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MIHALOVITCH, FLETCHER & COMPANY ET AL. v. DAVID L. BARLASS.

FILED MARCH 29, 1893. No. 4564.

1. **Attachment:** INDEMNIFYING BOND. An officer in whose hands an attachment is placed to be levied upon goods of the debtor in the action may, where there is doubt as to the ownership of the goods, demand an indemnifying bond from the plaintiff in the attachment.

2. ———: ACTION ON INDEMNIFYING BOND: FRAUD BY OFFICER EXECUTING WRIT: PLEADING. If an officer, by collusion and fraud, should permit a judgment to be wrongfully rendered against him, these facts may be pleaded to an action on such bond, together with a statement of the plaintiff in attachment that the property levied upon was that of the debtor in attachment.

3. ———: ———: ———: DEFENSE. The fact that an officer permits judgment to be rendered against him for an alleged wrongful levy without making a defense, although a circumstance which with others may show fraud, yet in order to do so it must appear that a defense was available.

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

Bowen & Bowen, for plaintiffs in error.

Capps, McCreary & Stevens, and *John M. Ragan, contra.*

MAXWELL, CH. J.

This is an action upon an indemnifying bond for the sum of $550 given by the plaintiffs in error to the defendant in error, who was sheriff of Adams county, to indemnify him for levying upon and selling certain property levied upon as belonging to one Fist, who was indebted to the plaintiff in error. On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of

$550, upon which judgment was rendered. The principal error relied upon is that the verdict "is contrary to law."

The testimony tends to show that on the 24th of September, 1887, the plaintiffs in error commenced an action in the district court of Adams county against one Emmanuel Fist to recover the sum of $274.50, and caused an attachment to be issued which was placed in the hands of the defendant in error for service; that he refused to levy the same upon the property alleged to be that of Fist, unless the plaintiffs in error would execute to him an indemnifying bond, which they did, whereupon he levied the attachment on certain property in a car on the St. Joe & Grand Island Railway Company which was consigned to the A. Furst Distilling Company, St. Joe, Mo. The plaintiff in error recovered judgment against Fist and an order for the sale of the property so levied upon, and the property was sold under said order. On the 7th of November, 1887, the Furst Distilling Company brought an action in replevin in the district court of Adams county against the defendant in error for the recovery of said property, but as it had been sold under the order of court and the proceeds applied on the judgment of the plaintiffs in error, the only remedy of the Distilling Company was an action for conversion of the property. The action was therefore changed to one for conversion, and the names of the plaintiffs in error were omitted from the petition, and the action proceeded against the defendant in error for the value of the property, and judgment was recovered for the sum of $2,000, which judgment is unreversed. The defendant in error thereupon brought an action on the indemnifying bond. It seems to have been claimed in the court below that there was no lawful authority to give an indemnifying bond and therefore it is void, and the capable judge before whom the case was tried, in overruling the motion for a new trial, bases his action principally on the ground that such authority does exist and that the bond is valid. We have no doubt his

views in that regard are correct and that the action may be maintained.

It is claimed that the defendant in error permitted judgment to go against him by default, and that the plaintiffs in error had a full and sufficient defense to the action. No doubt if an officer, by collusion and fraud, should wrongfully permit a judgment to be rendered against a party giving the indemnity, these facts might be shown as grounds for impeaching the judgment; in which case it would be necessary to submit the alleged defense, and the reasons for not asking to intervene in the former action and present the defense then. We find nothing of the kind here. In the absence of collusion and fraud the parties will be bound by the judgment, and we cannot in this action enter into a consideration of the merits of that case. No reason is shown by the record for the reversal of the case, and the judgment is

AFFIRMED.

THE other judges concur.

AUGUST GARDELS v. ROBERT F. KLOKE ET AL.

FILED MARCH 29, 1893. No. 4712.

1. **Statute of Frauds:** MEMORANDUM OF CONTRACT TO PURCHASE REAL ESTATE. A memorandum of an agreement in the form of a receipt which describes the land sold, the price and time of payment, with an admission of the receipt of $25 on the contract, and duly signed by the vendors, is sufficient under the statute.

2. ——: ——: ACCEPTANCE BY VENDEE. Prior to the statute of frauds a parol contract for the sale of land with delivery of possession was valid. The statute has merely changed the common law so that the party to be charged—ordinarily the vendor—

need sign the memorandum. The vendee accepting the same is bound as at common law.

3. **Contract for Sale of Real Estate:** FORECLOSURE OF VENDEE'S RIGHTS: DECREE. An action will lie to foreclose the rights of a purchaser in a contract for the sale of real estate, and the court by its judgment may direct the purchaser to comply with the terms of the contract within a reasonable time to be named by the court, or order the premises sold and the proceeds applied to the payment of the judgment.

4. ———: ———: JUDGMENT. The justice and equity of the case will determine the character of the judgment.

ERROR from the district court of Cuming county. Tried below before POWERS, J.

C. C. McNish and *J. C. Crawford*, for plaintiff in error:

Gardels filed a motion to open the judgment and be allowed to defend, supported by affidavits, showing that as soon as summons had been served upon him he had employed counsel to defend the suit, and that he only failed to make a defense because he was led to believe that the action would be dismissed. This motion should have been sustained. (*Haggerty v. Walker*, 21 Neb., 596; *Clutz v. Carter*, 12 Id., 113; *Blair v. West Point Mfg. Co.*, 7 Id., 146; *Taylor v. Trumbull*, 32 Id., 508; *Griswold Linseed Oil Co. v. Lee*, 47 N. W. Rep. [So. Dak.], 955; *Bertline v. Bauer*, 25 Wis., 486; *Stafford v. McMillan*, 25 Id., 566; *Beatty v. O'Connor*, 5 N. E. Rep. [Ind.], 880.) The petition did not state a cause of action. The receipt set out in plaintiffs' petition does not amount to such an agreement for the sale and conveyance of land as will take the case out of the statute of frauds. Mere part performance is not sufficient. (*Poland v. O'Connor*, 1 Neb., 50; *Mushrush v. Devereaux*, 20 Id., 49; *Baker v. Wiswell*, 17 Id., 52; *Guthrie v. Anderson*, 28 Pac. Rep. [Kan.], 164.) A petition that fails to state a cause of action will not support a judgment. (*Burlington & M. R. Co. v. Kearney County*, 17 Neb., 511; *Thompson v. Stetson*, 15 Id., 112.)

M. McLaughlin, contra:

Under the statute the agreement need only be signed by him who is to be charged by it. (*Gartrell v. Stafford*, 12 Neb., 552; *Robinson v. Cheney*, 17 Id., 679.) The party to be charged means the person who sells the land. (*Frazer v. Ford*, 2 Head [Tenn.], 464.) The petition is sufficient to support the decree. A written proposal containing the names of the contracting parties and the terms of the proposed agreement, signed by the vendor, when accepted and assented to by the party to whom the sale is made, is a sufficient memorandum; and the delivery of such instrument as a proposal, and the acceptance thereof and assent thereto by the party to whom it is made, may be proved by parol testimony. (*Reuss v. Picksley*, L. R., 1 Exch. [Eng.], 342; *Sanborn v. Flagler*, 9 Allen [Mass.], 474; *Himrod Furnace Co. v. Cleveland & M. R. Co.*, 22 O. St., 451; *Mc Williams v. Lawless*, 15 Neb., 131.)

MAXWELL, CH. J.

This is an action to foreclose a contract for the sale of real estate. Personal service was had upon the purchaser, who made default, and at the September term of the district court for Cuming county, a judgment was entered against the purchaser that he pay the purchase money within thirty days, or that said premises be sold as upon execution and the proceeds derived from said sale be brought into court to be applied in payment of said judgment, and that the vendors have judgment for any deficiency that may exist after the sale of said land, etc. Within thirty days from the date of said judgment the purchaser filed a motion as follows:

"Comes now the defendant and moves the court to open up and set aside the decree and default heretofore entered in this case and permit the defendant to interpose his defense for the following reasons, to-wit:

"1. That the plaintiffs' petition fails to state a cause of action against the defendant.

