the supreme court of Iowa in *Reid v. Cowduroy*, 44 N. W. Rep., 351, in a case very similar to this, and it was held that the seller could reclaim the goods. It is said "where goods are sold there is a promise, expressed or implied, on the part of the buyer to pay for them, and the seller has a right to rely upon the presumption that the buyer intends to perform his obligations by making payment. Therefore, if the latter entertains a secret intent not to make payment, that intent and his failure to disclose it constitute such a fraud as will entitle the seller to rescind the sale. (*Factory v. Lendrum*, 57 Ia., 581; s. c., 10 N. W. Rep., 900; *Lindauer v. Hay*, 61 Ia., 665; s. c., 17 N. W. Rep., 98; *Nichols v. Michael*, 23 N. Y., 266; *Hennequin v. Naylor*, 24 N. Y., 140; *Dow v. Sanborn*, 3 Allen [Mass.], 182; *Belding v. Frankland*, 8 Lea [Tenn.], 67; see, also, *Lee v. Simmons*, 65 Wis., 526; s. c., 27 N. W. Rep., 174; *Donaldson v. Farwell*, 93 U. S., 631.) The supposed solvency of the purchaser is usually a material inducement to the sale of goods; and where it is, and the purchaser makes false and fraudulent representations in regard to it, upon which the vendor, not knowing the truth, relies in effecting the sale, it may be rescinded by

the vendor as fraudulent." This, we think, is a correct statement of the law, and was so held by this court in *Symns v. Benner*, 31 Neb., 593; *Tootle v. First National Bank*, 34 Id., 863, and is the general rule. (*Redpath v. Brown*, 39 N. W. Rep. [Mich., 1888], 51; *McGraw v. Henry*, 47 Id. [Mich., 1890], 345; *Edson v. Hudson*, Id. [Mich., 1890], 347; *Reid v. Cowduroy*, 44 Id. [Ia., 1890], 352; *People's Savings Bank v. Bates*, 120 U. S. [1887], 556; *Morse v. Godfrey*, 3 Story [C. C. U. S.], 364; *Johnson v. Peck*, 1 Wood. & Min. [C. C. U. S.], 334; *Rison v. Knapp*, 1 Dill. [C. C. U. S.], 187.) It follows that the judgment must be reversed and the cause will be remanded to the district court to render judgment in accordance with this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

LIZZIE REEVES, EXECUTRIX, APPELLANT, V. EDWARD M. WILCOX ET AL., IMPLEADED WITH H. W. CURTIS ET AL., APPELLEES.

[FILED DECEMBER 16, 1892.]

Mortgage Foreclosures: PURCHASE MONEY: MORTGAGE EXECUTED BY ONE OF THREE PURCHASERS: DEFICIENCY JUDGMENT. Three persons jointly purchased three lots in an addition to the city of Lincoln for $3,000, one-fourth cash in hand and the balance on credit. By agreement the title was taken in the name of W., one of the purchasers, and he was to give his note secured by mortgage on the lots for the unpaid purchase money, and these were accepted by the vendor. *Held*, There being no trust relations involved, and neither fraud, accident, or mistake that the vendor was restricted to the security thus taken and could not recover a deficiency judgment against the purchasers who did not sign the note.

APPEAL from the district court for Lancaster county. Tried below before FIELD, J.

Thomas Ryan, for appellant.

Davis & Hibner, and *C. Thompson*, *contra*.

MAXWELL, CH. J.

This is an action to foreclose a mortgage and to recover a deficiency judgment against the defendants Curtis and McCargar. The testimony tends to show that Frank D. Reeves in his lifetime, jointly with one Fred A. Hovey, owned lots 17, 18, and 19, in Woolworth's addition to Lincoln, and defendant Wilcox was their agent for the sale of said lots; that Wilcox, while acting as such agent, went to appellees Curtis and McCargar and represented that he could make some money on the lots in question if he could raise the cash payment, $750. The property was exhibited and price stated, after which the parties went to the office of Reeves and there concluded a bargain by which Wilcox took a deed from Reeves (who held the legal title) to himself, not as trustee, but in his individual capacity. The appellees each agreed to contribute and did contribute one-third, or $250, of the cash payment, and Wilcox, by and with the consent of all the parties to the transaction and as one of the conditions on which the sale was concluded, having taken the deed for that purpose, gave his note for the balance, $2,250, secured by a first mortgage on the premises purchased. There was an understanding between Wilcox, McCargar, and Curtis, to the effect that the property should be marketed and each receive one-third of the profits a memorandum of which was at some time made in writing, but to which neither Reeves nor Hovey were parties in any way. No sale was made and no profits accrued, and the notes given by Wilcox were not paid. Foreclosure proceedings were commenced against Wilcox, Curtis, and

McCargar. McCargar, appellee herein, defendant therein, filed a separate demurrer to the petition, which was overruled, and he then answered denying the alleged oral contract, disclaiming any interest in the property, and denying liability on the notes. Wilcox was defaulted and the property went to sale, bringing about $800. The court gave judgment against Wilcox for the deficiency, and discharged appellees McCargar and Curtis, from which judgment this appeal was taken.

The deposition of Frank Reeves was taken, as he was in poor health. In his direct examination he testifies: "On the 9th of March, A. D. 1887, or about that time, H. W. Curtis, E. M. Wilcox, and C. A. McCargar came to my office in Lincoln together and purchased lots Nos. 17, 18, and 19 of Woolworth's subdivision in Lincoln, Nebraska, for $3,000; all three participated in the negotiation, said they were buying them jointly, each to own an undivided one-third part; the cash payment was $750 and each of the defendants mentioned paid $250, his portion. When the deed came to be drawn, they asked if I had as soon make the deed direct to Wilcox and take mortgage and notes from Wilcox and wife for the balance of the purchase money. They said they would rather have it that way and have a writing between themselves showing the interest of each. They gave some reasons for wanting it fixed that way, which I do not now recall, and whatever those reasons were, I consented to that arrangement, and the deed and notes and mortgage were so drawn." He also says that there was an agreement between the defendants as to the disposition of the property and distribution of the proceeds. This, however, could only affect the defendants themselves, and, so far as the evidence discloses, could not inure to the benefit of the plaintiff. The plaintiff made the conveyance and agreed to accept the note of Wilcox secured by a mortgage on the lots in question. This, then, was the measure of his security. None of the

parties expected that the property would depreciate in value, hence there seemed no necessity for obtaining the notes of the defendants Curtis and McCargar. The plaintiff, therefore, cannot hold these parties liable.

The case of *Reynolds v. Dietz*, 34 Neb., 265, does not contravene the principle here established. In that case ten persons had purchased a tract of land for $20,000, and as a part of the consideration, had assumed a mortgage on the property, the title being taken in the name of a trustee, and it was held that each was liable for his proportionate share of the mortgage debt. The liability in that case results from the nature of the contract.

In this case there was no trust in its proper sense. In any event there was an express contract as to the security for the unpaid purchase money, and there being neither fraud, accident, nor mistake in the transaction, the plaintiff's remedy is restricted to such security. The judgment is right and is

AFFIRMED.

THE other judges concur.

GRAHAM & SNYDER V. E. J. CARPENTER.

[FILED DECEMBER 16, 1892.]

Replevin: EVIDENCE. Upon the conceded facts and the evidence the judgment is right and is affirmed.

ERROR to the district court for Dawes county. Tried below before KINKAID, J.

H. M. Uttley, for plaintiffs in error.

Alfred Bartow, contra.

MAXWELL, CH. J.

March 16, 1887, one Andrew McGinley, as assignee, brought suit in the county court of Sioux county against The O 4 Cattle Company, Dr. E. B. Graham, manager, to recover $50 for labor and services performed for the O 4 Cattle Company by one Irving Wilson, the claim or account for which had been purchased by said McGinley from said Irving. The transcript of the county judge shows the following facts:

"The plaintiff and defendant, represented by Dr. E. B. Graham, manager of said O 4 Cattle Company, appeared personally, and the defendant waived process and entered his appearance in the cause, and with the consent of the plaintiff confesses that he is indebted to him upon said account in the sum of $50 principal and $1.70 interest, and asks that judgment be rendered against the O 4 Cattle Company therefor. It is therefore considered by me that the said plaintiff recover from the said defendant the debt as aforesaid confessed, and also his costs. Ex. issued 31 March, 1887; Ap. 18, 1887, returned and judgment satisfied.

C. E. VERITY,
"County Judge."

February 18, 1888, an action in replevin was commenced by Graham & Snyder, plaintiffs in error, against the defendant in error, E. J. Carpenter, before W. G. Pardoe, J. P., of Dawes county, to recover two cream colored horses, each branded "O 4" on left shoulder. Mr. E. J. Carpenter purchased the horses sought to be recovered in said action, from one W. T. Livermore, in July, 1887. The justice seems to have found in favor of the defendant. An appeal was taken to the district court, where a jury was waived and the cause tried to the court, which rendered judgment in favor of the defendant in error.

The attorney for the plaintiffs in error has simplified the case somewhat by the statements in his brief. It is

said: "For the purpose of this argument at this point let us admit that there was such a corporation as the O 4 Cattle Company, and that a man by the name of E. B. Graham was manager of the same, and I ask then according to the answer of the witness on page 12 in answer to this question by the court:

"'Do you mean that was Graham—that is, one of this firm of E. B. Graham & Snyder?

"'Yes; at that time it was Graham, Millard & Snyder.'

"This answer of the witness clearly shows that it was not the same Graham that he referred to as the Graham, one of the plaintiffs in this action; and when we turn back to page 9 and the answer by this same witness, we find this fact made more plain; so we have absolutely no connection in fact by any competent evidence between the Graham whom the witness says purchased the property at the execution sale and the member of the firm of Graham & Snyder, plaintiffs; and when we take the evidence of Mr. Snyder, who positively declares that the partnership of which he was a member never did business under any name but Graham & Snyder (and the court will see by the copy of the articles of partnership in the record that such was to be the name), which partnership, so far as this record discloses, is still in existence, while the partnership or corporation of which the E. B. Graham referred to in the record by the witness McGinley, being Graham, Millard & Snyder, went out of existence in the summer of 1886, yet the judgment in the action upon which they pretended to sell this property was not recovered until 1887.

"Under this state of the record we find this to be the status of the case: One E. B. Graham, Millard & Snyder formed what was known and what we admit was the O 4 Cattle Company, a corporation; that this corporation was in debt and suit was commenced against them; that E. B. Graham (whether he had authority or not) waived service and confessed judgment, execution was issued, and the

property of my clients (because they happened to have a member whose name was similar to the other) was taken and sold without their knowledge (I say sold because the witness McGinley says they were sold) to Graham, by Graham to Clough, Clough to Livermore, and Livermore to defendant, and by the judgment of the court this is legal and right. It cannot be."

Taking these statements together and the only question in dispute is the identity of Graham. As to him the proof shows beyond a doubt that the Graham who confessed judgment was the same Graham who was a member of the firm, and that the firm was indebted for labor to the plaintiff in that action, he being the assignee of Wilson. It is unnecessary to review the evidence at length. It is evident that the judgment conforms to the proof, and there is no error in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

LEVERETT M. ANDERSON, APPELLANT, V. SOUTH OMAHA LAND COMPANY ET AL., APPELLEES.

[FILED DECEMBER 16, 1892.]

Trusts: SUFFICIENCY OF EVIDENCE TO ESTABLISH. Evidence *held* to be insufficient to establish a trust in favor of the plaintiff in the property in controversy.

APPEAL from the district court for Douglas county. Heard below before WAKELEY, J.

B. F. Kauffman, Seevers & Seevers, A. S. Churchill, and *Edson Rich,* for appellant.

J. M. Woolworth, Gannon, Donovan & Shea, and *Lee S. Estelle, contra.*

NORVAL, J.

This suit was instituted in the court below on the 10th day of November, 1888, by Leverett M. Anderson against the South Omaha Land Company, a corporation organized and existing under the laws of this state, and William A. Paxton, Peter E. Iler, James M. Woolworth, Alexander H. Swan, Thomas Swobe, Frank Murphy, and Charles W. Hamilton, alleging in his petition, in substance, that in or about the month of September, 1883, certain lands, described in the petition, situate in the counties of Douglas and Sarpy, were conveyed to the plaintiff and held by him in trust for certain parties who had contributed to the purchase price thereof, which amounted to the sum of $350,000, including certain improvements made upon said lands, and at the time contemplated; that plaintiff contributed $6,250 of said sum of $350,000, and by reason thereof was the owner of one fifty-sixth portion of all of said property; that all the persons named as individual defendants, together with a large number of other parties, contributed to said sum of $350,000 and were interested in said property, but that the exact amount so contributed by them is unknown to the plaintiff; that all the defendants knew that plaintiff was one of the contributors to said sum and owner of a portion of the property; that on or about the 1st day of January, 1884, at the request of the beneficiaries in said property, plaintiff and his wife, Ella S. Anderson, conveyed to the individual defendants, as trustees for the use and benefit of all the parties beneficially interested, all of said real estate, together with all structures, erections, improvements, ways, and rights of way, tracks, bridges, viaducts, culverts, fences, warehouses, shops, dwelling houses, superstructures, and fixtures upon said lands, as well those which should

thereafter be acquired as those which have been acquired for the use of said trust estate, or in connection therewith, or which may be incident to said trust; that by the terms of said trust deed it was provided for the issue of three series of bonds in said deed described and secured thereby, and by said instrument said trustees were given certain and definite powers with respect to said trust property, as well as certain powers relative to the issuing of the several series of bonds in said deed of trust mentioned, which are set forth in a copy of the deed made in that behalf, annexed to and made a part of the petition; that by the terms of said deed, the said trustees were to issue of the first series of bonds five hundred of the face value of $1,000 each, a second series of four hundred and fifty bonds of $1,000 each, and a third series of a like number and denomination as the second series; that the defendants named in said conveyance as trustees accepted the trust and undertook the execution thereof, and that by virtue of the premises plaintiff was entitled to one fifty-sixth of the bonds to be issued under the provisions of said trust deed; that only the first series of bonds were ever issued, and for the second and third series certificates were issued in lieu of said bonds, stating that the holder of said certificates was entitled to the bonds, of the second series as shown by said certificates.

It is further alleged that by the terms of said trust deed certain of the lands therein described were to be sold to the Union Stock Yards Company of Omaha; that said trustees have sold and conveyed a portion of said lands to said Stock Yards Company, and received in payment thereof the sum of $78,250; that said trust deed provided for the laying out and platting into lots and blocks certain other of said lands, and for the manner and method of making sales of such lots; that by the terms of said trust deed the said trustees were required from time to time to take, and preserve in writing, evidence as to the value of the trust

estate, and to appraise the value thereof, and were prohibited from making sale at a less price than was so ascertained.

It is further alleged that on or about the 23d day of July, 1886, the said trustees, in violation of their said trust, made a pretended sale of all of said trust property, funds, and assets to one John H. Bosler, for the pretended sum of $750,000, and said trustees ultimately conveyed to him all of said property; that certain of the trustees and other parties were interested with Bosler in said purchase, who afterwards, together with certain of said trustees, organized the South Omaha Land Company for the purpose of receiving the conveyance of said real estate and trust property, and holding the same for the use and benefit of the parties so claiming to purchase said trust property; that Bosler conveyed all of said property to said corporation, and it received such conveyance with full knowledge of all the facts stated in the petition; that the trustees concealed from plaintiff the fact that they were interested in the purchase of the property; that plaintiff has never received any part of said trust property, or any portion of the first issue of bonds, or any benefit arising therefrom, nor any certificate showing him to be entitled to his due and legal portion of the second and third series of bonds, when the same should be issued; that all of said trustees knew that plaintiff had furnished the money, as above stated, to purchase said lands, and create said trust property and funds, and also of his interests in and right to his proportion of said bonds and certificates aforesaid and that he had never received the bonds and certificates representing his interests; that of the said fund of $350,000 there were $22,951.72 turned over to the trustees mentioned in said trust deed and formed a part of the trust estate.

It is further alleged that said trustees sold said property for a grossly inadequate price and far below the appraised

value thereof; that, in order to procure all of the said trustees to sign the conveyance to said Bosler, there were paid to certain of said trustees large sums of money, in addition to the distributive shares of such trustees, who were also personally interested in said property, as a bonus to secure the relinquishment of their own personal interest therein and to induce them to sign said conveyance; that the money thus paid as a bonus was taken out of the trust property; that such of the trustees as were not paid a bonus were interested with Bosler in said purchase, assisted in the organization of the defendant corporation, and are officers in said company.

The petition further charges that a large portion of said trust funds has been misappropriated by said trustees, and devoted to the payment of attorney fees in certain litigation brought about by the refusal of certain of the trustees to sign the deed of conveyance to said Bosler, and in payment of moneys to said certain trustees to induce them to sign such deed, and in other illegal and unwarranted expenditures; that since said pretended sale to Bosler, and the conveyance by him to the defendant company, large sales of said lands have been made, and there is now a large amount of money, notes, contracts, bills receivable, and other assets in the hands of said company; that a large portion of said lands has not been sold, in all of which funds, assets, property, money, and lands plaintiff is interested; that said funds, bills receivable, assets, and unsold property are of the value of $5,000,000; that said trustees have wholly renounced and repudiated said trust relation to said property, and refuse to further act under said deed of trust, but insist that the sale is valid, and that the defendant corporation claims to be the owner of all of said trust property.

The prayer is, that the sale and conveyance of said property to Bosler, and by him to the South Omaha Land Company, be set aside, as fraudulent and void; that plaintiff's

interest in the trust property be ascertained, declared, and established; that the trustees be required to account for all moneys, property, bills receivable, and assets which have come to their hands, and the said company be likewise required to account; that plaintiff be decreed his full right and interest therein; that a receiver be appointed, and for such other or further relief as plaintiff is in equity entitled.

The defendants Swan, Swobe, Murphy, and Hamilton did not answer. The other defendants filed a joint answer, which is too lengthy to give the substance thereof here. For the purpose of our investigation it is sufficient to say that the answering defendants deny that plaintiff was one of the contributors to the purchase price of the lands in controversy, or ever had any interest in the property, and also many other allegations of the petition are denied. The defendants set up some new matters of defense which are controverted by plaintiff in his reply.

Upon the trial the district court found the issues in favor of the defendants, and dismissed the bill. Plaintiff appeals.

It is disclosed by the record that plaintiff has been a resident of Omaha since 1866, a portion of which time he was a conductor on the Union Pacific railroad; that the defendant Swan has been for many years a resident of Wyoming and engaged in the cattle business; that Anderson and Swan have been for years intimately acquainted, besides being distantly related by marriage; that in the latter part of 1882 Swan was in Omaha, and had some talk with Anderson on the subject of buying lands and building stock yards where South Omaha now stands, but no definite plan for the proposed enterprise was then formulated. In January following Swan went to Europe, and while on his way east, wrote and sent to Anderson the following letter:

"NEW YORK CENTRAL, Jan. 15, 1883.

"*L. M. Anderson, Omaha:* I had a long talk with Kimball, and very satisfactory. He gave me full history

of all troubles and differences. I am not at liberty to give details now, as he requested strict confidence; but I may say this to you, that he will favor me in any and every way possible in the carrying out of a scheme on the Omaha side with yards, slaughter houses, canning houses, and all other things that may follow—making the enterprise a big and successful scheme. He's all right; and if he holds his power in the road, I am solid for knocking down the whole outfit. I explained to him my plans, and he told me to make every endeavor to carry them out and he would see me through. You will understand the enterprise has attractions for him. Don't say anything more to Schaller, only to say that you can't tell anything about it until I get back. That ground and yards will not do; but you may take them down and use elsewhere. The ground at the Summit, about a mile beyond, where the drainage goes the other way from town, is now our idea. He will run the dummy right out regular trips, whenever the business is opened. The idea is to buy from one to two hundred acres at the Summit, and start yards, canning house, and all at once. He, Kimball, knew how I was pushed out of the other side, and he knows that J. T. was with Paxton. That was not entirely new to me; for I had a hint of it before. This is a brief outline of what will come if nothing happens to interfere. I will take in one or two moneyed parties, perhaps Scotch, have not yet determined who; but I will not again lose control and get Kimball out. This must be treated entirely confidential, as any leakage of plans would defeat all. No more will be made until I return. We sail 17th on 'Pavonia, Cunard Line.' My address, 23 Mayfield Garden, care James Wilson.

"A. H. SWAN."

In the month of April, 1883, Mr. Swan returned from his European trip, and soon thereafter he determined to go ahead with the stock yards scheme already alluded to, and to that end he made arrangements with Anderson, by which

the latter was to contract for the lands in controversy. One C. R. Schaller was likewise employed to negotiate for the lands. In pursuance of said arrangement, Schaller, during the months of May, June, July, and August, 1883, purchased under contracts over 1,800 acres of land, at a cost of $327,048.43, taking the contracts therefor in his own name. A portion of the purchase price was paid down, while on the remainder time was given. On the 6th day of June, 1883, after two purchases had been made, Schaller and Anderson entered into a writing, stating that the purchases, payments, and contracts were made by Schaller for Anderson, and the former, by said instrument, also assigned all interest in said contracts to the latter. The contracts taken by Schaller subsequent to the date last above were duly assigned to Anderson on the 12th day of January, 1884. Prior to the 30th day of August, 1883, there had been paid upon the lands something less than $40,000. The testimony shows that prior to said date Mr. Swan solicited certain capitalists of Omaha to assist in the enterprise. Finally a meeting of the persons thus solicited was held on said date at the Millard Hotel, which resulted in the formation of the South Omaha Land Syndicate, of which Swan was made president and financial agent. A secretary and a treasurer were chosen. The syndicate raised, including the amount which had previously been paid on the contracts, the sum of $350,000. The balance of the purchase money due upon the lands was paid, which left in the treasury $22,951.57. Upon full payment being made on the contracts of purchase, the lands were conveyed by the owners to Anderson, who held the title in trust for the use and benefit of all the parties beneficially interested therein. Subsequently, at the request of the syndicate, Anderson and wife, by deed of trust, conveyed the property to Alexander H. Swan, Frank Murphy, Thomas Swobe, Charles W. Hamilton, William A. Paxton, Peter E. Iler, and James M. Woolworth, as trustees, they having been chosen by the

syndicate for that purpose. The terms of the trust upon which they took the title are set forth at great length in said instrument. The deed of trust recites, in substance, that said trustees have made their fourteen hundred several coupon bonds of $1,000 each of even date with said instrument, payable to the order of L. M. Anderson, the bonds being divided into three series as follows: 500 of the first series and the second and third series to the number of 450 each. The form of the bonds and coupons of each series is set out in said instrument. Then the said deed of trust declares in brief, among other things, that the said trustees shall sell and convey a certain portion of the premises therein mentioned to the Union Stock Yards Company, of Omaha, at and for such sum of money as may be agreed upon by and between them and the said company, subject to certain conditions as to improvements to be made upon said real estate by said Stock Yards Company; that the trustees shall lay out the remainder of the lands conveyed to them, or so much and such parts thereof as they in their discretion may deem expedient, into a town, with streets, passage ways, and public grounds, and improve the same; that the lands shall be carefully valued and appraised by said trustees, and they were authorized to sell any parcel or parcels of said lands at not less than the appraised value thereof; that all moneys arising from such sales, after deducting the expenses of executing the trust, be held by said trustees for the security of the said bonds and coupons, and all such moneys be applied, first, to the payment of the bonds and coupons of the first series, and then to the payment of those of the second and third series, in the order named; that in case of any default in the payment of any interest or principal of any of said bonds for the period of six months, the holders of said bond so due and unpaid were empowered to enforce their rights by legal proceedings.

It is further provided in article eleventh of said trust deed that "If, after the payment of all the bonds secured

by this indenture, or any of the said trust estates, rights, interests, or property of whatever nature hereinbefore mentioned, or arising out of the same, or the proceeds thereof, shall remain in the hands of said trustees undisposed of, and subject to be disposed of by them for the holders of the bonds of the third series, the said bondholders shall be, and shall be taken to be, entitled to the whole beneficiary right and interest therein, and in respect thereof; and the said trustees shall hold the said estate, rights, interests, and property for and in trust for them, and shall dispose of the same, either by distribution, division, or partition, among the said bondholders, or by sale and a distribution among the said bondholders of the proceeds arising therefrom according to their respective interests; and in such case of the final determination and settlement of their said trust, the said trustees shall respect the directions in writing of a majority of said bondholders, except as to the proportions of the interests of the several bondholders in the residue of the said trust estate."

It further appears from the evidence that bonds of the first series were issued by the trustees in accordance with the stipulations contained in said deed of trust; while the second and third series of bonds provided for in said instrument were never issued, but in lieu thereof certificates were given, certifying that the holder of the same was entitled to the number of bonds of the said second and third series stated therein, when the same should be issued. Subsequently all the bonds of the first series and the said certificates calling for bonds of the other series were distributed among the members of the South Omaha Land Syndicate, according to their respective subscriptions to the enterprise. At a meeting of the said trustees held on the 7th day of May, 1886, Mr. Swan, as president and financial agent of the syndicate, was directed to sell all the lands, bills receivable, cash, and assets belonging to the same for $750,000, provided he effected such sale by the

1st day of August following. At a meeting of the trustees on July 24, 1886, Mr. Swan reported that he had entered into a contract for the sale of all of the trust estates to John H. Bosler for $750,000; the sale was ratified and confirmed by a majority of the trustees, although three of them, Swobe, Murphy, and Hamilton, disapproved of the sale and refused to join with their associates in executing a deed of conveyance to Bosler. Thereupon Bosler brought suit in the circuit court of the United States for the district of Nebraska against all the trustees for the specific execution of the contract of sale, and Herman Kountz was appointed receiver by said court, to take charge of the trust properties. On the first day of January, 1887, said court rendered a decree in favor of the plaintiff in said action, and ordered the trustees to execute a conveyance to said Bosler, and on the 31st day of the same month the trustees executed their deed conveying to him the lands in controversy, as well as all the rights, debts, choses in action, moneys and interest of every kind and nature connected with and incident to the lands described in said trust deed. On the 3d day of January, 1887, the South Omaha Land Company was incorporated by John A. McShane, W. A. Paxton, J. H. Bosler, P. E. Iler, and J. A. Creighton, and by the articles of incorporation certain of the said trustees of the South Omaha Land Syndicate, with others, were appointed directors of the Land Company. On the 19th day of February, 1887, all the properties covered by the deed to Bosler were conveyed by him to the South Omaha Land Company.

It is an admitted fact that during the pendency of the suit already mentioned, and prior to the final determination thereof, a bonus amounting to several thousand dollars above their proportion or share of the $750,000 was paid by Bosler to the three trustees who resisted the sale made to him by Swan, and thereafter such trustees made no further resistance to the carrying out of said sale, or to the said suit

in the federal court. There is likewise to be found in the record some testimony tending to prove that certain of the remaining trustees were interested with Bosler as purchasers of the trust properties.

Counsel for appellant contend that Anderson contributed and paid out of his own moneys toward the original purchase of the real estate involved in this lawsuit, prior to the formation of the South Omaha Land Syndicate, $10,576.15, for which he has never been reimbursed, and that by reason thereof he is entitled to one fifty-sixth interest in all of said lands. Appellees, on the other hand, insist that Anderson never invested a dollar of his own funds in the enterprise. The most important, as well as the most difficult question presented by the record for our consideration is purely one of fact, namely: Did appellant ever advance the sum claimed by him, or any other amount, towards the purchase of these lands? If he did not, then it is clear his suit must fail, for he bases his right to have a trust declared in his favor upon the ground that he was one of the contributors to the purchase price.

There is no dispute but that nearly $40,000 had been paid on the contracts of purchase prior to August 30, 1883, the day on which the meeting was held at the Millard Hotel for the purpose of inducing certain Omaha parties to join Swan in his scheme for the purchasing of said lands and laying out a town. Of the said sum it is conceded that Mr. Swan furnished to Anderson $15,808.57 on August 24, 1883, and the further sum of $13,684 on the following day, which amounts were deposited by the latter in the Omaha National Bank to his own credit, and were paid by him on the contracts of purchase by checks drawn upon said bank. In fact all payments, both prior and subsequent to the organization of the syndicate, were made through Anderson. Plaintiff claims, and he so testified at the trial, that of the said sum of $40,000 he contributed of his own funds the following amounts: May

30, 1883, $1,900; June 4, 1883, $579.90; June 11, 1883, $1,020.20; June 23, 1883, $1,000; June 25, 1883, $3,000; June 27, 1883, $2,000; August 15, 1883, $750; that the foregoing sums were paid by his personal checks drawn for the several amounts upon the Omaha National Bank, payable to the order of C. R. Schaller, the person in whose name the contracts of purchase were taken. Checks for the said sums indorsed by Schaller, and stamped paid by the bank, were introduced in evidence, and copies thereof appear in the record. Plaintiff also testified to having paid of his own means several sums after the date of the meeting at the Millard Hotel, already alluded to, enough to swell the total amount alleged to have been contributed by him to $10,576.15.

Mr. A. H. Swan testified on behalf of plaintiff to the effect that Anderson furnished of his own means to put into the purchase of these lands something in excess of $10,000; and that at certain meetings of the trustees he stated to them that Anderson was interested in the said purchase.

If the foregoing was all the testimony to be found in the record relating to the furnishing of money by Anderson, the question would be an easy one to solve. There are, however, other facts and circumstances disclosed by the testimony, some of which will be now mentioned, which appellees insist established that Anderson is not now, nor ever was, financially interested in the said trust properties, but that the payments made by him were made with Swan's money, and solely for the benefit of the latter. It is uncontradicted that prior to the land transaction in question plaintiff had been interested in business with Mr. Swan at different places; and that from January, 1883, until September of the same year the latter was engaged in feeding cattle, and, when fat, shipping them to eastern markets for sale. Proceeds derived from the sale of stock were placed to Anderson's credit in the Omaha National Bank, and were carried into the same account as funds deposited

which belonged to him individually; that plaintiff, during the same period, paid out for Swan, by checks upon said bank, large sums of money on account of the cattle business. The account of Anderson's with said bank was introduced in evidence and is included in the bill of exceptions, from which it appears that on the 30th day of May, 1883, the day on which the $1,900 check already referred to was drawn to make the first payment on the lands, his bank account was overdrawn to the amount of $758.46, excluding the amount called for in said check; and on the 11th day of June, 1883, when the check for $1,020.29 was issued to make the third payment, Anderson's bank account showed a balance against him of $7.926.95, not including the amount of the check. Between May 30th and June 12th but three deposits were made to his credit in the bank, aggregating $6.022.21, and between the same dates he drew out of the bank, on account of the cattle business, $10,351.86, besides $579.71 to make the second payment on these lands, and also two other sums aggregating $285.60, but for what purpose used the evidence fails to show. An examination of the subsequent items of the account, in connection with the evidence of Mr. Wallace, the bank cashier, shows that the above balance standing against Anderson on the bank books, on June 11, 1883, as well as all checks drawn after that date by Anderson to make payments on the lands, were subsequently met by deposits of moneys belonging to Swan. On June 14th a deposit of $14,862.50 was made to Anderson's credit, which amount was the proceeds of a note for $15,000, signed by Swan Bros. & Co., and L. M. Anderson, due in thirty days. It is conceded by appellant that the money derived from the discount of the note was not his own, but belonged to Mr. Swan. After the last mentioned date, and prior to August 1st, Anderson has credit on his account with seven items, aggregating over $70,000, derived from the sale of cattle, and

his account only shows three items to his credit after June 11th, which the evidence does not establish, came from the same source. One on July 3d, $408.58; one on July 17th, $255.88, and another on July 24th, $230.20. Considering these facts in connection with appellant's inability on cross-examination, when requested so to do, to tell where he obtained the money he advanced on the lands, and the further fact that several of the trustees testified that no statements were ever made in their presence by Mr. Swan, or any one else, about Anderson being financially interested in the venture, but that at the meeting of August 30, 1883, which was attended by plaintiff, Mr. Swan did state that he had furnished the money to Anderson that had been paid on the lands, we are not willing to say that the trial court was not warranted in inferring that the amounts advanced by Anderson, although from funds deposited to his credit, were made with moneys belonging to Mr. Swan, and on his behalf.

Now, while the evidence does not make plain of whose funds some of the deposits in the bank to Anderson's credit were made, nor on whose account several of the items of disbursements were made, yet we think, inasmuch as the account was overdrawn several hundred dollars when the check for $1,900 was drawn, and that the aggregate of all deposits made subsequently thereto, not established by the proofs to have come from the cattle business, was wholly inadequate to cover the sums claimed to have been advanced by plaintiff on account of the lands in dispute, Anderson was called upon to show, if such was the fact, that the overdraft at the bank was occasioned by disbursement relating to the feeding of cattle, and not on his individual affairs. In other words, that at the date of the overdraft appellant had drawn out of the bank of his individual funds, for Mr. Swan's benefit, and for which he had not been reimbursed, an amount sufficient, with his own means thereafter deposited, to cover all the checks given by him

as payment on the lands. His failure to do so is a strong circumstance against his contention here made. We cannot assume, as counsel ask us to do, that certain items on the debit side of this account prior to May 30, 1883, related to the cattle business. There is certainly no presumption that they were not paid for Anderson's own benefit.

It is argued that even if Anderson used funds belonging to Mr. Swan to purchase these lands, the former became thereby indebted to the latter for the amount thus used, and Anderson acquired an interest in the trust property. This view might be taken, were it not for other facts appearing in the record, already alluded to, and others hereafter stated, which tend to show that Anderson did not regard the transaction at that time in that light.

Other matters are disclosed by the record which doubtless helped turn the scales against the plaintiff in the lower court. Some of these will be briefly stated. He only claims in his petition, and in his evidence, that he is entitled to one fifty-sixth interest in the trust property, by reason of his having contributed $6,250 of the sum of $350,000. He explains it in his testimony thus: That after the making of the trust deed he had an understanding with Mr. Swan, the financial agent and president of the syndicate, to the effect that he was to retain an interest to the extent only of $6,250 in the property, and was to be reimbursed by the trustees the difference between that sum and $10,576.15, the amount alleged to have been advanced by him from his own means. It is not contended that prior to the instituting of this action Anderson ever made any claim to the trustees for reimbursement of the excess of $6,250, although there remained in their hands of the fund of $350,000, after paying for the lands, and all expenses connected therewith, $22,951.17. He was in the employ of the trustees at a stated salary during the major portion of the time they held title to the property and was

paid for his services from time to time, but made no claim that anything was due him on account of moneys advanced. He knew of the pendency of the suit against the trustees in the federal court, of the appointment of the receiver, of the conveyance of all the trust properties to Bosler, and by him to the South Omaha Land Company, and was employed by the receiver to look after the lands while they were under his care, and occupied the same position under the land company, yet he failed to assert any interest in the trust estate, and made no claim to the trustees for moneys paid out by him, until long after the sale of the land to the defendant corporation. It would seem reasonable, under the circumstances stated, if he had any rights or interest in these lands, or if anything was coming to him on account of their purchase, he would have asserted the same earlier than he did.

It appears that at the preliminary meeting held at the Millard Hotel on August 30, 1883, for the purpose of raising money with which to pay for the lands, it was determined that certificates should be issued to the subscribers to the purchase price upon the payment of their subscriptions, which certificates were to be converted into bonds thereafter to be issued by the trustees. A subscription for the bonds was started, by the terms of which each subscriber was to pay twenty-five per cent of the face value of the bonds by him subscribed for. Subscriptions were made for 1,400 bonds, aggregating $1,400,000, being the exact number of bonds and the amount secured by the trust deed. There is evidence tending to show that Anderson was present at the meeting at which the subscription paper was drawn up and signed, yet his name nowhere appears on the list. The subscriptions were afterwards paid, thereby raising the fund of $350,000, which is conceded to be the amount that went into the venture. True Anderson swears that he never heard of the subscription paper, but the preponderance of the testimony is against

him. If he knew of it, as we think he must, a pertinent inquiry is, why did he not sign for the amount claimed to have been advanced by him, as did Swan? Every one, unless it be Anderson, who contributed to the project, signed the subscription paper. He admits he was present when the bonds were being signed, and they were distributed among the persons signing the subscription paper, according to the amount subscribed by each. From which, as well as from the recitals in the deed of trust signed by himself, Anderson was apprised of the fact that the bonds were about to be issued. He afterwards knew of their issue, for he purchased and held two of them. He also knew that the bondholders were the beneficiaries under the trust deed, and that by the eleventh article thereof, if, after the payment of the bonds secured thereby, any portion of the trust estate remained undisposed of, it was to be distributed among the bondholders of the third series; yet he made no claim to any portion of the bonds. Such conduct is convincing proof that he did not then consider he had any interest in these lands.