"2. The defendant has a good, valid, meritorious, and complete defense to the cause of action set forth in the plaintiffs' petition, as is shown by the answer herewith filed, and which defense he did not interpose for the reason that prior to the entering of said decree the plaintiffs agreed with the defendant that they would dismiss their said action, which agreement and promise the defendant relied upon.

"3. Said decree was entered in the absence and without the knowledge or consent of the defendant, and in violation of the plaintiffs' promise that they would dismiss their said action."

He accompanied this motion with an answer, in effect a denial of the facts stated in the petition. A large number of affidavits were filed by both the plaintiffs and defendant, tending to show what was done in relation to the contract and also that the vendors promised to dismiss the action, by reason of which the purchaser failed to make an appearance in the case. These affidavits are about equal in number on behalf of the vendor and vendees, and upon the evidence thus submitted the court refused to vacate the judgment, and from the order overruling the motion the cause is brought into this court.

The principal ground relied upon for a reversal of the case is that the petition fails to state a cause of action. The petition is as follows:

"1. Plaintiffs complain of the defendant for that on or about the — day of February, 1890, the plaintiffs, being the owners in fee of the following described premises, situated in Cuming county, Nebraska, to-wit, the S. W. ¼ of the S. E. ¼ of Sec. 34, T. 22, R. 6 east, except a certain parcel in the northeast corner of said described land, which is platted, recorded, and known as Hugh's addition to West Point, on said days sold the same to the defendant

for the sum of $3,100, and on the same day the defendant paid the plaintiffs on said purchase the sum of $25, and then and there agreed to pay the remainder of said purchase money on the first day of May, 1890.

"2. That on the same day, and after the payment of the said $25 on said purchase, the plaintiffs made and delivered to the defendant, in writing, a receipt and memorandum of said sale and purchase, and the said defendant accepted the same and has ever since retained possession thereof; said memorandum is, in substance, as follows:

"'WEST POINT, NEBR., Febr. —, 1890.

"'Received of August Gardels $25 as part purchase money for the purchase of 35 acres in the S. W. ¼ of S. E. ¼, Sec. 34, T. 22, R. 6 east, Cuming county, Neb., for $3,100, balance to be paid, possession given, and deed delivered May 1st, 1890. R. F. KLOKE.

"'OTTO BAUMAN.'

"3. The plaintiffs have duly performed all the conditions of said agreement on their part to be performed, and on the 5th day of May, 1890, tendered to the defendant a deed of said premises in pursuance of the terms of said agreement, but the defendant refused and still refuses to accept the same and pay said purchase money or any part thereof. The plaintiffs therefore pray that said defendant be required to perform said agreement and pay plaintiffs the remainder of said purchase money, amounting to the sum of $3,075, with interest from the first day of May, 1890, at the rate of eight per cent per annum, or in case of his refusal to complete said contract, that said premises be sold and the proceeds be applied to the payment of the sum due, and in case a deficiency the defendant be required to pay the same, and for such other relief as justice and equity may require."

The petition seems to state a cause of action. In *McWilliams v. Lawless*, 15 Neb., 131, it was held that a memorandum which shows the names of the parties, the

description of the land sold, the price and general terms of the sale is sufficient, and the memorandum is only required to be signed by the party to be charged. (*Gartrell v. Stafford*, 12 Neb., 552; *Robinson v. Cheney*, 17 Id., 679.) The object of the statute of Charles II was to prevent frauds and perjuries. Thus, prior to that statute, a parol agreement for the sale of land, with formal delivery of possession, was sufficient. These things could be proved by witnesses of the transaction. This opened a wide field for false testimony. The statute therefore declared that no such contract was enforcible unless the party to be charged had signed a memorandum of the contract. Our statute embodies this feature of the statute of Charles II. In respect to the vendee, the common law remains as before the statute was passed. The acceptance of a memorandum by the vendee is evidence that he has accepted the contract and he is bound thereby. No objection is raised to the form of the judgment nor the judgment for a deficiency. The authority of the court to order a sale of the land instead of rendering a decree of strict foreclosure is undoubted. The parties are before the court and the subject-matter of the suit is within its jurisdiction, and the court may render such decree as may seem to comport with justice and right. In equity, the purchaser of an estate is treated as the owner, and the person holding the legal title as holding the same in trust for his use when he complies with the terms of the contract. The land itself appears to be the remainder of a governmental subdivision after a certain portion thereof had been platted and laid off into town lots, but in any event it is not claimed that the description is indefinite. The question whether a judgment for a deficiency may be recovered does not arise in the case, and will not be considered. As the proposed answer is, in effect, a denial, many of the matters set forth in the affidavits as to fraud in obtaining the judgment do not arise in the case, and if they did, the evidence being so nearly

equally balanced, it would be impossible to say that the ruling of the trial court was wrong. Upon the whole case it is apparent that there is no reversible error in the record and the judgment is

AFFIRMED.

THE other judges concur.

EDWARD CLAPHAM v. S. W. STORM.

FILED MARCH 29, 1893. No. 4625.

Review. Where the principal error relied upon is that the verdict is against the weight of evidence the verdict will not be set aside, unless it is clearly wrong.

ERROR from the district court of Madison county. Tried below before POWERS, J.

J. R. Gilkeson and *Wigton & Whitham*, for plaintiff in error.

Holmes & Hays, contra.

MAXWELL, CH. J.

This is an action upon three promissory notes given by the defendant upon which there is claimed to be due to the plaintiff the sum of $600. The defendant filed an answer to the petition as follows:

"1. The defendant, for answer to plaintiff's petition herein filed, admits the making and delivering to the payee therein named of the notes set out in said petition.

"2. The defendant denies each and every other allegation in said petition contained.

"3. The defendant avers the facts to be that shortly prior to the 6th day of September, 1887, the defendant sold and conveyed by deed of general warranty to the plaintiff his farm, comprising 160 acres of land in Pierce county, Nebraska, at the agreed price as expressed in said deed of $3,600; that as part consideration of the purchase of said premises the plaintiff assumed and agreed to pay certain incumbrances then existing against said premises, and for the balance of consideration of said purchase plaintiff sold to this defendant a large amount of stock, consisting of horses and cattle then on the plaintiff's farm in Saunders county, Nebraska, and then and there agreed that said stock should remain on said farm until the defendant could give sufficient notice of the public sale of said property at the plaintiff's farm aforesaid, and the plaintiff then and there agreed that he would purchase all notes at such sale at a certain agreed discount, to-wit, eight per cent, and at the same time the defendant further agreed to advance to the defendant on such sale notes the sum of $600, to be used in paying the notes set out in plaintiff's petition, with the understanding that the said plaintiff should retain the said notes as security to him for the faithful performance of the defendant of his agreement to sell said property and turn over to the plaintiff the sale notes received at such sale to the amount of $600 thus advanced by the plaintiff; that the plaintiff immediately filed his deed to the said property in Pierce county for record in the office of the clerk of said county and entered into possession of said premises; that he caused public notice to be given of the sale of the stock so as aforesaid purchased from the plaintiff, said sale to be had on the — day of October, 1887, at the premises of the plaintiff in Saunders county, Nebraska, and that he went to the premises of the plaintiff aforesaid at said time for the purpose of selling said property and carrying out and performing all the conditions of the agreement aforesaid on his part to be performed, but the plaintiff refused to deliver the said

property, and has ever since refused to deliver the said property to this defendant, whereby the defendant was prevented from selling the said property and from the proceeds of the sale thereof returning to the plaintiff the money so advanced by him, and the residue of the property of the value of $475 was wholly lost to this defendant, whereby this defendant has suffered damages in the sum of $475. The defendant therefore prays that said note be declared canceled and he have judgment against the plaintiff for the said sum of $475 and costs herein expended."