There is nothing in the letter written by Swan to Anderson, a copy of which is given above, which can be construed as conveying the idea that appellant was to become interested with Swan in the venture, but on the contrary the whole tenor of the language used therein tends to show that Swan had no such intention. He writes: "I will take in one or two moneyed parties, perhaps Scotch; have not yet determined who." There is nothing significant in the fact that Swan wrote Anderson about the proposed scheme, or that the deeds to the lands were taken in the name of the latter, since the two were connected by marriage, had been associated together in business, and at the time Anderson was receiving the moneys belonging to Swan arising from the sale of cattle, and was disbursing the same. The confidence reposed in plaintiff by allowing the title to the property to be taken in his name, under the

circumstances, is perfectly reasonable and natural and entirely consistent with the theory that plaintiff was not financially interested in the lands. Our conclusion is that the evidence is not sufficient to establish a trust in favor of the plaintiff.

It is argued by counsel for appellant that the transfers of the property to Bosler and by him to the South Omaha Land Company were void, for the reason that a portion of the defendant trustees were interested therein as purchasers, and others of them were paid a bonus by Bosler to prevent their resisting the transfer. While the law forbids one who holds property in trust from becoming a purchaser thereof from himself, either directly or indirectly, plaintiff is not in a position to invoke the rule in this case, inasmuch as he had no interest in the property. Only those beneficially interested in the trust estate could question the transfers on the ground urged. For the reasons stated the judgment below is

AFFIRMED.

THE other judges concur.

FREDERICK WOHLENBERG V. JOHN MELCHERT.

[FILED DECEMBER 16, 1892.]

1. **Bill of Exceptions:** AFFIDAVITS used at the hearing of a motion in the district court, to be available in this court, must be brought into the record by a bill of exceptions.

2. **Trial:** ADMISSION OF INCOMPETENT EVIDENCE: OBJECTIONS: REVIEW. When incompetent or illegal testimony is admitted upon a trial without objection, error cannot be predicated in a reviewing court upon the admission of such testimony.

3. **Review:** NEWLY DISCOVERED EVIDENCE AS GROUND FOR NEW TRIAL: BILL OF EXCEPTIONS. A party is not entitled to re-

view, on appeal or error, the decision of a trial court in denying a new trial upon the ground of newly discovered evidence, unless all the testimony given on the hearing of the motion is set out in a bill of exceptions.

4. **Sufficiency of Evidence:** DAMAGES. *Held*, That the evidence in the case is sufficient to sustain the verdict, and that the damages assessed by the jury are not excessive.

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

E. P. Holmes, and *Edwin M. Lamb*, for plaintiff in error.

Pound & Burr, *contra*.

NORVAL, J.

This action was brought in the court below by defendant in error to recover damages for personal injuries alleged to have been sustained by John Melchert, a minor, resulting from kicks given by the plaintiff in error. The jury returned a verdict in favor of the plaintiff below, assessing his damages at the sum of $2,000. Judgment was entered upon the verdict, to reverse which the defendant brings the cause to this court on error.

The first question presented for consideration is raised by the motion filed by defendant in error to strike out of the transcript and record, copies of certain affidavits made by Frederick Wohlenberg and E. L. Holyoke, which were filed in the office of the clerk of the district court, and which, presumably, judging from their character, were used on the hearing of the motion for a new trial. The motion to strike is well taken, for the reason that the affidavits in question were not made a part of the record in the case by bill of exceptions. Affidavits used at the hearing of a motion in the district court, to be available in the supreme court, must be included in the bill of exceptions. This is too well settled to require the citation of cases.

Complaint is made that the verdict is not sustained by

the evidence, and that the damages assessed by the jury are excessive. The record shows that John Melchert, in October, 1882, at the time the alleged injuries were received by him, was residing with his step-father, the plaintiff in error, and was at that time about ten years of age. We quote from the bill of exceptions that portion of the direct testimony of the defendant in error, which describes the nature and character of the injury and how it occurred, as follows:

Q. Where were you when you were injured?

A. In the house.

Q. Who injured you?

A. Fred Wohlenberg.

Q. How did it occur?

A. It was in the morning. The three boys slept upstairs. He called me, and told me to call the boys. I called them, and he said, what are you doing up there, you damned hog? And he kicked me on the side, kicked me down. I cried; my mother came in and he kicked me twice after that.

Q. Where were you kicked?

A. In the dining room of his house.

Q. Where did he kick you each time?

A. On the side and back.

Q. What did he have on his feet?

A. He had boots.

Q. How large were the boots?

A. About number 10.

Q. How hard did he kick?

A. He kicked hard enough to kick me down.

Q. How many times?

A. Three times.

Q. Who were present and saw this?

A. My mother, sister, and brother.

Q. Which brother was it?

A. My half brother, Fred Wohlenberg.

Q. The son of Mr. Wohlenberg?

A. Yes, sir.

Q. Before that time did you ever have any pain or sickness?

A. No, sir; I was healthy.

Q. Can you describe the pain that was occasioned by these kicks?

A. Yes, I can. It is such that I cannot do any work, and whenever I do any work it lays me up. I have pain all the time.

Q. How was it at that time?

A. I don't hardly remember, it has been so long ago. I know it was awful bad.

Q. What did you do, and what did your mother do, if anything, for this injury?

A. We did nothing for a while, and then I went to Dr. Peters, who treated me for my kidneys, but did not do me any good.

Q. What then did you do?

A. I did not do anything until a year and a half ago, when I went to Dr. Hart, who put a plaster of Paris jacket on.

Q. How many of these plaster of Paris jackets did you have?

A. Two.

Q. How long did you wear them?

A. About two months.

Q. Explain what the plaster of Paris jackets are?

A. They fit something like a corset, only closer to the body.

Q. They are cast right on the body?

A. Yes, sir.

Q. Do you know the object and purpose of wearing them?

A. They thought it would strengthen my back and hold that rib in place.

Q. Do you know what part of your body was injured by these kicks?

A. Yes, sir.

Q. Where was it?

A. It was the last floating rib, and the spine.

Q. Did you have any curve in the spine prior to that time?

A. Not that I know of.

Q. Do you know how your spine has been since that time?

A. Yes, sir.

Q. How was it?

A. Curved.

Q. What has been your business since?

A. I worked a long time at the 99-cent store, worked on a farm a while, and for the State Journal Company.

Q. Who did you work for at the 99-cent store?

A. Mr. Shelton.

Q. How long did you work for him?

A. Very nearly two years.

Q. While you worked for him did you suffer pain resulting from your injuries?

A. Yes, sir; I always suffer pain in my side and in my back whenever I do hard work.

Q. How is it at the present time?

A. There is a pain there now, a steady pain; I can hardly explain it.

Q. How is it when you lift any article, especially one of any weight?

A. It hurts me a great deal worse than at other times.

Q. Did you see any other doctor than Dr. Peters?

A. Yes, sir; Drs. Mitchell, Righter, and Woodward.

Q. Did you consult any physician out of this town?

A. Yes; some in Omaha.

Q. Who were they?

A. Dr. MacNamara.

Q. What did you go there for?

A. To have my back straightened by the electric treatment. I was at the hospital.

Q. What objections did he have to your going?

A. He made none that I knew of, because I was not staying there.

Q. Why was that?

A. He drove me away.

Q. When?

A. About a year ago last summer.

Q. What did he drive you away for.

A. We had a fight down there at the house when I had on one of the plaster of Paris jackets. We were playing at throwing ball, my eldest brother and I. Mother called us to supper, and when we got around the corner, he struck me in the face and pounded me all up, when I did nothing; he told me to keep away from the house. That was the 8th day of April; it will be three years.

Q. Three years next April?

A. No; two.

Q. Did you ever talk with your step-father about this pain in your side?

A. I have told the whole family about it.

Q. Have you talked to him about it in the presence of the family?

A. Yes.

Q. What did he ever do in regard to it?

A. He did not do a thing, he said I was always pretending to have a pain, and I done it to get out of work.

Q. What did you tell him?

A. I told him there was a pain there; I did not know where it came from at the time; I did not know what was the matter until I began doctoring.

Q. What did he say to that?

A. He kept on telling me I was lazy, and trying to make expense.

Q. Did you ever receive any injuries to your spine or back, or any of your ribs, at any other time except from those kicks you have spoken of?

A. No, sir; I never have.

Q. What did MacNamara in Omaha do for your back?

A. He told me my back was curved, my spine was curved, and one of the floating ribs was broken, and he gave me electric treatment to draw the pain out.

Q. State how long a time, if any, between the time you received these kicks and the present, that you have been free from pain.

A. I have not been free from pain at all.

Q. Whose farm was it you went to work on?

A. Mr. Hickson's.

Q. When was it you went to work for him?

A. Four years ago.

Q. How long did you work for him?

A. Two months.

Q. Why did you quit?

A. I could not stand the work on account of my back.

Q. What kind of work were you doing?

A. Plowing and cultivating.

Q. When you came in from there where did you go to work?

A. I went to work for Mr. Shelton again.

Q. Did you go to work for the Journal Company at any time?

A. I went to work for the Journal Company after I quit Shelton.

Q. In what department?

A. In the book-binding.

Q. What were you doing?

A. Learning the trade. I was carrying books down to the job room and getting stock in.

Q. What did you quit there for?

A. I could not stand it for the pain in my back and side.

Q. How long did you work for them?

A. About six months.

Q. When was it you ascertained what was the matter with your back?

A. When I first consulted a physician.

Q. When did you first find out what your injury consisted of?

A. About two years ago.

Q. Was that the time you went to Omaha?

A. No, sir; that was when Dr. Dogge here told me about it.

Q. You consulted him, did you?

A. Yes, sir.

Q. With what result?

A. He said that my spine was out of order, out of shape; but I did not doctor with him any.

Q. Who advised you to go to this Omaha concern?

A. My mother.

Q. How is it in your sleep?

A. I have to lie on my right side. I cannot lie on my left at all. I have to lie on my back, or on my right side.

The cross-examination of defendant in error tends to strengthen his testimony given in chief, instead of weakening it. His statement, as to the circumstances of his receiving the injury, is fully corroborated by his mother, Catherine Wohlenberg, his sister, Hannah Melchert, and his half-brother, Fred Wohlenberg. These persons further testified that before receiving the injuries defendant in error's health was good, was never sick, nor did he complain of his side and back to their knowledge; that since he was kicked by plaintiff in error he has been continually complaining of pain in his side and back, and has been unable to stand hard work.

Dr. F. B. Righter testified that he has been a practicing physician and surgeon for twenty-five years, thirteen of them in the city of Lincoln; that before the trial he made

a careful personal examination of the plaintiff, particularly his spine and the lower part of his chest; that he found that at some time there had been a fracture of one of the lower ribs on the left side, and a curvature of the spine to the right, about three-quarters of an inch, opposite such fracture, about an inch and a half from where the rib joins the spinal column; that in his opinion, based on the amount of callous, the rib was broken entirely through; that in a healthy person such curvature is caused only by an injury to the spine; that a curvature might be caused by constitutional diseases, such as scrofula, but in such case there would be apt to be some trace of the disease, and that "this case did not look like that"; that such a curvature is a permanent injury; that in his opinion, based on the proximity of the fracture and curvature, the fact that the curvature is opposite the fractured rib and the convex position of the spine, the fracture of the rib and curvature of the spine were simultaneous; that on account of being thus affected, he has not the strength nor the endurance of a normal person; that the curvature prevents, to some extent, the working of the spinal muscles; that while the fracture does no damage to the rib, it has produced an affection of the nerve on that side, "so there is great soreness around the injury with the result of great irritation of the nerve in the spine and the feeling of sensitiveness at the ends of that nerve."

The plaintiff in error testifies that he did not kick defendant in error at the date claimed, although he admits that he kicked and hit him at other times; admits that his step-son has been injured in the side and back, from which he will never recover, and attributes it to different causes, namely: To sickness when John Melchert was a child about two years old, then to a fall received while skating on the ice, and again to a fight with another boy. The clear preponderance of the testimony is against each of these theories, and establishes that Wohlenberg kicked de-

fendant in error, thereby breaking one of his ribs and permanently injuring his spine; that before receiving the injury he was always hearty and free from pain, but since which time he has constantly suffered with his side and back, and has been, and still is, unable to perform hard work.

Plaintiff in error also introduced upon the trial testimony tending to prove that he was absent from the city on the 15th day of October, 1882, the day named by the defendant in error and his witnesses, on which the injury was inflicted.

Drs. Woodward and Andrews testified, in effect, that they made an examination of Melchert's body, but did not find anything peculiar about his back in any way, did not discover any curvature of the spine, nor observe that any of the ribs were fractured. The proofs show that these medical experts did not make a very critical examination of the body of Melchert. Neither examined the spine nor looked for a fractured rib.

It has been the uniform holding of this court that it will not reverse a judgment on the ground that it is against the evidence, unless the finding of the trial court is clearly wrong or is manifestly against the weight of the testimony. Applying this rule to the case at bar it is obvious that the verdict of the jury should not be disturbed. The testimony of the plaintiff below, and his witness, if true, of which the jury were the sole judges, is ample to sustain the verdict and judgment. The damages are not excessive, but are fully justified by the evidence.

It is urged that the court below erred in allowing the defendant in error to testify that his step-father beat him cruelly about two years before the trial. The record discloses that this testimony went to the jury without objection; hence the error, if any, in admitting it was waived. When incompetent or illegal testimony is admitted upon a trial without objection, error cannot be predicated in the supreme court upon the admission of such testimony.

We are finally asked to reverse the judgment upon the ground of newly discovered evidence. Although it is one of the causes assigned in the motion for a new trial, we are precluded from considering the question, inasmuch as the evidence submitted to the lower court in support of and in resistance of the motion is not before us. A party is not entitled to review in the supreme court the decision of the district court in denying a new trial upon the ground of newly discovered evidence, unless all the testimony given on the hearing of such motion is set out in a bill of exceptions. And this for the purpose of enabling the reviewing court to ascertain whether the moving party has been injured by the ruling. Prejudicial error is never to be presumed, but must be shown by the record. Our conclusion is that no sufficient ground is pointed out for disturbing the verdict, and the judgment is

AFFIRMED.

THE other judges concur.

LEWIS A. WINCHELL, SHERIFF, v. JOHN MCKINZIE ET AL.

[FILED DECEMBER 16, 1892.]

1. **Attachment on Claim Not Due:** JURISDICTION OF COUNTY JUDGE: ORDER GRANTING. A county judge has jurisdiction, under section 238 of the Code of Civil Procedure, to grant an attachment on a claim not due, upon the proper affidavit being made and filed, showing the existence of at least one of the statutory grounds or causes for issuing an attachment on a debt before due.

2. ——: PRACTICE: ORDER GRANTING, ISSUED ON AFFIDAVIT FOR ATTACHMENT. No written application for an order allowing an attachment, other than the filing of the proper affidavit, is necessary.

3. ———: ———: ACTION COMMENCED BEFORE COUNTY JUDGE: ISSUANCE OF WRIT SUFFICIENT. When the county judge issues a writ of attachment in a case commenced before him, it is not necessary to the validity of the writ that he should spread upon his docket a formal order allowing the attachment. In such case the issuing of the writ is, in itself, the granting of the order.

4. ———: IRREGULARITIES: OMISSION OF SEAL OF COUNTY COURT: COLLATERAL ATTACK. The county judge of P. county made an order granting an attachment in an action to be brought in the district court of the county, and signed the same officially, but he failed to attach thereto the seal of the county court, which order was filed with the clerk of the district court, who issued a writ of attachment thereon. *Held*, That the omission of the seal of the county court did not make the order absolutely void, but an irregularity which could be taken advantage of only by the defendant in attachment, in the proper mode. The question cannot be raised by third parties in a collateral proceeding.

5. **Replevin of Goods Taken by Sheriff Under Attachment:** DEFENSE: JUSTIFICATION: BURDEN OF PROOF. When a sheriff, under and by virtue of a writ of attachment, levies upon property found in possession of a stranger to the suit, in an action of replevin therefor by such stranger, the officer, to justify the taking, is required to show that the attachment writ was regularly issued; that is, that the writ is regular on its face, and was issued upon a sufficient affidavit by a court having jurisdiction of the parties and the subject-matter of the action.

6. ———: IRREGULARITIES IN ATTACHMENT PROCEEDINGS: COLLATERAL ATTACK. Where proceedings in attachment are irregular and erroneous, but not void, such errors and irregularities cannot be taken advantage of by third parties in a collateral proceeding.

ERROR to the district court for Perkins county. Tried below before CHURCH, J.

Cornish & Robertson, for plaintiff in error.

Saunders & Prime, and *John J. Halligan*, *contra*.

NORVAL, J.

Lewis A. Winchell, the plaintiff in error, was the sheriff of Perkins county. James A. Hatcher and Fred L.

Knight were formerly engaged in the mercantile business in the town of Madrid, in said county, under the firm name of Hatcher & Knight, and on the 11th day of June, 1889, they executed and delivered a bill of sale of their stock of goods to John McKinzie and George W. Snyder, defendants in error, who took possession of the goods under said bill of sale. Shortly thereafter two writs of attachment against the firm of Hatcher & Knight, one issued by the clerk of the district court of Perkins county, the other issued out of the county court of said county, were placed in the hands of Lewis A Winchell, as sheriff, who levied upon said stock of goods by virtue of said writs of attachment. Subsequently defendants in error brought this action in replevin against plaintiff in error to recover said goods. The property was taken under the replevin writ, and the possession thereof delivered to plaintiffs below. There was a trial to a jury, which resulted in a verdict and judgment in favor of the plaintiffs.

On the trial in the court below plaintiffs introduced in evidence the bill of sale above mentioned, and evidence tending to prove that they had taken possession of the goods under the bill of sale.

The defendant attempted to justify under the two writs of attachment, and to that end he offered in evidence the files and record in a cause in the district court of Perkins county, wherein M. E. Smith & Co. were plaintiffs and Hatcher & Knight were defendants, consisting of the precipe, summons, with the return of the officer indorsed thereon, showing service on defendants, affidavit for attachment, undertaking, order of attachment, appraisement, the order of the county judge of Perkins county allowing a writ of attachment to issue in the action, demurrer of Fred L. Knight to the petition, answer of James S. Hatcher, and the judgment in favor of the plaintiffs in said suit. To the introduction in evidence of said papers and records the plaintiffs objected on the ground that no seal was attached

to the order of the county court allowing the writ of attachment; that the court had no jurisdiction to issue the summons, for the reason no order of the county judge allowing a writ of attachment on a claim before due to issue in said action was on file with the clerk at the time the summons was issued, and that the judgment was incompetent and immaterial, and the court rendering the same was without jurisdiction, which objections were sustained by the court, and defendant excepted.

Defendant then offered in evidence the docket of the county court of Perkins county, showing the affidavit filed in the said court for an order allowing a writ of attachment to issue, and the order of the county judge granting the writ of attachment; to which the plaintiffs objected as incompetent, immaterial, and irrelevant. The objection was sustained and the defendant excepted.

The defendant further offered to prove by the county judge of Perkins county that the order allowing the writ of attachment to issue in said case of *M. E. Smith & Co. v. Hatcher & Knight* was made by said county judge on the application of the plaintiffs in said action, and that by mistake or oversight the seal of the county court was not attached to said writ; to which plaintiffs objected as before. The objection was sustained and the defendant excepted.

The defendant also offered in evidence the petition, affidavit for attachment, bond in attachment, summons and return, writ of attachment and return thereon, appraisement, answers, motion to the jurisdiction of the court, motion to dissolve the attachment, judgment, and docket entries in a cause in the county court of Perkins county, wherein Kirkendall, Jones & Co. were plaintiffs and Hatcher & Knight were defendants; to which plaintiffs objected for the reason no foundation had been laid for their admission, that no application had been made for the writ of attachment, and no order had been made granting the

same; and for the further reason the county court has no jurisdiction in that kind of a case; which objections were sustained and the defendant excepted.

The foregoing rulings of the trial court are now assigned for error. Both writs of attachment, under which plaintiff in error sought to justify, were issued upon claims not then due. Authority is conferred by statute upon creditors to maintain an action by attachment on a debt before it is due, in certain specified cases. Among others, where the debtor has sold or disposed of his property with the intent to defraud his creditors, or to hinder or delay them in the collection of their debts; and this is one of the grounds set up in each of the attachment affidavits. It is not claimed that the facts stated in the affidavits were insufficient to authorize the issuing of the attachments and the bringing of the suits. Power is conferred upon a county judge by section 238 of the Code to make an order allowing an attachment to issue on a debt not due, upon the proper affidavit being made and filed. This was expressly decided in *Reed, Jones & Co. v. Bagley*, 24 Neb., 336, and must be regarded as the settled law of the state.

It is urged that the writ of attachment in the case of M. E. Smith & Co. is void because no formal written application was made to the county judge for the allowance of an attachment thereon, and for the reason that the order of the county judge authorizing the clerk of the district court to issue a writ of attachment in said suit was not made under the seal of the county court. The attachment proceedings in the case of Kirkendall, Jones & Co., it is claimed, are invalid on the ground that no written application was made for the attachment, and that no order was made by the county judge granting the writ. These several objections we will now consider.

Section 237 of the Code enumerates the grounds for which an attachment may be granted in actions on debts before due. Section 238 provides that "the attachment

authorized by the last section may be granted by the court in which the action is brought, or by a judge thereof, or by the probate judge of the county, but before such action shall be brought, or such attachment shall be granted, the plaintiff, his agent or attorney, shall make an oath, in writing, showing the nature and amount of the plaintiff's claim that it is just, when the same shall become due, and the existence of some one of the grounds for attachment enumerated in the preceding section." It will be observed that the section quoted only requires that before an action can be properly commenced on a claim before it is due, or an attachment shall be allowed, the plaintiff, his agent or attorney, shall make an oath, in writing, setting forth the nature and amount of the claim, that it is just, when the same will become due, and the existence of at least one of the statutory grounds or causes for the issuing of an attachment on a claim not due. We have been unable to find any statute, and none has been cited by counsel, which requires as a condition precedent to the granting of an attachment in such actions that a written application therefor, other than the proper affidavit, must be made to the court or judge. It is no more necessary to do so in attachments on debts not due than in ordinary attachments, and in our view it is not required in either case. To hold that it is necessary would be to inject words into the statute. In the absence of any statutory requirement as to a written request, we think it sufficient that the proper affidavit entitling the plaintiff to an attachment be in fact made and filed; the filing of which in itself is a request to grant the writ and confers upon the court or judge jurisdiction to act. However, in one of the attachment cases we are considering, that of M. E. Smith & Co., a written request for an attachment was made. The affidavit filed with the county judge as the basis of his order closes as follows: "Affiant therefore asks for an order granting an attachment against the property of the defendants." This, it would seem, ought

to be sufficient, even though the construction contended for by defendants in error should obtain.

It is urged that the files and record in the case of Kirkendall, Jones & Co. were properly excluded, because the county judge did not spread upon his docket a formal order authorizing the granting of an attachment. The docket entry relating to that matter is as follows:

"Issued summons and order of attachment, both returnable July 1, 1889, and delivered the same to L. A. Winchell, sheriff, for service. B. F. HASTINGS,

"*County Judge.*"

The suit of Kirkendall, Jones & Co. was brought in the county court. The issuing of the writ of attachment by the judge thereof was in itself the granting of the order. The entry made upon his docket above quoted is sufficient evidence of the fact that an attachment was allowed; that was all that was necessary. As the county judge is his own clerk, there is no reason why he should make a written order authorizing and directing himself to issue an attachment; but when he grants an attachment on a debt not due, in a case where the writ is to be issued by the clerk of the district court, the judge must make an order allowing the attachment and sign the same officially, since the clerk has no jurisdiction to issue a writ of attachment on a debt before due, unless the order has been allowed by his court or a judge thereof, or the county judge.

In the suit of *M. E. Smith & Co. v. Hatcher & Knight* the county judge of Perkins county made a written order authorizing an attachment therein, which order was signed by him officially, but he failed to attach thereto the seal of the county court. This order was filed in the office of the clerk of the district court before the attachment was issued. Did the omission of the seal invalidate the proceedings? We think not. The affixing of the official seal to such a document is for the purpose of authentication, and the failure to attach it is at most a mere irregularity. The signa-

tures and official capacities of county officers are matters of public notoriety, and the court will officially take notice of them. The district court of Perkins county is presumed to know, and was bound to take judicial notice, that B. F. Hastings was at the time county judge of that county and of the genuineness of his signature to the order in question. (Wade on Notice, sec. 1413; *Jones v. Gales's Curatrix*, 4 Mart. [La.], 635; *Scott v. Jackson*, 12 La. An., 640; *Templeton v. Morgan*, 16 Id., 438; *Wetherbee v. Dunn*, 32 Cal., 106.)

Counsel for defendants in error cite in their brief authorities from other states which lay down the doctrine that an execution or writ of attachment without the seal of the court from whence it issues is invalid, and that the defect is of such a character that it cannot be cured by amendment. Such is not the rule in this state. In *Taylor v. Courtnay*, 15 Neb., 190, the seal had been omitted from an execution; lands had been sold, and the sale confirmed, after which leave was given to amend the execution by affixing the seal to the same. It was held that the execution without a seal is not void, but may be amended, although the sale made thereunder has been confirmed. Many cases are cited in the opinion to sustain the proposition, and there can be no doubt as to the soundness of the rule stated. The failure to attach the seal would not render the process absolutely void. Counsel concede that the order of the county judge granting the attachment could be amended by attaching the seal. In effect, this is an admission that the order is not void, for there must be something to amend before an amendment can be made, and a void order is a nullity, and cannot be amended.

Counsel for defendants in error urge that this case is controlled by the decisions of this court, wherein it is held that when an officer attempts to justify the seizure of goods found in the possession of a stranger claiming title, that the mere production of the writ is not a sufficient justifi-

cation, but that the officer must go further and show affirmatively that the writ was regularly issued. In none of the authorities cited by counsel, nor in any of our cases, so far as we are aware, has it been held that when a sheriff or other officer seeks to justify the seizure of property under a process regular on its face, mere technical errors intervening after the issuing of the writ may be shown in a collateral attack, and when proven will invalidate the entire proceedings.

True, in the cases referred to in defendants' brief it is said, that it must be "shown affirmatively that the writ was regularly issued." By that it was meant that it must appear that the process was issued by a court having jurisdiction of the parties and the subject-matter of the action, and that the steps taken leading up to the writ were not void. It was not meant that the officer was required to prove that the proceedings were free from mere errors and irregularities which are not of such a nature as to affect the jurisdiction, although they might be sufficient grounds for reversal by a suitable proceeding in a tribunal having authority to review them. There are many errors occurring in a trial of a cause which may be waived by the parties, and if the one against whom they are made fails to take advantage of the same, strangers to the record cannot do so. Suppose an attaching creditor files the proper affidavit in attachment, and the writ issues without his having given a bond for the indemnity of the defendant, in a case where one is required by statute, his failure to file an undertaking would not render the attachment absolutely void. It would be a mere irregularity, of which the defendant in attachment alone could take advantage.

The case of *Connelly v. Edgerton*, 22 Neb., 82, was a suit in replevin against an officer who claimed possession of the property by virtue of the levy of certain writs of attachment. The court in the syllabus say: "Where proceedings in attachment are irregular and amendable, but not

void, and no objection is made thereto by the defendant in the action, such proceedings cannot be attacked or questioned collaterally by third parties." (See *Rudolf v. McDonald*, 6 Neb., 166.)

The defendants in the case of M. E. Smith & Co. never called the attention of the court in which the case was pending to the fact that the seal was omitted from the order of the county judge granting the attachment therein, although they both appeared in the action. Had the court's attention been challenged to the defect, doubtless it would have permitted an amendment. As the defendants in that suit were satisfied, the defendants in error herein cannot be heard to complain. Our conclusion is that the records and files in the attachment cases should have been received in evidence, and that the court below erred in excluding the same. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. CHARLOTTE A. COCHRAN ET AL., V. MELVILLE R. HOPEWELL, JUDGE.

[FILED DECEMBER 16, 1892.]

1. **Bill of Exceptions:** TIME FOR PREPARATION: LIMITATION. The time within which a party must prepare and serve a bill of exceptions begins to run from the final adjournment of the term of court at which the cause was decided, and not from the date of the formal entry of the judgment by the clerk upon the court journal.

2. ——: ——: ——. *Bickel v. Dutcher*, 35 Neb., 761, distinguished.

3. ———: ———: ———. When a cause is tried to the court, without the intervention of a jury, at one term of the district court and taken under advisement, and final decree rendered at a subsequent term of said court, the time for settling of a bill of exceptions begins to run from the close of the term at which the decision was rendered.

4. Record: CONCLUSIVENESS OF RECITALS: REMEDY FOR ERRONEOUS RECORD. The recitals of the record of a trial court are conclusive upon the parties as to the term at which a decree was rendered. If the record is incorrect, the remedy is by a proper proceeding in the trial court to secure a correction of the same.

ORIGINAL application for *mandamus*.

Brome, Andrews & Sheean, for relators.

B. G. Burbank, contra.

NORVAL, J.

This is an original application for a writ of *mandamus* to compel the defendant to sign a bill of exceptions in the case of Thomas Hines against the relators and others, which was tried before respondent in the Douglas county district court. The action above mentioned was to foreclose a mechanic's lien. Affidavits were filed to the effect that the cause was tried at the May, 1891, term of said court, and the decision was orally announced in open court in the presence of the parties on the 8th day of August, 1891, the same being a day in said May term of court; that on the same day a draft of the decree was prepared by the attorney for the successful party, which was presented to the attorney for the relators as well as the attorneys for all the other parties interested in the litigation, who approved the same; that immediately thereafter, and on the said 7th day of August, the said draft of the decree was filed with the clerk of the district court, who indorsed thereon the following: "Filed August 8, 1891. Frank E. Moores, Clerk." That, by the terms of the decree so

drawn, relators were given forty days from the rising of the court to prepare and serve their bill of exceptions; that the May term of the district court of Douglas county finally adjourned on the 15th day of August, 1891; that the said draft of the decree was not presented to respondent for his signature until the 30th day of December, 1891, which was a day in the September term, when the draft of the decree was approved by him, and it was then recorded in the journal of the district court as a final decree as of the September term; that the September, 1891, term of the district court of Douglas county adjourned without day on the 23d day of January, 1892; that on the 20th day of March, 1892, and within forty days from the rising of said court for said term, relators caused to be prepared and served upon counsel for the adverse parties a true bill of exceptions, who refused to receive the same, and declined to propose any amendments thereto; that the proposed bill was thereupon presented to respondent for his signature, who refused to sign or allow the same on the ground that it had not been served upon the adverse parties within forty days from the final adjournment of the term of court at which the decree was rendered.

It is conceded that the proposed bill is correct. Was it completed, served upon the parties in interest, and presented to the judge for his signature within the time allowed by statute? Section 311 of the Code of Civil Procedure, relating to bills of exceptions, provides that "When the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment of the court *sine die*, and submit the same to the adverse party or his attorney of record for examination and amendment if desired," etc. Manifestly under the above statutory provision the time within which a party must complete and

serve his bill of exceptions begins to run from the final adjournment of the term of court at which the trial is had and the decision rendered. This is conceded by respondent, but he insists that the case of *Hines v. Cochran et al.* was tried and decided at the May, 1891, term of the district court, therefore relators only had forty days from the adjournment *sine die* of said term to reduce their exceptions in the case to writing and serve the same upon the adverse parties. The case of *Horn v. Miller*, 20 Neb., 98, is cited to sustain his contention. It was there held by a divided court, that the time in which an appeal to the supreme court must be taken commences to run from the date on which the trial court orally announces its conclusion and judgment and not from the day on which the judgment is actually and formally entered on the journal by the clerk in vacation. The decision in *Horn v. Miller* is no longer to be regarded as a precedent on that question, since that case has, in direct terms, been overruled by this court in the opinion written by Judge POST in *Bickel v. Dutcher*, 35 Neb., 761, wherein it is stated that "the time within which an appeal may be taken from a decree of the district court does not begin to run until such decree has been entered of record, so that it is within the power of the appellant to comply with the statute regulating appeals by filing in this court a certified transcript of the proceedings of the district court." The question involved in *Bickel v. Dutcher* was carefully considered, and we are satisfied the rule there announced is sustained both by reason and the weight of authority, and should be followed in similar cases. But we are unwilling to hold that the time begins to run for the settling of a bill of exceptions from the date of the formal entry of the judgment or decree by the clerk upon the journal of the court. The statutory provision which limits the time for appeals from the district court differs materially from the one which governs the settling of bills of exceptions. The former requires that the transcript must

be filed in the office of the clerk of the supreme court "within six months after the date of the rendition of the judgment or decree or the making of the final order," while the section of the statute relating to bills of exceptions above quoted provides that the party must reduce his exceptions to writing "within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment of the court *sine die*." In the one case time is computed from the rendition of the judgment or decree, while in the other it is from the date of the final adjournment of the term. There is good reason for holding that for the purpose of taking an appeal a judgment is not considered rendered until it is actually entered upon the record, since until such entry is made there is no authentic record evidence that a judgment has been rendered in the case. It is impossible for a party to perfect an appeal before he can obtain a transcript of the proceedings. The settling of a bill of exceptions does not depend upon the formal entry of a judgment or decree upon the journal of the court. We know that it frequently happens that judgments are not actually spread at large upon the records until after the adjournment of the term at which they were orally announced by the court, when they are entered by the clerk upon the court journal as of the date and of the term at which the decisions were rendered. In such a case the time of settling a bill of exceptions begins to run from the final adjournment of the term of court, and not from the date of the formal entry of the judgment by the clerk.

At which term of the district court was the decree in *Hines v. Cochran* rendered? If the determination of the question depended upon the affidavits filed in this case, we would be forced to the conclusion that the decree was pronounced at the May, 1891, term. But there is in the record other evidence, of a higher character, of the date of the rendition of the decree. A certified copy of the journal

entry of the district court in said cause is before us, which recites that "At the September term of said court, and on the 30th day of December, 1891, a decree was rendered herein as follows:

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"This cause came on to be heard at a previous term of this court upon the petition of the plaintiff, the answer and cross-petitions of * * *, the several replies filed herein, and the evidence, and being submitted to the court, and the court, being fully advised in the premises, find * * * and forty days from the rising of the present term to prepare and serve a bill of exceptions herein."

It appears from the above journal entry that the cause was tried at the May, 1891, term, and the decision was rendered at the following September term. The record is conclusive as to the time the decree in question was rendered, and neither party can contradict the statements of the record by affidavits or other evidence. If the record is incorrect as to the time the decree was rendered, the remedy is by a proper proceeding in the trial court to correct the error, if one was made. The record of the trial court imports absolute verity. (*Haggerty v. Walker*, 21 Neb., 596; *Worley v. Shong*, 35 Neb., 311; *McAllister v. State*, 81 Ind., 256.) That the cause was tried at the May term of the district court is quite immaterial. The time of completing and serving a bill of exceptions in the case did not commence to run from the adjournment of that term, for the reason no decision was made until the succeeding term. In a cause tried to the court without the intervention of a jury at one term and decided at a subsequent term, it has been held that the party has the statutory time for reducing his exceptions to writing after the close of the term at which the decision was made. (*Wineland v. Cochran*, 8 Neb., 528.)

The conclusion is irresistible, that the proposed bill of exceptions in the case was prepared and served in ample time, and that the respondent should have signed and allowed the same. This being the opinion of the court, we doubt not that the respondent will promptly discharge such duty and not wait for a writ to issue. The writ therefore will be withheld.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THOMAS J. HINES, APPELLEE, V. CHARLOTTE A. COCHRAN, APPELLANT, IMPLEADED WITH PHILADELPHIA MORTGAGE & TRUST COMPANY ET AL., APPELLEES.

[FILED DECEMBER 16, 1892.]

1. **Appeal:** GROUNDS FOR DISMISSAL: FAILURE TO SETTLE BILL OF EXCEPTIONS. It is the settled law of this state that an appeal will not be dismissed on the ground that no bill of exceptions has been settled and allowed.

2. **Practice in Supreme Court:** MOTION TO DISMISS APPEAL: MERITS OF CAUSE NOT CONSIDERED. On a motion filed by an appellee to dismiss an appeal out of this court, we will not consider the merits of the action, but will only inquire whether an appeal lies, and whether it is properly taken and perfected.

MOTION to dismiss appeal from a judgment rendered by the district court for Douglas county.

B. G. Burbank, for the motion.

H. E. Cochran, contra.

NORVAL, J.