To this answer the plaintiff's amended reply is as follows:

"The plaintiff, for reply to defendant's answer, denies each and every allegation therein contained. Plaintiff alleges the fact to be that on or about the 6th day of September, 1887, the defendant sold and conveyed to plaintiff his farm of 240 acres of land in Pierce county, Nebraska. In consideration of said conveyance plaintiff assumed and agreed to pay all liens and incumbrances then existing against said land, and as a further consideration plaintiff sold and delivered to defendant certain stock and property, consisting of a wagon and a set of harness; that on or about the 24th day of September, 1887, plaintiff and defendant had a full settlement and stated an account of all matters in difference between them as to the sale and conveyance of said land, and the payment of the consideration therefor, and said account stated was that plaintiff was indebted to defendant in the sum of $600, which plaintiff admits is still due defendant on said account stated. Plaintiff further alleges that in making said account stated the $600 loaned by plaintiff to defendant as alleged in his petition was not included or considered."

On the trial the jury returned a verdict in favor of the defendant for the sum of $375 at seven per cent. The court properly overruled the seven per cent, as the jury should have found the entire amount, and rendered judgment for

$375. The principal ground for a reversal relied upon is that the verdict is against the weight of evidence.

The testimony tends to show that the defendant sold a farm of 240 acres in Pierce county to the plaintiff for the sum of $3,600; that the plaintiff assumed an incumbrance on the land for $2,000 and was to pay the remaining consideration in stock on the plaintiff's farm in Saunders county. The defendant contends that the plaintiff guaranteed this stock to bring at public sale the sum of $1,600; that the defendant in pursuance of the contract offered a part of the stock for sale and sold sufficient to amount to $775.25, and the remainder of the stock is retained by the plaintiff. The plaintiff does not deny that a portion of the stock is unsold in his hands, but claims that the defendant agreed to take the stock at a price agreed upon, and that if he sold the same for less the loss must fall upon him, and this is the principal contention in the case. The defendant, it appears, was in embarrassed circumstances, and the plaintiff, after he received a deed for the land and had assumed the mortgage, etc., complained that he had paid too much for the land, whereupon the defendant admits that he said to him, in effect, that if he would guarantee the stock to bring $1,600 that he would throw off $600, the defendant also to have the right to redeem the property within a certain time. The testimony before the jury on this point would warrant them in finding that the plaintiff had not complied with the terms of the alleged agreement —if it had any validity, which we doubt. There is also proof that after the sale of the cattle the parties spent a day in attempting to settle the controversy, but being unable to do so it was submitted to the wife of one of the parties, who computed that there was due the defendant the sum of $26, but that the plaintiff would only pay thereon the sum of $16. It also appears that the plaintiff sold the farm in question for the sum of $3,600. This, perhaps, is not material. The mortgage and judgment liens on the

farm exceeded $2,400. These the jury deducted from the purchase price of the farm. They also evidently deducted $600 advanced by the plaintiff to the defendant, and $175.25 paid to Mr. Hicks. These several sums deducted from the purchase price of the farm, viz., $3,600, leave a sum in excess of the verdict. This question is one proper to submit to a jury and in our view the verdict is right and should not be disturbed. It is unnecessary to review the instructions as they seem to conform to the proof. The judgment is

AFFIRMED.

THE other judges concur.

ART ELIZA ALEXANDER V. JOHN OVERTON ET AL.

FILED MARCH 29, 1893. No. 4359.

Action for Wrongful Sale of Land by County Treasurer: PROPER PARTY PLAINTIFF: HOLDER OF LEGAL TITLE. One M. purchased certain lands at tax sale and had the certificates and deeds made to one A., his sister. He testified that he had money belonging to her to invest and that he purchased the property in question. It was sought to impeach this testimony by showing that after the purchase he had made statements that on account of domestic difficulties he had taken the title in the name of his sister. *Held*, That as the money paid purported to be that of the sister and the titles were taken in her name she could maintain an action against the county treasurer and his sureties for the wrongful sale of the property.

ERROR from the district court of Otoe county. Tried below before CHAPMAN, J.

C. W. Seymour, for plaintiff in error.

John C. Watson, contra.

MAXWELL, CH. J.

This is an action upon four causes of action against the defendant and sureties on his official bond, for a wrongful sale of lands, as treasurer of Otoe county, to plaintiff; in other words, for selling lands where no title could pass by the sale. The answer is, prior adjudication, and that the plaintiff is not the real party in interest. On the trial of the cause the jury returned a verdict for the defendants, upon which judgment was rendered. The verdict is conceded to have been rendered for the defendants on the ground that the plaintiff was not the real party in interest. It appears from the testimony that the plaintiff is a sister of W. D. Merriam. It also appears that he purchased the lands in question and transacted all the business. Merriam testifies that he had money belonging to the plaintiff to invest and that he did so by purchasing the land in question for the plaintiff. We find no testimony contradicting this, but many witnesses testify that in a conversation they had with Merriam after these investments were made he stated in effect that he in fact had made the purchases for himself at tax sale but had taken the title in the name of his sister, and one witness testifies that he gave as a reason for so doing that he had had some family difficulty. Now, suppose all that proved as to statements of Merriam is true, it would not follow that he was the real party in interest. Leaving out of view the fact that the statements of an agent made after the transaction are not admissible against his principal, they are not sufficient to defeat the action. If the money invested in fact belonged to the plaintiff, the action could be prosecuted in her name, and the same is true if it was invested in her name. Suppose a brother should take the title to a tract of land in the name of his sister—the deed being made to her, will it be seriously contended that an action of ejectment could not be maintained in her name to

recover the possession? In law she would hold the legal title and would be the real party in interest. The common law did not recognize assignments of claims. They were supposed to foster litigation which in theory the common law did not favor. Hence if it was sought to bring an action on an assigned claim it was to be done in the name of the original party. The reason for this rule is stated in *Lampet's Case*, Coke's Rep. [Eng.], part 10, p. 48, as follows: "The great wisdom and policy of the sages and founders of our law have provided that no possibility, right, title, nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people and chiefly of terre-tenants, and the subversion of the due and equal execution of justice." (*Warmstrey v. Tanfield*, 1 Rep. Ch. [Eng.], 29*; *Wright v. Wright*, 1 Ves. Sr. R. [Eng.], 411; *Mandeville v. Welch*, 5 Wheat. [U. S.] 283; *Bacon v. Bonham*, 33 N. J. Eq., 614; *East Lewisburg Lumber Mfg. Co. v. Marsh*, 91 Pa. St., 96; *Kountz v. Kirkpatrick*, 72 Id., 376; *Trull v. Eastman*, 3 Met. [Mass.], 121B; ispham's Eq., 214.)

The case of *Thalimer v. Brinkerhoff*, 20 Johns. [N. Y.], 386, decided by a divided court, seems to be one of great hardship where, under the forms of law, a party was robbed of his property on the ground that, as assignor, he had contributed to the expenses of maintaining an action. In equity the assignee of a chose in action may maintain an action in his own name. In the case at bar, however, there has not, so far as appears, been any assignment. The tax deeds were taken in the name of the plaintiff, and an action is now brought in her name to recover for the wrongs perpetrated by the defendant in selling the lands. The plaintiff holds the legal title to this claim. There is no claim that the prosecution of the action in her name will defraud the defendant or any one else. A judgment on this claim, either for her or against her, will be ample pro-

tection to the defendant. If the claim was assigned to Merriam, or any one else, it might be insisted that he was not the real party in interest, and it might be necessary to bring in the assignor as a witness to determine that question, but it does not arise in this case. Here the contract purports to have been made with the plaintiff, and the money was paid in her name. The contract relations that may exist between herself and Merriam do not arise in this case and need not be considered.

Section 30 of the Code provides: "The assignee of a thing in action may maintain an action thereon, in his own name and behalf, without the name of the assignor."

Section 31: "In the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any set-off or other defense now allowed; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith, and upon good consideration before due."

Section 32: "An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."

The contract in the case at bar purports to have been made by the plaintiff, and the deeds were made in her name, and she is authorized to bring the action. The judgment is therefore reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

SECURITY COMPANY OF HARTFORD, CONNECTICUT, APPELLANT, V. BENJAMIN F. EYER ET AL., APPELLEES.

FILED MARCH 29, 1893. No. 4788.

1. **Negotiable Instruments:** VALIDITY OF PROVISIONS FOR PAYMENT OF ATTORNEY'S FEE. Following the repeated decisions of this court it was *held*, that a provision in a note executed since June 1, 1879, the date of the taking effect of the act repealing the attorney fee law, stipulating for the payment of an attorney's fee to the plaintiff for instituting and prosecuting a suit on the note, is invalid.

2. ———: ———: FORECLOSURE OF MORTGAGE: CONFLICT OF LAWS: LEX FORI. B. F. E., a resident of Nebraska, for the purpose of procuring a loan of money, on July 9, 1886, executed a note in this state, and secured the payment thereof by mortgage on real property within the state. The payee and mortgagee was a resident of Iowa, but the papers were executed and delivered, and the money was paid to the borrower, in this state. The note, by its terms, was payable in New York City, and contained a provision to the effect that in case an action is commenced to foreclose the mortgage securing the same, plaintiff should be allowed by the court in the decree an attorney's fee of $70, which provision was valid and binding in the state of Iowa. The note and mortgage each contained a clause expressly providing that "they are made and executed under and are in all respects to be construed by the laws of the state of Iowa." *Held*, In a suit to foreclose the mortgage, that the law of the place of the forum governs the application of the remedy, such as the recovery of costs, etc., and that the said provision in the note for attorneys' fees, being contrary to the settled law of this state, will not be enforced.

3. **Mortgage Foreclosure:** CONTRACT: INTERPRETATION. The contract set out at length in the opinion construed, and *held* that the promise of T. D. and the bank to pay off and discharge the incumbrances on the real estate covered by plaintiff's mortgage was not absolute, but conditional.

4. ———: DEFICIENCY JUDGMENT. *Held*, Under the pleadings and proofs in the case, that plaintiff is not entitled to a deficiency judgment against the said T. D. and the bank.

APPEAL from the district court of Holt county. Heard below before KINKAID, J.

Breckenridge, Breckenridge & Crofoot, for appellant:

A promise in a note to pay attorneys' fees is valid and may be enforced where suit is brought upon default in payment. (*Harvey v. Baldwin*, 24 N. E. Rep. [Ind.], 347; *Reisterer v. Carpenter*, Id., 371; *Smock v. Ripley*, 62 Ind., 81; *Ogborn v. Eliason*, 77 Id., 394; *Smith v. Silvers*, 32 Id., 321; *Farmers & Merchants National Bank v. Barton*, 21 Ill. App., 403; *Barry v. Guild*, 28 Id., 50; *Wood v. Winship Machine Co.*, 83 Ala., 424; *Williams v. Flowers*, 7 So. Rep. [Ala.], 439; *Boutwell v. Steiner*, 5 Am. St. Rep. [Ala.], 376; *Peyser v. Cole*, 4 Pac. Rep. [Ore.], 520; *Wilson Sewing Machine Co. v. Moreno*, 6 Sawyer [U. S.], 35; *Bank of British N. A. v. Ellis*, Id., 96; *Miner v. Paris Exchange Bank*, 53 Tex., 561; *Washington v. First National Bank of Denton*, 64 Id., 4; *Md. Fertilizer & Mfg. Co. v. Newman*, 45 Am. Rep. [Md.], 750; *Bowie v. Hall*, 69 Md., 433.) A reasonable attorney's fee may be stipulated for in a mortgage and collected in case of foreclosure. (*Casler v. Byers*, 22 N. E. Rep. [Ill.], 507; *Telford v. Garrels*, 24 Id. [Ill.], 573; *McIntire v. Yates*, 104 Ill., 492; *Clawson v. Munson*, 55 Id., 394; *Succession and Community of Duhe*, 6 So. Rep. [La.], 502; *Levy v. Beasley*, Id. [La.], 630; *Alden v. Pryal*, 60 Cal., 215; *Moran v. Gardemeyer*, 23 Pac. Rep. [Cal.], 6; *Snow v. Warwick*, 20 Atl. Rep. [R. I.], 94; *Rice v. Cribb*, 12 Wis., 198; *Hitchcock v. Merrick*, 15 Id., 578; *Killips v. Stephens*, 40 N. W. Rep. [Wis.], 652; *Williams v. Meeker*, 29 Ia., 292; *McGill v. Griffin*, 32 Id., 445; *McIntire v. Cagley*, 37 Id., 676; *Davidson v. Vorse*, 52 Id., 384; *Cox v. Smith*, 1 Nev., 161; *McLane v. Abrams*, 2 Id., 199; *Rickards v. Hutchinson*, 18 Id., 215; *American Mortgage Company v. Downing*, 17 Fed. Rep., 660.) A creditor taking security of any kind for

debt may include a stipulation that he may recover with it the reasonable expenses for collection, including attorney's commission. (*McAllister's Appeal*, 59 Pa. St., 204; *Imler v. Imler*, 94 Id., 372; *Huling v. Drexell*, 7 Watts [Pa.], 126.)

H. M. Uttley, contra:

The provision of the contract for the payment of attorneys' fees is void. (*Dow v. Updike*, 11 Neb., 95; *Hardy v. Miller*, Id., 395; *Otoe County v. Brown*, 16 Id., 395; *Bond v. Dolby*, 17 Id., 493; *Hand v. Phillips*, 18 Id., 593; *Winkler v. Roeder*, 23 Id., 706; *Bullock v. Taylor*, 39 Mich., 140; *Myer v. Hart*, 40 Id., 522; *First National Bank of Trenton v. Gay*, 63 Mo., 33; *Ayrey v. Fearnsides*, 4 Mees. & W. [Eng.], 168; *Smith v. Nightingale*, 2 Stark. [Eng.] 375; *Bolton v. Dugdale*, 4 B. & Ad. [Eng.], 619; *Smith v. Mercer*, 1 Marsh. [Eng.], 253; *Clarke v. Percival*, 2 B. & Ad. [Eng.], 660; 1 Parsons, Notes & Bills, 37; *Read v. McNulty*, 12 Rich. L. R. [S. Car.], 445; *Woods v. North*, 84 Pa. St., 407; *Witherspoon v. Musselman*, 14 Bush [Ky.], 214; *Thomasson v. Townsend*, 10 Id., 114; *Gaar v. Louisville Banking Co.*, 11 Id., 189; *Smith v. Shelden*, 35 Mich., 42; *Merchants National Bank v. Sevier*, 14 Fed. Rep. [Ark.], 662; *Shelton v. Gill*, 11 O., 417; *Martin v. Trustees Belmont Bank of St. Clairsville*, 13 Id., 250; *Jones v. Radatz*, 11 Cent. L. J. [Minn.], 513; *Loudon v. Taxing District*, 104 U. S., 771; *State v. Taylor*, 10 O., 381.)

NORVAL, J.

This action was brought by the plaintiff and appellant in the district court of Holt county for the foreclosure of a mortgage on the N. W. ¼ of section 15, town 28, range 13 west, executed by Benjamin F. Eyer and Hatta S. Eyer, his wife, on the 9th day of July, 1886, to secure the payment of a bond or note given by said Benjamin F.,

calling for the sum of $700 with seven per cent interest from date thereof. To the action, C. H. Toncray, George W. E. Dorsey, the Farmers & Merchants National Bank of Fremont, and others were made defendants. A decree of foreclosure was rendered in an amount satisfactory to the plaintiff.

Two questions are raised by the appeal:

1. Was the plaintiff entitled to an allowance of an attorney's fee and to have the same taxed as costs in the case?

2. Did the court below err in holding that Toncray, Dorsey, and the bank were not personally liable to the plaintiff for the payment of the mortgage debt?

The note and mortgage each contained a provision to the effect that, in case an action is commenced to foreclose the mortgage, the plaintiff shall be allowed by the court in the decree an attorney's fee of $70.