This is an appeal from the district court of Douglas county. The transcript contains the pleadings and decree, and a draft of a bill of exceptions which has not been signed and allowed either by the trial judge or the clerk of the district court. The appellees move to dismiss the appeal for the reason that no bill of exceptions was settled by the district court as required by law. The motion must be denied. It has been settled by repeated decisions of this court that a motion to dismiss an appeal or proceeding in error will not be sustained on the ground that no bill of exceptions has been settled and allowed. (*Mewis v. Johnson Harvester Co.*, 5 Neb., 217; *Hollenbeck v. Tarkington*, 14 Neb., 430; *Baldwin v. Foss*, Id., 455; *Carlson v. Beckman*, 35 Neb., 392.)

There may be other questions presented by the record for consideration not depending upon a bill of exceptions. On a motion filed by an appellee to dismiss an appeal, this court will not consider the merits of the controversy, but will only inquire whether an appeal lies, and whether it is properly taken and perfected. The motion to dismiss is

OVERRULED.

THE other judges concur.

GEO. W. WHITLOCK, APPELLEE, V. WILLIAM GOSSON ET AL., APPELLANTS.

[FILED DECEMBER 16, 1892.]

1. **Homestead:** MORTGAGE. A mortgage of the homestead of married persons in this state is of no validity as against the homestead right unless signed and acknowledged by both husband and wife.

2. ———: INSANE WIFE: VALIDITY OF MORTGAGE EXECUTED BY HUSBAND. G., the head of a family consisting of himself and three children, but having an insane wife in another state, mortgaged the family homestead, which was exempt under the laws of this state. *Held*, That the mortgage is void as to the homestead right.

3. ———: ———: ———: FORECLOSURE: ESTOPPEL. The mortgage in such case being void for want of power to incumber the homestead, neither the husband nor wife will be thereby estopped to deny its validity in a foreclosure proceeding by the mortgagee.

4. ———: MORTGAGE: FORECLOSURE. Where the answer in an action of foreclosure puts in issue the validity of the mortgage on the ground that the property in question is exempt as a homestead, and the defendants, husband and wife, did not join in its execution, a decree will not be allowed for the sale of so much of the homestead as exceeds $2,000 in value, unless the value of the property is alleged by the plaintiff or put in issue by proper pleadings.

APPEAL from the district court for Madison county. Heard below before POWERS, J.

Allen, Robinson & Reed, for appellants:

Mortgages or conveyances of the homestead without the signature and acknowledgment of both husband and wife are void. (*Swift v. Dewey*, 20 Neb., 107; *Larson v. Butts*, 22 Id., 370; *Betts v. Sims*, 25 Id., 166; *Aultman v. Jenkins*, 19 Id., 209; *McCreery v. Schaffer*, 26 Id., 173; *Stinson v. Richardson*, 44 Ia., 375; *Howell v. M'Crie*, 14 Pac. Rep. [Kan.], 260.) A deed or mortgage made in violation of statute, or with reference to a prohibited transaction, is void and will not work an estoppel. (*Mason v. Mason*, 140 Mass., 63; *James v. Wilder*, 25 Minn., 305; *Shevlin v. Whelen*, 41 Wis., 88; *Dunlap v. Thomas*, 28 N. W. Rep. [Ia.], 638; *Merriam v. Boston*, 117 Mass., 241.) The mortgage in this case being in violation of statute is void, and does not estop either Gosson or his wife to deny its validity in a foreclosure proceeding. (*Hall v. Loomis*, 30 N.

W. Rep. [Mich.], 374; *Myrick v. Bill*, 37 Id. [Dak.], 369; *Conway v. Elgin*, 38 Id. [Minn.], 370; *McClure v. Braniff*, 39 Id. [Ia.], 171; *Herron v. Knapp*, 40 Id. [Wis.], 149; *Bank v. Dickinson*, 10 S. E. Rep. [Ga.], 446; *Timothy v. Chambers*, 11 Id. [Ga.], 598; *Franklin Land Co. v. Wea Gas, Coal & Oil Co.*, 23 Pac. Rep. [Kan.], 630.) The domicile of the wife follows that of the husband. (Jacobs, Domicile, sec. 214; *Republic v. Young*, Dallam [Tex.], 464; *Russell v. Randolph*, 11 Tex., 460; *Lacey v. Clements*, 36 Id., 661; *Johnston v. Turner*, 29 Ark., 280; *Burlen v. Shannon*, 115 Mass., 438.) The fact that the wife does not live with her husband on the homestead does not destroy her homestead interest in the premises. (*Larson v. Butts*, 22 Neb., 370; *Herron v. Knapp*, 40 N. W. Rep. [Wis.], 149; *Sherrid v. Southwick*, 5 N. W. Rep. [Mich.], 1027; Schouler, Dom. Rel., 54; Story's Conflict of Law, 40, 41; 9 Am. & Eng. Ency. Law, p. 812, sec. 4.)

Barnes & Tyler, contra.

POST, J.

There is in this case one question which, according to our conclusion, is decisive of the controversy, viz., the effect of a mortgage by a husband, the head of a family, upon the homestead in this state, having at the time an insane wife in another state. From the pleadings and proofs it appears that the defendant William Gosson, with his three children, removed from Illinois to this state in the year 1879, and has ever since resided upon and occupied the premises in controversy as a homestead, his family in this state consisting of his three children, whose ages do not appear, and a housekeeper. At the time of his removal to this state the defendant had a wife, Margaret Gosson, who was and still is insane and an inmate of an asylum for the insane in the state of Illinois, and who is still the wife of said defendant. It further appears that said Margaret Gos-

son has never resided upon the premises and never acquired an actual residence in this state. It has been repeatedly held by this court that mortgages or conveyances of the homestead are void unless signed and acknowledged by both husband and wife. (*Aultman v. Jenkins*, 19 Neb. 209; *Swift v. Dewey*, 20 Id., 107; *Larson v. Butts*, 22 Id., 370; *Betts v. Sims*, 25 Id., 166; *McCreery v. Schaffer*, 26 Id., 175.) The rule is also well settled by the decisions of this and other courts, that a wife who is living separate and apart from her husband will not from that fact alone be held to have abandoned or forfeited her interest in the homestead. (*Larson v. Butts, supra; Herron v. Knapp*, 72 Wis., 553; *Castlebury v. Maynard*, 95 N. Car., 281.) The pertinent inquiry, therefore, is, whether the rule stated applies to the case under consideration. We are clearly of the opinion that it does, both upon reason and authority. The authorities are not harmonious on the question of the rights of a wife with respect to the homestead after a voluntary abandonment of the family without cause, although the decisions under statutes similar to ours are uniform to the effect that the mere absence of the wife from the state, through no fault of her own, will not be construed as an abandonment of the homestead so as to authorize a conveyance or incumbrance thereof by the husband alone. (*Chambers v. Cox*, 23 Kan., 393; *Ott v. Sprague*, 27 Id., 620; *Alexander v. Vennum*, 61 Ia., 160; *Sherrid v. Southwick*, 43 Mich., 515.)

In *Alexander v. Vennum*, A. recovered judgment against M., the owner of a homestead in Iowa. The latter conveyed to V., the defendant, his insane wife joining in the execution and acknowledgment of the deed, and immediately thereafter abandoned the property as a homestead. It was held that the conveyance by M. was void, on account of the insanity of his wife, and that a sheriff's deed to A. in pursuance of an execution sale to satisfy the judgment in his favor passed the title to the property.

The statutory provision for the conveyance or incum-

brance of the homestead is exclusive. The language is, "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Here is a plain prohibition against the incumbrance of the homestead without the joint act of both husband and wife. It contains no exception with respect to an absent or insane husband or wife. Had Mrs. Gosson, defendant's wife, been in fact a resident of this state and her domicile the premises in controversy, it is plain that she would have been incapable of relinquishing her homestead right, and a mortgage executed by her would have been ineffectual for the purpose of creating a lien thereon. And it requires no argument to prove that on account of her absence from the state she could accomplish by indirection that which she was incapable of doing by her voluntary act.

2. It is contended, however, that the defendant William Gosson is now estopped to claim the property as a homestead by reason of having represented himself to be a single man. He is in the mortgage described as a single man, and it is alleged that the credit represented by the mortgage was given on the faith of his statement to that effect. Defendant on the other hand denies that he ever represented to plaintiff that he was a single man and alleges that the latter accepted the mortgage with full knowledge of all the facts. The evidence upon that issue is conflicting and does not call for an examination here. Estoppel will not supply the want of power, or make valid an act prohibited by express provisions of law. The statute in effect declares a conveyance or incumbrance of the family homestead by the husband alone void not only as to the wife, but also as to the husband himself. Therefore neither is estopped from asserting the homestead right as against the grantee or mortgagee. Such is the view sanctioned by the clear weight of authority and supported by the soundest reasoning. (*Connor v. McMurray*, 2 Allen [Mass.], 202; *Barton*

v. Drake, 21 Minn., 299; *Alt v. Banholzer*, 39 Id., 511; *Crim v. Nelms*, 78 Ala., 604; *Morris v. Ward*, 5 Kan., 239; *Ayers v. Probasco*, 14 Id., 190; *Hait v. Houle*, 19 Wis., 475; *Bruner v. Bateman*, 66 Ia., 488; *Dye v. Mann*, 10 Mich., 291; *Sears v. Dixon*, 33 Cal., 326; *Green v. Marks*, 25 Ill., 221; Thompson on Homesteads and Exemptions, 474; Smith on Homesteads and Exemptions.) To hold that such a conveyance could be enforced as against the husband while void as to the wife and children, would be not only absurd in the extreme, but would be a flagrant usurpation of legislative powers.

3. The decree of foreclosure is defended by counsel for appellee on the ground that the property in question exceeds $2,000 in value, and that the mortgage is valid as to the excess over and above that amount. The value of the homestead is, we think, under the issues in this case wholly immaterial. It is not doubted that in a proper proceeding the homestead property in excess of the statutory limit may be subjected to the satisfaction of a mortgage by the husband. But if such relief is sought it should be by pleadings which put in issue the value of the homestead. The case of *Swift v. Dewey*, 20 Neb., 107, was in a proceeding in the nature of a creditor's bill and is therefore not in point. (See *Black v. Lusk*, 69 Ill., 74; Thompson on Homesteads and Exemptions, 481.) We think, however, that the claim of appellee with respect to the value of the property is not sustained by the evidence in the record. The present value of the homestead, according to the preponderance of the evidence, is between $1,800 and $2,000, certainly not to exceed the amount last named. The decree of foreclosure will be reversed and the cause remanded to the district court with directions to enter judgment for the plaintiff for the amount of the notes introduced in evidence.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JAMES DAILEY, APPELLEE, V. CATHERINE KINSLER, APPELLANT, ET AL.

[FILED DECEMBER 16, 1892.]

1. **Bona Fide Purchaser of Real Estate:** NOTICE: PLEADING. A defendant who claims protection as a *bona fide* purchaser of real estate without notice of the plaintiff's equities is required to deny such notice, although not alleged in the petition.

2. **Real Estate:** PAROL TRUSTS: STATUTE OF FRAUDS: PLEADING. Where, in an action to set aside certain conveyances through which the defendant claims title to lands, a court of equity has entered final decree in accordance with the prayer of the petition and quieting the title of the plaintiff, the latter may plead the statute of frauds in a subsequent action by the grantor of the defendant to establish a parol trust claimed to have been created in his favor at the time of the conveyance by him to the defendant.

3. ——: ——: ——: ——: CASE STATED. In an action by D. against F., the holder of the legal title to the land in dispute, to set aside certain conveyances through which the latter claimed title, a final decree was entered for the plaintiff in accordance with the prayer of his petition, which decree still remains in force. Subsequently K., F.'s grantor, intervened and filed an answer in which it was alleged that the deed to F. was without consideration, and executed and delivered in accordance with a contemporaneous verbal agreement by which F. was to reconvey to K. on demand of the latter. *Held*, That D. may plead the statute of frauds as a defense against K., although F. may be willing to recognize the trust.

4. **Evidence** examined, and *held*, not to establish a trust in parol.

REHEARING of case reported in 31 Neb., 340.

Mahoney, Minahan & Smyth, for appellant.

Switzler & McIntosh, contra.

POST, J.

This is an appeal by the defendant Catherine Kinsler from a decree of the district court of Douglas county.

Judgment was entered at the January, 1891, term affirming the decree below. (See *Dailey v. Kinsler*, 31 Neb., 340.) Subsequently, however, on the motion of the appellant, a rehearing was allowed. The reliance of the appellant at this time is upon two propositions, viz.:

First—That the original petition did not state a cause of action against Feeney, her co-defendant, hence the question of title in him to the property in controversy was not concluded by the decree of the district court.

Second—There is no such privity between the plaintiff and Feeney in relation to said property as will entitle the former to avail himself of the provisions of the statute of frauds as against her; that the right to interpose the statute is personal to Feeney, and since he is willing to recognize the alleged trust in her favor, the plaintiff should not be heard to complain.

The record shows that the decree against Feeney was by default. Such a judgment or decree is conclusive as to the cause of action alleged only. By a failure to answer, a defendant does not confess the allegations of a petition which fails to state a cause of action. This is an elementary rule of pleading. The particular objection to the petition in this case is that it is not therein distinctly charged that Feeney had notice of the alleged equities of the plaintiff at the time he took the deed for the property. The allegation of the petition is as follows: "Said James H. Feeney claims to own said property at this time by virtue of a deed from said defendant, Catherine Kinsler, under date of May 2, 1884, which said conveyance came to plaintiff's knowledge only on May 8, 1884, and it was made without any consent on his part." The petition also contains a prayer for general relief and for the quieting of the plaintiff's title as against both defendants. The plaintiff was not required to anticipate a defense by Feeney on the ground that he was a *bona fide* purchaser. As said by Chancellor Walworth in *Lowry v. Tew*, 3 Barb. Ch. [N. Y.],

414, "It is a general rule of equity pleading that a defendant who claims protection as a *bona fide* purchaser without notice must deny such notice, although not distinctly alleged in the bill." And in *Denning v. Smith*, 3 Johns. Ch. [N. Y.], 345, it is said that "The pleader must deny fully, in the most precise terms, every circumstance from which notice could be inferred." (See also *Manhattan Co. v. Evertson*, 6 Paige Ch. [N. Y.], 457; *Harris v. Fly*, 7 Id., 421; *Bowman v. Griffith*, 35 Neb., 361.) It is evident that the petition stated a cause of action against Feeney, and if he claimed the rights of a *bona fide* purchaser, he was bound to allege and prove purchase in good faith without notice of the equities of the plaintiff.

2. In determining whether the statute of frauds is available to the plaintiff in this case, the fact should not be overlooked that both the appellant, Miss Kinsler, and Feeney, her grantee, were, at the inception of this controversy, joined as defendants. The former was served by publication and the latter personally. Both were defaulted and a decree entered quieting the plaintiff's title and perpetually enjoining both defendants from in any way conveying or incumbering the property. That decree was, on the motion of the appellant, set aside as to her, but continues in full force and effect as to Feeney, who afterward, regardless of the injunction, conveyed the property to the appellant. An answer was subsequently filed by the appellant, in which, after denying the allegations of the petition, she alleged that she was the equitable owner of the property, and that the deed to Feeney was executed with the distinct understanding that the latter would reconvey the property to her upon demand. It appears from the evidence in the bill of exceptions that there was no written agreement by Feeney to reconvey. Nor is it even contended that the alleged trust could have been enforced by the appellant as against him. Did the plaintiff, by virtue of the decree, succeed to the rights of Feeney, so that he may now inter-

pose the plea of the statute to defeat the alleged trust in favor of the appellant? It should be noted in this connection that the decree does not in terms command a conveyance by Feeney to plaintiff. But that omission we regard as unimportant. It is in all other respects in the usual form and clearly sufficient to bind the defendant therein and all who are in privity with him in respect to the property affected thereby. (Wells, Res Adjudicata, 28; *Adams v. Barnes*, 17 Mass., 365; *Kelly v. Donlin*, 70 Ill., 386.)

It was held in *Rickards v. Cunningham*, 10 Neb., 417, and *Hansen v. Berthelsen*, 19 Id., 433, that the defense of the statute of frauds is personal, and available only to the party sought to be charged and those in privity with him. This we understand to be the rule generally accepted by courts in giving effect to the provisions of the statute. The term privity denotes mutual or successive relationship to the same rights of property. (1 Greenleaf on Ev., 198.) By the decree in his favor the plaintiff must be held to have succeeded to the rights of Feeney, whatever they may have been, in the property in controversy. As said by Judge Day in *McDonald v. Gregory*, 41 Ia., 516: "If the rights of two parties have been determined respecting a particular subject and the subject-matter of the suit is afterwards assigned, the assignee takes it affected by the prior adjudication and may avail himself of its advantages and is subject to its burdens." *Rickards v. Cunningham* and *Hansen v. Berthelsen* are not in conflict with the view here expressed. The point decided in the first named case is, that an execution plaintiff cannot defeat a sale of personal property by the defendants to a third party on the sole ground that such sale is in violation of the provisions of the ninth section of the statute of frauds, and in the last named case the only question discussed or decided was whether the grantee on the facts in that case could plead the statute as a defense. The decision, both in the district

court and in this court, was upon the ground that the grantee of Berthelsen took with notice of the plaintiff's rights. The question of the application of the statute was not necessarily involved, and whether the grantee could in such a case interpose the statute for his protection is a question not raised in this controversy, and on which the writer does not wish to be understood as expressing an opinion.

3. There is a failure of proof on the part of the appellant to sustain the allegations of a trust in her favor. The conveyance to Feeney appears to have been voluntary on her part, unaccompanied by any promise to reconvey or understanding to that effect. She is asked, while testifying in her own behalf, how she came to execute the deed to Feeney, to which she answered, "I was sick and thought I was going to die at the time, and I wanted to have some money to bury me, and that is the reason I gave the deed at that time, but I didn't go away; I was sick and didn't expect to get well, and I made the deed for money enough to bury me out of it." Again, on redirect examination, she is asked to state whether or not there was any understanding between herself and Feeney, at the time the deed was executed, with respect to a reconveyance of the property, to which she answered, "When I made the deed to Mr. Feeney I had no idea of anything at all, only that I made it on the conditions I spoke of." This evidence does not prove an agreement to reconvey and is clearly insufficient to establish a trust. The decree of the district court is right, therefore, and is

AFFIRMED.

THE other judges concur.

GEORGE BETTS ET AL. V. F. L. SIMS.

[FILED DECEMBER 16, 1892.]

1. **Real Estate:** PAYMENT OF MORTGAGE BY PURCHASER: FAILURE OF TITLE: SUBROGATION. A purchaser of real estate who has paid off a prior mortgage thereon in the belief that he was the owner of the property purchased, will, on a failure of his title, be subrogated to the rights of the mortgagee as against the mortgagor and others who are in equity liable for the mortgage debt.

2. ——: ——: ——. In an action by the plaintiffs, husband and wife, to quiet the title to their homestead against the defendant who claimed title through a conveyance executed by the husband alone, it was disclosed that B., who held title through the deed mentioned, at the request of plaintiffs, mortgaged the premises to a third party, and with the proceeds thereof paid and satisfied two prior mortgages thereon executed by both plaintiffs; and that the defendant, who held by certain *mesne* conveyances from B., believing himself to be the owner, paid off the mortgage executed by the latter. *Held*, That defendant should be subrogated to the rights of the several mortgagees and is entitled to a decree of foreclosure in the action to quiet title.

3. ——: CONVEYANCE OF HOMESTEAD: PURCHASE OF APPARENT TITLE AT REQUEST OF REAL OWNERS: RIGHT OF PURCHASER TO RECOVER PURCHASE MONEY: SET-OFF. Plaintiffs, husband and wife, induced P., defendant's grantor, to purchase real estate from B., who held the apparent title thereto, for their benefit, and at their request, agreeing to purchase a part thereof from him at the price paid B., as soon as they could raise the necessary funds. P. accordingly purchased the property from B. for $1,000 in money and assumed a prior mortgage thereon amounting to $1,150, for which plaintiffs were liable. Plaintiffs subsequently brought an action to quiet their title to the same property against the defendant on the ground that it was their homestead, and a conveyance through which both B. and P. must trace title was executed by the husband only. *Held*, On the facts found, that the $1,000 paid by P. for the land should in equity be treated as an advancement by him for the benefit of plaintiffs, and that defendant, P.'s assignee, was entitled to offset that amount, with interest, against the claim of plaintiffs for rents and waste.

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

Hall, McCulloch & English, for plaintiffs in error.

Robert Ryan, contra.

POST, J.

This controversy had its inception in an action by the plaintiffs in error in the district court of Saline county to quiet their title to the property in controversy, to-wit, a quarter section of land in said county, as against the defendants in error. They alleged in their petition that the defendants claimed title through a deed from George Betts which was void and insufficient to pass any title whatever, for the reason that said property was at the time in question the homestead of the said George Betts and his wife Eliza, who did not sign or join in the execution thereof. The defense relied upon was an estoppel as against both plaintiffs. On a final hearing the district court dismissed the petition for want of equity and entered a decree for the defendant. An appeal was taken to this court, where the decree of the district court was reversed and judgment entered here for plaintiffs in accordance with the prayer of the petition. (See *Betts v. Sims*, 25 Neb., 166.) The facts involved in that controversy, so far as they are material to this, are fully stated in the opinion cited above. Subsequently the defendant in error made application to this court for a modification of the decree against him so as to allow him to be subrogated to the rights of Charles Bidleman, who held a mortgage on the property in controversy, and which he, defendant, had paid in full while in good faith, relying upon his title through the aforesaid deed from George Betts. Said application was granted, but it appearing that an accounting would be necessary in order to fully determine the rights of the parties with respect to

said claim, the case was remanded to the district court for hearing upon amended pleadings. It is not deemed necessary to make an extended reference to the pleadings, as the findings and decree of the district court, which are set out below, are responsive to all the issues presented, and plainly indicate the contentions of the parties at the hearing. The findings and decree are as follows:

"And now on this 24th day of November, 1890, the same being a portion of the October term of this court, this cause came on to be decided upon the submission heretofore had of said cause, and the court, being now fully advised in the premises, finds that the findings of fact heretofore made by this court are, and each of them is, fully sustained by the evidence submitted upon this hearing. This court further finds that the defendant F. L. Sims, believing in good faith that he was the owner at the time of the southeast quarter (S. E. ¼) of section eight (8), in township eight (8) north, range one (1) east, sixth (6) principal meridian, did, on the 4th day of March, 1883, pay off the amount due on a certain mortgage made on said premises by Joseph Brown to Charles Bidleman of date September 1, 1880, which said mortgage was duly filed for record in the office of the county clerk of Saline county, Nebraska, on September 24, 1880, and duly recorded in Mortgage Record No. 11, on pages 388 and 389 of said office. That said mortgage was made with the knowledge and assent and at the request of George Betts and Eliza Betts, and the proceeds were used for their benefit, and in making said mortgage the court finds that Joseph Brown was acting as the trustee of said George Betts and Eliza Betts. * * * That the amount so paid on March 4, 1883, by F. L. Sims was eleven hundred and fifty dollars, with eight per centum per annum interest thereon from the preceding 1st day of September, which interest so paid was in amount fifty-seven dollars, and that the said F. L. Sims is entitled to be subrogated as to said

mortgage and its lien, enforcement, and remedies in respect thereto to all the rights which the said Charles Bidleman could now assert if he held said mortgage unpaid and undischarged. The court therefore finds that F. L. Sims, as to said premises above described, is entitled to the relief by him prayed, and the foreclosure of said mortgage, as though in form assigned by Charles Bidleman to said F. L. Sims, and to an order of sale, under which said premises shall be sold to pay the amount above found due, to-wit, the sum of eleven hundred and ninety-seven dollars, with interest thereon at eight per centum per annum to the present date, in all to this date the sum for which F. L. Sims is entitled to the relief as aforesaid is nineteen hundred and thirty-six $\frac{45}{100}$ dollars, to draw eight per centum interest per annum from this date. The court further finds that the said premises were conveyed by F. M. Patton to F. L. Sims with all his right, title, interest, claim that he held against George Betts and Eliza Betts and Joseph Brown as to the lands above described; that said George Betts and Eliza Betts requested, urged, and induced said F. M. Patten to purchase said premises from Joseph Brown and as part consideration to pay, and the said Patton did therefore pay, to said Brown for the use and benefit of, and upon the direction of, George Betts and Eliza Betts the sum of one thousand dollars ($1,000) cash, and assuming the mortgage to Charles Bidleman for $1,150; that said one thousand dollars was paid as aforesaid September 7, 1882, by F. M. Patton, and that as to the said sum of one thousand dollars F. L. Sims is entitled to be subrogated to the rights of his grantor, F. M. Patton, and to have computed interest thereon at the rate of seven per centum per annum, which sum of one thousand dollars and interest should be credited upon the amount found due in favor of George Betts and Eliza Betts as hereinafter stated. The court finds further that the said F. L. Sims should account for the rental value of the above premises from the time he took possession of the

same until dispossessed by the decree of the supreme court, a period of six years, at the rate of one $\frac{15}{100}$ dollars per acre per year, or in all one hundred and eighty-four dollars per year, said rent being due at the end of each year, and to draw seven per centum interest from the said times, and the said Sims should also account for the granary removed from said premises at its fair value, which the court find, to be one hundred dollars, and for the stable removed, at its fair value, which this court finds to be ten dollars, and for the value of all trees removed from said premises, twenty-two $\frac{75}{100}$ dollars, and the court, being without reliable data upon which to figure the time for which Sims should pay interest on the three items last mentioned, assumes that it should be for three years at seven per centum per annum, which amounts to twenty-seven $\frac{87}{100}$ dollars. The court further finds that the above named amounts (excluding the Bidleman mortgage) with seven per centum interest thereon should be treated as a set-off as to the one thousand dollars paid by F. M. Patton as above stated, with seven per centum interest thereon from the date of said payment, which was on September 7, 1882; that upon that basis the court finds that the said one thousand dollars, with seven per centum interest thereon from September 7, 1882, computed thereon, exceeds the total amount for which F. L. Sims should account as aforesaid, including interest thereon as above found due, but this court finds no prayer for relief in favor of F. L. Sims as to said excess on said premises nor for reimbursement for taxes paid or improvements made by Sims, and therefore finds that any relief on that score must be denied. It is therefore ordered, adjudged, and decreed by this court that F. L. Sims be entitled to be and is subrogated to the rights of Charles Bidleman as to the southeast quarter (S. E. $\frac{1}{4}$) of section eight (8), township eight (8) north, range one (1) east, sixth principal meridian, as against George Betts and Eliza Betts and all parties claiming under or through them or either of them;

that the mortgage in favor of Charles Bidleman be declared in full force and virtue in favor of F. L. Sims by subrogation from September 1, 1880; that said mortgage be foreclosed as prayed, in favor of F. L. Sims for the amount now due thereon, which the court finds to be nineteen hundred and thirty-six $\frac{45}{100}$ dollars, to draw eight per centum per annum from this date."

The first point made in the brief of plaintiffs in error is that the order of this court modifying the decree in their favor did not include the so-called Patton claim; hence, the question whether the defendant should be subrogated to the rights of Patton with respect to money paid by the latter to Brown, his grantor, was not involved in the second hearing. It is not necessary to look to the order remanding the case for the issues, since the question of the defendant's right to offset the $1,000 paid by Patton to Brown at the special instance and request of the plaintiffs was distinctly raised by the pleadings in the supplemental proceeding.

2. The evidence before the district court was not preserved, hence the only question now open for consideration is whether the decree is warranted by the facts as found by the court. Of the right of the defendant to be subrogated to the equities of Bidleman there can be no doubt. From the findings of the court on the first hearing, which are set out at length in the opinion previously filed in the case, and which the court in this proceeding finds to be true, it appears that in the year 1876 the plaintiffs mortgaged the land in controversy to the New England Mortgage Security Company to secure the sum of $600, borrowed by them, which indebtedness bore interest at the rate of ten per cent, and in the year 1877 they mortgaged said land to one R. S. Bentley to secure the sum of $500, borrowed by them, which indebtedness bore interest at the rate of twelve per cent. Both plaintiffs signed and acknowledged the said mortgages. In the year 1880 plaintiffs procured

said Bentley, to whom the land had in the meantime been deeded as security, for the $500 loan, together with other money advanced by him, to convey said land to Joseph Brown, who assumed said mortgages as part of the consideration therefor. Brown, after the conveyance to him, mortgaged the premises to Bidleman for $1,150, with the proceeds of which he paid off and satisfied the two mortgages executed by plaintiffs. The defendant, who subsequently purchased from Patton, Brown's grantee, paid in full and caused to be satisfied of record the mortgage to Bidleman. Plaintiffs having invoked the equitable powers of the court must, as a condition to relief, discharge the obligation which in equity they owe to the defendant. "The rights of subrogation," says Chancellor Kent, "is founded upon natural justice and is recognized in every cultivated system of jurisprudence." (*Cheesbrough v. Millard*, 1 Johns. Ch. [N. Y.], 412.) The court, therefore, did not err in awarding a decree of foreclosure for the amount of the Bidleman mortgage and interest thereon.

3. It is urged finally that the defendant was not entitled to be subrogated to the rights of Patton as to any claim for the $1,000 paid by the latter to Brown, and that the district court erred in allowing that amount as an offset against the sum of $1,236, found due them on account of rents and for waste by the defendant. By reference to the finding, set out above, it appears that plaintiffs requested and induced Patton to purchase the premises from Brown and to pay the $1,000 for their benefit and by their direction. It is further found that Patton conveyed said property to the defendant "with all his right, title, interest, and claim that he held against George Betts and Eliza Betts, as to the lands above described," etc. The facts as found amount to an assignment by Patton of whatever cause of action he may have had against plaintiffs, and which is available to the defendant in this action.

The next and only remaining question is that of the lia-

bility of plaintiffs to Patton for the $1,000 paid to Brown as part consideration for the property. By reference to the tenth finding, accompanying the original decree, it will be observed that plaintiffs were beneficially interested in the purchase of the land by Patton, that they were desirous of securing a part of the premises, but not having the necessary money, induced Patton to purchase it, agreeing to purchase a part of it from him at the price paid therefor to Brown. Construing the several findings together, it is apparent that the $1,000 in question should in equity be treated as an advancement by Patton for plaintiffs and for their benefit, and for which they should account in this action. It is not contended that this claim could be made a lien upon the property, nor is there a prayer for judgment for the excess remaining in defendant's favor after allowing plaintiffs credit for the amount found in their favor. The claim for rents of the property and for waste committed thereon does not partake of the character of the homestead, and is not shown to be exempt on other grounds. The decree is right and is

AFFIRMED.

MAXWELL, CH. J., concurs.

NORVAL, J., not sitting.

STATE OF NEBRASKA, EX REL. S. W. CHRISTY, V. HERMAN E. STEIN, COUNTY CLERK, AND L. L. JOHNSON, INTERVENOR.

[FILED DECEMBER 20, 1892.]

1. **Elections:** RETURN OF POLL BOOK: CERTIFICATION. Under the provisions of section 20, chapter 26, Compiled Statutes, it is the duty of judges and clerks of election to return a true list of the persons voting at that election and certify the same. It is also the duty of the judges and clerks to certify the aggregate number of votes cast for each person voted for, but it is no part of their duty to certify that certain persons received a specified number of votes as a democrat and a certain number as people's independent, or otherwise, and such certification has no force or effect.

2. ———: DUTY OF COUNTY CLERK: CANVASSING RETURNS: CERTIFICATE OF ELECTION: CLASSIFICATION OF VOTES. By section 46 of the above chapter it is made the duty of a county clerk, upon the reception of the returns from each election precinct, ward, etc., and within six days after the closing of the polls, together with two disinterested electors chosen by himself, to open the poll books and make abstracts of the votes cast * * * for members of the legislature from the county alone on one sheet, and "of votes for members of the legislature by districts comprising more than one county, on another sheet," and by section 48 the clerk is required to make out a certificate of election to the person having the highest number of votes. *Held*, That it was the duty of the clerk to issue a certificate to the person having the highest number of votes, and that he had no authority to classify the votes cast for a candidate as people's independent, democratic, or otherwise.

ORIGINAL application for *mandamus*.

L. G. Hurd, *G. M. Lambertson*, and *A. W. Agee*, for relator.

Thomas H. Matters, and *John M. Ragan*, *contra*.

MAXWELL, CH. J.

This is an application for a *mandamus* to compel the defendant Stein to issue a certificate of election to the relator.

The cause of action, as set forth in the amended affidavit, is as follows:

"S. W. Christy, the relator, being first duly sworn says and represents to the court, that he is a citizen of the United States, and of the state of Nebraska, and has been for more than two years last past, and continuously to the present time, a resident elector of the county of Clay, in said state, and is eligible to the office of state senator for the twenty-fifth senatorial district, in the state of Nebraska, which said senatorial district is composed of the counties of Clay and Hamilton and no others; that the respondent, Herman E. Stein, is, and has been for more than two years last past, the duly elected, qualified, and acting county clerk of the said county of Clay, which is the first county named in the law designating the said senatorial district.

"That at the general election in said senatorial district held on the 8th day of November, 1892, the relator was a candidate for the office of state senator, from said senatorial district, and that the several election boards in the several precincts in the county of Clay duly made returns to the respondent as county clerk of Clay county, Nebraska, of all the votes cast in the several voting precincts respectively, in said county including those cast for state senator for said twenty-fifth senatorial district, and that within six days after the 8th day of November, 1892, the said county clerk, together with two disinterested electors and residents in said county who were selected by him for that purpose, canvassed the votes of the several precincts in said county, which had been duly returned to him as such county clerk by the several election boards in said county, including the votes cast for state senator in said district, and made an abstract thereof as provided by law, and found that there had been cast in the several voting precincts in said county for state senator as follows:

CLAY COUNTY.

Name of Office.	Name of Candidate.	School Creek.	Eldorado.	Harvard, 1st dist.	Harvard, 2d dist.	Leicester.	Inland.	Lynn.	Lewis.	Sutton, 1st dist.	Sutton, 2d dist.	Sheridan.	Marshall.	Lone Tree.	Glenville.	Spring Ranch.	Fairfield, 1st dist.	Fairfield, 2d dist.	Edgar, 1st dst.	Edgar, 2d dst.	Logan.	Total.
Senator 25th District.....	S. W. Christy...	70	51	123	104	58	68	108	67	149	19	28	25	95	68	62	89	92	177	45	84	1582
"	L. L. Johnson, People's Ind..	.....	.....	25	18	77	.....	39	.....	38	128	.....	.....	.....	44	85	116	81	56	79	76	862
"	L. L. Johnson..	59	89	.....	.....	.....	75	.....	102	.....	.....	68	105	134	.....	.....	.....	.....	.....	.....	.....	632
"	L. L. Johnson, Democrat.....	.....	.....	35	40	15	.....	18	.....	56	7	.....	.....	.....	41	16	27	5	13	4	3	280

HAMILTON COUNTY.

		Orville.	Farmers' Valley.	Scoville.	Otis.	Beaver.	Valley.	Aurora.	Union.	Deep Well.	Bluff.	Cedar Valley.	South Platte.	Monroe.	Phillips.	Hamilton.	Grant.	City, 1st ward.	City, 2d ward.	City, 3d ward.		
"	S. W. Christy..	66	82	27	38	55	111	57	76	37	52	5	91	65	54	23	86	90	99	89		1203
"	H. W. Castle...	3	1	4	6	4	3	10	3	1	14	5	10	4	6	2	2	2	7	9		96
"	L. L. Johnson..	81	35	96	80	48	92	80	98	107	39	13	101	88	60	113	79	46	47	29		1232
"	Mart Castle	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	1	.....	.....	.....	.....	.....	.....	.....		1

For the relator, S. W. Christy 1,582
For L. L. Johnson, people's independent..... 862
For L. L. Johnson..... 632
For L. L. Johnson, democrat..... 280

which were all the votes cast for the office of state senator at said election in the county of Clay.