Counsel for plaintiff, in the brief, cite a long line of decisions from the courts of last resort of several of our sister states which hold that a stipulation in a mortgage like the one before us for the payment of an attorney's fee, in the event of an action being instituted to foreclose the same, is valid and binding. This court in repeated decisions has held, and it is now the settled law of this state, that stipulations of this character found in contracts executed since June 1, 1879, the date of the taking effect of the act repealing the attorneys' fees statutes, are invalid and will not be enforced. (*Dow v. Updike*, 11 Neb., 95; *Hardy v. Miller*, Id., 395; *Otoe Co. v. Brown*, 16 Id., 395; *Winkler v. Roeder*, 23 Id., 706.) The question being no longer an open one we shall not now attempt to examine the subject anew, or to review the authorities which hold a different view from the one enunciated by this court in the cases cited above. If the rule is changed in this state it should be by statute, and not by judicial decision.

But it is contended by counsel for plaintiff that the note and mortgage were executed in the state of Iowa and must

be enforced according to the laws of that state, which authorize the allowance of attorney fees in foreclosure cases, where such fees are contracted by the parties. The record shows that when the mortgage was executed the mortgagee, Clarence K. Hesse, was a resident of Iowa and that the mortgagors resided in this state, on the land covered by the mortgage. Burnham, Tulleys & Co., of Council Bluffs, were the agents of the mortgagee and negotiated the loan for him through their sub-agent, John L. Pierce, a resident of Norfolk, this state. The papers were drawn in Iowa and sent here for execution. The note is headed at Council Bluffs and purports to have been dated and signed there. By its terms it is payable at the Banking House of Gilman, Son & Co., New York City. The uncontradicted testimony shows that the papers were executed and delivered in Nebraska. The mortgage was acknowledged in Holt county on January 9, 1886, and was filed for record in the forenoon of the same day, so it could not have been delivered in Iowa before it was placed on record. It also appears that the money was paid on the loan to the borrower in Nebraska through said John L. Pierce.

Bishop on Contracts, sec. 1389, says that "When the preliminaries of a contract and its formal execution have occurred partly in each of two or more states, its place of making is, as a sort of general rule, that at which, by delivery or otherwise, it first becomes a contract. For example, since ordinarily it is delivery which gives effect to the writing, a contract is commonly deemed to have been made in the state where the delivery took place, without reference to where it was written and signed. But in many cases this rule is inadequate, or its pointings are not readily understood; then the court will look into the preliminaries, the surroundings of the parties, their domicile, the words, the nature of the contracting, and the like, from which combined whole it will deduce the result."

There can be no doubt, under the rule just stated, that

the evidence fixes Nebraska as the *locus contractus*. The contract having been made in this state, if that fact alone is to be considered, it is clear that the agreement to pay an attorney's fee would have to be held invalid, for, as a general rule, where there is no stipulation to the contrary, the *lex loci contractus* governs. Of course it is competent for parties to contract with reference to the law of a particular place. Thus, where the place of performance of a contract is different from the place of making, the parties may stipulate that the contract shall be governed by the law of either place. Although New York city, in the state of New York, is mentioned in the note as the place of payment, the contract is not to be construed with reference to the law of that state, for the obvious reason there is no averment in the petition that the parties agreed or intended that the place of payment was in the state of New York, nor is the statute of that state pleaded. The note and mortgage both contained a printed clause expressly providing that "they are made and executed under and are in all respects to be construed by the laws of the state of Iowa."

It is urged that under the quoted stipulation the decree of the district court should have provided for an attorney's fee, in accordance with the contract of the parties, since the laws of Iowa, at the time of the making of the note and mortgage, allow attorneys' fees, when stipulated for in the contract. The books abound with decisions to the effect that parties may stipulate that either the law of the place of making the contract, or the place of performance, shall be applied by the courts in the construction of the contract and that such stipulation is binding upon the parties; but no case has been cited by counsel for appellant, nor have we been able to find any, which holds that a provision in a contract like the one before us, providing that it shall be construed by the laws of a state other than that of the one where the contract is made, or in which it is to be performed, will govern and control. We shall

not now decide the force and effect of such provision, since its determination is not essential to a proper disposition of the question under consideration; but for the purposes of this case we shall assume that the mortgage was an Iowa contract and the law of that state governs as to its construction. But it by no means follows, because the clause in the note and mortgage in regard to attorneys' fees is valid in Iowa, that the stipulation can be enforced in this state. Attorneys' fees, in states where they are allowed by the court to the successful party, are in the nature of costs and are taxed and treated as such. They are no part of the judgment proper. (*Rich v. Stretch*, 4 Neb., 186; *Hendrix v. Rieman*, 6 Id., 516; *Heard v. Dubuque County Bank*, 8 Id., 10; *Rosa v. Doggett*, Id., 51; *Hand v. Phillips*, 18 Id., 593; *State v. Boyd*, 52 N. W. Rep. [Ia.], 513)

In general, costs are recoverable only by force of some statutory provisions, and the law of the place of the forum in respect to costs is applied. The law in force at the place the contract is made does not govern costs. (*Commercial National Bank of Ogden v. Davidson*, 22 Pac. Rep. [Ore.], 517.) The case cited was an action brought in one of the circuit courts of the state of Oregon to foreclose a chattel mortgage on property within said state, given to secure a note made out of that state. The note contained a clause that "if not paid at maturity, ten per cent additional as costs of collection" should be recovered, which provision was valid and enforcible in the state where the note was executed. The court held that the *lex fori* governs the application of the remedy, and that the stipulation for attorneys' fees, being contrary to the public policy of the state of Oregon, would not be enforced by the courts of that state. The following quotation is from the opinion in the case: "As a general rule, the law of the place where contracts merely personal are made governs as to their nature, obligation, and construction. But I do not think that rule

applies to an extraneous agreement, the obligation of which does not arise until a remedy is sought upon the contract, to which it is only auxiliary. In regard to such agreements, the law of the place where they are attempted to be enforced, I should suppose, would prevail. This agreement was to pay the additional percentage as costs for collection of the note, and if the courts where the note was executed would have enforced the agreement, it does not follow that the courts of another jurisdiction are bound to do so. The effect of the agreement was to provide for an increase of costs, which are only incidental to the judgment, and the allowance of which must necessarily depend upon the law of the forum. A stipulation in a note made in Utah territory, providing that in an action on the note the plaintiff, in case of a recovery, should be entitled to double costs, might be considered valid under the laws of that territory, and enforcible in its courts; but that certainly would not render it incumbent upon the courts of this state, in an action upon such note, to award double costs."

In our opinion, the clause in the note and mortgage in the case at bar, relating to attorneys' fees, is invalid, and the court below did right in not enforcing it.

As to the remaining question involved in this appeal, the record before us shows that a few days after the making and recording of the mortgage in suit the mortgagors conveyed the land therein described, and other lands, by warranty deed to one Augusta Elwood; that on August 19, 1887, said Augusta Elwood and her husband, by warranty deed, conveyed the land to George Burke, who by quitclaim deed conveyed the property to George W. E. Dorsey on March 29, 1888, and that Elwood and wife also executed a quitclaim deed to the real estate to C. H. Toncray on April 12, 1889. It further appears that the said Elwoods executed and delivered mortgages upon the same lands as follows: On March 1st, 1887, two mortgages to the Farmers Loan & Trust Company to secure the sums

of $24,000 and $9,460 respectively; on April 21, 1887, a mortgage to the Oregon Horse & Cattle Company for the sum of $18,023; on April 28, 1887, a mortgage to C. H. Toncray for $11,516.70, and on July 2, 1888, another mortgage to Toncray for $8,000.

On the 6th day of April, 1888, the following contract was entered into between S. H. Elwood and Toncray, Dorsey, and the bank:

"This agreement, made this 6th day of April, 1888, by and between C. H. Toncray, George W. E. Dorsey, the Farmers & Merchants National Bank, and S. H. Elwood, witnesseth: That whereas said Elwood has been engaged in various deals for several years, in which deals said Elwood has borrowed money, and said Toncray and Dorsey have settled and assumed the same, and whereas said Elwood has given various mortgages, both on real and personal property, to said Toncray and said bank, and whereas said Elwood has purchased large quantities of land for said Toncray and Dorsey in Holt county, for which lands and services said Elwood was to receive all sums over the mortgages on said lands for what said lands were sold:

"Now, this agreement witnesseth, that said Elwood hereby releases said Dorsey and Toncray from any and all claims by reason of such purchases, and from all claims and demands of whatsoever kind and description up to this date, and said Toncray, Dorsey, and said bank agree to, and do hereby, release said Elwood, and said Elwood's wife, from any and all claims, notes, demands of any kind or nature, except one note hereafter stated, now due them, or either of them, and agree to deed to said Elwood his home place, consisting of seven hundred and twenty acres, and to clear the same from all incumbrances out of the proceeds of the last three quarter sections purchased by Elwood, when the money shall be received therefrom.

"And said Toncray, Dorsey, and said bank hereby re-

lease, sell, and make over to said Elwood all the cattle, horses, and agricultural implements on said home place, or handled on said place, except 167 steers, which said Elwood agrees to handle for said Toncray without charge for his personal supervision. The home place above described, being the north half of section 22, and the northwest quarter of the southwest quarter of section 23, and the northwest quarter of section 15, and the south half of the northeast quarter of section 10, and the southwest quarter of the southwest quarter of section 11, township 28, range 13, in Holt county, Nebraska.

"The note excepted from this agreement is a note of $12,000, made by Mrs. Elwood in December or November, 1888, but said Elwood may pay said note by services in securing land on the same terms as heretofore. This agreement being a full and complete settlement of all claims, demands, notes, bills, or accounts existing between the parties hereto, or any claims of any kind or nature, and all evidences of debt are to be surrendered and cancelled."

This contract was duly signed by the parties therein named and was afterwards, on the 25th day of June, 1888, duly recorded.

Plaintiff insists that by virtue of the foregoing agreement he was entitled to a finding that Toncray, Dorsey, and the bank were liable for the payment of the amount due on its mortgage. The allegations in the petition under which plaintiff bases its claim to a deficiency judgment against the three parties in case the mortgaged premises do not bring enough to pay the mortgage debt are to the effect that Toncray, Dorsey, Elwood, and the bank, subsequent to the execution of the mortgage in said petition described, acquired title to the premises, or some interest therein, and as a part of the purchase price thereof, and in further consideration of some agreement between themselves, the said Toncray, Dorsey, and the bank agreed to pay all liens

upon the property, including the debt secured by plaintiff's mortgage.

There is absolutely no evidence in the bill of exceptions conducing to prove that either Toncray, Dorsey, or the bank assumed the payment of the mortgage as part consideration for the land. Neither of them at the time of making the agreement was purchasing the land, but, on the other hand, the legal title thereto was then in Dorsey, and the three parties, by the agreement under consideration, obligated themselves to deed certain lands, including the 160 acres herein involved, to Elwood, and upon certain conditions they promised to pay the incumbrances thereon. It does not appear that the quarter section has ever been conveyed to Elwood.

Upon the trial, some oral testimony was introduced tending to show that it was not within the contemplation of the parties, when the agreement was made, to include plaintiff's mortgage. Whatever may have been the actual intention of the parties in that respect, the language used is certainly broad enough to include this incumbrance.

It will be observed, however, that the agreement to pay the incumbrances on the property is not absolute, but conditional. The provision of the contract is that said Toncray, Dorsey, and said bank agree to and do hereby release said Elwood "from any and all claims, notes, demands of any kind or nature, except one note hereafter stated, now due them or either of them, and agree to deed said Elwood his home place, consisting of 720 acres, and to clear the same from all incumbrances *out of the proceeds of the last three quarter sections purchased by Elwood when the money shall be received therefrom.*" The parties only agreed to pay the liens from money thereafter to be derived from the sale of certain lands. There is no averment in the petition, nor is there a particle of proof tending to establish, that any part of the three quarter sections has been sold. For these and other reasons that might be stated these parties

are not as yet liable under the terms of said contract to pay the mortgage debt to plaintiff, and no recovery can be had against them thereunder. The decree of the court below is

AFFIRMED.

THE other judges concur.

GEORGE O. YEISER v. S. W. FULTON ET AL.

FILED MARCH 29, 1893. No. 4358.

Action on Note: USURY: EVIDENCE. *Held*, That the evidence sustains the plea of usury, and that the plaintiff was entitled to recover a sum equal to the amount of money loaned, less $11.25 paid by the defendant as interest.

ERROR from the district court of Webster county. Tried below before GASLIN, J.

John O. Yeiser and *G. R. Chaney*, for plaintiff in error.

Case & McNeny, *contra*.

NORVAL, J.

This action was brought by George O. Yeiser on a promissory note for the sum of $250, executed by S. W. Fulton, Everett Harrison, and W. C. Richardson. The petition is in the usual form. The answer of the defendant Fulton sets up the defense of usury, alleging that he had paid the sum of $85.25 as usurious interest on the note. For reply the plaintiff admits that he charged and received $11.25 usurious interest, and denies each and every allegation contained in the answer of Fulton. The other two defendants, Harrison and Richardson, filed an answer alleging that they signed the notes merely as sureties for their

co-defendant Fulton. The cause was tried to a jury, who returned a verdict for the plaintiff for $164.75, and judgment was rendered thereon. The plaintiff prosecutes error, alleging that the verdict is not supported by the evidence.

The facts are undisputed and are briefly stated as follows: The defendant Fulton borrowed, at what date the record fails to disclose, the sum of $500 of the Farmers & Merchants Banking Company of Red Cloud, on ninety days' time, and agreed to and did pay, for the use of the money, interest at the rate of one and a quarter per cent per month. He renewed the note from time to time, the bank charging him interest at one and a half per cent a month, which was paid by the defendant. Finally Fulton paid all the interest and $250 on the principal, and gave a new note for $250, upon which the defendant agreed to and did pay interest at the rate of two per cent a month. The total amount of interest paid the bank on the loan is $74. After the last renewal note became due, Fulton wrote the bank asking that the time of payment be extended, to which Mr. Garber, the cashier of the bank, sent the following letter in reply:

"FARMERS & MERCHANTS BANKING CO.

"Capital, $50,000. Stockholders' Liability, $100,000.

"RED CLOUD, NEB., Sept. 15, 1888.

"*S. W. Fulton, Bladen, Neb.*—DEAR SIR: Replying to yours of the 13th inst., we do not feel like renewing your note again after your definite proposition to settle, made us May last. We appreciate your misfortune, and have taken steps looking to your receiving the amount at, I think, a less rate of discount than we can grant. G. O. Yeiser has money at present. I have told Mr. Yeiser that you want $250 and will give Everett Harrison and W. C. Richardson as security, and have recommended it as first class paper. If Mr. Yeiser grants you the loan you can intrust him to take your note up with us with the proceeds

of the loan and remit the canceled note to you. Your note and interest amounts to $255.37, if paid by the 20th.

"Yours truly, W. S. GARBER, *Cashier.*"

The plaintiff also wrote Mr. Fulton a letter, of which the following is a copy:

"RED CLOUD, NEB., Sept. 15, 1888.

"*S. W. Fulton, Bladen, Neb.*—DEAR SIR: Mr. W. S. Garber has just spoken to me to loan you $250. I have drawn a note for you to sign. Have Everett Harrison and W. C. Richardson also sign with you. I will charge you 1½ per month. Please send draft for discount, $11.25, with note signed, to Farmers & Merchants Bank, where I do my business, and it will receive immediate attention.

"Truly, GEO. O. YEISER."

With the letter was enclosed the note in suit, which, after being signed by the defendants, was returned to the plaintiff. The defendant Fulton also at the same time sent a draft to the plaintiff for $11.25, as interest on the $250 loan for ninety days. No other payment thereon was ever made. On the receipt of the note by Yeiser, he paid off the defendant's note held by the bank. It is also stipulated in the record that Yeiser was one of the directors of the bank at the time it made the loan to the defendant, and also at the time of the several renewals thereof, and knew that usurious interest was collected by the bank on such renewals.