"The relator further states and shows to the court, that in the county of Hamilton the several election boards in the several voting precincts in said county duly made returns of all the votes cast at said election so held in said county on November the 8th, 1892, including the votes cast for state senator for said twenty-fifth senatorial district in said county, to the county clerk of said county, and that within six days after the said 8th day of November, 1892, L. W. Shuman, who was the duly qualified and acting county clerk of said county of Hamilton, together with two disinterested electors selected by him for that purpose, duly opened and canvassed the returns of the votes cast in said county including the votes cast for state senator in said twenty-fifth senatorial district, and made an abstract thereof as required by law, and found that the votes cast for state senator in said county were as follows, to-wit:

For the relator, S. W. Christy.....1,203 votes
For L. L. Johnson.....1,232 votes
For H. W. Castle..... 96 votes

"That the foregoing were all the votes cast in either of said counties for said office of state senator for said twenty-fifth senatorial district; that within six days after the holding of said election, on the 8th day of November, 1892, the county clerk of Hamilton county duly transmitted by mail to the county clerk of Clay county, Nebraska, Herman E. Stein, respondent herein, a certified copy of the abstract of all the votes cast in said county of Hamilton, for the office of state senator for said twenty-fifth senatorial district, and notwithstanding the relator herein received

the highest number of votes cast for any person for state senator in said senatorial district, as it appears by the returns made by the several election boards in said counties of Clay and Hamilton, composing said senatorial district, and as it appears by the canvass of votes and the abstracts thereof made by the canvassing board in said counties respectively, a copy of said abstracts, which were compared by the respondent and disinterested electors, are hereto attached marked A and B, and made part hereof, yet the said respondent, Herman E. Stein, refused, and still refuses, to issue to this relator a certificate of election to the office of state senator for the twenty-fifth senatorial district, although this relator has demanded of the said respondent that he issue to him, this relator, such certificate.

"The relator therefore prays that a peremptory writ of *mandamus* may issue, commanding the respondent, Herman E. Stein, to forthwith issue to this relator, S. W. Christy, a certificate of his election to the office of state senator for the twenty-fifth senatorial district of the state of Nebraska, composed of the counties of Clay and Hamilton, and for such other relief as the relator may be entitled to, and for costs."

The defendant Johnson was permitted to intervene and filed an answer in which he admits the facts stated in the first, second, third, fourth, and fifth paragraphs of the affidavit except as to the abstract of the votes made by the board of canvassers. He then alleges:

"At the election held on November 8, 1892, in the twenty-fifth senatorial district, comprising the counties of Clay and Hamilton, there were three candidates for said office, to-wit, S. W. Christy, L. L. Johnson, and H. W. Castle; that L. L. Johnson was duly nominated by the people's independent party, which nomination was duly certified according to law to the county clerk of Clay county, Nebraska, and within the time prescribed by law, and no objection was made thereto; that L. L. Johnson

was also nominated by the democratic party in said district, and his nomination was duly certified to the county clerk of Clay county, Nebraska, according to law, and within the time prescribed by law, and no objection was made thereto; that the county clerk of Clay county, Nebraska, who is respondent herein, was also the chairman of the republican county central committee of Clay county, Nebraska, and of the twenty-fifth senatorial district of the state of Nebraska; that immediately preceding the election held November 8, 1892, said county clerk of Clay county, Nebraska, proceeded to and did write in the poll books as sent out by him to the various polling places in Clay county, Nebraska, the name of this answering defendant as the candidate of two different parties, and also in part of the poll books putting no political designation for the office of this answering defendant, and in all of the poll books sent out by him he placed no political designation after the name of the relator of this action; that within the time prescribed by law L. L. Shuman, who was the duly qualified and acting county clerk of Hamilton county, Nebraska, together with two disinterested persons, being freeholders, selected by him for that purpose, duly opened and canvassed the returns of the votes cast in said county, including the votes cast for said state senator in the twenty-fifth senatorial district, and made an abstract thereof as required by law, and duly certified the same to the county clerk of Clay county, Nebraska; that within the time prescribed by law the votes as cast at the general election held in Clay county on the 8th of November, 1892, were returned to the county clerk of Clay county, Nebraska, and within the time prescribed by law the clerk selected two disinterested persons, being freeholders, who, together with the county clerk of Clay county, Nebraska, comprised the board of canvassers of said county, and on the 14th day of November, 1892, said board canvassed the vote of said county of Clay and state of Nebraska, and made the fol-

lowing abstract of election in relation to the matter now before this court:

"'ABSTRACT OF ELECTION.

"'*Abstract of Votes Cast in Clay and Hamilton Counties, Nebraska, at the General Election, held on Tuesday, the eighth day of November, 1892.*

"'For the office of senator twenty-fifth district there were fifty-eight hundred eighty-eight votes cast, which were cast for the persons as stated in the following schedule, to-wit:

"'Name of office, senator twenty-fifth district.

"'Names of persons, number of votes cast for each. Figures voted for: S. W. Christy, 2,785; H. W. Castle, 96; Mart Castle, 1; L. L. Johnson, 1,864; L. L. Johnson (people's independent), 862; L. L. Johnson (democrat), 280.'

"That on the 14th day of November, 1892, the board of canvassers made full return of their acts and doings in relation to the matter hereinbefore set forth and declared the result of their computation in words and figures following, to-wit:

"'We, the undersigned, H. E Stein, county clerk of said county, and W. A. Ward and J. E. Wheeler, two disinterested householders of the county, chosen by the said county clerk, acting as a board of county canvassers for said county, do hereby certify that the foregoing is a correct abstract of the votes cast at the aforesaid election according to the poll books returned from the several precincts in said county. We further certify that at the said election the following persons were duly elected to the office stated opposite their respective names:

NAMES OF PERSONS ELECTED.	NAME OF OFFICE.
L. L. Johnson	Senator 25th Senatorial District.

"'In testimony whereof we have hereunto set our hands

and caused this to be attested by the seal of said county, this 14th day of November, 1892.

"'[SEAL.] H. E. STEIN,
"'W. A. WARD,
"'J. E. WHEELER,
"'*Canvassers.*'

"That according to the returns of the canvassing board of Clay county, Nebraska, as hereinbefore set forth, L. L. Johnson received 3,006 votes, and S. W. Christy 2,785 votes, and H. W. Castle 96 votes; that after the returns were made, as herein set forth, and canvassed by the board of canvassers of Clay county, Nebraska, and the result declared by them as above set forth, the county clerk of Clay county, Nebraska, refused to issue to this defendant a certificate of election according to law, and on the 15th of November, 1892, this answering defendant served notice upon the county clerk of Clay county, Nebraska, that he would appear before the district court of Clay county, Nebraska, then in session at Clay Center, Nebraska, the county seat of said county, on the 16th day of November, 1892, at 9 o'clock A. M. of said day, and ask for a peremptory writ of *mandamus* to issue, compelling the county clerk, the respondent herein, to issue to this answering defendant a certificate of election according to law. On said 16th day of November, 1892, this defendant appeared before said court and presented said cause to said court. The respondent in this action, also being the respondent in that action, appeared before said court personally and with his attorneys, Hon. S. W. Christy (who is the relator herein and while appearing on the face of the record for Stein, in truth and in fact he appeared in said action for himself), Hon. L. G. Hurd, and Hon. George W. Bemis, who are the attorneys for the relator in this action, and resisted said application before said court, and the court thereupon, after full consideration of the same, issued an alternative writ of *mandamus*, set forth in the respondent's answer in this mat-

ter, returnable on the 17th day of November, 1892, at 9 o'clock A. M. of said day."

A copy of the sample ballot is set out in the answer of the defendant Stein.

Section 20 of chapter 26, Compiled Statutes, is as follows: "The county clerk, previous to the opening of the polls, shall prepare duplicate poll books, in the manner and form following:

"Poll books of an election held in ——— precinct, ——— township, or ——— ward, in ——— county, on the ——— day of ——, A. D. ——, at which time A. B., C. D., and E. F. were judges, and G. H. and I. K. were clerks of said election—the following named persons voted thereat:

"NUMBER AND NAMES OF ELECTORS.

No. 1.	A. B.	No. 3.	E. F.
No. 2.	C. D.	No. 4.	G. H.

"We do hereby certify that the above is a true list of the persons voting at the above named election.

"Attest:

"A. B.,
"C. D.,
"E. F.,
"*Judges of Election.*

G. H.,
I. K.,
Clerks.

"TALLY LIST OF PERSONS VOTED FOR, AND FOR WHAT OFFICE, CONTAINING THE NUMBER OF VOTES FOR EACH CANDIDATE.

Governor.	Member of Congress.	County Clerk.	

"We hereby certify that A. B. had —— votes for governor, and C. D. had —— votes for governor; that E. F. had —— votes for member of congress, etc.

"Attest:

"A. B.,
"C. D.,
"E. F.,
"*Judges of Election.*

G. H.,
I. K.
Clerks."

Section 46 provides that the county clerk, within six days after the closing of the polls, together with two disinterested electors of the county, to be chosen by himself, shall open the poll books and from the returns therein shall make abstracts of the votes in the following manner: Of votes for governor, etc., on one sheet. Of votes for presidential electors, on another sheet. Of votes for members of the legislature from the county alone, on another sheet. Of votes for members of the legislature by districts, comprising more than one county, on another sheet, etc.

Section 48 requires the clerk to issue a certificate of election to the person having the highest number of votes for the several county and legislative offices.

It will thus be seen that it is the duty of the several election boards to send to the county clerk a true list of the names of persons voting at the election over which they presided, and to add up the votes cast for the several persons voted for and certify the same to the county clerk. Such board has no more authority to certify the politics of the persons voted for than it would have to certify the color of the hair or eyes of the several candidates or their height, weight, or other immaterial facts. Nor has such certification any force or effect whatever. Neither had the board of canvassers of the county any right or authority to separate the votes cast for the same candidate as a democrat, people's independent, or without any designation. It was their duty to add the whole number of votes cast for each candidate and declare the result, and it is the duty of the clerk to issue a certificate of election to the person having the highest number of votes.

Considerable stress is laid upon the want of authority of the board to declare the result—as though such declaration was, in effect, a judgment. Whatever the rule may be in other states it has never had that effect here; and a declaration in favor of a party while the votes showed

that he had not received the highest number of votes cast for that office would be unavailing. The declaration in this state has never amounted to more than a proclamation of the result of the election. The proclamation in this case showed that the board of canvassers, after adding the votes together in favor of the defendant and the other candidates, found that the defendant Johnson had 3,006 votes in the district, while the relator, his most prominent competitor, had but 2,785, and these figures are admitted to be correct. This would seem to settle the controversy in favor of the defendant.

Considerable stress is laid upon the Australian ballot law of this state, as though it was a scheme to put voters in a strait-jacket and compel them to vote for the candidate of one party alone. The title of the law is, "An act to promote the independence of voters at public elections; to enforce the secrecy of the ballot, and to provide for the printing and distribution of ballots at public expense." The first section provides that printing ballots and cards of instruction at all elections for public officers, shall be at the expense of the county, etc. Section 2 provides for the nomination of candidates. Section 3 provides for certifying said nominations. Section 5 provides for nominating by petition. Section 6 prohibits certifying the nomination of two persons by any nominating body where but one person was to be elected. Section 7 requires the preservation of certificates for two years. Section 8 provides when the certificates shall be filed. Section 9 requires the secretary of state to certify to certain nominations to the county clerk of each county. Section 10 provides the mode of declining a nomination. Section 11 provides for filing objections to certificates of nomination, and declares in case no objection is made, that the officer with whom the original certificate was filed shall in the first instance pass upon the validity of such objection and his decision shall be final unless an order shall be made by a court or

judge having jurisdiction. Section 12 provides for filling the vacancy in case of the death of a nominee, etc. Section 13 requires the use of official ballots upon which shall be printed the name of every candidate whose name has been certified. Section 14 provides for "sample ballots printed upon red or green paper, but in the form of those to be used on election day, each containing the names of the candidates. Every ballot shall contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this act, and no other names. The names of candidates for each office shall be arranged under the designation of the office in alphabetical order according to surnames, except that the names of electors of president and vice president of the United States presented in one certificate of nominations shall be arranged in a separate group. Every ballot shall also contain the name of the party or principle which the candidates represent as contained in the certificates of nomination. At the end of the list of candidates for each office shall be left a blank space large enough to contain as many written names of candidates as there are offices to be filled. There shall be a margin on each side at least half an inch wide, and a reasonable space between the names to be printed thereon, so that the voter may clearly indicate, in the way hereinafter provided, the candidate or candidates for whom he wishes to cast his ballot." Section 15 requires the county clerk to print and provide for said election precinct or district before the election a certain number of ballots. Section 16 provides for correcting errors or omissions in the ballots. Section 17 requires the county clerk to cause to be delivered to one of the judges of each election precinct the proper number of ballots as provided in section 15. Section 18 provides for election districts and booths, the general form of the latter, their location, and the manner in which voters shall enter and use the same. Section 19 pro-

vides for two additional judges to deliver ballots to the voters for preparation. Section 20 provides that the voter shall designate his choice of candidates by placing a × opposite the name of the one selected. These crosses must be made on ballots furnished by the county clerk in pursuance of the provisions heretofore stated, and upon which two members of the election board shall first write their names in ink on the back of the ballot. The remaining sections relate more particularly to securing the rights of voters and a free and unobstructed right to exercise the elective franchise.

The object of the law is "to promote the independence of voters at public elections." This is effected by placing all the nominees of all the parties and those nominated by petition before the voter on one ticket, and requiring him to designate the person for whom he votes by a cross opposite such name. No name printed on the ballot is to be counted unless a cross is placed opposite to it. If a person receive a nomination from more than one party it would seem proper to place his name with the nominees of each party. This would not entitle a voter to vote more than once for a particular person. Suppose a candidate is known to be a fair-minded man of integrity and ability and he should receive a nomination from the republican and democratic parties, he would be the nominee of each and should, in the opinion of the writer, be placed on the ballot as the nominee of each of said parties. The object of requiring the designation of the party making the nomination is not to build up any particular party, but to prevent deception by making it appear to voters that a certain person was the nominee of a party when in fact he was not. Besides, this question cannot be considered at this time. The certificates of nomination were properly made and settled and the sample ballots prepared and submitted before the election, and seem to have conformed in all respects to the requirements of the law. This question will be further considered under the second subdivision.

Second—It will be observed from the synopsis of the several sections of the statute above given that the county clerk is to place the names of all persons nominated in any of the modes provided on the sample ballots, and that they shall be in possession of the clerk and open to public inspection at least six days before the election. This sample ballot is to be in the form of the official ballots. If the sample ballot is unsatisfactory to any one party the law provides a summary remedy for its correction

In the answer of Mr. Stein it appears that he placed the name of L. L. Johnson at first in but one place in the sample ballot; that the chairman and secretary of the democratic county central committee and the same officers of the people's independent county central committee protested against this form and insisted that as two nominations had been made by distinct parties that each party was entitled to have its nominees placed separately on the ballots. They also notified him that unless the error was corrected they would apply to the proper tribunal for redress. Stein at first refused to make the correction on the ground it would not be legal, but after consulting eminent counsel he sent the officers above named the following letter:

"CLAY CENTER, Oct. 29, 1892.

"*Hon. N. M. Graham, Chairman, and Geo. A. Shike, Secretary, People's Independent Party.*

"GENTLEMEN: Upon the receipt of your favor of the 25th inst., requesting that the official ballot to be used at the coming election to be held November 8, 1892, be printed in a form suggested by you different than from that intended by me, and being anxious to do exact justice and comply with the law, I offered to submit the question to the supreme court for its decision, and upon your refusal, and you having employed the county attorney, whose duty it is to advise me in regard to my official duties, I immedialy took the train to Lincoln and submitted the question to able counsel in that city so as to get a disinterested, un-

biased opinion, and he being of the opinion that either the form suggested by you, or the one intended by myself, would be legal, and you representing different parties from myself, and rather than appear to be taking an advantage of a political opponent by reason of my official position, and having just returned home this morning and take this method of informing you that I have concluded to grant your request and print the ballots as you suggest.

"Yours truly, H. E. STEIN,

"*County Clerk.*"

That is, that the defendant Stein, having consulted able counsel, was advised that the ballots as he was requested to make them would be valid, and therefore he framed them as desired. Thus, all parties, after examining the statute and consulting learned attorneys, came to the conclusion that the form of the ballot here used was the proper one, and acted honestly in that belief. That was their construction of the statute and no doubt was correct. If no objection is made to the form in which names on the ballots are submitted, or if made, decided, and such ballots are used at the election, it will be too late thereafter to raise the objection, provided all the names certified to the clerk were placed upon the sample and official ballots. There is no complaint on the latter ground and it is now too late to raise objections to the *form* of the ballots.

In the original affidavit filed by the relator in this court on November 14, 1892, which is part of the files, we find the following allegations:

"That your relator was the nominee of the republican party regularly nominated and whose name regularly appeared on the official ballots as the republican candidate, which were prepared and used by the voters at said election in said district; that L. L. Johnson, a citizen and resident of said county and district, was also a candidate for said office of state senator in said district and was nominated for said position by the people's independent party

and was also nominated for said office by the democratic party of said district; that the defendant Herman E. Stein, whose duty it is by law to prepare the ballots used by the voters in said county for said office at said election, prepared said ballot intending to have the same used in the following form:

SENATORIAL.

For Senator 25th District.		Vote for one.
S. W. Christy	Republican.	
L. L. Johnson	Democrat. People's Independent.	

Placing the name of said Johnson on said ballot in but one place and followed by the words democrat—people's independent. But upon the written demand of said Johnson and the chairman of the county central committee of both the people's independent and democratic parties, and by threats of legal proceedings, the said defendant Herman E. Stein so changed the form of the ballot, which ballots were used, so as to present the name of said L. L. Johnson, followed by the words, 'people's independent,' and also printed in another place on said ballot the name of L. L. Johnson, followed by the word 'democrat,' so that on each ballot presented, prepared for use, and used by the voters at said election in said county of Clay, the name of said L. L. Johnson appeared in two places, in one as people's independent and in the other as democrat. Said ballot, as prepared, printed, and used at said election, was in the exact form for said office of state senator as follows, to-wit:

SENATORIAL.

For Senator 25th District.		Vote for one.
S. W. Christy	Republican.	
L. L. Johnson	People's Independent.	
L. L. Johnson	Democrat.	

"Your relator further shows that the ballots prepared

for use and used by the voters of Hamilton county in said district were in the following form to-wit:

SENATORIAL.

For Senator 25th District.	Vote for one.
S. W. Christy, Edgar, Clay Co.....Republican.	
H. W. Castle, Marquette, Hamilton Co...Prohibition.	
L. L. Johnson, Inland, Clay Co.. { Democrat and People's Independent.	

"Your relator alleges and avers that the use of the ballot printed as above stated by the county clerk of Clay county, Nebraska, and used at the election aforesaid for said office of state senator in said twenty-fifth district, was a deception and fraud upon the voters of said district, and gave the said Johnson an undue prominence on said ballot and an undue advantage over your relator at the said election. That while many democrats would not have voted for a people's independent candidate, but seeing the name L. L. Johnson followed by the word democrat without the words people's independent, voted for said Johnson, and many members of the people's independent party would not vote for a democrat and not knowing the democrats were running the said Johnson as their candidate for the same office, and seeing the name L. L. Johnson followed by the words people's independent without the word democrat, likewise voted for Johnson, both names being the same identical person and candidate for the same office."

These statements are sworn to positively by the relator. After the filing of this affidavit the relator asked and obtained leave to file an amended one in which nearly all these allegations are omitted, and he claims the office upon the broad ground that he had the largest number of votes cast at said election.

It may be said that the court should not refer to the first affidavit filed. The court, however, in permitting an amended affidavit to be filed, did not permit the relator to

take the first one off the files without the consent of Johnson. In his first he makes a sworn statement that these votes were cast for Johnson as one person, and he nowhere denies it in his second. He also alleges as his ground for relief that Johnson thereby acquired an undue advantage. It is not claimed that there was any misrepresentation or that a single voter was thereby induced and did vote differently from what he intended, or that the result was to affect, much less change, the election. In no view of the case therefore does either of the affidavits state a cause of action.

In conducting a free government, parties are necessary. Parties, however, are formed to carry out certain specific objects. If the government is free to the full extent, it will be based upon equitable and just laws, with fair and impartial courts, open and ready, as far as possible, to redress grievances; in other words, where the rights of each and every one are protected and enforced. The courts are for the people, not a party, and every person may confidently appeal to them with the assurance that his rights and not his politics, when they are not involved, will be considered and adjudicated. If a court, upon some pretext which may nearly always be found, may throw out votes lawfully cast and thus defeat the will of the electors, government by the people to that extent is defeated, and an example of disregard of law set before them by the guardians and exponents of the law. It is the duty of all courts to carry out the lawfully expressed will of the electors as declared through the ballot box; and that duty this court not only recognizes, but will duly enforce. It is very clear that the relator has not the highest number of votes cast for senator of the twenty-fifth district, and that defendant Johnson has the highest number of such votes. The writ is therefore denied and the

ACTION DISMISSED.

NORVAL, J., concurs in result and the propositions stated in the syllabus.

POST, J., concurs.

STATE OF NEBRASKA, EX REL. JOHN PALMER, V. HERMAN E. STEIN, COUNTY CLERK, AND E. A. MCVEY, INTERVENOR.

[FILED DECEMBER 20, 1892.]

ORIGINAL application for *mandamus*.

L. G. Hurd, S. W. Christy, G. M. Lambertson, and *A. W. Agee,* for relator.

Thomas H. Matters, and *John M. Ragan, contra.*

MAXWELL, CH. J.

The questions involved in this case are substantially the same as in *State, ex rel. Christy, v. Stein, ante,* p. 848, just decided, and the same judgment will be entered. The writ is denied and the

ACTION DISMISSED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. W. J. TURNER, V. H. E. STEIN, COUNTY CLERK, AND S. M. ELDER, INTERVENOR.

[FILED DECEMBER 20, 1892.]

ORIGINAL application for *mandamus*.

L. G. Hurd, *S. W. Christy*, *G. M. Lambertson*, and *A. W. Agee*, for relator.

Thomas H. Matters, and *John M. Ragan*, *contra*.

MAXWELL, CH. J.

The questions presented in this case are substantially the same as in the case of *State, ex rel. Christy, v. Stein, ante*, p. 848, and the same judgment will be entered. The writ is denied and the

ACTION DISMISSED.

THE other judges concur.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY V. BERNARD CLARK.

[FILED DECEMBER 20, 1892.]

1. **Railroad Companies:** NEGLIGENCE: NEEDLESSLY ALLOWING STEAM TO ESCAPE: PLEADING. In an action against a railway company for negligently, wrongfully, and unlawfully blowing off steam from its engine whereby the plaintiff's horses were frightened and ran away, breaking his leg, etc., *held*, that the words employed implied that steam was blown off needlessly and unnecessarily, and as no objection had been made to the petition by demurrer, it was sufficient after verdict.

2. ——: ——: ——: INJURIES FROM FRIGHTENING OF HORSES. A railway company in the legitimate transaction of its business has the right to use steam and is not liable for the proper and necessary use of the same, even if it result in injury to others as by frightening horses and causing them to run away. If, however, an engineer within a city, where teams are constantly passing, needlessly and unnecessarily opens the valves of his engi e and frightens such horses and causes them to run away and commit injury, the company will be liable, provided the plaintiff is free from contributory negligence.

3. **Evidence**: QUESTION FOR JURY. There being testimony which would warrant the jury in finding a verdict against the defendant, it was properly submitted to them, and the court did not err in refusing to direct a verdict for the defendant.

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

John M. Thurston, *W. R. Kelly*, and *E. P. Smith*, for plaintiff in error.

E. P. Wigton and *E. F. Gray*, *contra*.

MAXWELL, CH. J.

This action was brought by the defendant in error against the plaintiff in error to recover for personal injuries, and on the trial the jury returned a verdict in his favor for the sum of $4,835, upon which judgment was rendered. The questions presented are, many of them, new in this court. The cause of action is set forth in the petition as follows:

"That at the time of the committing of the wrongs and injuries hereinafter complained of, the said defendant was, and still is, a corporation duly incorporated and organized under and pursuant to the laws of the state of Nebraska; and then and ever since owned and operated with its locomotives and cars a railroad leading from Columbus, in Platte county, Nebraska, to and through the city of Norfolk, in Madison county, Nebraska; that at said time of the commit-

ting of the wrongs and injuries hereinafter mentioned said city of Norfolk was a city of the second class, compactly built up, of the population of 5,000 inhabitants, and then had and long prior and ever since has had, a street named Norfolk avenue, and also called Main street, passing through said city in its most central and business portion, and running east and west, which said street then was, and had been, and still is, the principal street, roadway, and thoroughfare of said city; that at said time of the committing of the wrongs and injuries hereinafter complained of, the defendant's said railroad and its side tracks crossed the said principal stree , roadway, and thoroughfare in the central and most public business portion of said city, running north and south; that at said time of the committing of the wrongs and injuries hereinafter complained of, the said defendant, by its servants and agents, negligently, wrongfully, and unlawfully stopped, left, and permitted its locomotive engines to stand and remain headed south for a long time, viz., for the space of twenty minutes, on its side track, at the north margin of said principal street, at the point of the said crossing of the same by said railroad and side tracks, and at the same time negligently, wrongfully, and unlawfully omitted and neglected to have at said crossing any flagman or person to give warning; that on the 13th day of August, 1888, the said plaintiff was engaged in hauling dirt with his team of horses and wagon upon said principal street, roadway, and thoroughfare, in said city, to grade the same and other streets, and necessarily had to pass and repass over the said crossing of the same by said railroad and side tracks with his said team and wagon, and having unloaded his said wagon of dirt in one of the said streets, and the plaintiff then standing upon the dirt bed or planking floor of his wagon necessarily, without any negligence, wrong, default, or want of due care on his part, drove his said team of horses and wagon west in the center of said principal street, roadway, and thoroughfare to pass over said cross-

ing, when, as plaintiff had so driven his team upon said crossing, in the center of said principal street, in front of said locomotive engine and about fifty feet from it, so left standing as aforesaid, the said defendant, by its servants in charge of its said locomotive engine, negligently, wrongfully, and unlawfully, suddenly, and without warning to the plaintiff, let off and discharged steam from said locomotive engine and from the cylinders thereof in great volume, noise, and hissing sound, by means of which, and the several negligent, wrongful, and unlawful acts, omissions, and defaults of the defendant, its servants and agents, above stated, the said team of horses took fright, became unmanageable, ran away, and threw the plaintiff off from his said wagon, down under the same, and ran said wagon and the wheels thereof over him, whereby he was greatly injured, his right leg between the knee and ankle was crushed and both bones thereof broken in several places and mashed into several pieces, the thigh of the same leg was bruised and injured, his left leg and thigh and ankle were bruised and injured, his head was cut and bruised, and he was otherwise bruised and injured, from which injuries he became and was, from thence hitherto, sick, sore, and crippled and unable to carry on his usual work and business, and from which injuries he has from thence hitherto suffered great pain and anguish, and from which injuries he is permanently crippled and injured, and will continue to suffer pain and anguish for the remainder of his life; and that he has necessarily incurred, expended, and paid out for surgical and medical attendance, medicine, and nursing in endeavoring to be cured of said injuries the amount of $325, and that the plaintiff's entire damages in the premises are $10,000."

To this petition the railway company made answer, in substance, denying that its employes wrongfully, negligently, and unlawfully permitted its engine to stand on the track at the point indicated or that there was no watchman at the crossing named; denies that the plaintiff was driving

in the streets and that the locomotive in question suddenly, without warning, let off steam from the cylinders, with other special denials which need not be noticed. It will thus be seen that the question of negligence of the company and the contributory negligence of the plaintiff below were fairly presented to the jury.

It is insisted with great earnestness on behalf of the plaintiff in error that the petition fails to allege actionable negligence, and we are referred to the case of *A. & N. R. Co. v. Loree*, 4 Neb., 446. In that case it was held, in effect, that there was a failure to allege that the arrangement of material on the cars was unusual and unnecesary in the legitimate transaction of the business of the company. It was also held, in effect, that the words "scare crow," "horrid," and "frightful appearance," without stating in what respect, were not sufficient to raise an issue, and therefore, taking the whole petition together, it failed to state any dereliction of duty on the part of the company, and in our view the decision is correct. The petition in this case, however, charges that the railway crosses one of the principal streets of the city; that no flagman was placed there; that the plaintiff below, without notice or knowledge of the presence of the engine, drove to the center of the street to pass over the railway and about fifty feet in front of a locomotive when the person in charge thereof "negligently, wrongfully, and unlawfully, suddenly, and without warning to the plaintiff, let off and discharged steam from said locomotive engine and from the cylinders thereof in great volume, noise, and hissing sound," etc., by means whereof his horses were frightened and ran away. If steam was blown off "negligently, wrongfully, and unlawfully," then it was unnecessary, and in violation of its duty. Had any question been raised upon the petition a demurrer should have been interposed and its legal effect determined before going to trial. This was not done, but its sufficiency in effect conceded; and liberally construed, it states a cause of

action. In saying this we are not to be understood as deciding that where the cylinder cocks are opened and steam necessarily blown off and horses frightened thereby that the company is liable for the damages. (*Hahn v. Southern P. R. Co.*, 51 Cal., 605; *Beatty v. Cent. I. R. Co.*, 58 Ia., 212; *Abbot v. Kalbus*, 43 N. W. Rep. [Wis.], 367. In the case last cited it is said, in effect, that the evidence did not show that the locomotive made any other than the usual noises, and all the cases cited by the plaintiff in error are to the same effect. But it is said that even if the law is as contended by the defendant in error, still there is no evidence in support of the charge.

One George R. Latimer, a civil engineer, called as a witness by the plaintiff below, testified that he was about 600 feet away from the engine at the time of the occurrence; that his attention was called to the scene of the accident by the escape of steam.

Q. You may state what attracted your attention and what you saw.

A. Well, I think there were several of us there together and a remark something like this was made—I think that the remark was made by some of us—that that engine was making an unusual amount of noise; that was about the remark.

Q. A remark was made by some one in regard to the engine?

A. Yes, sir.

Q. Did you look up then to see?

Q. What did you do when that remark was made?

A. I turned around and saw a team running away.

Q. You remember looking around and seeing a team running away; whose team was that?

A. I learned afterwards that it was Mr. Clark's team.

Q. Bernard Clark, the plaintiff?

A. Yes, sir.

Q. Did you see the man that was hurt?

A. Yes, sir.

Q. State whether or not he was the same man that was driving that team.

A. Yes, sir.

Q. Now you may state whether or not that was Bernard Clark, the plaintiff.

A. Yes, sir,

Q. It was?

A. Yes, sir.

Q. Now, as you looked up and saw this team running away, did you see an engine near to the team?

A. Yes, sir.

Q. Where, as you looked up, was the team and was the engine; where was the team, what part of the street, or that crossing, that railroad crossing?

A. Well, it was just near the crossing—just on the crossing, or coming to the crossing going west.

Q. Just on the crossing, or just coming to the crossing?

A. Yes, sir; the team.

Q. Now, where was the team with reference to the middle of the street?

A. It was very near the middle of the street.

Q. Now, where was this engine that you saw with reference to the team?

A. It was north of the street.

Q. Now, how near to the north—that street runs east and west?

A. Yes, sir.

Q. And the railroad tracks run north and south, or nearly so?

A. Yes, sir.

Q. Now, where was the engine with reference to the north margin of the street?

A. Well, it was very close; it was not very far away; it was not very far from the street.

On the cross-examination he testified:

Q. Which direction was you looking at that particular time?

A. Well, my recollection is that I was facing a little bit northwest.

Q. Well, now, what were you looking at at the time, or just before you heard the noise that you have testified to, and what were you doing?

A. I was looking at the winding up the tape.

Q. You was looking at the tape, was you not?

A. Yes, sir.

Q. Who was with you there?

A. I don't remember who the parties were?

Q. Do you remember who they were or how many there were?

A. I think that there were two.

Q. Well, now, what do you remember as to buildings on that side of the street where you were, between you and the Elkhorn Valley track and the U. P. tracks?

A. Well, my recollection is that there was this building that we have been speaking of—the Gravel grocery—that is my recollection of it.

Q. Do you remember of any other buildings along there?

A. I don't call to mind just now; there may have been a house.

Q. What grocery did you call that?

Q. I think it is called the Gravel grocery. There may have been a residence or two there also.

Q. Well, now, while you was winding up this tape and paying attention to the tape, what was it that first called your attention to the runaway team?

A. Well, I think it was the noise of the steam that I heard.

Q. Well, now, did you hear steam any more after you observed the runaway?

A. I don't remember of hearing any noise after the

team was excited at that time that I looked around and saw both of them.

Q. You was in the habit of passing up and down that street frequently?

A. Yes, sir.

Q. And was in the habit of seeing trains and engines passing over this particular street?

A. Yes, sir.

Q. As you came to and from your place of residence?

A. Yes, sir.

Q. Had you not frequently heard these engines letting off steam and making a noise?

A. Yes, sir.

Q. Was there anything particular about this noise which called your attention more than any ordinary noise that happens as you go up and down that street when you have heard other engines letting off steam?

A. I presume, probably, that I have heard the noise before and since.

M. Phillips, a carpenter, testifies that he was at work on the roof of a story and a half building, about one block from the engine at the time of the accident, and saw what transpired.

Q. You may state what you saw and heard with reference to the engine at the time that you saw the team.

A. Well, I heard an unusual amount of steam, that is what attracted my attention, that is the reason that I looked that way and at the same time I saw the team.

Q. State whether you saw the team or not.

A. Yes, sir.

Q. Where did the steam escape from?

A. I think that the engine was going off at the time and also escaping from the cylinder cocks.

Q. In referring to the cylinder cocks, what part of the engine do you refer to.

A. The steam chest.

Q. You mean down on the sides of the engine?

A. Yes, sir.

Q. Whereabouts is that with reference to the front trucks?

A. It is right over the front trucks.

Q. And about how high up are these steam cylinders?

A. Just about a couple of feet.

Q. What kind of a sound was this escaping steam?

A. It was a hissing sound, the same as steam escaping.

Q. Now, what was it that first attracted your attention and caused you to look that way?

A. It was the noise of the steam.

Q. When you first looked up, on your attention being so attracted, was that the time that you spoke of as first seeing the steam?

A. Yes, sir.

Q. After you first looked up and first saw the team what was the team doing then, where were they? Just state what the team was doing, and what the driver was doing; state all the facts as you first looked up.

A. Well, the team was running, it had started to run; it was under pretty good headway.

Q. Did you notice it when it had started to run?

A. No, sir; I did not.

Q. It was running when you looked up and saw it?

A. Yes, sir.

Q. State whether it went faster after you first looked up?

A. Yes, sir; it went faster afterwards.

Q. Well, now, about the driver, did you notice that he was holding onto the lines when you first looked up?

A. Yes, sir; he was on the wagon holding onto the lines.

Q. Did you notice his position on the wagon?

A. I think he was sitting down.

Q. When you first looked up and saw the team, as you spoke of a little while ago, what was its position; I want to locate its position when you first looked up and saw the

team, where was it with reference to the front of the engine?

A. It was between me and the engine and a little west.

Q. Of what?

A. When I first looked up to see it was a little bit west of the engine, probably the length of the wagon west of the engine.

Q. It was a length of the wagon west of the engine then?

A. Yes, sir, when I first noticed it.

Q. How long did that engine keep letting off steam from the cylinder cocks, so far as you noticed it, at that time?

A. I did not pay any more attention to the engine; I kept my eye on the team while after they passed by where I was at work.

Q. Did you notice by hearing or seeing whether the steam kept on blowing or let up?

A. I could not say about that.

The plaintiff below testifies:

A. I drove carefully up to within about 100 feet of the crossing, then I tightened on the lines and braced myself up, I did not know but what the engine might move, and I prepared myself for any emergency that might take place the best I could.

Q. Did you still remain standing—was you standing?

A. Yes, sir.

Q. That was within about 100 feet of the crossing.

A. Yes, sir.

Q. What occurred then?

A. I went on slowly; I could not tell whether I was trotting or walking; I could not tell which; as I was on the crossing and entering on the track in front of the engine, the engine blew off steam, a loud hissing noise.

Q. At that time was you still standing up?

A. When the engine blew off steam and the team jumped I sat down on the wagon and pulled on the lines.

Q. How did you sit down?

A. Well in pulling on the lines, I sat down quietly.

Q. Stand up and just show us how you pulled on the lines and sat down.

A. Pulled that way and sat down (witness showing the jury how he did).

Q. Steadied yourself with the lines?

A. Yes, sir.

Q. You held the lines as tight as you could; your feet were towards the horses?

A. Yes, sir; towards the horses.

Q. Just tell us again what point you were at when the team took fright and jumped, with reference to the front of the engine.

A. I said that I was entering on the railroad or railway just entering on it, my team was just entering the railroad track that the engine was on.