It appears from the special findings returned by the jury that they decided the case upon the theory that the note in suit was taken in plaintiff's name, in pursuance of some arrangement or agreement entered into between him and the officers of the bank, as a shift or device for the purpose of evading the usury laws of the state, and that the bank was in fact the owner of the note. It is patent that the verdict could not have been reached upon any other theory, inasmuch as by deducting from the face of the note the sum of $85.25, which is the aggregate amount of in-

terest paid by Fulton to both the bank and the plaintiff, leaves $164.75, the exact sum assessed by the jury. There is no dispute but that the note given to the plaintiff is tainted with the vice of usury, and it was proper for the jury to apply on the principal the sum of $11.25 which, was paid by the defendant as interest on the note; but the evidence did not justify the jury in also deducting the amount of interest which the defendant had paid to the bank on a usurious loan obtained from it. There is not to be found in the record sufficient evidence upon which to base a conclusion that in the taking of the note in question there was any collusion between the plaintiff and the bank, or that the note was taken in Yeiser's name for the purpose of escaping the penalty for taking usurious interest.

We have no right to presume that the intention of the parties was to evade the law. It is reasonable to suppose, if the object in taking the note in the name of Yeiser was merely a device to avoid the defense of usury, that the plaintiff would not have written to the defendant as he did, proposing to charge the defendant on the loan a greater rate of interest than the maximum allowed by law. The evidence shows that the money was actually loaned by the plaintiff in good faith for the purpose of paying defendant's note at the bank and that the money was so applied. The fact that Yeiser was a director in the bank, and loaned Fulton the money to pay his usurious debt to the bank, which was known by the plaintiff at the time to be usurious, is not alone sufficient to authorize the defendant to set up as a defense to this action the usurious transaction between himself and the bank.

The plaintiff under the evidence was entitled to recover the sum of $238.75, without costs. The judgment of the court below is reversed and the case remanded.

REVERSED AND REMANDED.

THE other judges concur.

JAMES H. MCMURTRY, APPELLANT, V. WILLIAM KEIFNER ET AL., APPELLEES.

FILED MARCH 29, 1893. No. 4910.

1. **Partition:** NOT MAINTAINABLE BY PARTY OUT OF POSSESSION. A party out of possession of real estate, whose title is denied, cannot maintain an action of partition against one in possession, claiming title to said land. (*Seymour v. Ricketts*, 21 Neb., 210.)

2. ———: RECITALS IN DEED: PROOF OF DEATH. A recital in a deed of recent date, that the grantors are the heirs at law of a former owner of the lands therein described, is not sufficient evidence, as against a stranger to the instrument, of the death of the supposed ancestor, or that the persons who executed the deed are his heirs.

APPEAL from the district court of Lancaster county. Heard below before HALL, J.

Abbott, Selleck & Lane, for appellant.

Lamb, Ricketts & Wilson, contra.

NORVAL, J.

This was an action brought by the appellant for the partition of real estate. Plaintiff, in his petition filed in the district court, alleges that he is the owner of an undivided one-half interest in the lands in dispute, and that the defendant William Keifner is the owner of the other undivided one-half interest thereof; that the defendant J. R. Richards, as trustee for the defendant State Loan & Trust Company, has a mortgage heretofore executed by the defendant Keifner upon his interest in the premises, to secure the payment of $800, due July 1, 1893.

The defendant Keifner alone answered: First—By a general denial. Second—That he and his grantors have been in the open, notorious, exclusive, adverse possession

of the premises as owner for more than ten years next before the bringing of the suit, and that the said defendant has such possession at the present time.

The reply of the plaintiff denies every allegation of the answer.

The district court, on the trial, found the issues against the plaintiff, and dismissed the action.

The undisputed testimony shows, and the trial court so found, that the defendant Keifner was at and for some time prior to the bringing of this suit in the exclusive possession of the entire tract described in the petition, claiming the legal title to the lands. McMurtry has never been in possession of the premises, and his title being denied by the defendant, the plaintiff cannot maintain a suit in partition until he has established his title by an action at law. This doctrine was affirmed in *Seymour v. Ricketts*, 21 Neb., 240, where the authorities are collated.

Another reason why the court did not err in dismissing the petition is that the plaintiff failed to prove by any competent evidence that he had any interest in the lands sought to be partitioned. It is conceded that the title to the premises in dispute was originally in Catherine Tozier. The defendant Keifner claims title from her through the following conveyances: Catherine Tozier to John B. Phinney and James F. Phinney, warranty deed, dated May 8, 1869, recorded June 19, 1869; John B. Phinney and Mary A., his wife, to Albert G. Gutheridge, warranty deed, dated June 29, 1869, covering the entire tract, which deed was recorded on the 26th day of July, 1869; Albert G. Gutheridge and wife to S. C. Head, warranty deed for all the lands, dated August 13, 1869, recorded on the 18th day of the same month; S. C. Head to Samuel P. Axtell, warranty deed embracing the lands in controversy, dated May 23, 1872, recorded on the 22d day of August, 1872; Samuel P. Axtell to Frances Morrison, warranty deed, dated July 22, 1872, recorded August 22, 1872; Frances Morrison

and John P. Morrison, her husband, to the defendant William Keifner, warranty deed to the entire tract, bearing date August 2, 1886, and filed for record on the 29th day of December, 1886.

It will be observed that the chain of title to the property is continuous from Catherine Tozier to the defendant Keifner with the exception that there is no deed of the undivided one-half thereof from James F. Phinney to John B. Phinney.

The defendant insists, and he introduced on the trial in the court below some testimony tending to show, that the one hundred and sixty acre tract which embraced the lands in controversy, and which quarter section was conveyed by Catherine Tozier to John B. Phinney and James F. Phinney by the deed of May 8, 1869, was divided by the said Phinneys, John B. taking the part including these lands and James F. receiving the other portion, and that mutual deeds were made between them of their respective allotments, but that the deed from James F. Phinney to John B. Phinney for these lands is lost and cannot be found, and that through oversight and neglect it was never recorded. It is not our purpose to determine whether or not the evidence is sufficient to establish that John B. ever acquired the interest of James F. in the property, nor is it necessary that we should do so. It is uncontradicted that the defendant Keifner has a perfect title to at least an undivided one-half of the premises. Unless the plaintiff owns the other moiety, he has no interest in the lands, and therefore would not be entitled to a partition thereof.

The plaintiff, for the purpose of showing that he acquired the undivided one-half of the property in question, which was formerly owned and held by said James F. Phinney, introduced in evidence a quitclaim deed from Adeline Phinney, Lauren P. Phinney, Ella Phinney, Mary E. Phinney, John S. Phinney, and Sarah A. Phinney to James H. McMurtry, conveying to him all their

right, title, and interest to the lands, which deed was executed on the 26th day of June, 1888. This deed contained a recital stating that the grantors therein named were the sole heirs at law of James F. Phinney, deceased. No evidence was introduced in the cause outside of said recital in the deed that tended to prove that James F. Phinney, the former owner of the lands, was dead, or that the persons who executed said conveyance were his heirs. The question is squarely presented to the court for consideration, whether the said recital alone is sufficient proof, as against the defendant Keifner, of the death of said James F. Phinney, or of the heirship of the grantors in the deed. The general rule is that a recital in a deed is only evidence against the parties to it and their privies. It is not binding upon strangers, or those who claim through a paramount title.