Q. When the team jumped?

A. Yes, sir.

Q. Had you got on past the engine when they first jumped?

A. The team was entering the track that the engine was on at the time the noise was made from the engine.

Q. Now, this noise from the engine; state the appearance of any steam that you saw or heard.

A. I did not see any steam; I heard a loud hissing, continuous blowing off of steam.

Q. You say that you did not see it?

A. No, sir.

Q. Did you have time to look at it?

A. No, sir.

Q. What did you say that the sound was?

A. It was a hissing sound.

Q. Now state, with reference to the time the team started to run, whether the steam escaped just before or after.

Q. State when you heard the hissing sound with reference to the time that the horses started.

A. Why the horses started when they heard the noise of the steam—not until then.

There is considerable other testimony to the same effect. Some of the witnesses on behalf of the company testify that the noise was made by the escape from the pop valve over which the engineer had no direct control. The question thus became proper to submit to a jury, and under the state of proof in this case the court will not disturb their findings.

It is unnecessary to review the instructions at length. The principal contention of the plaintiff in error is that there is no liability shown, and in effect that the jury should have been so instructed; but in our view the court below did right in submitting the questions to the jury. The questions of fact seem to have been fairly submitted. That a railway company, when necessary in operating its road, may blow off steam in the crowded thoroughfare of a city as well as other places is undoubted, even if by doing so horses will be frightened and losses thereby sustained, but it has no right to do so wantonly or when unnecessary to do so. While the rights of the company are to be respected and protected, other persons also have rights which in like manner must be respected by the company and its employes. The right of the public to use the streets of the city are equally as broad as the right of the company to use its tracks, and neither can willfully commit an injury whereby loss is sustained by the other without liability.

The case of *Andrews v. Mason, etc., Ry. Co.*, 42 N. W. Rep. [Ia.], 513, is very similar in its facts to this case, and it was held that the company was liable. In that case the plaintiff's team was frightened by the discharge of steam and ran away and committed injury for which the plaintiff was permitted to recover. The same rule was applied in *Man-*

chester, etc., Ry. Co. v. Fullarton, 14 C. B., n. s. [Eng.], 53; *Toledo, etc. Ry. Co., v. Harmon*, 47 Ill., 298; *Nashville, etc., Ry. Co. v. Starnes*, 9 Heisk. [Tenn.], 52, and is approved by Judge Thompson in his valuable work on Negligence, vol. 1, pp. 351, 352. He says: "Whilst no liability attaches for damages arising from the doing of these acts under proper circumstances, yet it will be different if they are done without necessity, negligently, or wantonly. For although, as will be shown in a subsequent chapter, the rule obtains in England, and generally in this country, that a master is not answerable in damages for the wanton and malicious acts of his servant, yet enlightened American courts have refused, on cogent grounds of public policy, to extend this immunity to railway corporations whose servants are entrusted with such extensive means of doing mischief. Accordingly it has been held that if such a servant, while in charge of the company's engines and machinery, and engaged about its business, willfully perverts such agencies to purposes of wanton mischief the company must respond in damages. This doctrine has been applied where the person in charge of a railway locomotive frightened a traveler's horse by blowing off steam and sounding the steam whistle with a loud noise when it was wholly unnecessary." This, we think, is a correct statement of the law. Upon the whole case the questions were proper to submit to a jury and there is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

CAROLINE THEMANSON, ADMINISTRATRIX, v. CITY OF KEARNEY.

[FILED DECEMBER 20, 1892.]

Municipal Corporations: ESTABLISHMENT OF GRADE: NEGLIGENCE: ACTION FOR DAMAGES FOR FLOODING CELLAR: INSTRUCTIONS. Under section 31 of chapter 9, General Statutes of 1873, a city of the second class was authorized to establish the grade of its streets by ordinance. In an action for damages for flooding the plaintiff's cellar in which his goods were stored, caused by filling up the street adjacent to the lot without the grade being established, *held*, that an instruction which in effect told the jury that the grade might be established otherwise than by ordinance was erroneous.

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

Greene & Hostetler, for plaintiff in error.

Calkins & Pratt, contra.

MAXWELL, CH. J.

This action was commenced June 3, 1884, in the district court of Buffalo county, by the plaintiff against the defendant. The allegations of the petition charge that in the year 1883 the defendant herein proceeded to grade up a certain street, to-wit, Wyoming avenue in said city, and did throw up the same to the height of three feet above the common level; that at a point on said avenue where said grading was done and where said avenue crossed South Railroad street, the surface water from a large area of ground was accustomed to flow in an easterly direction across Wyoming avenue in large volumes in time of rain; that said defendant, well knowing that fact, so carelessly and negligently constructed said embankment as to make no culvert or other outlet for said water to pass away in

its natural course; that at said point on said avenue as above described, plaintiff had on the first day of April, 1884, a store-room, said store-room being on the west side of Wyoming avenue, and on the south side of said South Railroad street; that at said time the basement of said store-room contained a large quantity of groceries and provisions of the value of $3,000; that on said first day of April, 1884, a heavy rain fell, and that by reason of such embankment and levee, as above described, and by reason of the negligence and unskillful manner in which it had been erected by said defendant, the surface water was held and turned back from its natural course in a large volume into the store-room and basement of the plaintiff, all without plaintiff's fault, and that said goods and groceries were damaged and destroyed. To this petition defendant made answer, admitting that it graded up the street in question; denies that it graded it up three feet above the level; denies that it graded said street above the grade which had long prior thereto been established; alleges that the windows and the basement of the building are below the grade theretofore established by proper authorities of said city; alleges that if there was any overflow of said cellar, it was caused by the negligence of the plaintiff; alleges that it dug a channel for the escape of the water which had previous thereto flowed eastward across said avenue.

Plaintiff replied to said answer denying each and every allegation of new matter. The case was afterwards tried to a jury and a verdict and judgment for the defendant.

The first error assigned in the plaintiff's brief is in giving the third instruction, which is as follows: "If the city procured the street to be built up and constructed with the grade which it declared established, then such grade was in fact established, and after such grade had been so constructed for a reasonable length of time the keeper of the grocery store was charged with notice of its existence, and if his landlord failed to raise the building to grade, or to protect

the walls below grade against the usual action of surface water, it became the duty of Mr. Themanson, so far as the city is concerned, to himself embank or otherwise protect the walls below grade if he would leave his wares and merchandise in the cellar."

It is admitted that no ordinance was ever passed establishing a grade and the question arises did any lawful grade exist when the grading was done? The alleged grade is claimed to have been established in 1874. Kearney was at that time a city of the second class, having a population of more than 500 and less than 15,000 inhabitants. The statute provides that cities of the kind named are "authorized and empowered to enact ordinances for the following purposes in addition to the other powers granted by this act: To open and improve streets, avenues, and alleys, make sidewalks, and build bridges, culverts, and sewers, within the city; and for the purposes of paying for the same, shall have power to make assessments in the following manner." Then follows the mode of assessment. This mode of establishing grades would seem to be exclusive. The case of *Hurford v. City of Omaha*, 4 Neb., 336, is not in conflict with this view. In that case it was held, under the special charter of that city, that the proof showed that the grade of St. Mary's avenue was established in 1866 and not in 1873. In the case at bar, however, the only authority to establish a grade was by ordinance, and as it was not so established, the instruction in question was erroneous. (*Fulton v. City of Lincoln*, 9 Neb., 358.) The doctrine of estoppel is relied upon by the defendant, but as it is not pleaded it cannot be considered. The other questions discussed in the briefs do not seem to be relied upon by the attorneys and will not be considered. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

J. C. ELDREDGE ET AL. v. AULTMAN, MILLER & CO.

[FILED DECEMBER 20, 1892.]

Action on Domestic Judgment. In this state an action can be maintained on a domestic judgment.

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

H. H. Blodgett, for plaintiffs in error.

Davis & Hibner, contra.

NORVAL, J.

The petition filed in the court below contains two counts In the first it is alleged, in substance and effect, that defendant in error recovered a judgment against plaintiffs in error before B. H. Turner, a justice of the peace of Fillmore county, for the sum of $70.95 and costs, taxed at $3.20; that a transcript of said judgment has been duly filed in the office of the clerk of the district court of Fillmore county; that the defendant in error has paid the above costs in full, and there is due and unpaid on said judgment the sum of $74.15 and interest.

For a second cause of action it is averred that the defendant in error recovered a judgment against plaintiffs in error before John Barsby, a justice of the peace within and for Fillmore county, for $30.35, and costs of suit, taxed at $2.90; that a transcript of said judgment has been duly filed in the district court of said county; that defendant in error has paid all of said costs; that plaintiffs in error have never paid said judgment, or any part thereof, except $15.90, and that there is due upon said judgment $16.35 and interest thereon. The prayer is for a money judgment.

To the petition the plaintiffs in error, defendants below, filed a general demurrer, which was overruled by the court, and they electing to stand upon their said demurrer, judgment was rendered against them and in favor of plaintiff below in accordance with the prayer of the petition.

Counsel in the brief of the plaintiffs in error assumes that this is an action to revive dormant judgments, and argues therefrom that, as the original judgments were obtained in Fillmore county, proceedings to revive them must be brought in that county and in the court in which they were rendered; therefore the district court of Lancaster county had no jurisdiction of the subject-matter. No such question was presented to the court below; besides counsel is in error in supposing that this is an action of revivor. This is in no sense such a proceeding. The object and purpose of the suit is to recover a new judgment for the amount due and unpaid on the original judgments described in the petition. Hence it is unnecessary to decide whether an action to revive a judgment can be brought in a county other than that in which the judgment was rendered.

The sole question presented for decision is: Can a suit be maintained on a judgment recovered in this state? At common law an action lies on a domestic judgment, and there is no statutory provision in this state which takes away that right. True, a domestic judgment may be enforced by execution, but such remedy is not exclusive. It is merely cumulative. A judgment, whether foreign or domestic, is a debt of a high order, and a recovery may be had upon it as upon any other contract. While there is some conflict in the decisions, the proposition stated is sustained by the great weight of authority in this country. (Black, Judgments, sec. 958; *McDonald v. Butler*, 3 Mich., 558; *Headley v. Roby*, 6 O., 521; *Burnes v. Simpson*, 9 Kan., 658; *Hummer v. Lamphear*, 32 Id., 439; *Ames v. Hoy*, 12 Cal., 11; *Stuart v. Lander*, 16 Id., 372; *David-*

son v. Nebaker, 21 Ind., 334; *Becknell v. Becknell*, 110 Id., 42; *Greathouse v. Smith*, 4 Ill., 541; *Denison v. Williams*, 4 Conn., 402; *Ives v. Finch*, 28 Id., 112; *Kingsland & Co. v. Forrest*, 18 Ala., 519; *Elliott v. Holbrook*, 33 Id., 659; *Church v. Cole*, 1 Hill [N. Y.], 645; *Wilson v. Hatfield*, 121 Mass., 551; *Stewart v. Peterson's Executors*, 63 Pa. St., 230; *Haven v. Baldwin*, 5 Ia., 503; *Simpson v. Cochran*, 23 Id., 81; *Thomson v. Lee County*, 22 Id., 206.)

It follows from what has been said that the petition states grounds for action, and that the court did not err in overruling the demurrer. The judgment is

AFFIRMED.

THE other judges concur.

THEODORE H. MILLER, APPELLEE, V. JOHN LANHAM, APPELLANT, ET AL.

[FILED DECEMBER 20, 1892.]

1. **Judicial Sales:** INADEQUACY OF PRICE: CONFIRMATION. Evidence examined, and *held*, that the value of property sold by virtue of a decree of foreclosure is not so greatly in excess of the value found by the appraisers as to call for the setting aside of the sale.

2. ——: ——: ——: HARMLESS ERROR. A sale will not be set aside for irregularities or errors not prejudicial to the party complaining.

3. ——: ——: ——: FAILURE OF PURCHASER TO PAY OFF PRIOR LIENS. A sale will not be set aside on the motion of a mortgagor on the ground that the purchaser has not paid off claims adjudged to be prior liens upon the property sold.

4. ——: NOTICE: DESCRIPTION OF PROPERTY. A notice of sale under a mortgage or decree will generally be held sufficient if the property be described as in the mortgage or decree.

APPEAL from the district court for Saline county. Heard below before MORRIS, J.

Abbott & Abbott, and *Webster, Rose & Fisherdick,* for appellant.

F. I. Foss, contra.

POST, J.

This is an appeal from an order of confirmation by the district court of Saline county. From the transcript it appears that on the 18th day of December, 1889, the appellee Miller recovered judgment against the appellant Lanham for $7,793.25 and $72.95 costs, and a decree of foreclosure against the following described property, to-wit: All of section 36, town 8, range 3 east; a part of the northeast quarter of the northeast quarter of section 33, town 8, range 4 east, which is more particularly described in the decree and order of sale; also a part of lot 1, in block 1, in the city of Crete. On the 14th day of December, 1889, judgment was entered against appellant in favor of the Union Trust Company, of Philadelphia, for $7,545.90 and a decree of foreclosure against section 36, and which was adjudged to be the first lien thereon. On the 2d day of April, 1890, the Union Trust Company, of Omaha, recovered judgment against appellant for $600 and a decree of foreclosure against said section 36, which was adjudged to be a second lien thereon. On the 2d day of April, 1890, the First National Bank of Crete recovered a judgment against appellant for $4,348.70 and a decree of foreclosure against the property in lot 1, block 1, city of Crete, which was adjudged to be a first lien thereon and upon which there had been paid the sum of $3,172.52 prior to the issuing of the order of sale. On the 4th day of December, 1890, an order of sale was issued, by virtue of which the property above described was advertised for sale and sold

to the appellee. On the return of the order of sale a motion was made by the appellant to set aside the sale, which was sustained as to the fractional part of the northeast quarter of the northeast quarter of section 33, and overruled as to section 36, and part of lot 1, block 1, in the city of Crete, as described in the decree. Exception was taken by appellant to the overruling of his motion and the case removed to this court by appeal. Said motion is as follows:

"And now comes the said defendant John Lanham, and objects to the confirmation of the sale herein heretofore had, and moves the court to set the same aside for the following reasons:

"First—That the property sold herein was appraised far below its actual value, and so far below its value as to show fraud, collusion, partiality, or incompetency on the part of the appraisers, as is shown by the affidavits of John Lanham, Charles E. Chowins, Thomas Patz, and Jacob Wagerman hereto attached.

"Second—That the property was sold at a grossly inadequate price, in this, that the same is, and at the time of the sale herein was, well worth the sum of $27,800, and is shown by affidavits hereto attached.

"Third—That there is error and irregularity in said sale, in this, that the decree of foreclosure in said case embraces with the amount found due to the plaintiff Miller, being $7,793.75, the amount found due to the Union Trust Company, of Philadelphia, being $7,545.90, and the amount found due to the Union Trust Company, of Omaha, $600, and the amount found due to the First National Bank of Crete, Nebraska, being $4,348.70, and consolidates all these amounts into one amount, and orders that there be but one sale for all, and the order of sale herein recites all of said amounts and purports to sell the property therein described to satisfy all, while the sheriff has reported and placed on file the existence of prior incumbrances against the section of

land described to the amount of $8,754.57, $8,053.70 of which is a part of the amount recited in said order of sale and is a part of the amount for which said sale was made, and therefore cannot be incumbrances prior to the amount for which the sale was being made; thus it is made to appear, by inspection of the files and proceedings in the case, that the incumbrance against said section of land is $8,053.70 greater than actually exists, and that a *bona fide* purchaser would reduce his bid by that much; all of which will more fully appear by an inspection of the files of this case.

"Fourth—And the defendant alleges further error and irregularity in said sale in relation to that part of lot 1, block 1, of the city of Crete, described in said proceedings, in this, that the sheriff reported and placed on file prior incumbrances against said part of lot 1, block 1, to the amount of $1,312.50, while, as a matter of fact, the said amount of $1,312.50 is that portion of said decree determining the amount due to the said bank, and for which said property was being sold, and therefore was not and could not be prior incumbrances, thus making the amount against said property appear by said proceedings to be greater by $1,312.50 than it really was, whereby the bid of a purchaser would be reduced by that amount.

"Fifth—There is further irregularity in the proceedings of said sale, in this, that no money was paid by the purchaser, Miller, to the sheriff, with which to pay the amounts due to the other beneficiaries in said decree; that in fact no money at all was paid or offered by the purchaser, Miller, at said sale to any one for any purpose.

"Sixth—That the advertisement of sale published herein was defective and misleading, in this, that the farm property offered for sale was one section by government survey; that the advertisement was such as to advise people that the said section should be sold in bulk; that if said section had been advertised and offered for sale by government subdivisions of a section, it would have sold to a much better advantage and for a larger amount.

"Seventh—The advertisement herein is not in accordance with the appraisement herein, in this, that the said section is appraised in government subdivisions, to-wit, quarter sections, while in the advertisement the entire section is offered in bulk, whereby persons desiring to buy quarters or lesser subdivisions were misled and prevented from attending the sale.

"Eighth—That the proceedings by which the said sale were had and the sale itself are in other respects informal, incomplete, and insufficient, whereby material injury has resulted to the said defendant. All of which will more fully appear by inspection of the files in this case and affidavits herewith filed."

The allegation in the motion with respect to the value of the property is not sustained by the evidence in the record. The presumption is in favor of the finding of the appraisers, who are sworn to impartially appraise the interest of the defendant or mortgagor.

The appellee, in addition to his own evidence, introduced the affidavits of seven apparently credible witnesses who are familiar with the property and its value, and who testify that the finding of the appraisers is above rather than below its value.

The order of the district court complained of is sustained by the clear preponderance of the evidence, and there is no error in the overruling of the motion to set aside the sale on that ground. Nor is there any foundation in the record for the contention that the appraisers deducted from the value of the different tracts, or either of them, any part of the decree in favor of appellee.

By reference to the appraisement of section 36 we find that the value thereof is found to be $16,320, while the amount deducted on account of prior liens as taxes, $700.87, and mortgages, as per certificate of register of deeds, $8,053.70. The prior liens, as certified by the register of deeds and clerk of the district court, exceed the amount deducted by

more than $800, but the omission is an error prejudicial to the appellee, who is the purchaser, and not to the appellant. The amount deducted from the value of the fractional lot 1 in block 1, in the city of Crete, is, taxes, $24.70, and liens, as per certificate of register of deeds, $1,312.50, the last named amount being evidently the balance due on the decree in favor of the First National Bank of Crete. It is alleged that the appellee did not on the day of the sale pay to the sheriff the amounts adjudged to be prior liens upon the premises. This is a failure, if true, of which the appellant cannot complain. It is apparent that appellee bought subject to the decrees in question, thereby recognizing them as prior liens. It appears, however, from his affidavit, which is not disputed, that he offered to pay the amount to the sheriff as soon as it could be ascertained, but that the latter declined to receive it. It further appears that he is ready and able to pay the amount of all prior liens whenever he is adjudged to be entitled to a confirmation of the sale. It is next objected that the notice of sale is defective and misleading, for the reason that section 36 was advertised for sale as an entirety, whereas it should have been advertised and offered for sale in parcels or fractions of a section. A sufficient answer to this objection is, that in the decree of appellee, as well as the two decrees adjudged to be prior to his, the property in question is described as section 36 without reference to subdivisions thereof. A notice of sale under a mortgage or decree will generally be held sufficient if the property be described as in such mortgage or decree. (*Model Lodging H. Ass'n v. Boston*, 114 Mass., 133.) It appears from the record, however, that the property in question was appraised in four separate tracts or quarter sections. It further appears that each quarter section was offered for sale separately, but without bidders, after which the entire section was offered for sale and sold to appellee for $6,000, being more than two-thirds of the appraised value of ap-

pellant's interest therein. We have carefully examined the entire record and are unable to discover any error prejudicial to the rights of the appellant. In our judgment the order of the district court confirming the sale is right and should be

AFFIRMED.

THE other judges concur.

OTTO SIEMSSEN V. WILLIAM R. HOMAN.

[FILED DECEMBER 20, 1892.]

1. **Real Estate Brokers:** SALE OF LANDS: WHEN RIGHT TO COMMISSION ACCRUES. A real estate broker who is employed to sell or dispose of the property of his principal is entitled to recover his commission whenever he has procured a customer who is willing and able to purchase the property at the price and upon the terms named by his principal.

2. ——: ——: ——: INABILITY OF PURCHASER TO COMPLY WITH TERMS OF AGREEMENT. *Held*, That the evidence clearly shows that the customer was not able to purchase in accordance with the terms of his agreement and that the broker is not entitled to recover.

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

Cavanagh, Atwell & Thomas, for plaintiff in error:

Whenever a broker or real estate agent seeks to recover his commission he must establish that he has procured a purchaser who is ready and willing and has the financial ability to complete the purchase. (*Vinton v. Baldwin*, 88 Ind., 104; *Lane v. Albright*, 49 Id., 275; *Reyman v. Mosher*, 71 Id., 596; *Moses v. Bierling*, 31 N. Y., 462; *Mooney v. Elder*, 56 Id., 238; *Hart v. Hoffman*, 44 How. Pr. [N. Y.], 168;

Richards v. Jackson, 31 Md., 250; Mechem, Agency, sec. 966; *Iselin v. Griffith*, 62 Ia., 668; *Coleman v. Mead*, 13 Bush [Ky.], 358; *Pratt v. Hotchkiss*, 10 Ill. App., 603.)

Kennedy & Learned, contra:

Where a real estate broker has procured a purchaser for the property of his principal, the solvency and ability of such purchaser to perform the obligations of his contract will be presumed until the contrary is proven. (*Grosse v. Cooley*, 45 N. W. Rep. [Minn.], 15; *Crevier v. Stephen*, 40 Minn., 288; *Goss v. Broom*, 31 Id., 484.)

POST, J.

This is a petition in error from the district court of Douglas county. The material part of the petition in that court is as follows:

"The plaintiff complains of the defendant for that on or about the 20th day of February, 1889, said defendant placed in the hands of the plaintiff as agent to sell, trade, or dispose of lot 11 in block 33, Kountz Place, an addition to the city of Omaha, on the sale, trade, or disposal of which the defendant agreed to pay the plaintiff the sum of $200. On or about the 27th day of February, 1889, the plaintiff sold, traded, and disposed of said lot for the benefit of said defendant, and has duly performed all the conditions of said contract on his part to be performed."

The answer is a general denial. From the bill of exceptions it appears that the defendant in error procured from one F. P. Roll an offer to exchange certain real estate owned by the latter in the city of Omaha for the property of the plaintiff in error, which resulted in the execution of the following agreement in writing:

"OMAHA, NEB., February 26, 1889.

"This memorandum of agreement witnesseth, that Otto Siemssen has this day sold to Frank P. Roll lot 11 in block

33, Kountz Place, subject to $3,500 first mortgage and accumulated interest in favor of Union Trust company, said Roll to give said Siemssen a second mortgage of $1,500, due in one, two, and three years from this date, on said Kountz Place lot, drawing eight per cent interest, and the east fifty feet of the west one hundred and forty feet of lot 16, Bartlett's addition, all of above described property situate in Omaha, Douglas county, Nebraska; said lot in Bartlett's addition is to be conveyed subject to a mortgaged indebtedness of $2,800, including interest, also subject to special taxes, each party to furnish abstract of title, and each party to pass title to the other as soon as the necessary papers can be made out and executed."

It is conceded that the amount of mortgages appearing of record as liens against the property to be conveyed by Roll was about $3,100, or $300 in excess of the amount stipulated in the agreement set out above. Defendant in error, having been notified that the liens against said property exceeded the amount specified in the agreement, requested plaintiff in error to assume that amount in addition to the liens provided for and allow Roll to assume other incumbrances as a consideration therefor. This proposition was rejected by plaintiff in error. The latter, on the 4th day of March, notified defendant in error by letter that unless the necessary conveyances were executed by Roll in accordance with the terms of the contract within twenty-four hours he would consider the trade at an end. On the 8th day of February following Roll wrote plaintiff in error as follows:

"OMAHA, NEB., February 8, 1889.

"*Mr. Otto Siemssen*—DEAR SIR: I am ready to make the trade with you consummated by Mr. Homan according to the terms of the agreement entered into between us, and shall expect you to comply with your part of the engagement. Respectfully yours,

"F. P. ROLL."

There is, however, no competent evidence that Roll had reduced the amount of liens against his property to the amount above named, or that he was able to convey in accordance with the terms of his contract. The only evidence on that point is the testimony of the defendant in error, which is to the effect that he had been informed by Roll that he, Roll, had made arrangements with Mr. Dall by which the latter was to release of record a mortgage held by him against the premises and take instead thereof a second mortgage on the property to be conveyed by plaintiff in error. He testifies explicitly that his only information on the subject is derived from the statement of Roll. When asked if the indebtedness against Roll's property had been paid off at the time a deed was tendered on the 8th day of February he testifies: "I do not know. It may have been paid, but I do not know. As I understood at the time that after that Mr. Siemssen was ready to give us a deed and that we were ready to give him the deed to Mr. Roll's property and close the matter up in accordance with what we had previously agreed." It is clear that Roll was not able to convey in accordance with his agreement, and the effect of his default was to discharge plaintiff in error from liability. To warrant a recovery for services in an action by a broker he must have procured a purchaser who was ready and able to complete the purchase. (Mechem on Agency, 966, and authorities cited in note.) It is argued, however, by defendant in error that for the purpose of his compensation the exchange of property was consummated upon the execution of the written agreement set out above. We have no occasion to determine from the authorities the general rule, since it is clear to us from the evidence in the bill of exceptions that the understanding of the parties was that his compensation depended upon an execution of the contracts between the plaintiff in error and Roll. For instance, on the 8th day of March he addressed to plaintiff in error the following note:

"As Mr. Roll is willing to close up the trade in accordance with the agreement, and you have refused to do so, I shall insist on my commission, as I fairly earned it. Please send me check for $200 and oblige

"Yours truly, W. R. HOMAN."

Had Roll been able to convey in accordance with the terms of his agreement, defendant in error would have been entitled to his compensation notwithstanding the refusal of the plaintiff in error, but having failed to procure a customer able to complete the purchase of the property, he cannot recover, and the judgment of the district court is

REVERSED.

THE other judges concur.

FERDINAND RUBE V. CEDAR COUNTY ET AL.

[FILED DECEMBER 20, 1892.]

Appeal by Taxpayer from Allowance of Claim by County Board: APPEAL BOND: DISMISSAL. Where a taxpayer in good faith attempts to appeal from the allowance of a claim against a county by the county board, and gives an appeal bond which is approved by the county clerk, his appeal will not be dismissed on account of informalities or omissions in the undertaking, but an opportunity will be given to file a new and sufficient undertaking in the district court.

ERROR to the district court for Cedar county. Tried below before NORRIS, J.

B. B. Boyd, and *J. C. Crawford*, for plaintiff in error.

A. M. Gooding, and *Leese & Stewart*, *contra*.

POST, J.

This is a petition in error from the district court of Cedar county, and the material facts as they appear from the record are as follows: The plaintiff in error recovered judgment in the district court of Cedar county for costs in an action of trespass against one William Sullivan. Subsequently the latter filed a claim against the county for the amount of the costs adjudged against him, $363.69, and for attorneys' fees paid in said action, $334. The county board allowed the sum of $588 on said bill, from which order the plaintiff in error, an alleged taxpayer of said county, appealed to the district court. In the district court a motion was made by Sullivan to dismiss the appeal on two grounds. First, because the appellant, plaintiff in error, was not a taxpayer of said county; and second, because no sufficient undertaking had been given. The first ground assigned is not supported by any evidence whatever. The notice of appeal, which is in due form, describes the appellant as a resident elector and taxpayer of said county. This allegation is sufficient to give the district court jurisdiction. There is no provision of statute for making up of issues in the district court in cases appealed from the county boards. It is customary to try them without pleadings, and an appeal should not be dismissed upon the bare assertion of the adverse party that the appellant is not a taxpayer. The undertaking is as follows:

"Whereas on the 16th day of April, 1890, the board of county commissioners of said county allowed to said Wm. Sullivan against said county an order of $588 on the general fund before said board of commissioners in above cause of action the sum of $588 costs and attorneys' fees, and the said Ferdinand Rube intends to appeal said cause to the district court of Cedar county. Now, whereas I, Ferdinand Rube, do promise and undertake to the said county of Cedar in the sum of one hundred dollars, that the said

Ferdinand Rube will faithfully ——— such appeal and pay all costs that may be adjudged against him, and shall prosecute his appeal to effect and without unnecessary delay, and that said appellant will, if judgment be adjudged against him on appeal, will satisfy all costs adjudged against him. ALBERT ERDENBERGER.

"B. B. BOYD,

"Surety approved by me this 25th day of April, 1890.

"[SEAL.] FRANS NELSON,

"*County Clerk.*"

This undertaking, although informal, is not void. The proceedings, while irregular, were sufficient to give the district court jurisdiction. The plaintiff in error appears to have acted in good faith and should have been given an opportunity to file a new and sufficient bond. The district court erred in dismissing the appeal and the judgment is

REVERSED.

THE other judges concur.

DANIEL D. JOHNSON ET AL. V. CHARLES A. BOUTON.

[FILED DECEMBER 21, 1892.]

1. **False Imprisonment:** POWER OF COUNTY JUDGE TO PUNISH FOR CONTEMPT: DISOBEDIENCE OF INJUNCTION ALLOWED BY COUNTY JUDGE IN ACTION PENDING IN DISTRICT COURT. A county judge has no power to commit for contempt one guilty of disobedience of an injunction allowed by him in an action in the district court. In such case the contempt is against the district court whose order is defied and not the county judge. MAXWELL, CH. J., dissenting.

2. ———: DEFINITION. False imprisonment is the unlawful restraint of a person without his consent either with or without process of law.

3. ———: MALICE. The question of malice in an action for false imprisonment is immaterial, except so far as it affects the measure of damage.

4. ———: WHO LIABLE. All persons who directly procure, aid, or assist in the unlawful detention are liable as principals.

5. ———: PROOF OF CONSPIRACY UNNECESSARY. It is not necessary to prove a conspiracy to unlawfully imprison, in order to entitle the injured party to recover.

ERROR to the district court for Scott's Bluff county. Tried below before CHURCH, J.

Lot L. Feltham, and *J. M. King*, for plaintiffs in error.

Greene & Hostetler, and *M. J. Huffman*, *contra*.

POST, J.

This was an action for false imprisonment in the district court of Scott's Bluff county, in which defendant in error, plaintiff below, recovered judgment. The material facts in the case are as follows: Johnson, one of the plaintiffs in error, commenced an action in the district court of said county against defendant in error Bouton, seeking to restrain the latter perpetually from diverting the water from Winter's creek, a water-course of said county, to the damage of his (Johnson's) land. In the absence of the district judge therefrom, King, another of the plaintiffs in error, as county judge, allowed a temporary injunction in said case. Subsequently, and while said action was still pending, Johnson, with Feltham, his attorney, appeared before King and charged Bouton with violating the said order of injunction and caused an order to be issued for his (Bouton's) arrest. Subsequently Bouton, who had in the meantime been arrested by virtue of the order aforesaid, was given a hearing by King and adjudged to be in contempt of court. He was accordingly sentenced to pay a fine of $30, and costs, and ordered to give bond in the

sum of $300, conditioned that he would in the future obey said injunction. Failing to satisfy said judgment, or give the required bond, he was by the order of King committed to the custody of the plaintiff in error, Fanning, as sheriff, by whom he was detained eight days. During said time he was in the custody of a deputy sheriff and boarded at the village hotel, except about twelve hours, during which time he was confined in jail. He subsequently commenced an action for damage against Johnson and Feltham, his attorney, King, the county judge, and sureties on his official bond, and Fanning, the sheriff and sureties. On trial in the district court he recovered judgment in the sum of $100 against all the defendants therein except the sureties of King and Fanning, which is the judgment we are called upon to review.

The first and most important question presented is that of the jurisdiction of a county judge to punish as for contempt the disobedience of an order of injunction allowed by him in an action in the district court. The authority for the allowing of an injunction by the county judge in such a case is found in section 252 of the Code, viz.: "The injunction may be granted at the time of commencing the action, or at any time afterward, before judgment, by the supreme court or any judge thereof, the district court or any judge thereof, or, in the absence from the county of said judges, by the probate judge thereof, upon it appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto."

The only other sections of said chapter which have any bearing on the subject under consideration are sections 255, 256, 257, and 260, as follows:

"Sec. 255. No injunction, unless provided by special statute, shall operate, until the party obtaining the same shall give an undertaking, executed by one or more sufficient sureties, to be approved by the clerk of the court

granting such injunction, in an amount to be fixed by the court or judge allowing the same, to secure the party enjoined the damages he may sustain, if it be finally decided that the injunction ought not to have been granted.

"Sec. 256. The order of injunction shall be addressed to the party enjoined, shall state the injunction, and shall be issued by the clerk. Where the injunction is allowed at the commencement of the action, the clerk shall indorse upon the summons, 'injunction allowed,' and it shall not be necessary to issue the order of injunction; nor shall it be necessary to issue the same, where notice of the application therefor has been given to the party enjoined. The service of the summons so indorsed, or the notice of the application for an injunction, shall be notice of its allowance.

"Sec. 257. Where the injunction is allowed during the litigation, and without notice of the application therefor, the order of injunction shall be issued, and the sheriff forthwith serve the same upon each party enjoined, in the manner prescribed for serving a summons, and make return thereof, without delay.

"Sec. 260. An injunction granted by a judge may be enforced as the act of the court. Disobedience of an injunction may be punished as a contempt by the court, or by any judge who might have granted it in vacation. An attachment may be issued by the court or judge, upon being satisfied by affidavit of the breach of the injunction, against the party guilty of the same; and he may be required, in the discretion of the court or judge, to pay a fine not exceeding two hundred dollars, for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or, in default thereof, he may be committed to close custody, until he shall fully comply with such requirement, or be otherwise legally discharged."

The general rule is that the authority to punish for con-

tempt belongs exclusively to the court in which the contempt is committed. (Hawes, Jurisdiction, sec. 221; Wells, Jurisdiction, p. 180.) In Rapalje on Contempts, sec. 13, it is said: "It is a well settled rule that the court alone in which the contempt is committed, or whose order or authority is defied, has power to punish or entertain proceedings to that end." In *Kirk v. Milwaukee D. C. Mfg. Co.*, 26 Fed. Rep., 501, it was held that when a cause is removed from the state court to the circuit court of the United States pending proceedings against one of the parties for contempt in disobeying an order of the former, the circuit court has no jurisdiction in such proceeding on the ground that the contempt was against the state court only. (See also *Passmore Williamson's case*, 26 Pa. St., 9, and *State v. McKinnon*, 8 Oregon, 487.) Mr. Bishop says (2 Bish., Crim. Law, 268): "It may be observed that the very nature of a contempt compels the court against which it was committed, to proceed against it, and if the court has jurisdiction precludes any other or superior tribunal from taking cognizance of it whether directly on appeal or otherwise." The injunction was the process of the district court. It was not effective for any purpose until a bond was given and approved by the clerk of the district court (sec. 255), nor until the order was issued under the seal of the clerk or the summons indorsed, injunction allowed (sec. 256). When issued and served it was under the exclusive control of the district court. Whatever act Bouton may have done in violation of the injunction was an offense against the district court and not the county judge. If such act amounted to a contempt it was a contempt of the former and not the latter. The order which a county judge is authorized to make is in an action in the district court—an order formerly within the exclusive jurisdiction of a court of chancery. When that order is made his jurisdiction ends, unless his further authority clearly appears from the statutes. Jurisdiction of a county judge

to commit for the violation of the orders of a court of equity is an anomaly which should not be sustained upon any doubtful or uncertain grounds. It has been held by this court that proceedings in contempt are in their nature criminal and that the strict rules of construction applicable to criminal proceedings are to govern therein. (*Boyd v. State*, 19 Neb., 128.) With this rule in mind let us examine some other provisions of our statutes on the subject. The general provision on the subject of contempts is found in section 669 of the Civil Code, as follows:

"Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: *First.* Disorderly, contemptuous or insolent behavior towards the court, or any of its officers, in its presence. *Second.* Any breach of the peace, noise or other disturbance tending to interrupt its proceedings. *Third.* Willful disobedience of, or resistance willfully offered to, any lawful process or order of said court. *Fourth.* Any willful attempt to obstruct the proceedings or hinder the due administration of justice in any suit, proceedings, or process pending before the courts. *Fifth.* The contumacious and unlawful refusal of any person to be sworn or affirmed as a witness, and when sworn or affirmed, the refusal to answer any legal and proper interrogatory."

By the next section it is provided that contempts committed in the presence of the court may be punished summarily, but in other cases the party, upon being brought before the court, shall have a reasonable time in which to make his defense. It will be observed that the power to punish for contempt is by the section quoted conferred, not upon its judges, but upon courts of record. The county court is a court of record in a restricted sense only, viz., while acting within the jurisdiction which it possesses concurrently with the district court. (*Schell v. Husenstine*, 15 Neb., 11.)

By the constitution, section 16, article 6, it is provided that the county court shall not have jurisdiction in actions in which the title to real estate is sought to be recovered or may be drawn in question. There is no doubt of the power of the county court to enforce its own orders made within its jurisdiction by proceedings in contempt. But the power of a county judge to punish as for contempt the violation of the order or decree of a court of chancery, as in this instance, where the title to real estate was directly involved, cannot be said to be within the spirit of the constitution. To hold that the county court, or the judge thereof, can under our system be authorized to enforce the orders or decrees of a court of equity in such a case by committing the offending party for the violation thereof, appears to the writer to be a direct contravention of the constitution, and would have been strikingly incongruous, to say the least, had such been the clearly expressed intention of the legislature. The provisions of our statute for the allowing of injunctions and punishments for the breach thereof were copied from sections 239 and 247 of the Code of Ohio of 1853. The constitution of 1851, which was then in force in that state, contained no such limitation upon the powers of the probate (county) court as does ours. On the contrary, it was expressly provided by section 8, article 4, after defining the jurisdiction of the probate court as generally exercised by such courts, that it shall have "such other jurisdiction in any county or counties as may be provided by law"; and although substantially the same provision is found in the present Code of Ohio with respect to the allowance and enforcement of injunctions as in ours, there is in the reports of that state no case in which the probate court or judge has committed an offender for the violation of an injunctional order in an action pending in the court of common pleas. So far, therefore, as the practice under the constitution of that state sheds any light upon the question under consideration, it

tends to confirm us in the view already expressed. For had the practice been for the probate judges to commit for violations of orders such as in this case, it is at least probable that there could have been found some mention thereof in the reports of that state.

That constitutional and statutory provisions upon the same subject should be construed together, and that all statutes should be construed with reference to the common law, are elementary rules of construction which have been repeatedly recognized by this court. By an application of those rules to the question before us it is plain that the literal wording of section 260 must yield to the evident meaning of the several provisions on this subject when construed in the light of the common law. The power, therefore, to punish for the violation of an injunction "by the court or any judge who may have granted it in vacation" is limited to the court or judge *thereof* who may have allowed the order in question.

Exceptions were taken to a number of instructions which need not be noticed, since they all state in different language the one proposition already considered, viz., that the county court had jurisdiction in the proceeding against the defendant in error for contempt.

Among the instructions refused are several containing the same proposition as the following: "In an action of false imprisonment it is incumbent upon the plaintiff to prove by a preponderance of evidence that the original prosecution was without probable cause and was malicious." These instructions were properly refused. False imprisonment is the unlawful detention of the injured party. (Am. & Eng. Encyc. of Law, vol. 7, 662.) The question of malice is immaterial except so far as it affects the measure of damage. (*Comer v. Knowles*, 17 Kan., 436.) *Casebeer v. Rice*, 18 Neb., 203, relied upon by plaintiff in error, was an action for malicious prosecution and, therefore, not applicable.

Other instructions were refused which were intended by plaintiffs in error as a definition of a conspiracy. There was no error in refusing them. It was not neccessary to prove a conspiracy. (*Painter v. Ives*, 4 Neb., 122; *Fenelon v. Butts*, 53 Wis., 344.) The rule is that any one who aids or assists in the unlawful imprisonment of another is chargeable as a principal. (7 Am. & Eng. Encyc. of Law, 679, and authorities cited in note.)

Lastly, it is insisted that the damages are excessive. The evidence discloses the fact that defendant expended $40 for the services of counsel in order to secure his discharge. He was detained in custody at least eight days, and was during said time imprisoned in the jail of the county twelve or thirteen hours. The verdict, $100, does not appear to be so disproportionate to the wrong as to call for action by this court.

AFFIRMED.

NORVAL, J., concurs.

MAXWELL, CH. J., dissenting.

I am unable to agree to the majority opinion for the following reasons: The proof clearly shows that the action was pending in the district court and that the district judge was absent from the county, and that the order of the county judge granting an injunction was valid. The sole question presented is, Has the county judge authority to punish for the willful violation of an injunction granted by himself?

Section 252 of the Code provides: "The injunction may be granted at the time of commencing the action, or at any time afterward, before judgment, by the supreme court or any judge thereof, the district court or any judge thereof, or, in the absence of said judges, by the probate judge thereof, upon it appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto." This is a copy of the first

part of section 239 of the original Ohio Code, with the exception of the words "district court," which in the Ohio Code are "the court of common pleas." (Seney's Code, p. 239.)

Section 253 of the Nebraska Code provides: "If the court or judge deem it proper that the defendant, or any party to the suit should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose at a specified time and place, and may in the meantime restrain such party." This is section 240 of the original Ohio Code.

Section 260 of the Nebraska Code is as follows: "An injunction granted by a judge may be enforced as the act of the court. Disobedience of an injunction may be punished as a contempt by the court, or *by any judge who may have granted it in vacation.* An attachment may be issued by the court or judge, upon being satisfied by affidavit of the breach of the injunction, against the party guilty of the same; and he may be required, in the discretion of the court or judge, to pay a fine not exceeding $200, for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or in default thereof, he may be committed to close custody until he shall fully comply with such requirement, or be otherwise legally discharged." This is a copy of section 247 of the original Ohio Code.

In looking through the reports of that state we have been unable to find a single case in which it was held that a judge who granted an injunction could not punish for a violation of the same. There is but little doubt violations of injunctions issued by county judges have taken place in that state and been punished by such judges, but if so, the plain language of the statute was held to be a sufficient warrant for such arrest and punishment, hence the cases were not taken to the supreme court. Under our statute the district court has jurisdiction to punish for a violation

of an injunction in a case pending in the court. If the statute stopped here, it would not be seriously contended that a judge could punish such violation. The language of the statute, however, is plain and unequivocal: "Disobedience of an injunction may be punished as a contempt by the court, or by any judge who may have granted it in vacation." If any judge who may have granted it in vacation may punish for a violation of the same, certainly a judge who was duly authorized and did grant it in vacation has authority to punish for a violation thereof. The punishment for a contempt is not based alone upon the disrespect shown the judge who granted the writ, but principally because the disobedience of the order interrupts the due administration of justice. This being so, it is necessary that the power to protect the order of injunction while it continues in force should remain in each county to be exercised as occasion may require. Suppose an individual or some of the great corporations should desire certain property for right of way or other use, in the county where the cause originated, or any other county in which no judge of the district court resides, and the property owner should obtain an injunction from the county judge against the appropriation of his property. In such case, as the county judge had no power to arrest and punish for a violation of the injunction, the owner of the property is practically without a remedy to prevent a violation of his rights. Suppose a railway was about to be built on a public street in front of the plaintiff's residence, or through his residence, causing a removal thereof, without complying with the law giving the company that right, and an order of injunction was obtained from the county judge, which it disregarded and went on and completed the work, the property owner would be practically without remedy. It is true he could recover damages after an expensive and exhausting litigation with a powerful opponent, but that is not an *adequate* remedy, and places the owner of the prop-

erty taken to quite an extent at the mercy of his antagonist. There are many other wrongs liable to occur in any county where the means of preventing the same are taken away. The statute provides an adequate remedy to prevent the wrong, which is available to every person, be he rich or poor. In a late case the court held that the county court had equity jurisdiction in cases arising out of probate matters, and the same rule, no doubt, applies in cases of injunctions. An examination of the constitution of Ohio and that of Nebraska will show no substantial difference as to the power conferred in this respect on the county judges.

Giving the words of the statute their plain natural meaning, a county judge has authority to punish the violation of an order of injunction, lawfully granted by him, and this, so far as the writer is advised, has been the construction placed on these words by the courts and bar of the state for a third of a century. Cases analogous to this frequently arise in those states where a temporary order of injunction is granted by a circuit court commissioner. Thus in *Nieuwankamp v. Ullman*, 47 Wis., 168, an order of injunction had been granted by a circuit court commissioner against an insolvent debtor to restrain him from disposing of his property. The order being violated, the court held that the commissioner could punish for a violation of the order, but that the court possessed the power also. The matter is discussed in *Haight v. Lucia*, 36 Wis., 355, in which it was held that in certain cases where the statute authorized it, a circuit court commissioner *could punish* for contempt. The Wisconsin statute is as follows: "Every court commissioner may issue subpœnas for witnesses, and attachments and other process to compel their attendance, administer oaths, take depositions and testimony in civil actions, when authorized by law, or by rule or order of any court having jurisdiction of such actions, and return and report such depositions and testimony; take and certify the ac-

knowledgments of deeds and other instruments in writing, state accounts between parties referred to him by order of court, determine upon the amount and sufficiency of bail, allow writs of *habeas corpus* and *ne exeat*, and grant injunctional orders; and may exercise within his county the powers of a circuit judge at chambers, in any civil action pending in such county, except as otherwise provided by law; and may do such other things as he may be authorized by law to do, and perform such other duties as may be required of him by the circuit court, or as are necessary and proper for the full exercise of the powers hereby granted; subject to review in all cases by the circuit court, as provided by law and the rules and practice of the court." Also, after providing for the examination of a debtor under oath before a circuit court commissioner, and where there is danger that the debtor will leave the state, authorizing the debtor's arrest and imprisonment, it is further provided in case "he has property which he has unjustly refused to apply to such judgment, he may be ordered to enter into an undertaking, with one or more sureties, that he will from time to time attend before the judge or court commissioner as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the judge, or court commissioner as for a contempt."

In this case it is distinctly held that a circuit commissioner, although his powers are much less than those of a county judge, may punish for the violation of an injunctional order issued by him, although the circuit courts also possessed that power. It is very clear to my mind that the county judge had jurisdiction and that the judgment should be reversed.

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2. When a dog leaves the owner's premises or goes upon the public road, no one having control of him being near, he is running at large. *Id.*

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10. The issues in the district court upon the trial of an appeal from a justice of the peace should be substantially the same as were presented below, unless some new matter has arisen since the former trial. *Lee v. Walker* 689
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11. The appeal of a taxpayer from the allowance of a claim against a county will not be dismissed on account of informalities or omissions in the undertaking, but an opportunity will be given to file a proper bond in the district court. *Rube v. Cedar County* 896

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Contracts. See BAILMENT. DAMAGES, 2. EJECTMENT, 11. GUARANTY. PLEADING, 5. PRINCIPAL AND SURETY, 6, 7. SCHOOLS, 3. VENDOR AND VENDEE, 3.

1. An action upon an attachment undertaking is one arising upon contract. *Withers v. Brittain*..... 436

2. In an action for breach of a contract to open and maintain a public road, damages which necessarily result from the breach may be recovered without any special statement of the same, and a motion to make the petition more definite and certain was properly overruled. *Kingsley v. Butterfield*..... 228

3. It is no defense to such an action that a railroad was located on the proposed route and prevented the opening of the public highway. *Id.* 228, 231

Contractors' Bonds. See BONDS. PRINCIPAL AND SURETY.

Contribution.

1. In determining whether one joint-wrong-doer is entitled to contribution from another the test is, whether the former knew, at the time of the commission of the act for which he has been compelled to respond, that such act was wrongful. *Johnson v. Torpy* 604
2. When a saloon-keeper sells liquor to a person known to be a common drunkard, he is presumed to know that he is doing an unlawful act, and when judgment is rendered againt him on his bond for the injury resulting therefrom, he cannot enforce contribution against another saloon-keeper who also sold liquor to the drunkard. *Id.*

Contributory Negligence. See NEGLIGENCE, 4.

1. In action for damages against a railroad company for wrongfully causing the death of plaintiff's intestate, and the plaintiff proves his case without disclosing any negligence on the part of the intestate, contributory negligence is a matter of defense, and the burden of establishing it is on the defendant. *Anderson v. C., B. & Q. R. Co.* 95
2. In such a case the judgment will not be reversed because the court gave an erroneous instruction on question of contributory negligence, its giving being error without prejudice. *Id.*

Conversion. See CHATTEL MORTGAGES, 1.

1. When a mortgagee, in foreclosing a chattel mortgage, sells more property than is sufficient to satisfy the debt and costs, he will be liable for conversion of such excess. *Omaha Auction & Storage Co. v. Rogers* 61
2. The owner of converted goods does not bar his right of action for the original wrongful taking by receiving back the goods or a portion thereof, or accepting the proceeds arising from their sale, but such facts may be shown in mitigation of damages. *Watson v. Coburn* 492
3. In an action for conversion it is no defense to show that the property has been taken from the wrong-doer by a third party, by legal process or otherwise, unless the original owner has received, or had the benefit of the proceeds thereof, where the same has been sold. *Id.*

4. In an action by a mortgagee for conversion against a sheriff who has levied on the property at the suit of a creditor of the mortgagor, the plaintiff is entitled to receive as damages the actual market value of the property at the time of the conversion, with interest from that date, less the market value of that portion of the property subsequently recovered or the proceeds of which plaintiff has had the benefit, and not exceeding the amount remaining unpaid on the mortgage. *Id.*

5. In an action by a chattel mortgagor against the mortgagee for conversion of the property, where the defendant justifies under a provision in the mortgage authorizing him to take immediate possession when he felt insecure, he may prove any facts tending to show the conduct of the mortgagors in regard to the chattels, but cannot prove mere rumors or reports. *Rector-Wilhelmy Co. v. Nissen*..... 716

6. In such a case it is proper to instruct the jury, if they find for plaintiff, to disregard the evidence of what the goods sold for at forced sale, in arriving at the value of the property. *Id*

7. Instruction on measure of damages set out in opinion approved. *Id.*

Conveyances. See DEEDS. VENDOR AND VENDEE.

Conveyances to Relative. See FRAUDULENT CONVEYANCES.

Corporations.

1. Unless otherwise provided, the whole amount of capital fixed by a subscription contract must be fully secured by a *bona fide* subscription before an action will lie upon the personal contract of a subscriber to recover an assessment on the several shares. *Hards v. Platte Valley Improvement Co*..... 263

2. In an action upon a contract of subscription to stock, where there is testimony tending to show that defendant waived the conditions in respect to amount of stock to be subscribed before entering upon the main purposes of the corporation, it should be submitted to the jury. *Id.*

3. In an action to recover a subscription to capital stock the defendant will not be released because the board of directors passed a resolution to drop from the list of stockholders the names of delinquent subscribers, where the evidence shows that such action was not taken, that defendant was not excluded from participating in the management of the corporation, and that he subsequently

obtained a reduction from the amount of a purchase from the company on account of his membership. *Hays v. Franklin County Lumber Co* 512

Corroborating Evidence. See WITNESSES, 3.

Costs. See DISMISSAL.

1. Will be taxed to the party at fault where copies of unnecessary papers are included in the transcript for review in supreme court. *Streitz v. Hartman* 406
2. The costs of suit will be taxed against the county in an action where a writ of *mandamus* issues against the county commissioners to compel them to call an election for the relocation of the county seat. *State v. Crabtree* 106
3. In an action by a principal against an agent for an accounting, where the defendant denied that he was indebted to plaintiff, and that he had accounted for all matters in controversy before the suit was brought, and defended on the theory that nothing was due from him, the plaintiff was not required to prove a demand for an accounting in order to entitle him to recover costs. *Carlson v. Beckman*, 392
4. In such a case a judgment for less than $200 will not alone prevent a recovery for costs by plaintiff since a justice of the peace has no jurisdiction. *Id.*

Counter-Claim.

Not pleaded before a justice of the peace will be stricken from the answer on trial of appeal to district court. *Carr v. Luscher* 318

Counties. See AGRICULTURAL SOCIETIES, 2. APPEAL, 11. COUNTY TREASURER.

The boundaries of an organized county cannot be lawfully changed so as to add to such county adjoining unorganized territory, unless a majority of the inhabitants of such territory so petition the county board of the county to which it is proposed to be added, nor unless the proposition has received the sanction of a majority of the voters of such county at an election duly called and held therein for that purpose. *Wayne County v. Cobb* 231

County Board.

Will not be required by *mandamus* to let the publishing of the delinquent tax list to the lowest bidder. *State v. Lincoln County* 346

County Clerks. See ELECTIONS, 1, 2.

County Commissioners. See COUNTY SEAT.

County Court. See INJUNCTIONS.

1. The constitution does not prohibit the conferring upon the county court of equity jurisdiction except as to the subjects enumerated in sec. 16, art. 6. *Wilson v. Coburn*..... 530
2. The funds of an insolvent debtor which come into the hands of an assignee are within the jurisdiction of the county court, which has authority to determine the rights of the creditors thereto and grant proper relief, subject to the limitations of the constitution. *Id.*

County Judge. See ATTACHMENT, 5, 8, 12. JUDGMENTS, 7.

County Seat.

Mandamus will issue against county commissioners to compel them to call a special election for the relocation of the county seat under sec. 1, art. 3, ch. 17, Comp. Stats., upon their unlawful refusal to do so after the petition provided by law has been presented to them. *State v. Crabtree*..... 106

County Superintendent. See MANDAMUS, 6. SCHOOL DISTRICTS.

County Supervisors. See AGRICULTURAL SOCIETIES, 2.

It is the duty of all present to vote on every proposition properly before the board, and those present who do not vote are to be counted in making up the aggregate of the votes. *Township of Inavale v. Bailey*..... 456

County Treasurer. See TAX LIENS, 2.

Is not entitled to fees on moneys paid to him by township treasurers. *Taylor v. Kearney County*..... 381

Courts. See COUNTY COURTS. DISTRICT COURTS. JUSTICE OF THE PEACE. SPECIAL TRIBUNAL.

Covenant. See LANDLORD AND TENANT, 6.

Covenant of Warranty.

1. An action for damages for breach of covenant of warranty is for a debt arising under a contract, which may be recovered by attachment. *Cheney v. Straube*..... 521
2. A cause of action on a covenant of warranty, or for a quiet enjoyment, does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title. *Id.*
3. A cause of action accrues to covenantee on his covenant of warranty, or for quiet enjoyment, upon eviction by the purchaser under a prior mortgage. *Id.*
4. In an action for the breach of a covenant of warranty by the covenantee, after eviction under a paramount title, it is

sufficient to allege in general terms an eviction under a title paramount to that of the covenantor. *Id.*

5. One who voluntarily surrenders to a third party asserting an adverse title must, in an action against his covenantor for breach of warranty, establish the validity of the title he has recognized. *Id.* 522

6. The measure of damages for breach is the consideration paid for the land, with interest, and costs and expenses incurred in the suit by which the covenantee is evicted; and if the latter is obliged to purchase an outstanding title in order to protect his own, he may recover the amount paid for such paramount title, not exceeding the consideration paid by him. *Id.*

Creditor's Bill. See FRAUDULENT CONVEYANCES. NEGOTIABLE INSTRUMENTS, 3.

Criminal Law. See EMBEZZLEMENT. LARCENY. LIBEL.

1. A district court has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by committment of the defendant under it and substitute for it another sentence at the same term of court, and in such a case the last sentence is a nullity. *In re Jones* 499, 502

2. In order to warrant a conviction on circumstantial evidence the evidence must be of so conclusive a character as to prove beyond a reasonable doubt that the accused, and no other person, committed the offense charged. *Kaiser v. State* 704

Criminal Libel. See LIBEL.

Cross-Examination. See WITNESSES, 2.

Cumbering Record.

Costs of unnecessary parts of record in transcripts for review will be taxed to the party at fault. *Streitz v. Hartman*... 406

Curtesy. See LIFE ESTATE.

Custom and Usage. See USAGE.

Damages. See ATTACHMENT, 11. CONTRACTS, 2. CONVERSION, 2, 4, 7. COVENANT OF WARRANTY, 6. EMINENT DOMAIN. LIQUORS. NEGLIGENCE.

1. A verdict for $2,000 was not excessive damage for personal injuries to a healthy boy ten years of age, resulting from being kicked by his step-father, where the proof showed that the boy's spine was permanently injured and caused constant pain and unfitted him for hard labor. *Wohlenberg v. Melchert* 804

2. Where a building is not erected within the time limited by the contract through the contractor's default or neglect, the owner is entitled to recover damages In the trial of such a case it is not error for the owner to prove that the building had been leased for a stipulated sum, and that the tenant was to take possession as soon as the work was completed, when it is shown that the reasonable rental value exceeded the amount of rent reserved by the lease. *Consaul v. Sheldon*..... 247

Death by Wrongful Act. See CONTRIBUTORY NEGLIGENCE. MUNICIPAL CORPORATIONS, 1.

1. Under sec. 2, ch. 21, Comp. Stats., in an action against a railroad company for wrongfully causing the death of plaintiff's intestate, where the proof shows that the next of kin was not pecuniarily injured by the death of the intestate, the plaintiff is only entitled to recover nominal damages. *Anderson v. C., B. & Q. R. Co.*..... 102
2. In case of a verdict in favor of the plaintiff, in an action against a railroad company for wrongfully causing the death of plaintiff's intestate, he is entitled to recover such a sum as the jury may deem from the evidence a fair and just compensation to the next of kin, for the pecuniary loss resulting from the death which is made the basis of the suit, not exceeding the statutory amount. *Id*..... 96

Deceit. See MARRIAGES, 2. SALES.

Declarations. See EVIDENCE, 10.

Decrees. See JUDGMENTS.

1. The recitals of the record are conclusive upon the parties as to the term at which a decree was rendered. *State v. Hopewell*..... 823
2. Record entry may be changed by district court after term to correspond to the decree pronounced. *Hoagland v. Way*..... 387
3. The taking of a stay of order of sale is not a waiver of the right to apply to district court to correct record entry of decree. *Id*..... 388
4. Cannot be assailed for mere irregularities by parties who appeared in the suit, to defeat confirmation of sale under a mortgage foreclosure. *Stratton v. Reisdorph*..... 314

Deeds. See ACKNOWLEDGMENT. MORTGAGES, 10.

1. Proof of recording where records have been destroyed by fire. *Deming v. Miles*.....739, 741
2. Identity of the name of a grantor or grantee is *prima facie* evidence of identity of the person. *Rupert v. Penner*..... 587

3. Real estate is sufficiently described in a conveyance when the deed refers for identification to another deed specifically mentioned therein, which contains an accurate description of the property sold. *Id.*

4. Under sec. 53, ch. 73, Comp. Stats., in construing an instrument conveying real estate, where, by any reasonable interpretation, the granting clause and the *habendum* can be reconciled, effect must be given to both. *Id.*

5. Where a deed, properly executed and acknowledged, is filed and recorded in the proper office, it is thenceforth notice to all the world, even though the record book containing it may be totally destroyed by fire. *Deming v. Miles* 739

6. When a deed, which is beneficial in its character to the grantee, named therein is properly acknowledged and recorded, the presumption of law is that it was delivered by the grantor and accepted by the grantee. *Bowman v. Griffith* 361

7. Where a deed, beneficial to the grantee, recites that it is executed for the purpose of correcting an error in a prior deed between the same parties, the record thereof is evidence of the facts therein recited. *Id.*

8. Filing a deed properly executed and acknowledged for record with the proper recording officer is constructive notice to all subsequent purchasers and mortgagees, although the officer may fail to comply with the requirements of the statute with respect to recording it. *Deming v. Miles*, 739

9. The proper recording of an absolute deed given and intended as a mortgage, where the contract to reconvey rests in parol, is constructive notice of the interest of the grantee. Such lien is superior to a mechanic's lien for materials furnished under a contract entered into with the grantor after the recording of such deed. *Livesey v. Brown* 112

10. The premises of a deed were "do hereby grant, sell, and convey unto J. P. C." The *habendum* clause was "to have and to hold said premises, with the appurtenances, unto the said J. P. C. for and during the term of his natural life, and at his decease the same shall descend in equal shares to his children," naming them. *Held*, That the deed conveyed a life estate to J. P. C., with remainder to his children therein mentioned. *Rupert v. Penner* 588

11. In the body of a deed and in the certificate of acknowledgment the grantor was correctly described as Archibald T. Finn. The deed was signed as Arch. T. Finn. The

certificate of acknowledgment identified the party mentioned as grantor as known to the officer to be the person whose name is affixed to the instrument and who executed the same. *Held*, That it sufficiently appeared that "Archibald T. and Arch. T." were one and the same person. *Id.*, 587

Defect of Parties. See ERROR PROCEEDINGS.

Deficiency Judgment. See VENDOR AND VENDEE, 2.

Definitions. See WORDS AND PHRASES.

Delinquent Tax List.

May be published in the newspaper designated by the county board. *State v. Lincoln County* 346

Delivery. See DEEDS, 6.

Demand. See COSTS, 3, 4. LANDLORD AND TENANT, 5.

Demurrer.

A misjoinder of parties plaintiff is not a cause for demurrer. *Lancaster County v. Rush*..... 120

Depositor. See BANKS AND BANKING.

Descent. See MORTGAGES, 10.

Description. See DEEDS, 3. EJECTMENT, 8. FORCIBLE ENTRY AND DETAINER, 1. JUDICIAL SALES, 2.

Diminution of Record. See APPEAL, 4.

Directing Verdict. See NEGLIGENCE, 6. TRIAL, 3, 7.

Discovery.

An order for the examination of a witness should not be made without notice. *Farrington v. Stone*..... 459

Discretion of Trial Court. See EVIDENCE, 1, 17. REVIEW. 27, 35. WITNESSES, 2.

Dismissal. See APPEAL, 1, 3, 9, 11.

Where an action is dismissed for want of prosecution, and the plaintiff gives a valid excuse for a failure to pay costs, the court will not compel such payment as a condition of permitting the second action to proceed. *U. P. R. Co. v. Mertes* 204

District Court.

1. Has jurisdiction in case of contested election in relation to township organization. *Albert v. Twohig*..... 563
2. Has power to correct a mistake in the record entry of a decree at a term subsequent to that at which it was rendered so as to make the same correspond to the decree

actually pronounced, and to conform to the pleadings in the case. *Hoagland v. Way* 387

3. May hold terms at the same time in different counties of the same district, and, when necessary, the court sitting in any county may be continued into and held during the term fixed for holding such court in any other county in the district, or may be adjourned and held beyond such time. *Tippy v. State* 368

Dogs. See ANIMALS, 1–3. MALICIOUS MISCHIEF.

Domestic Judgment. See JUDGMENTS, 1.

Drafts. See NEGOTIABLE INSTRUMENTS, 1, 5.

Drunkenness. See LIQUORS 3.

Ejectment. See ADVERSE POSSESSION. JOINDER OF ACTIONS.

1. The plaintiff must possess a legal estate to maintain ejectment. *Malloy v. Malloy* 224
2. A mortgagee cannot maintain ejectment to recover possession of real estate. *Id.*
3. Evidence *held* not sufficient to entitle the defendant in ejectment to recover for taxes paid by third parties. *Fletcher v. Brown* 660
4. Evidence *held* to sustain the finding of the trial court as to the value of improvements made by an occupying claimant. *Id.*
5. Under a general denial the defendant may show that a deed in plaintiff's chain of title was procured by fraud and undue means. *Staley v. Housel* 160
6. It is not error to allow a plaintiff out of possession to amend his petition to quiet title so as to state a cause of action in ejectment. *Homan v. Hellman* 414
7. Under a general denial a defendant may prove, by any legal evidence which he may have, any fact which will defeat the plaintiff's cause of action. *Staley v. Housel* 160
8. A description in the petition by metes and bounds, commencing at the southeast corner of the northwest quarter of the northwest quarter of a specified section, town, and range, is sufficient. *Mills v. Traver* 292
9. Permitting the introduction in evidence of records of deeds duly recorded for the purpose of proving title, instead of requiring the production of the originals, rests largely in the discretion of the trial court. *Rupert v. Penner* 587
10. Defendant in possession under title bond from holder of tax deed cannot recover taxes paid by the person whose

title bond he holds without a special assignment. *Fletcher v. Brown* 660
Carter v. Brown 673

11. A party who holds under a contract for the purchase of real estate is not in law deemed possessed of a legal estate in the premises, and unless authorized by statute, cannot maintain ejectment. *Malloy v. Malloy* 228
12. Where an occupant of real estate is allowed for valuable and lasting improvements, the measure of his recovery is the amount such improvements add to the value of the premises. Evidence of cost of improvements, irrespective of their effect upon the value of the land, is inadmissible. *Fletcher v. Brown* 660
13. To entitle defendant on eviction to recover under the occuping claimants' act for improvements, and taxes paid while in possession, it must appear that the improvements were made and money expended while he was in good faith claiming title derived from some public office, or from the state or the United States. *Carter v. Brown* 670
14. Where the defendant's only title was derived from a title bond executed by the holder of void tax deeds, he was not entitled to recover in ejectment by the owner, under the occupying claimants' act, for improvements and taxes, in the absence of evidence that his possession was by virtue of said bond, or that the expenditures were made while he was in good faith relying upon his title thereby acquired. *Id.*
15. Where in action of ejectment it appears that the conveyance by which plaintiff holds title was given as security for advancements of money which the grantor had agreed to repay, the defendant in possession, as heir of such grantor, will be required to pay the sum due plaintiff, and a decree of foreclosure and sale for the amount due should be entered in plaintiff's favor. *Malloy v. Malloy* 224
16. Damages for rents and profits may be recovered in an action of ejectment for the statutory period, prior to service of summons. The special provision of the occupying claimants' act, ch. 63, Comp. Stats., applies only to rents and profits subsequent to service of summons in ejectment. *Fletcher v. Brown* 660
17. Whether such special provision is exclusive as to damages for rents and profits subsequent to the service of summons or concurrent only, *query*. *Id.*

Elections.

1. Under sec. 20, ch. 26, Comp. Stats., it is no part of the

duty of judges and clerks of election to certify that certain persons received a specified number of votes as democrat and a certain number as people's independent, or otherwise, and such certification has no force or effect. *State v. Stein* 848

2. Under sec. 46, ch. 26, Comp. Stats., it is the duty of a county clerk, with two disinterested electors, to make abstract of the votes cast for members of the legislature, and under sec. 48, ch. 26, the clerk is required to make out a certificate of election to the person having the highest number of votes, but he has no authority to classify the votes cast for a candidate as people's independent, democratic, or otherwise. *Id.*

3. The district court has jurisdiction in case of contested election in relation to township organization. *Albert v. Twohig* 563

4. The ballots cast constitute the primary evidence in such a case to determine the rights of the respective parties. If they have been placed in a position to be tampered with by interested parties the burden of proof is on the party offering them in evidence to show that they have been properly preserved. *Id.*

Embezzlement.

1. In a trial of the defendant for embezzlement of pianos, evidence tending to prove that he claimed to be absolute owner of the instruments, that he received them as agent and converted them to his own use with a fraudulent intent, by pledging them for borrowed money and by transferring them by bill of sale, is sufficient to sustain a verdict of guilty. *Morehouse v. State* 647

2. An agent who, having received property of another to sell on commission on certain prescribed terms, fraudulently, and without the knowledge and consent of the owner thereof, pledges it for money borrowed by the agent for his own use and benefit, with the intent to deprive the owner of his property, is guilty of embezzlement. *Id.*..... 643

Eminent Domain.

1. The special remedy provided by statute for determining, by condemnation proceeding, the damage to land when a part thereof is taken for right of way purposes by a railroad company, is exclusive. *F., E. & M. V. R. Co. v. Mattheis* 48

2. The judgment of the district court on appeal from an award in a condemnation proceeding for right of way is

conclusive upon the parties thereto as to all matters actually litigated therein, and also as to all matters necessarily within the issues joined, although not formally litigated. *A. & N. R. Co. v. Forney* 607

3. A petition for the appointment of a commission to appraise damages for taking property for right of way, which sets forth that the petitioner desires to acquire a strip 100 feet wide through a particular tract, and refers to an accompanying plat for a more particular description, is sufficient. *F., E. & M. V. R. Co. v. Mattheis* 48

4. The construction of a railroad track upon trestle work along an alley and across a street where the benches rest mostly in the alley is a direct injury to adjacent lots, for which the owner is entitled to recover damages in a proceeding to condemn a portion of the lots for right of way. *A. & N. R. Co. v. Forney* 607

5. In a subsequent action by the owner of the lots to recover damages for the obstruction of the street, in the absence of evidence to the contrary, the presumption is that the cause of action was included in the judgment in the former proceeding, and is now *res adjudicata*. *Id.*

Equity. See LANDLORD AND TENANT, 6. VENDOR AND VENDEE, 1.

1. A defendant who claims protection as a *bona fide* purchaser of real estate without notice of the plaintiff's equities is required to deny such notice, although not alleged in the petition. *Dailey v. Kinsler* 835

2. Where many questions are in dispute between a lessor and lessee beside the mere right of possession, a court of equity will entertain jurisdiction and thus settle all matters between the parties relating to the subject in one action, and prevent a multiplicity of suits. *Haynes v. Union Investment Co* 767

Equity Jurisdiction. See COUNTY COURTS.

Error. See REVIEW. TRIAL.

1. Admission of testimony to prove a fact admitted by the pleadings is error without prejudice. *Consaul v. Sheldon* ... 247

2. The failure to except to the ruling of the trial court, to the admission or exclusion of testimony, is a waiver of the error. *Johnson v. Swayze* 117

Error Proceedings. See APPEAL. REVIEW.

All parties to a joint judgment should be made parties in supreme court, yet where there is a defect of parties it is too late to raise the objection after the cause is submitted, the

submission being a waiver of absence of proper parties. *Consaul v. Sheldon* 247

Estoppel. See HOMESTEAD, 2, 3. LANDLORD AND TENANT, 2.

1. On the trial of an appeal by a land-owner from an award of damages, a city cannot urge defects and irregularities in its own proceedings in changing the grade of a street to defeat recovery. *Second Congregational Church Society v. City of Omaha* 103
2. Statements of an agent with authority to collect rents and care for property will not be received in disparagement of the title of his principal so as to work an estoppel in favor of one who purchased from a stranger claiming adversely to such principal. *Bowman v. Griffith* 362

Evidence. See ATTACHMENT, 9, 13. CONVERSION, 5. CORPORATIONS, 2, 3. DAMAGES, 1. DEEDS, 1. EJECTMENT, 3, 4, 9, 12. ELECTIONS, 4. INSURANCE, 2, 3. LARCENY. NEGOTIABLE INSTRUMENTS, 4–6. REVIEW. TRIAL, 2, 4. TRUSTS, 2. USAGE, 3. WITNESSES, 3.

1. Order of introduction rests in discretion of trial court. *Consaul v. Sheldon* 247
2. *Held* that certain testimony set forth in opinion was improperly rejected. *Cunningham v. Fuller* 58
3. Admission of testimony to prove a fact admitted by the pleadings is harmless error. *Consaul v. Sheldon* 247
4. The record of a deed correcting a former one is evidence of the facts recited therein. *Bowman v. Griffith* 361
5. In the absence of pleadings and proof to the contrary, the laws of another state are presumed to be like our own. *Haggin v. Haggin* 376
6. Where offered testimony is excluded, the error, if any, is cured by the subsequent admission of the same evidence. *Consaul v. Sheldon* 248
7. Every material allegation of new matter in a pleading not denied by the answer or reply, for the purposes of the action is to be taken as true. *Id* 247
8. The evidence referred to in the opinion is not sufficient to overcome an officer's certificate of acknowledgment of a mortgage on a homestead. *Phillips v. Bishop* 487
9. The admission in evidence of copies of records of mechanics' liens, as well as the original liens, was not prejudicial to plaintiffs. *Consaul v. Sheldon* 251
10. Declarations of a person in the possession of property, as to title, are admissible evidence against him and all persons claiming under him. *Cunningham v. Fuller* 58

11. Evidence that a note has been materially altered after execution is admissible on foreclosure of mortgage securing it under a general denial. *Walton Plow Co. v. Campbell*... 173

12. In an action of ejectment, under a general denial, the defendant may show that a deed in plaintiff's chain of title was procured by fraud and undue means. *Staley v. Housel*, 160

13. In an action of replevin against a railroad company, a bill of lading is admissible in evidence, where its genuineness is not denied and the possession of the goods is admitted. *C., B. & Q. R. Co. v. Gustin* 92

14. A person having a general knowledge of the value of household goods may testify as to such value although he may not have dealt in goods of that kind. *Omaha Auction & Storage Co. v. Rogers*..... 61

15. In a cause tried to a jury the admission of opinion evidence which has no legitimate bearing on any matter in issue, and which is prejudicial to the party complaining, is good ground for reversal of the judgment. *Darner v. Daggett* 695, 698

16. In a proceeding for forcible entry and detention the plaintiff may be permitted to prove payment of taxes by one under whom he claims, for the purpose of showing that the claim and possession of the latter is in good faith. *Galligher v. Connell*..... 517

17. Permitting the introduction in evidence of records of deeds duly recorded, instead of requiring the originals, in ejectment trials for the purpose of proving title rests largely in the discretion of the trial court. *Rupert v. Penner* 587

18. In an action for damages by a wife for loss of means of support resulting from the sale of liquors to her husband, the latter's previous intemperate habits may be considered by the jury as affecting the measure of damages. *Uldrich v. Gilmore* 288

19. A communication through the telephone from Schuyler to Omaha, repeated by the operator at Fremont, an intermediate station, *held* admissible in evidence in an action for breach of contract in case stated in opinion. *Oskamp v. Gadsden* 7

20. When a defendant moves to dissolve an attachment and makes affidavit that the plaintiff's affidavit for attachment is untrue, the burden of proof is upon the plaintiff to sustain the attachment by a preponderance of the evidence. *Dolan v. Armstrong*..... 339

21. Where a witness has testified on a former trial of the case and his testimony reduced to writing in open court by the stenographic reporter, and the witness is absent from the state, such testimony, if otherwise competent, is admissible in evidence; and an objection "that no sufficient cause has been shown for the reading of that testimony" is not an objection to the mode of certifying the same, and was properly overruled. *City of Omaha v. Jensen* 69

Exceptions. See BILL OF EXCEPTIONS. REVIEW.

Executions. See JUDICIAL SALES.

Property in hands of a bailee under agreement to purchase at his election cannot be taken on execution to satisfy a judgment against such bailee, before payment made by him to bailor. *McClelland v. Scroggin* 537

Exhibits. See BILL OF EXCEPTIONS, 3, 6.

Factors and Brokers. See REAL ESTATE BROKERS.

False Imprisonment.

1. All persons who directly procure aid or assist in the unlawful detention are liable as principals. *Johnson v. Bouton* 899
2. Is the unlawful restraint of a person without his consent, either with or without process of law. *Id.* 898
3. It is not necessary to prove a conspiracy to unlawfully imprison, in order to entitle the injured party to recover. *Id.* 899
4. The question of malice in an action for false imprisonment is immaterial, except so far as it affects the measure of damages. *Id.*

Fees. See BENEVOLENT SOCIETIES.

A county treasurer is not entitled to fees on moneys paid to him by township treasurers. *Taylor v. Kearney County* ... 381

Findings. See MORTGAGES, 5.

On review in supreme court the presumption is in favor of the correctness of the finding of the trial court, and such finding will not be reversed unless clearly wrong. *Bickel v. McAleer* 515

Fire and Police Commissioners. See METROPOLITAN CITIES, 4. STATUTES, 3.

Fire Department. See MUNICIPAL CORPORATIONS, 1.

Fire Insurance. See INSURANCE.

Forcible Entry and Detainer.

1. A description of land in a complaint, as the "N. W. ¼ sec-

tion 20, township 29, range 14 west," is not void for uncertainty. *Devine v. Burleson* 238

2. Where a grantee of real estate, on receiving his deed, takes undisputed possession thereof, by himself, his agent or tenant, causing the premises to be fenced and cultivated, such facts constitute a prior possession which will entitle such grantee, or his tenant, to prosecute one by whom he is dispossessed for forcible entry and detention. *Galligher v. Connell*..... 517

3. The plaintiff may be permitted to prove payment of taxes by one under whom he claims, for the purpose of showing that the claim and possession of the latter is in good faith. *Id.*

4. Instructions set out in opinion, *held* properly given and refused. *Id.*

Foreclosure. See CHATTEL MORTGAGES, 1. EJECTMENT, 15. MORTGAGES. TAX LIENS, 1, 3.

Foreign Laws.

In the absence of pleading and proof to the contrary the laws of another state will be presumed to be like our own. *Haggin v. Haggin*..... 376

Forfeiture. See INSURANCE, 8, 10. LANDLORD AND TENANT, 5.

Forgery.

Where the evidence tended to establish the fact that the mortgage was a forgery, a judgment canceling the apparent lien thereof was right. *Capital National Bank v. Williams*..... 410

Fraud. See BANKS AND BANKING. SALES. STATUTE OF FRAUDS.

1. The ratification of a deed procured by fraud and undue influence must be with full knowledge of all facts affecting its validity. *Staley v. Housel*..... 172

2. In an ejectment suit the jury was warranted in finding that the deed of plaintiff's grantor was obtained by fraud and undue influence where the testimony showed that the maker was a drinking man, old, feeble, and childish; that he conveyed the land while sick and delirious, without lawful consideration, to a young, vigorous, and attractive woman, who had unlawfully cohabited with him, and promised to stay with him while he lived, and afterward abandoned him. *Id*..... 168

Fraud and Misrepresentation.

Instructions set out in opinion *held* erroneous. *Leavitt v. Sizer*.. 84

Fraudulent Conveyances.

1. While a transfer of property to a relative by a person liable on a claim, where the effect will be to defeat the payment of the same, will be scrutinized very closely, yet it will be sustained if made in good faith for an adequate consideration. *Farrington v. Stone*..... 456
2. It is not sufficient that the vendor desires to defeat the payment of a claim by the transfer of his property; to render the conveyance fraudulent it must be taken with knowledge, actual or constructive, of the proposed fraud, or there must be a want of consideration. *Id.*

Garnishment. See ATTACHMENT, 5, 7.

General Circulation. See LIBEL.

General Denial. See EJECTMENT.

Governor. See OFFICE AND OFFICERS. CONSTITUTIONAL LAW, 2.

Grade of Streets. SEE MUNICIPAL CORPORATIONS, 2.

Guaranty. See WARRANTY.

A contract of guaranty is assignable and the assignee may maintain an action thereon in his own name. *Weir v. Anthony*..... 936

Habeas Corpus.

A prisoner in the penitentiary under a second sentence pronounced after a former judgment against him upon the same verdict had been vacated without authority of law will be discharged where the first sentence has expired. *In re Jones* 503

Harmless Error. See CONTRIBUTORY NEGLIGENCE, 2. JUDICIAL SALES, 1. REVIEW. TRIAL.

Herd Law. See ANIMALS, 4, 5.

Homestead. See QUIETING TITLE, 2, 3.

1. A mortgage of the homestead of married persons is of no validity as against the homestead right unless signed and acknowledged by both husband and wife. *Whitlock v. Gosson*..... 829
2. A mortgage executed by a husband, the head of a family, whose wife was at the time insane and an inmate of an asylum in another state, was *held* void as against the homestead right. *Id.*

3. In such a case neither the husband nor wife will be estopped to deny the validity of the mortgage in a foreclosure proceeding. *Id.* 830

4. In such a suit, where the answer puts in issue the validity of the mortgage on the ground of exemption, a decree will not be allowed for the sale of so much of the homestead as exceeds $2,000 in value, unless the value of the property is alleged by the plaintiff or put in issue by proper pleadings. *Id.*

Husband and Wife. See HOMESTEAD. MARRIAGE.

Identity. See DEEDS, 2.

Impeachment. See ACKNOWLEDGMENT. WITNESSES, 6.

A certificate of acknowledgment of a deed or mortgage, in proper form, can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent. *Phillips v. Bishop* 487

Impounding Animals. See ANIMALS, 4, 5.

Imprisonment. See FALSE IMPRISONMENT.

Improvements. See EJECTMENT, 12–14.

Indemnity Bond. See LOST INSTRUMENTS.

Injunctions.

A county judge has no power to commit for contempt one guilty of disobedience of an injunction allowed by him in an action in the district court. In such a case the contempt is against the district court. *Johnson v. Bouton* 898

Insanity. See HOMESTEAD, 2.

A son was mentally incapacitated for transacting business. His father assisted him in paying and securing debts, and took possession of certain personal property of the son, under a bill of sale. In an action of replevin by the son to recover the property, the contract, not being for necessaries, was *held* void. *Wilkins v. Wilkins* 212

Insolvency. See BANKS AND BANKING.

Instructions. See FRAUD, 1. LANDLORD AND TENANT, 3 LARCENY, 2. TRIAL, 3, 7.

1. A party is entitled to have his case submitted to the jury upon his theory as shown by the evidence. *Cunningham v. Fuller* 58

2. An oral instruction directing the jury to "disregard this testimony entirely on this point" where no testimony had been given was not prejudicial error. *Consaul v. Sheldon* 258

3. The instructions in an action to recover the value of certain goods sold under foreclosure of chattel mortgage, on questions of value, usury, and conversion, set out in opinion, *held* to be a correct statement of the law. *Omaha Auction & Storage Co. v. Rogers* 66–7

4. A paragraph of a charge to the jury should be construed as a whole, and if so construed it correctly states the law, will not be condemned because a detached part thereof, construed by itself, might be subject to criticism. *St. Paul Fire & Marine Insurance Co. v. Gotthelf* 352

Insurance. See BENEVOLENT SOCIETIES.

1. The valued policy act of 1889 is sustained. *German Insurance Co. v. Penrod* 273

2. Evidence of freight charges and cost of handling goods destroyed by fire is admissible to show amount of loss. *St. Paul Fire & Marine Insurance Co. v. Gotthelf* 358

3. The testimony and conduct of the parties referred to in the opinion clearly established the making and delivery of the policies of insurance. *Star Union Lumber Co. v. Finney* 215

4. After a loss has occurred the insured may assign the right to recover for same without the consent of the company, and the assignee may recover in his own name. *Id.*

5. An agent with authority to issue a policy has power to authorize an assignment of so much thereof as would cover a mortgage named in the application. *German Insurance Co. v. Penrod* 273

6. A finding of arbitrators that includes only a stock of goods as it appeared after the fire, and makes no reference whatever to the value before, is merely an invoice and not an award. *St. Paul Fire & Marine Insurance Co. v. Gotthelf* 352, 358

7. The provision in a policy of insurance, that the company shall have sixty days in which to pay the loss, is personal and may be waived by it. It is merely a provision that during the time stated it shall not be liable for costs. *Star Union Lumber Co. v. Finney* 215

8. Where there is a default in paying assessments and the company does not declare the policy forfeited, but continues to make further assessments as losses occur, it will be a waiver of the cause of forfeiture. *Farmers Union Insurance Co. v. Wilder* 573

9. A company waives the provision of a policy for notice within a specified time, where part of a stock of goods has

been destroyed, by demanding and taking possession of the remainder of the goods and books of the insured and endeavoring with the latter to ascertain amount of loss. *St. Paul Fire & Marine Insurance Co. v. Gotthelf*..... 351

10. Under the provisions of a policy reserving to the company the right to cancel the risk at any time by returning the premium *pro rata* for the unexpired term, the company cannot rescind the policy without notice to the in sured and payment of the unearned premium. *German Insurance Co. v. Rounds*..... 752

11. A petition alleging the execution and delivery of the policy, destruction of the buildings by fire, loss, that plaintiff was not negligent and that he had performed all the conditions of the policy to be performed by him, was *held* to state a cause of action without alleging that the damages had not been paid. *Hanover Fire Insurance Co. v. Schellak*, 701

12. The company was not prejudiced by an innocent misstatement of the title by the insured in his proof of loss where he had an insurable interest in the property, and the proof of loss would have been equally available had the insured stated therein the actual facts as to his ownership. *Star Union Lumber Co. v. Finney*..... 215

13. Where premium notes have been given to a mutual insurance company, assessments to be made thereon from time to time as losses occur, in case an assessment is not paid in thirty days after personal demand therefor, or by letter, the company may recover for the whole amount of the deposit note with costs, and executions will thereafter be issued on such judgment as assessments for losses may require. *Farmers Union Insurance Co v. Wilder*..... 572

14. Where a loss occurred before the building was completed, in an action upon a policy which stated that the building was occupied by a tenant, it was no defense that the building was unoccupied where the agent had filled out the application for insurance showing that the building was in course of erection, and issued the policy thereon. *German Insurance Co. v. Penrod*..... 273

15. A local agent who has the power to make a contract of insurance has authority to consent to additional insurance and to accept notice of a change in the risk and of the placing of incumbrances on the property, unless there is some provision in the policy to the contrary. *German Insurance Co. v. Rounds*..... 752

16. Where such an agent employed a clerk and authorized him to transact business in the agent's name an endorse-

ment by the clerk upon a policy made within the agent's authority; and in which the latter acquiesced, was the act of the agent and was binding upon the company. *Id.*

17. The indorsement upon a policy by such an agent of his approval of the assignment of a policy is binding upon the company where the policy contains a clause that "no assignment thereof shall be valid unless the same is indorsed thereon and approved by the company, or its regular agent, in writing." *Id.*

Intoxicating Liquors. See CONTRIBUTION. LIQUORS.

Issues in Appellate Court. See APPEAL, 5, 7, 10, 15.

Joinder of Actions.

An action of ejectment may be joined with one to recover rents and profits. *Fletcher v. Brown* 660

Joint Tort-Feasors. See CONTRIBUTION.

Journal Entry.

On justice's docket cannot be corrected by order from an appellate court. *Worley v. Shong* 312

Judgments. See DECREES. EMINENT DOMAIN, 4, 5. REPLEVIN, 1, 3, 5.

1. An action can be maintained on a domestic judgment. *Eldredge v. Aultman* 884
2. Entered by a justice of the peace the day after verdict is void. *Worley v. Shong* 312
3. A court of equity will grant relief against a judgment procured by the creditor's fraudulent concealment of facts. *Phillips v. Kuhn* 195, 196
4. Without a showing of prejudice to plaintiff in error in case stated in opinion the judgment will not be reversed. *McDonald v. Bowman* 93
5. Will not be set aside where the testimony is conflicting and does not preponderate in favor of either party. *Oleson v. City of Plattsmouth* 153
   Rudolph v. Davis 157
6. A decree foreclosing a real estate mortgage is a final judgment upon which the parties to the suit may reply, and any modification thereof without notice is void. *Homan v. Hellman* 414
7. An order of a county judge, duly made without fraud or collusion, allowing a claim against the estate of a deceased person, is a final order, and unless appealed from will be conclusive and have the effect of a judgment and not be open to collateral attack. *Yeatman v. Yeatman* ... 422

8. Where there is actual personal service of process upon a defendant, as by reading the summons to him in place of serving a copy of the same, and the defendant does not appear and object on that ground, and judgment is rendered against him, it is not open to collateral attack, as the judgment is not void but voidable. *Gandy v. Jolly*... 711

9. Three common carriers united to complete a line for the transportation of goods, and a piano was injured by the intermediate carrier. Judgment, in an action of which the wrong-doer had notice, was rendered against the carrier that received the piano for shipment. In an action by the latter against the carrier guilty of negligence the judgment was conclusive. *M. P. R. Co. v. Twiss*..... 267

10. Attorneys satisfied a judgment for less than the amount named therein. On motion of their client, after the time for taking the cause to the supreme court had elapsed, the satisfaction was set aside on the grounds that the client was the *sole* owner of the judgment and that the attorneys were without authority to make a compromise. A petition in an action to restrain the collection of the sum in excess of the amount for which satisfaction had been entered, alleging, *inter alia*, that the client owned half the judgment and the attorneys the other half, stated a cause of action. *Phillips v. Kuhn*..... 187

Judicial Sales. See MORTGAGES, 6. REVIEW, 30.

1. A sale will not be set aside for irregularities or errors not prejudicial to the party complaining. *Miller v. Lanham*... 886

2. A notice of sale under a mortgage or decree will generally be *held* sufficient if the property be described as in the mortgage or decree. *Id.*

3. A sale will not be set aside on the motion of a mortgagor on the ground that the purchaser has not paid off claims adjudged to be prior liens upon the property sold. *Id.*

4. Evidence examined, and *held* that the value of the property sold by virtue of a decree of foreclosure is not so greatly in excess of the value found by the appraisers as to call for the setting aside of the sale. *Id.*

5. A purchaser at a mortgage foreclosure sale is chargeable with notice of such material facts as the records disclose, and will not be relieved from completing his purchase on account of defective title or prior incumbrances. *Norton v. Nebraska Loan & Trust Co*..... 466

6. The doctrine of *caveat emptor* applies to all judicial sales, subject to the qualification that the purchaser is entitled

to relief on the ground of fraud or after-discovered mistake of material facts, where he is free from negligence. He is bound to examine the title and not rely on statements of officers conducting the sale. *Id.*

7. The officer conducting is under the control of the court, and it is its duty to see that the advertisement of sale is published in a paper that will give it general publicity so as to invite competition, and that the sale in other respects is fairly conducted. *State v. Holliday* 327

8. If the trial court errs in any of its proceedings, its action may be reviewed; but the supreme court will not by *mandamus* direct the officer making the sale to advertise the same in any particular newspaper. *Id.*

Jurisdiction. See ATTACHMENT, 5. COUNTY COURTS. EQUITY, 2. SPECIAL TRIBUNAL. SUMMONS, 2, 3.

Jury.

1. Where a party waives all objections for cause to the jurors called to try his case, and also his peremptory challenges, he thereby waives a challenge to the array. *Weeping Water Electric Light Co. v. Haldeman* 139, 142

2. A motion to quash the panel of jurors because not drawn in proportion to the number of electors of the several precincts of a county, verified by an attorney upon mere belief, is not sufficient to justify the court in quashing the panel. *Id.* 139

Justice of the Peace. See PLEADING, 14.

1. On the trial of a case in an ordinary action, where the defendant has entered an appearance but is not present at the trial, it will be assumed that the cause of action is denied, and it will devolve upon the plaintiff to prove the same. *Carr v. Luscher* 318

2. A judgment entered by a justice of the peace upon the verdict of a jury the day after the verdict was filed was not entered immediately within the meaning of section 1002 of the Code, and the justice had lost jurisdiction at the time the entry was made. *Worley v. Shong* 312

Laches.

It is not the policy of the law to enforce stale claims. *Streitz v. Hartman* 406

Landlord and Tenant. See EQUITY.

1. A promise by a lessee of real estate to pay all taxes upon the property does not apply to special assessments for the construction of a sewer. *Ittner v. Robinson* 133

2. In action upon a lease to recover rent, the defendant alleged that the building was leased for an unlawful purpose, naming it, to which the plaintiff replied that the same defense had been interposed to an action upon other installments of rent, and overruled. *Held*, That the proof failed to establish an estoppel. *Hellman v. Oliver*..... 334
3. An instruction, in substance, that the jury may determine if the house was to be "used for such unlawful purpose," "or other unlawful purposes," is erroneous. *Id.*
4. The unlawful purpose which it is claimed renders the contract illegal and void must be pleaded, and unless so pleaded should not be submitted to the jury. *Id.*
5. In order to work a forfeiture of a lease for non-payment of rent there must be a demand on the tenant for the rent, although such demand may be in the form of a notice to quit. *Haynes v. Union Investment Co.*..... 767
6. A court of equity will protect a tenant in possession of property until he is paid the value of the furniture and fixtures purchased by him under a lease which provided that the lessor should pay for the same upon the expiration of the lease, and before the surrender of the premises, and for that purpose will restrain the landlord from prosecuting a suit for possession. *Id*.....766, 771

Larceny. See CRIMINAL LAW, 2.
1. Evidence examined, and *held* not to sustain a judgment of conviction for larceny. *Kaiser v. State*..... 704
2. Instruction set out in opinion, on question of possession of stolen property, *held* erroneous. *Robb v. State*.....285, 286
3. Whether the inference of guilt is to be drawn from possession of stolen goods is a question of fact for the jury. *Id*..... 285

Leading Question. See WITNESSES, 1.

Lease. See BAILMENT. LANDLORD AND TENANT.
A promise by a lessee of real estate to pay all taxes upon the property does not apply to special assessments for the construction of a sewer. *Ittner v. Robinson*..... 133

Legislature. See CONSTITUTIONAL LAW, 3.

Libel.
1. In the prosecution for a false and malicious libel charged to have been published in the *Kansas City Sun*, a newspaper published and of general circulation in Douglas county, Nebraska, *held*, that to charge a felony the paper must be of general circulation and that the limitation to one county merely charged a misdemeanor. *Koen v. State*, 676

2. In a prosecution for a false and malicious libel it is not necessary that the newspaper circulate to any considerable extent, if at all, out of the state, nor that it circulate in every county in the state, but it must extend beyond the county in which it is published and have a general circulation. *Id.*

Liens. See MECHANICS' LIENS.

Life Estate.

The life estate of a husband as tenant by the curtesy is subject to seizure and sale on execution against him. A tenant by the curtesy may likewise convey his title by deed or mortgage. *Deming v. Miles* 739

Limitation. See APPEAL, 14. BILL OF EXCEPTIONS, 8.

Limitation of Actions. See ADVERSE POSSESSION, 2.

Liquor Dealer's Bond. See PRINCIPAL AND SURETY, 5.

Liquors. See CONTRIBUTION.

1. Defective dealer's bond does not release the principal from liability for damages resulting from sale. *Uldrich v. Gilmore* 290
2. Where a dealer's bond contains no provision for the payment of all damages which may be adjudged against him under the license law, no action can be maintained against the sureties thereon for damages resulting from the sale of intoxicating liquors by the principal on the bond. *Id.* 288
3. In an action for damages by a wife for loss of means of support resulting from the sale of liquors to her husband, the latter's previous intemperate habits will not defeat a recovery, yet they may properly be considered by the jury as affecting the measure of damages. Defendant's instructions as modified by the court were properly given. *Id.* 288, 291

Lost Instruments.

Where a negotiable note is lost before it becomes due the court will require the plaintiff to give an indemnifying bond to the maker as a condition of recovering judgment, but where the instrument is lost after it becomes due, no bond ordinarily will be required. *Means v. Kendall* 693

Majority Vote. See COUNTY SUPERVISORS.

Malice. See FALSE IMPRISONMENT, 4.

Malicious Mischief.

A dog has a money value which the owner may recover from one who wrongfully and unlawfully kills his dog. *Mohr v. State* 638

Mandamus.

1. Will not lie to compel a county board to let the contract for printing the delinquent tax list to the lowest bidder. *State v. Lincoln County* 346
2. Lies to compel board of county supervisors to include in its estimate of expenses the amount payable to an agricultural society under sec. 12, ch. 2, Comp. Stats. *State v. Robinson* 402
3. Will lie to compel a school district to pay money due a contractor upon estimates furnished by the architect under a contract for the construction of a high school building. *Gray v. School District of Norfolk* 438
4. Will issue against the auditor of state to compel the issuance of a certificate to a secret benevolent order to transact business in this state, without the payment of fees, under sec. 32, ch. 43, Comp. Stats. *State v. Benton* 466
5. Will not issue to require a judge of the district court to fix the amount of a bond for appeal from an order confirming a sale under mortgage foreclosure, where no objection was made to the order. *State v. Doane* 707
6. Will issue on the relation of a county superintendent to compel the moderator of a school district to countersign all proper orders drawn by the director on the district treasurer where he has refused to perform such duty. *Montgomery v. State* 655
7. The supreme court will not by *mandamus* direct an officer making a sale under a decree of foreclosure of a mortgage rendered in the district court to advertise the same in any particular newspaper. *State v. Holliday* 327
8. Will issue against county commissioners to compel them to call a special election for the relocation of the county seat under sec. 1, art. 3, ch. 17, Comp. Stats., upon their unlawful refusal to do so after the petition provided by law has been presented to them. *State v. Crabtree* 106

Marriage.

1. Without license does not affect its validity if otherwise legal. *Haggin v. Haggin* 376
2. Where a marriage is solemnized before a person professing to be authorized by law to solemnize marriages, and it is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in wedlock, the marriage will be valid, although the person before whom it was solemnized had no authority. *Id.* 375

3. In such a case the wife could not recover damages from her husband for fraudulently inducing her to enter into a pretended marriage, but was entitled to have satisfaction of a former judgment for alimony set aside and the judgment reinstated. *Id.* 376

Master Commissioners. See JUDICIAL SALES, 7, 8.

Maxims.

1. "*Caveat emptor*" applies to all judicial sales. *Norton v. Nebraska Loan & Trust Co.* 466
2. "*Respondeat superior*" does not apply to the negligent acts of a member of the fire department of a city. *Gillespie v. City of Lincoln* 34

Mayor. See METROPOLITAN CITIES, 2.

Measure of Damages. See ASSAULT. CARRIERS, 3–5. CONVERSION, 4. COVENANT OF WARRANTY, 6. DAMAGES. DEATH BY WRONGFUL ACT. EJECTMENT, 12. FALSE IMPRISONMENT, 4. VENDOR AND VENDEE, 3, 4.

For breach of builder's contract. *Consaul v. Sheldon* 247

Mechanics' Liens.

1. The findings of the trial court will not be disturbed on appeal where they are sustained by the evidence. *Herbert v. Keck* 508
2. Where the answer to a petition to foreclose a mechanic's lien denies the indebtedness in the full amount claimed, but admits indebtedness, not stating the amount, the plaintiff is entitled to judgment on the pleadings. *Gray v. Elbling* 278, 284
3. A person who furnishes any material for the construction of a building by virtue of a contract, express or implied, with the owner thereof, is entitled to a lien thereon for the amount due for the same, upon filing a sworn statement of his account with the register of deeds of the proper county within four months of the time of furnishing such material. *Livesey v. Brown* 111
4. Where an absolute deed, properly executed and acknowledged, is given and intended only as a mortgage, and the contract to reconvey rests in parol, the proper recording of the instrument is constructive notice of the interest of the grantee in the property therein described. Such lien is superior to a mechanic's lien for materials furnished under a contract entered into with the grantor after the recording of such deed. *Id.* 211

Metropolitan Cities. See OFFICE AND OFFICERS.

1. The general provision contained in section 172 of the

charter of the city of Omaha, for the removal of city officers, upon charges by the district court, is not exclusive. *State v. Smith* 14

2. The mayor had authority to remove the commissioner of health without having made charges, and to appoint one in his place. *State v. Somers* 323

3. Section 172 of the act in relation to metropolitan cities requiring charges to be made before removing officers does not apply to a case where the power of removal is retained and no charges are required. *Id.*

4. By the Omaha charter the governor is authorized to remove members of the board of fire and police commissioners for official misconduct only, and, upon charges specifying the particular act or acts to be proved and an opportunity to be heard in their own defense. *State v. Smith* 14

5. Where the statute authorizing the appointment of a commissioner of health contains a reservation of the right of removal without preferring charges and this power is exercised by the removal of the incumbent and the appointment of another in his stead, the right of the former to the office will cease. *State v. Somers* 322

Mingled Funds. See BANKS AND BANKING.

Mischief. See MALICIOUS MISCHIEF.

Misjoinder of Parties.

Is not ground for demurrer. *Lancaster County v. Rush* 120

Moderator of School District. See SCHOOLS, 3.

Money Had and Received. See PLEADING, 2, 5.

Mortgages. See ACKNOWLEDGMENT. DEEDS, 9. HOMESTEAD. JUDICIAL SALES, 2. QUIETING TITLE, 2. SUBROGATION, 2. VENDOR AND VENDEE, 2.

1. In a foreclosure proceeding the holder of a prior mortgage is not a necessary party. *Stratton v. Reisdorph* 314

2. It is not essential to the validity of a notice to sell real estate, to state therein the amount of the decree. *Id.*

3. Where forgery is proven a judgment canceling the apparent lien of a mortgage is proper. *Capital National Bank v. Williams* 410

4. The fraudulent alteration of a promissory note secured by a mortgage cancels the debt which it evidenced and discharges the mortgage. *Walton Plow Co. v. Campbell* 174

5. In a foreclosure proceeding, where the holder of a prior

mortgage is not made a party, it is not necessary for the court to find the amount due on such mortgage. *Stratton v. Reisdorph* 314

6. Where parties have been personally served with summons and make an appearance in a suit to foreclose a mortgage, they cannot afterward, to defeat confirmation, assail the decree for a mere irregularity. *Id.*

7. A person who received an application through an agent for a loan upon real estate sent a draft for the amount of the loan, payable to the mortgagor, to his agent, and instructed him to have certain liens on the property satisfied. The agent procured the indorsement of the mortgagor on the draft and retained the same on the pretense of satisfying the liens, but instead of doing so absconded with the money without paying the claims. *Held*, That the proof failed to show a delivery of the draft to the mortgagor, and did show that the agent was intrusted with the same as agent of the lender. *Figley v. Bradshaw* 337

8. The loan having failed, a mortgage for commission in procuring the same was properly canceled. *Id.*

9. The note and mortgage being void, and having been transferred to a *bona fide* purchaser, judgment was properly rendered against the party making the assignment. *Id.*

10. In a foreclosure proceeding it appeared that defendant, before the execution of the mortgage, had conveyed the land by deed to one who afterwards became his wife; that the deed was duly filed for record before the mortgage was given; that the records of the county where the land was situated were destroyed by fire, and when partially restored failed to show the record of the deed; that the mortgage was executed after the wife's death, and that the wife died intestate. *Held*, That the title to the property was in the wife at the time of her death and descended, subject to the husband's right by curtesy therein, to her only daughter, and that the mortgagee was entitled to a decree of foreclosure and sale only of the life estate of the husband. *Deming v. Miles* 739

Motions. See AFFIDAVITS. APPEAL, 6, 9, 12. ATTACHMENT, 13. BILL OF EXCEPTIONS, 2, 6. CONTINUANCE. PLEADING, 9. PRACTICE, 1. REVIEW, 18. 26, 33.

A motion to quash a panel of jurors, verified by an attorney upon mere belief, is insufficient. *Weeping Water Electric Light Co. v. Haldeman* 139

Multiplicity of Suits. See EQUITY, 2.

Municipal Corporations. See ESTOPPEL, 1. METROPOLITAN CITIES. NEGLIGENCE, 1. OFFICE AND OFFICERS. TAXATION.

1. A city is not liable at common law for the negligent acts of the members of its fire department. *Gillespie v. City of Lincoln* 34
2. Under sec. 31, ch. 9, Gen. Stats., a city of the second class can only establish the grade of a street by ordinance. In an action for damages caused by surface water it was error to instruct the jury otherwise. *Themanson v. City of Kearney* 881
3. A city cannot shift responsibility for keeping its streets in a safe condition onto a contractor who has made an excavation in a public street, and thus relieve itself from liability for neglect to erect proper barriers. *City of Omaha v. Jensen* 68
4. The collection of a special assessment for the improvement of a public street will not be enjoined in a case where the pleadings and evidence show that it was substantially correct; no objection having been made until the work was completed and there being no offer to pay the amount justly due for the improvement. *Redick v. City of Omaha* 125, 128
5. When the authorities of a city change the grade of a street, appoint appraisers to assess the damages of abutting owners, and confirm the award when returned, the city, on the trial of an appeal taken by the land-owner from the assessment of damages, cannot urge defects and irregularities in its own proceedings in changing the grade, to defeat a recovery. *Second Congregational Church Society v. City of Omaha* 103

Mutual Fire Insurance Companies. See INSURANCE, 8, 13.

Negligence. See CARRIERS, 3-5. CONTRIBUTORY NEGLIGENCE.

1. A city is not liable at common law for then egligent acts of the members of its fire department. *Gillespie v. City of Lincoln* 34
2. In an action for damages to a brick wall caused by negligence in the construction of a sewer, where there is a conflict in the evidence, the judgment of the court below will be affirmed. *Oleson v. City of Plattsmouth* 153
3. In an action for damages where injury resulted from delay a contractor was not chargeable with negligence for refusing to prosecute at night and on Sunday the work of constructing a sewer. *Id.*

4. Although a party may have negligently exposed himself to an injury, yet, if the defendant, after discovering his exposed situation, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages. *U. P. R. Co. v. Mertes* 204

5. A railway company is liable for damages where its engineer, in a city where teams are constantly passing, needlessly and unnecessarily opens the valves of his engine and permits the steam to escape, whereby horses are frightened and run away, causing injury. *O. & R. V. R. Co. v. Clark* 867

6. There being testimony which would warrant the jury in finding a verdict against the defendant, it was properly submitted to them and the court did not err in refusing to direct a verdict. *Id* 868

7. In an action against a railway company for negligently, wrongfully, and unlawfully blowing off steam from its engine, whereby plaintiff's horses were frightened and ran away, breaking his leg, it was *held* that the words employed implied that steam was blown off needlessly and unnecessarily, and as no objection had been made to the petition by demurrer it was sufficient after verdict. *Id*... 867

Negotiable Instruments. See ALTERATION OF INSTRUMENTS. LOST INSTRUMENTS. PLEADING, 13.

1. In case stated in opinion, an indorsee showed reasonable diligence in the collection of a check drawn upon a bank which closed its doors before payment thereof, and the drawers were liable to the indorsee for the amount of the check. *Nebraska National Bank of Omaha v. Logan* 182

2. When the signature of an illiterate person is obtained to a promissory note by the payee fraudulently inducing him to believe that he is signing an instrument of an entirely different character, without any fault or negligence of the maker, the note cannot be enforced, even in the hands of a *bona fide* holder. *Willard v. Nelson* 651

3. Where an officer of a bank received notes, payable to an individual member of a partnership to secure the latter's private debts, knowing that the notes belonged to the company as proceeds of a sale of the firm business and stock, the notes were properly subjected to the payment of the firm debts in a creditor's bill by the partnership creditors. *Tolerton v. McLain* 725

4. In an action against an indorser, where the sole issue was upon the question whether or not the words "protest waived" were written upon the notes when the defendant

delivered them to plaintiff, proof tending to show that the indorsee was unacquainted with the makers, and in effect required the defendant to guarantee the notes by making the indorsement, was sufficient to justify a verdict for plaintiff. *Mehagan v. McManus*..... 633

5. The verdict conformed to the proof in an action on drafts, where the defendant denied that he was acceptor, and testified that the signatures to the acceptance were not his, and the proof showed that the alleged acceptance had been obtained, if at all, by a stranger at a time when the defendant had signed two contracts, and two property statements for an alleged hydro-carbon burner, which the stranger professed to be about to furnish. *State Bank of Wilcox v. Wilkie*..... 579

6. In such a case in determining the good faith of the purchaser it was proper to submit to the jury evidence to show that on the night of the alleged acceptance a stranger took the alleged drafts, indorsed the same and delivered them in the night time to one Wheeler and then left the county; that at 9 A. M. next morning Wheeler took the drafts to a bank and discounted them for four-fifths of their face value; that the acceptor lived less than three miles from the bank, was solvent, and no inquiry was made about the drafts. *Id.*

New Trial. See REVIEW, 18, 33, 34.

Newspapers. See LIBEL. MANDAMUS, 7.

Non Compos Mentis. See INSANITY.

Notice. See ANIMALS, 4, 5. EQUITY, 1. INSURANCE, 7, 9, 10. JUDICIAL SALES, 2. MORTGAGES, 2.

The purchaser at a mortgage foreclosure sale is chargeable with notice of such material facts as the records disclose. *Norton v. Nebraska Loan & Trust Co*..... 466

Nuisance. See ANIMALS, 3.

Objections. See EVIDENCE, 21. REVIEW, 16, 18, 20, 23, 32. TRIAL, 4.

Failure to except to admission or exclusion of testimony is waiver of error. *Johnson v. Swayze*..... 117

Occupying Claimants. See EJECTMENT, 12–14.

Office and Officers. See METROPOLITAN CITIES.

1. Where by law there is no fixed term of office and the incumbent holds during the pleasure of the appointing power, the power of removal is discretionary and may be exercised without notice or hearing. *State v. Smith*..... 14

2. Where the incumbent is elected or appointed for a definite term, and is removable only for specified cause, the power of removal cannot be exercised until there has been preferred against him specific charges, of which he shall have notice and an opportunity to defend. *Id.*

3. Where a person is appointed to an office for a definite period and there is a provision of statute that to obtain his removal charges must be preferred against him, he cannot be removed unless such charges are made; but this rule does not apply to a case where the power of removal is retained and no charges are required. *State v. Somers*..... 323

Official Seal. See ATTACHMENT, 12.

Onus Probandi. See ATTACHMENT, 13. ELECTIONS, 4. EVIDENCE, 20. USURY.

Opening and Closing.

Defendant is entitled to open and close where he admits plaintiff's cause of action and sets up and establishes new matter as a defense. *Suiter v. Park National Bank*..... 372

Opinion Evidence. See EVIDENCE, 15.

Order. See DECREES.

In an action by a payee against the acceptor of a conditional order for the payment of money the plaintiff must aver and prove that the conditions stipulated in the order have been fulfilled. *Stabler v. Gund*..... 648

Paramount Title. See COVENANT OF WARRANTY, 4, 6.

Parol Contract. See DEEDS, 9.

Parol Trust. See STATUTE OF FRAUDS.

Parties. See ERROR PROCEEDINGS.

In a foreclosure proceeding the holder of a prior mortgage is not a necessary party. *Stratton v. Reisdorph*..... 314

Partnership.

A chattel mortgage given to secure a partnership debt, executed by one partner with the assent of the other, is valid. *Clay v. Greenwood*..... 736

Payment.

While as between the debtor owing several debts and his creditor, where the former, at the time of payment of a sum of money, fails to designate the debt on which it is to be applied, the latter may do so, yet there is an exception to this rule, as, where the money was received by the debtor from a third party whose property would be liable

for the debt in case the money was not applied upon the third party's liability. *Crane Bros. v. Keck* 683

Personal Injuries. See DAMAGES, 1. NEGLIGENCE, 4, 5.

Plats. See TAXATION, 2.

Pleading. See APPEAL, 7, 10. DEMURRER. EJECTMENT, 6. EQUITY, 1. FOREIGN LAWS. INSURANCE, 11. JUDGMENTS, 10. LANDLORD AND TENANT, 4. MECHANICS' LIENS, 2. NEGLIGENCE, 7. ORDER. STATUTE OF FRAUDS.

1. Permission to amend is discretionary with court in actions pending in district court. *Johnson v. Swayze* 117
2. In an action in substance for money had and received, a general denial only puts in issue the receipt of the money. *Smith v. Wigton* 460
3. Every material averment in a petition, not denied by the answer, for the purposes of the action will be taken as true. *Livesey v. Brown* 112
4. A plaintiff out of possession may change his petition to quiet title so as to state a cause of action in ejectment. *Homan v. Hellman* 414
5. Where the defendant claims money as due him under a contract with the plaintiff, he must plead the fact showing his right to retain the same. *Smith v. Wigton* 460
6. Every material allegation of new matter in a pleading not denied by the answer or reply, for the purposes of the action, is to be taken as true. *Consaul v. Sheldon* 247
7. A denial in an answer of all material allegations in the petition, although faulty, will be held sufficient when assailed for the first time by motion for a new trial. *Rosenbaum v. Russell* 513
8. An answer that defendant is not indebted in the full amount claimed is not a denial of any fact on which the right to recover depends and raises no issue. *Gray v. Elbling* 279
9. An objection to a petition on the ground that an instrument on which the action is based, or a copy thereof, is not attached, should be made by motion before answer. *Cheney v. Straube* 521
10. Where an amended answer to an amended petition has been filed without making the original answer part of the second, the case stands for trial on the amended pleadings and the originals are disregarded. *Smith v. Wigton* 460
11. An error, if any, in overruling a motion to require

plaintiff to separately state and number his two causes of action, is cured by instructing the jury that a recovery can only be had upon one. *St. Paul Fire & Marine Ins. Co. v. Gotthelf* 353

12. Damages which necessarily result from the injury complained of in an action for breach of contract may be recovered without a special statement of the same in the petition. *Kingsley v. Butterfield* 230

13. A petition setting out the note upon which suit was brought, alleging that it "is long past due and no part of same has been paid," but failing to allege a waiver of demand and notice, was *held* sufficient after judgment to sustain it, as the defendant, who could avail himself of the defense, does not object. *Belcher v. Palmer* 449

14. The only pleadings required in an ordinary action before a justice of the peace are the bills of particulars provided by sec. 951 of the Code. Where a cause is appealed to the district court, and the answer contains new matter, the plaintiff may follow the procedure in the appellate court and reply to such new matter. *C., B. & Q. R. Co. v. Gustin* 86, 90

Policies of Insurance. See INSURANCE.

Possession. See ATTACHMENT, 10, 14. CHATTEL MORTGAGES, 3. FORCIBLE ENTRY AND DETAINER, 2.

Powers of Attorney. See ATTORNEY AND CLIENT.

Practice. See APPEAL. ATTACHMENT, 2. 6. BILL OF EXCEPTIONS, 1, 3, 6. RECORDS, 2. REVIEW, 25.

1. A defendant who desires to submit his case to the jury on plaintiff's evidence, and asks the court to instruct the jury to find for him, should make his motion to that effect without reservation. *U. P. R. Co. v. Mertes* 204

2. Any error in refusing to direct a verdict against the plaintiff at the conclusion of his testimony in chief is waived by the introduction of evidence by the defense. *Id.* 208

3. So long as the subject of the action remains substantially the same, an amendment may be permitted to adopt the relief to the facts relied upon for a recovery. *Homan v. Hellman* 414

4. A failure to pay costs of suit in an action which has been dismissed for want of prosecution, where there is a valid excuse for non-payment, will not prevent procedure in a second action. *U. P. R. Co. v. Mertes* 204

5. Where the clerk of the court and deputy sheriff assist in

drawing the jury and talesmen, and are interested in the result of an action, the party complaining should bring the matter to the attention of the court before trial, otherwise the objections are waived. *Leavitt v. Sizer* 84

Premium Notes. See INSURANCE, 13.

Presumption. See DEEDS, 6.

Principal and Agent. See ESTOPPEL, 2. MORTGAGES, 7 REAL ESTATE BROKERS. USAGE.

Principal and Surety. See CONTRACTS, 1.

1. A surety cannot urge the default of his principal as a ground for discharge from his obligation. *Consaul v. Sheldon* 248
2. Where a statute required two or more sureties to a bond which was signed by but one, who waived additional sureties, he will be held liable. *Gray v. School District of Norfolk* 438
3. A surety on the bond of a contractor for the erection of a building is bound only in the manner and to the extent provided in the obligation, and if payments are made to the contractor in excess of the amounts due on estimates, he will not be liable for such excess. *Id.*
4. In an action upon a contractor's bond it was *held* that the making of reasonable changes in the plans of the building during the progress of the work which did not materially increase the cost beyond the contract price did not release the sureties, where the contract permitted alterations to be made. *Consaul v. Sheldon* 248
5. Where a liquor dealer's bond contains no provision for the payment of all damages which may be adjudged against him under the license law, no action can be maintained against the sureties thereon for damages resulting from the sale of intoxicating liquors by the principal in the bond. *Uldrich v. Gilmore* 288
6. Under a building contract authorizing changes in the plans, the writing of the word "glazed" thereon, indicating the kind of doors, does not invalidate the contract or release the sureties on the bond where the change was made without the knowledge or consent of the contractor. *Consaul v. Sheldon* 257
7. When the plans and specifications for a building are changed after the contract is signed, without the knowledge or consent of either of the parties, the same will not vitiate the contract; and where the contract authorizes alterations the sureties on the bond will not be released. *Id.* 248, 256, 259

8. In an action on a builder's bond in case stated in opinion, it was *held* that the sureties were discharged from liability, where payments were made during the progress of the work without the consent of the sureties, and without estimates of the architect in excess of eighty-five per cent of the contract price in violation of the agreement between the contractor and owner. *Bell v. Paul* 240

Priority. See FORCIBLE ENTRY AND DETAINER, 2. JUDICIAL SALES, 3. MORTGAGES, 1, 5. REPLEVIN, 6.

Process. See SUMMONS.

Promissory Note. See NEGOTIABLE INSTRUMENTS, 2–4. PLEADING, 13. SUMMONS, 2.

Proof of Loss. See INSURANCE, 9.

Protest. See NEGOTIABLE INSTRUMENTS, 4.

Provocation.

Words of provocation will not justify an assault, but may be ground of mitigation of damages. *Haman v. Omaha Horse Ry. Co* 74

Public Improvements. See MUNICIPAL CORPORATIONS.

Public Lands. See ADVERSE POSSESSION. RAILROAD COMPANIES, 2.

Purchaser. See JUDICIAL SALES, 3, 5.

Quieting Title. See BONA FIDE PURCHASERS, 3.

1. A plaintiff out of possession may amend his petition to state a cause of action in ejectment, upon payment of costs. *Homan v. Hellman* 414

2. Where title of a purchaser of real estate fails, at the suit of a husband and wife to quiet title to their homestead by reason of the failure of the wife to join in the conveyance to such purchaser, and it appears such purchaser, in the belief that he held title under his conveyance from the husband, had paid a mortgage that had been executed by such husband and wife, he should be subrogated to the rights of the mortgagees and decree of foreclosure should be entered in his favor. *Betts v. Sims* 840

3. A husband and wife requested a person to buy their homestead from a grantee of the husband alone, agreeing to purchase a part thereof from him as soon as they could procure funds, and the person so requested thereupon bought and took conveyance from such grantee of the husband. The husband and wife subsequently brought suit to quiet title in themselves to the same land on the

ground that it was their homestead and the former conveyance was executed by the husband only. On these facts the purchase money paid by the person so requested by the real owners to purchase from the holder of the apparent title should in equity be treated as an advancement for the plaintiffs, and defendant should be allowed to offset the amount thereof, with interest, against the plaintiff's claim for rents and waste. *Id.*

Quitclaim Deed. See VENDOR AND VENDEE, 1.

Quo Warranto. See OFFICE AND OFFICERS.

Railroad Companies. See ADVERSE POSSESSION, 1. DEATH BY WRONGFUL ACT. EMINENT DOMAIN. NEGLIGENCE, 4-7.

Where a railroad company had earned lands granted to the state by the United States for internal improvement at the time taxes were levied thereon, and the state had, prior to the levy, parted with its title to the company, the lands were taxable although the United States did not approve the selection of the state until after the levy of taxes had been made. *Elkhorn Land & Town Lot Co. v. Dixon County* 426

Railroad Grants. See RAILROAD COMPANIES.

Real Estate. See EJECTMENT. VENDOR AND VENDEE.

Real Estate Brokers.

1. A real estate broker who is employed to sell or dispose of the property of his principal is entitled to recover his commission whenever he has procured a customer who is willing and able to purchase the property at the price and upon the terms named by his principal. *Siemssen v. Homan* 892
2. In an action by a real estate broker to recover commission for effecting a contract to purchase lands, where the evidence clearly showed that the customer was not able to purchase according to the terms of his agreement, the agent was not entitled to recover. *Id.*

Receivers.

1. An order by a judge apparently within his jurisdiction, appointing a receiver, which is regular on its face, is *prima facie* valid; and where money is collected by the receiver under such an order and applied in good faith to necessary repairs and to payment of taxes due upon the property therein named, such an order is a sufficient justification in an action against the receiver to recover the rents col-

lected by him after it has been vacated for want of sufficient notice of the application. *Edee v. Strunk* 307

2. Such an order is a sufficient defense as to acts done in good faith in obedience to its commands; but if the receiver claim property or other rights as such, he is required to show a valid appointment. *Johnson v. Powers*, 21 Neb., 292, distinguished. *Id.*

Recitals. See DEEDS, 7. RECORDS, 2.

Records. See APPEAL, 2, 14. DEEDS.

1. In all appellate proceedings, the records of the trial court, when properly verified, import absolute verity. *Worley v. Shong* 311

2. The recitals of the record of a trial court are conclusive upon the parties as to the term at which a decree was rendered. If the record is incorrect, the remedy is by a proper proceeding in the trial court to correct the same. *State v. Hopewell* 823

Referees.

Should settle and sign bills of exceptions in cases tried before them. *Carlson v. Beckman* 392

Registration. See DEEDS. TAXATION, 2.

Is *prima facie* evidence of the delivery of deed. *Bowman v. Griffith* 365

Relocation of County Seat. See COUNTY SEAT.

Remittitur.

In case stated in opinion the judgment was affirmed upon the plaintiff below filing a remittitur in the supreme court for $1,375. *Haggin v. Haggin* 381

Removal of Officers. See METROPOLITAN CITIES. OFFICE AND OFFICERS.

Rents and Profits. See EJECTMENT, 16. JOINDER OF ACTIONS. LANDLORD AND TENANT, 2, 5.

Replevin. See ATTACHMENT, 10. SALES.

1. Upon the conceded facts and evidence referred to in opinion, the judgment is right and is affirmed. *Graham v. Carpenter* 782

2. When property has been delivered to plaintiff, who is the general owner thereof, if the jury find in his favor, it is unnecessary for them to assess the value. *Hanscom v. Burmood* 504

3. In such an action, where a verdict is returned in favor of the plaintiff, a judgment in the alternative for the return

of the property, or in case a return cannot be had, the value thereof, is improper, but the judgment will not be reversed on that ground where it appears that the property was in plaintiff's possession when the judgment was rendered. *Id.*

4. Where a mortgagee replevies the property from the mortgagor before any conditions of the mortgage have been broken entitling the former to the possession of the same in case of the verdict in favor of the defendant in the replevin suit, the amount of the mortgage debt must not be deducted from the value of the property in determining the interest of the defendant. *Manker v. Sine*..... 749

5. Where the evidence shows that two partners entered into a scheme to evade the payment of their creditors and transacted business in the name of their wives, a judgment in favor of the latter in an action of replevin by which goods seized on execution as property of the husbands were recovered, will be reversed. *Wedgwood v. Withers*..... 583

6. Where, in an action of replevin by mortgagees of goods and chattels against a sheriff who had levied on the goods under a writ of attachment, a verdict is rendered in favor of the sheriff, and the value of the goods taken by the mortgagees is found to be sufficient for payment of all the liens, the judgment entered thereon will not be reversed without a showing of prejudice to the mortgagees, even though it be conceded that the lien of the mortgages was superior to that of the attaching creditors. *McDonald v. Bowman*..... 93

7. In an action of replevin, where the property has been delivered to the plaintiff, in case a verdict is returned in favor of the defendant, the judgment must be in the alternative for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for the unlawful detention. The statute requiring the judgment to be in the the alternative form is imperative. *Manker v. Sine*..... 746

8. The judgment not being in the alternative form, the cause is remanded to the court below to render the proper judgment upon the verdict returned by the jury. *Id.*

Res Adjudicata. See EMINENT DOMAIN, 4, 5.
N. R. Co. v. Culver..... 143

Rescission. See SALES.

Revenue. See TAX LIENS. TAXATION.

Review. See AFFIDAVITS. APPEAL, 9. ATTACHMENT, 7, 9. EJECTMENT, 3, 4. ERROR PROCEEDINGS. EVIDENCE, 2, 6, 15. INSTRUCTIONS, 3, 4. REPLEVIN, 6.

1. There is no material error in the record. *Powers v. House*, 129
2. Evidence *held* sufficient to sustain the verdict. *Mehagan v. McManus* 633
3. Evidence *held* sufficient to sustain the verdict. *Willard v. Nelson* 651
   Lyon v. Moore 536
4. Upon the conceded facts and evidence the judgment is affirmed. *Graham v. Carpenter* 782
5. Evidence examined and, *held* not sufficient to establish a trust in parol. *Dailey v. Kinsler* 835
6. Evidence examined, and *held* sufficient to sustain the judgment of the trial court. *Galligher v. Connell* 517
7. Evidence examined, and *held* sufficient to sustain the judgment. *McClelland v. Scroggin* 537
8. Where the verdict is against the weight of evidence, the judgment will be reversed. *Watson v. Coburn* 492
9. Evidence examined, and *held* insufficient to support the verdict of the jury. *Wedgwood v. Withers* 583
10. The verdict and judgment conform to the proof and are affirmed. *Weeping Water Electric Light Co. v. Haldeman*, 139
11. The evidence examined, and *held* to sustain the judgment of the district court. *Hays v. Franklin County Lumber Co* 511
12. Findings and judgment are right and need not be reviewed at length. *Taylor v. Kearney County* 381
13. A judgment will not be reversed on account of harmless error. *St. Paul Fire & Marine Ins. Co. v. Gotthelf* 351
14. Evidence examined, and *held* sufficient to sustain the verdict and judgment. *Id* 352
15. Where evidence, although conflicting, is sufficient to sustain the findings of the jury the judgment will not be reversed. *Mills v. Traver* 293
16. Exceptions must be taken to the giving of instructions in a civil case in order to review them in the supreme court. *Darner v. Daggett* 696
17. It is not prejudicial error, for which a judgment will be reversed, to admit in evidence proof of admissions of defendant's attorney, when the same admissions had been made in the answer. *Rosenbaum v. Russell* 513, 514
18. Objections to instructions to the jury must be made in the

motion for a new trial in order to have them reviewed by the supreme court. *Hanover Fire Insurance Co. v. Schellak*, 701

19. The testimony in an action on notes given for a harvesting machine on question of guaranty did not sustain the verdict for the defendant. *McCormick Harvesting Machine Co. v. Hartman* 629

20. Ordinarily objections to the admission of testimony not made when offered are waived and cannot be urged for the first time on appeal to the supreme court. *Rupert v. Penner*, 587

21. In the supreme court the presumption is in favor of the correctness of the finding of fact by the trial court, and such finding will not be reversed unless clearly wrong. *Bickel v. McAleer* 515

22. Where the testimony is conflicting and nearly evenly balanced, the judgment will be affirmed. *Oleson v. City of Platt mouth* 157
Rudolph v. Davis 157

23. When incompetent or illegal testimony is admitted upon a trial without objection, error cannot be predicated thereon in a reviewing court. *Wohlenberg v. Melchert* 803

24. In an action to foreclose a mechanic's lien, where the testimony is conflicting, but where there is sufficient evidence to sustain the finding of the court, its decree will be affirmed. *Herbert v. Keck* 508

25. Judgments in causes submitted to supreme court without briefs or oral argument will ordinarily be affirmed without an investigation of the questions presented. *Stabler v. Gund* 648

26. The order of a trial court made on affidavits upon a motion to dissolve an attachment will not be reversed where there is a conflict of evidence unless the ruling is against the clear weight thereof. *Dolan v. Armstrong* 339

27. The allowing of a leading question is a matter within the discretion of the trial court, and a judgment will not be reversed on that ground unless there has been an abuse of discretion. *St. Paul Fire & Marine Insurance Co. v. Gotthelf* 351, 357

28. Objections to the rejection of certain testimony considered and overruled. Evidence examined, and *held* that the damages assessed by the jury for loss by fire are not excessive. *Hanover Fire Insurance Co. v. Schellak* 701

29. Where issues of fact are tried on affidavits, the supreme court will not review the order of the district court upon such evidence, unless the affidavits are identified and pre-

served in the form of a bill of exceptions. *Fitzgerald v. Benadom* 317

30. Where a defendant under a foreclosure sale of real estate fails to object to an order of confirmation after notice of a rule to show cause why the sale should not be confirmed, he cannot have the confirmation reviewed in supreme court. *State v. Doane* 707

31. An assignment of error that the court erred in admitting the evidence of a witness for plaintiff, as shown by a certain page of the record furnished by the official reporter, and made a part of the bill of exceptions is sufficient for the purpose of reviewing the rulings of the trial court on the admission of the evidence on the page referred to. *Darner v. Daggett* 695

32. Where the clerk of the court and deputy sheriff are interested in the result of an action, and hence in drawing the jury and talesmen, the party complaining should make objections before the trial, otherwise they cannot be considered in the supreme court. *Leavitt v. Sizer* 80

33. A party is not entitled to review, on error or appeal, the decision of a trial court in denying a new trial upon the ground of newly discovered evidence, unless all the testimony given on the hearing of the motion is set out in a bill of exceptions. *Wohlenberg v. Melchert* 804

34. A motion for a new trial is necessary to obtain a review by petition in error of the rulings of the trial court on admission or exclusion of testimony, or to secure a review of the evidence for the purpose of determining whether it is sufficient to sustain the finding and judgment. *Miller v. Antelope County* 237

35. The refusing of permission to amend a pleading in an action pending in the district court rests largely in the legal discretion of the court, and unless there has been abuse of such discretion which has deprived the party of a substantial right, the supreme court will not interfere. *Johnson v. Swayze* 117

Running at Large. See ANIMALS, 1, 2.

Sales. See ATTACHMENT, 14. BAILMENT. JUDICIAL SALES. REAL ESTATE BROKERS. VENDOR AND VENDEE. WARRANTY.

Where an insolvent purchaser of goods makes representations as to his financial condition which he knows do not represent the true condition of his affairs, by reason of which a seller is induced to part with his goods, the transaction is

fraudulent and the seller may, upon discovering the fraud, rescind the sale and reclaim the goods. *Work v. Jacobs* 772

Satisfaction. See JUDGMENTS, 10.

School Districts.

The county superintendent has exclusive original jurisdiction in all matters pertaining to the division of counties into school districts. *Hendreschke v. Harvard High School District* 400

School Lands. See EJECTMENT, 15.

Schools. See MANDAMUS, 3, 6. SPECIAL TRIBUNAL.

1. Under sec. 3, subdivision 6, chap. 79, Comp. Stats., the rules adopted by a board of trustees must be reasonable and just. *Bourne v. State* 4
2. Board of trustees has power to adopt and enforce appropriate and reasonable rules and regulations for the government and management of schools under its control. *Id*... 1
3. A contract of employment of a teacher entered into on behalf of the district by the director and treasurer will bind the district, although the moderator was not consulted concerning the employment. *Montgomery v. State*, 655
4. A rule which makes it a duty of a teacher to keep a record of the standing, attendance, and deportment of each pupil, and to send a written report to his parent or guardian, requiring such parent or guardian to sign and return the same to the teacher, is a reasonable one. *Bourne v. State* 1

Seal. See ATTACHMENT, 12.

Secret Benevolent Societies. See BENEVOLENT SOCIETIES.

Sentence. See CRIMINAL LAW, 1.

Service. See SUMMONS.

Set-Off. See QUIETING TITLE, 3.

Sheriffs. See JUDICIAL SALES, 6, 7.

Solemnization. See MARRIAGE, 2.

Special Assessments. See MUNICIPAL CORPORATIONS, 4.

Special Legislation. See CONSTITUTIONAL LAW, 5.

Special Tribunal.

Where a statute upon a particular subject has provided a special tribunal for the determination of questions pertain-

ing to such subject, the jurisdiction of such tribunal is exclusive, unless otherwise expressed or clearly implied from the act. *Hendreschke v. Harvard High School District*..... 400

Specific Performance. See VENDOR AND VENDEE, 3, 4.

Sporting. See SUNDAY LAW.

State Legislature. See CONSTITUTIONAL LAW, 3.

Statute of Frauds.

Where, in an action to set aside a certain conveyance through which the defendant claims title to lands, a court of equity has entered final decree in accordance with the prayer of the petition and quieting the title of the plaintiff, the latter may plead the statute of frauds in a subsequent action by the grantor of the defendant to establish a parol trust claimed to have been created in his favor at the time of the conveyance by him to the defendant. *Dailey v. Kinsler*..... 835

Statute of Limitations. See ADVERSE POSSESSION.
N. R. Co. v. Culver..... 143

Statutes. See TABLE, *ante*, p. xlv. CONSTITUTIONAL LAW, 4-6. TOWNSHIP ORGANIZATION.

1. Repeal by implication is not favored, and a statute will not be declared so repealed unless the repugnancy between the new statute and the old one is plain and unavoidable. *Albert v. Twohig*..... 563
2. The provision of the constitution that "no bill shall contain more than one subject, and the same shall be clearly expressed in the title," has no application to laws in force at the time of the adoption thereof. *State v. Robinson*..... 401
3. The act approved April 9, 1891, by which section 145 of ch. 12*a*, Comp. Stats. 1889, was amended does not take effect until the expiration of the terms of office of the two fire and police commissioners of the city of Omaha, who were appointed in May, 1889. *State v. Smith*..... 13

Statutory Bonds.

While a statutory bond must conform substantially to the requirements of the statute in respect to the penalty, conditions, form, and number of sureties, yet, where two or more sureties are required and it is signed by but one, who by his words or acts waives additional sureties, he will be held liable. *Gray v. School District of Norfolk*..... 438

Stay. See DECREES, 3.

Stock. See CORPORATIONS.

Street Railways.

In ejecting a passenger from the street car the conductor can use no more force than is necessary for that purpose, and if he do so the company will be liable. *Haman v. Omaha Street Ry. Co.* 74

Streets. See MUNICIPAL CORPORATIONS.

Submission of Cause. See REVIEW, 25.

Subrogation. See QUIETING TITLE, 2.

1. Where a father in good faith pays the debts of an insane son, it is probable that in a proper proceeding he may be subrogated to the rights of the creditors. *Wilkins v. Wilkins* 213
2. A purchaser of real estate, having paid a mortgage thereon in the belief that he was the owner, will, on failure of his title, be subrogated to the rights of the mortgagee as against the mortgagor and others who are in equity liable for the mortgage debt. *Betts v. Sims* 840

Subscription. See CORPORATIONS.

Summons. See JUDGMENTS, 8.

1. If there is any irregularity in the manner of service on the defendant of valid process, he must take advantage of such irregularity by motion or other proceeding in the court where the action is pending. *Gandy v. Jolly* 712
2. Where there is no charge of collusion or fraud between the indorser and holder of a promissory note as to the liability of such indorser, and an action is brought against him in the county where he resides within the state, and service had on him there, a summons may be issued and served on the makers in other counties of the state. *Belcher v. Palmer* 449
3. Where an action is instituted by attachment against an absconding debtor in the county from which he absconded, process may be served upon him in any other county of the state, and a judgment rendered on such service will be valid unless he appears and contests the right to maintain the action there. *Gandy v. Jolly* 712

Sunday Law.

Playing base-ball on Sunday is sporting within the meaning of sec. 241 of the Criminal Code, and renders the persons engaging therein liable to a fine in a sum not exceeding twenty dollars, or to be confined in the county jail not ceeding twenty days, or both. *State v. O'Rourk* 614

Supervisors. See COUNTY SUPERVISORS.

Surety. See PRINCIPAL AND SURETY. STATUTORY BONDS.

Surface Water. See MUNICIPAL CORPORATIONS, 2.

Tax Liens.

1. Power is conferred upon counties to foreclose tax liens by secs. 1 and 2, art. V, ch. 77, Comp. Stats. *Lancaster County v. Rush* 120
2. Under the statutes in force since February 15, 1877, a county treasurer is not compelled to seize and sell personal property of the taxpayer for real estate taxes before offering the realty. *Id.* 119
3. In an equitable proceeding to foreclose a lien for taxes the court will not consider questions which go only to the manner of assessment or levy of the tax in question or other irregularity or informality in the proceedings. *Roads v. Estabrook* 297

Tax List. See MANDAMUS, 1.

Tax Titles.

When the title of a purchaser for delinquent taxes shall fail he is entitled to recover in a proceeding to foreclose his lien, not only the taxes for which the property in question was sold and such as are subsequently levied, but also such as were levied for previous years and paid subsequent to date of his purchase. *Roads v. Estabrook* 298

Taxation. See CONSTITUTIONAL LAW, 3, 5. MUNICIPAL CORPORATIONS, 4. RAILROAD COMPANIES.

1. Under sec. 50, ch. 46, Rev. Stats., the county clerk had authority, where lands in his county had not been assessed, to "enter the same upon the assessment roll and assess the value." *Elkhorn Land & Town Lot Co. v. Dixon County* ... 426
2. Taxes assessed against property in the city of Omaha when listed for taxation according to the description on a certain recognized plat will not be held void for the reason that the plat was never recorded. *Roads v. Estabrook* 298
3. In an action to foreclose the tax lien in case stated in opinion, *held* that the action of the county commissioners incorporating the town of Lincoln was not void, though unplatted lands were included, and that taxes levied by the proper city authorities upon said lands were valid. *Lancaster County v. Rush* 120

Teachers. See SCHOOLS, 3.

Telephone Communications. See EVIDENCE, 19.

Terms of Court. See DISTRICT COURT, 3.

Terms of Office. See OFFICE AND OFFICER.

Title of Act. See STATUTES, 2.

Torts. See ASSAULT. CONTRIBUTION. DEATH BY WRONGFUL ACT. FALSE IMPRISONMENT.

Townships.

1. The several statutes in relation to township organization to which appellant objects are valid and are to be construed together. Sec. 7 of the act of 1891, in reference to elections, was designed to apply to future elections and does not affect art. 4, sec. 4, ch. 18, Comp. Stats, which provides for temporary organization. *Albert v. Twohig*..... 563
2. In changing the boundaries of a township there were present seventeen members of the county board, of which eight voted in favor of the change and seven against, and two refrained from voting. It was *held* the duty of all present to vote, and under sec. 912 Consol. Stats., those not voting must be counted in making up the aggregate, and that as less than a majority had voted for the proposition it failed. *Township of Inavale v. Bailey*..... 453

Transcripts. See COSTS.

Trial. See APPEAL, 15. ARGUMENT OF COUNSEL. CONVERSION, 5–7. EJECTMENT, 5, 7, 9. ERROR. EVIDENCE. INSTRUCTIONS. NEGLIGENCE, 6. PLEADING, 6, 10. PRACTICE, 1, 2. REVIEW, 16, 17, 23. WITNESSES.

1. The order in which a party shall introduce his testimony rests in the discretion of the presiding judge. *Consaul v. Sheldon*..... 247
2. The admission of illegal evidence in a cause tried to a court without a jury is not sufficient ground for the reversal of the judgment. *Stabler v. Gund*..... 648
3. Where, from the testimony before the jury, different minds might draw different conclusions, it is error to direct a verdict. *Suiter v. Park National Bank*..... 372
4. An objection to the admission of a deed as incompetent, immaterial, and irrelevant, is not specific enough to reach a defect in the execution of the instrument. *Rupert v. Penner*..... 587
5. In an action on a note where the defendant admits plaintiff's cause of action, but sets up new matter, such as usury, for a defense, so that the defense would fail without proof of such new matter, he is entitled to open and close. *Suiter v. Park National Bank*..... 372
6. Where a jury after retiring returned into court, announced

that they were unable to agree, and requested the reading of a portion of defendant's testimony, it was *held* not reversible error to permit the stenographic reporter to read it to them in the presence of the attorneys for the respective parties. *Darner v. Daggett* 695

7. In an action upon a contract of subscription to stock of a corporation where there was testimony tending to show that defendant waived the conditions in respect to amount of stock to be subscribed before entering upon the main purpose of the corporation, it was error to direct a verdict. *Hards v. Platte Valley Improvement Co* 266

Trover and Conversion. See CONVERSION.

Trusts. See BANKS AND BANKING. STATUTE OF FRAUDS.

1. Only those beneficially interested in a trust estate can question the transfer of trust property by the trustee to himself. *Anderson v. South Omaha Land Co* 803
2. The evidence referred to in the opinion *held* to be insufficient to establish a trust in favor of plaintiff in the property in controversy. *Id.*
3. It is not the policy of the law to enforce stale claims which are asserted after the witnesses are dispersed or dead. The action discussed in the opinion is barred by the statute of limitations. *Streitz v. Hartman* 406
4. Where a trustee conveys real estate to the shareholders, and his deeds are received in full satisfaction of the trust, the grantee of a shareholder cannot open up the trust and require the trustee to account and convey to him land not included in his purchase. *Id.*

Unauthorized Appearance. See APPEARANCE.

Undertaking. See APPEAL, 11. BONDS.

Unliquidated Damages. See ATTACHMENT, 11.

Unorganized Territory. See COUNTIES.

Usage.

1. Where a principal empowers an agent to transact business with respect to which there is a well defined and publicly known usage, the presumption is, in the absence of facts indicating a different intent, that such authority was conferred in contemplation of such usage, and persons dealing with such agent in good faith will not be bound by limitations upon such usual authority. *Milwaukee & Wyoming Investment Co. v. Johnston* 554
2. Such usage to bind a principal must have existed for such time, and became so widely and generally known as to

warrant the presumption that he had it in view at the time of the appointment of the agent. *Id.* 555

3. In an action of replevin against the purchaser of cattle sold by an agent without authority, it was error to receive evidence on the part of the defendant to prove that at the time he made the purchase it was the usage of such agents where the purchase was made, to sell cattle, in the absence of any testimony to show that the plaintiff had knowledge of such usage. *Id.*

Usury.

When usury is clearly established in the transaction, the burden of proof is on the person holding the instrument to show that he is a *bona fide* holder for value before maturity. *Suiter v. Park National Bank* 372

Valuable Improvements. See EJECTMENT, 12–14.

Valued Policy Act.

Is sustained. *German Insurance Co. v. Penrod* 273

Vendor and Vendee. See BONA FIDE PURCHASER. JUDICIAL SALES. SALES.

1. One who accepts a quitclaim deed from his grantor is bound, at his peril, to ascertain what equities, if any, exist against his title. *Bowman v. Griffith* 362

2. Where three persons jointly purchase three lots and by agreement took the title in the name of one of the purchasers who gave his note for balance of the purchase price secured by a mortgage on the lots, and the vendor accepted the same, it was *held* that he was restricted to the security thus taken, and could not recover a deficiency judgment against the purchasers who did not sign the notes. *Reeves v. Wilcox* 779

3. In case of the breach of an executory contract to convey real estate where the vendor having title refuses or puts it beyond his power to convey, and no part of the consideration has been paid, the measure of damages which the vendee is entitled to recover is the value of the land at the time the contract should have been performed less the contract price. *Carver v. Taylor* 429

4. In such a case, where the land is of less value than the contract price, the vendee is entitled to recover nominal damages for the breach of contract. *Id.*

Verdict. See NEGLIGENCE, 6. REPLEVIN, 3. TRIAL 3, 7.

Verification.

Where a pleading is to be used as an affidavit as well as a

pleading it must be verified positively. *Weeping Water Electric Light Co. v. Haldeman* 142

Voluntary Assignment. See BANKS AND BANKING.

The funds of an insolvent debtor which come into the hands of the assignee are within the jurisdiction of the county court. *Wilson v. Coburn* 530

Votes. See COUNTY SUPERVISORS. ELECTIONS.

Waiver. See ERROR PROCEEDINGS. INSURANCE, 7-9. REVIEW, 20. STATUTORY BONDS. SUMMONS, 1.

1. Failure to except to admission or exclusion of testimony is a waiver of error. *Johnson v. Swayze* 117
2. The right to have the record entry of a decree corrected, is not waived by taking a stay of an order of sale. *Hoagland v. Way* 388
3. Where a party waives all objections for cause to the jurors called to try his case, and also his peremptory challenges, he thereby waives a challenge to the array. *Weeping Water Electric Light Co. v. Haldeman* 139

Warranty. See COVENANT OF WARRANTY.

1. In an action for damages for breach of warranty in the sale of a piano for $525, where the agent misrepresented the value and quality of the instrument, a verdict for the plaintiff for $250 was sustained by the evidence. *Lyon v. Moore* 636
2. In an action on notes given for a harvesting machine where the contract of sale provided that if on one day's trial the machine could not be made to do good work, and were returned at once, the money paid would be refunded, but that a continuous use of the machine would be an acceptance, and the proof showed that it had been used two years, it was *held* that defendant failed to show a compliance with the terms of guaranty and a verdict in his favor was against the clear weight of evidence. *McCormick Harvesting Machine Co. v. Hartman* 629

Weight of Evidence. See EVIDENCE. REVIEW, 8, 22.

Witnesses.

1. The court in its discretion may permit a party to ask a witness a leading question. *St. Paul Fire & Marine Insurance Co. v. Gotthelf* 351, 357
2. The extent to which a witness may be cross-examined for the purpose of showing bias is within the discretion of the trial court. *Consaul v. Sheldon* 248
3. A book containing correct entries made at the time goods were purchased, when properly identified, may be intro-

duced in evidence in corroboration of a witness, and as a detailed statement of the items involved. *St. Paul Fire & Marine Insurance Co. v. Gotthelf* 351

4. Where a witness admitted that he had felt unfriendly toward a party to the suit at times, but disclaimed such feeling at the time of giving his testimony, it was proper to exclude answers to questions by which it was sought to show hostility three years before the trial. *Consaul v. Sheldon* 255

5. It is competent to show on cross-examination of a witness that he is hostile towards one of the parties, and if he deny such fact it is proper to contradict him, but the impeaching evidence must tend to show hostility at the time of trial. *Id* 249, 254

6. When it is sought to impeach a witness by proving that he has made statements out of court, or upon a formal trial, contradicting his testimony, the attention of the witness must be first called to the alleged statements, to the time and place of making them, and to whom made. *Hanscom v. Burmood* 504

Words and Phrases. See MAXIMS.

1. "Agricultural societies." *State v. Robinson* 402
2. "All moneys collected." *Taylor v. Kearney County* 381
3. "Base-ball." *State v. O'Rourk* 614
4. "Caused" and "contributed to." *Uldrich v. Gilmore* 292
5. "General circulation." *Koen v. State* 676
6. "Majority vote." *Township of Inavale v. Bailey* 453
7. "Special assessments." *Ittner v. Robinson* 133
8. "Sporting." *State v. O'Rourk* 614
9. "Taxes." *Ittner v. Robinson* 133

Writs. See SUMMONS.