It has been held that recitals in ancient deeds are presumptive evidence of pedigree. (*Bowser v. Cravener*, 56 Pa. St., 132; *Scharff v. Keener*, 64 Id., 376; *Little v. Palister*, 4 Greenl. [Me.], 209.) But a recital contained in a deed of a recent date that the grantors are heirs at law of a former owner is insufficient proof, as against a stranger to the conveyance, of the death of such previous owner, or that the persons who executed the deed are in fact his heirs. The proposition is well sustained by the authorities. (*Potter v. Washburn*, 13 Vt., 558; *Hill v. Draper*, 10 Barb. [N. Y.], 454; *Sharp v. Speir*, 4 Hill [N. Y.], 76; *Penrose v. Griffith*, 4 Binn. [Pa.], 231; *Hardenburgh v. Lakin*, 47 N. Y., 109; *Carver v. Jackson*, 4 Peters [U. S.], 1; *Murphy v. Loyd*, 3 Wharton [Pa.], 538; *Costello v. Burke*, 63 Ia., 361; *Miller v. Miller*, 63 Id., 387; *Kelley v. McBlain*, 42 Kan., 764; *Yahoola River Mining Co. v. Irby*, 40 Ga., 479; *Lamar v. Turner*, 48 Id., 329; Devlin, Deeds, sec. 996.)

The deed to McMurtry was executed less than three years before the trial in the district court, and, therefore,

was of too recent date to be regarded as an ancient document, so as to entitle it to be introduced in testimony under the rules of evidence relating to ancient documents. It is elementary that the best evidence obtainable, or in existence, must be produced on the trial of a cause. The record shows that James F. Phinney was alive in 1884; and if he has since died there ought to be no difficulty in establishing that fact by competent evidence, and whether or not the persons who executed the deed were his heirs. The plaintiff must establish his title to the lands by a suit in ejectment before he can maintain a suit for a partition thereof. The judgment of the district court is

AFFIRMED.

THE other judges concur.

A. W. JONES v. A. S. HAYES.

FILED MARCH 29, 1893. No. 5084.

Error Proceedings: REVIEW: MOTION FOR NEW TRIAL. **This court will not review alleged errors occurring during the trial of a cause in the district court by petition in error, unless a motion for a new trial was made in the trial court, and a ruling obtained thereon.**

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

M. A. Hartigan, for plaintiff in error.

John M. Ragan and *J. B. Cessna, contra.*

NORVAL, J.

This was an action brought by A. S. Hayes upon a promissory note executed by A. W. Jones. Plaintiff re-

covered a judgment in the court below for the sum of $546.34, and the defendant prosecutes error to this court, alleging that the judgment is not sustained by the evidence and is contrary to law.

We cannot review the proceedings, for the reason the records fails to disclose that a motion for a new trial was presented to the trial court, and its ruling obtained thereon. While the transcript contains a copy of a motion for a new trial, it does not appear that the attention of the court below was ever called thereto. It has been frequently decided by this court that in order to review the proceedings of a district court by a petition in error, a motion for a new trial must be made in that court and a ruling obtained on the motion. (*Cropsey v. Wiggenhorn*, 3 Neb., 108; *Gibson v. Arnold*, 5 Id., 186; *Lichty v. Clark*, 10 Id., 472; *Smith v. Spaulding*, 34 Id., 128.) The petition in error is

DISMISSED.

THE other judges concur.

JENNIE BROWN ET AL., APPELLANTS, V. FRANK LUTZ, APPELLEE.

FILED MARCH 29, 1893. No. 5573.

1. **Municipal Corporations:** CITY COUNCIL: ORDINANCES. In a city of the second class, containing a population of less than five thousand, an ordinance of a general character may be presented, read, and adopted by the city council thereof on the same day, provided the rule requiring such ordinances to be fully read on three different days is dispensed with by a vote of three-fourths of the members of the council.

2. ———: LIQUOR LICENSES: ORDINANCES. Certain provisions contained in the ordinance of the city of G., regulating the license and sale of liquors, *held* valid.

3. ———: ———. No license for the sale of intoxicating liquors, issued by a city of the above class, can extend beyond the municipal year in which it shall be granted.

4. ———: ———: NOTICE OF APPLICATION. Action cannot be taken by a city council on an application for a liquor license until at least two weeks' notice of the filing thereof has been given in the mode provided by law.

5. ———: ———: PETITION FOR LICENSE: REMONSTRANCE: BURDEN OF PROOF. Where a remonstrance in opposition to an application for such a license denies that the petition is signed by the requisite number of resident freeholders, the burden is upon the applicant to prove by competent evidence that the same is signed by the required number of qualified petitioners, and if he fails so to do, a license should be refused.

6. ———: ———: ———. It is not necessary to state in such a petition whether the applicant desires to sell at wholesale or retail.

APPEAL from the district court of Fillmore county. Heard below before HASTINGS, J.

F. B. Donisthorpe, for appellants.

Charles H. Sloan and *John D. Carson, contra.*

NORVAL, J.

This is an appeal from the decision of the district court of Fillmore county sustaining the action of the city council of the city of Geneva in overruling the remonstrance of appellants to the petition of Frank Lutz for a license to sell intoxicating liquors in the first ward of the said city.

It is argued that the city council had no jurisdiction to issue the license for the reason that the ordinance under which license was sought was void. This objection is predicated upon the fact that the ordinance in question was presented, read, and passed by the city council on the same day.

Section 79 of article 1, chapter 14, Compiled Statutes, declares that "All ordinances and resolutions, or orders for the appropriation or payment of money, shall require

for their passage or adoption the concurrence of a majority of all members elected to the council or board of trustees; ordinances of a general or permanent nature shall be fully and distinctly read on three different days, unless three-fourths of the council or trustees shall dispense with the rule," etc.

The foregoing section is found in the act governing cities of the second class, containing less than 5,000 inhabitants, and is a limitation upon the powers of city councils of such cities as are embraced within the act in the passage or adoption of ordinances. It requires no argument to show that an ordinance of a general character cannot legally be read and put upon its final passage by a city council of the class to which the city of Geneva belongs on the same day it is presented or introduced, unless at least three-fourths of the council shall vote to dispense with the rule which requires the reading of ordinances on three different days before their adoption. But if the rule be thus suspended, the conclusion is irresistible that an ordinance can be placed upon its first, second, and third readings, and be passed on the same day it was first presented. To support the position that the ordinance in question could not be passed at the same meeting at which it was introduced, counsel for appellants cites section 123 of chapter 12*a* of the Compiled Statutes, which reads as follows:

"Sec. 123. All ordinances of the city shall be passed pursuant to such rules and regulations as the council may prescribe; *Provided*, That upon the passage of all ordinances the yeas and nays shall be entered upon the record of the city council, and a majority of the votes of all the members of said council shall be necessary to their passage; *Provided further*, That no ordinance shall be passed the same day or at the same meeting it is introduced, except the general appropriation ordinance at the first meeting of each month."

It is plain that the foregoing provisions have no bearing

upon the question now under consideration, inasmuch as the section last above quoted is contained in the act defining, regulating, and prescribing the duties, powers, and government of metropolitan cities. While there is no proof in the record before us as to the population of Geneva, we will take judicial notice of the fact that it is a city of the second class, containing a population of less than five thousand, and, therefore, is governed by the act of the legislature incorporating cities of the second class and villages.

The transcript of the record of the proceedings of the city council of the city of Geneva, which is before us, shows that the ordinance in dispute was passed in strict conformity with the provisions of section 79, copied above. At the meeting at which the ordinance was adopted the mayor and every member of the city council were present, and after the first reading of the ordinance the rule requiring the same to be distinctly read on three different days was dispensed with by the unanimous vote of the council. The ordinance was then read a second time, and on motion the said rule was again suspended by a like vote of the council, and the ordinance was put upon its third reading and was passed and adopted by the vote of each member of the city council voting in favor thereof upon the call of the yeas and nays, and the same was declared adopted. Every requirement of the statute has been observed in the passage of the ordinance, and the objection to the granting of the license on that ground must be overruled.

It is urged that section 15 of the ordinance is unreasonable and unjust, because it provides that no chairs or seats of any kind shall be placed in any saloon, and fixes a penalty for any violation thereof. The objection is without merit. The provision referred to is a reasonable one, and if it were not the remonstrators would have no just cause to complain, since it is not shown that their rights are in any manner affected thereby.

It is claimed that section 7 of the ordinance leaves it optional with the council as to the length of time a license shall be issued. The language of the provision is: "The license shall state the time for which it is granted, which shall not exceed one year or extend beyond the end of the municipal year for which it is granted." The objection is too technical. The word "or" as used in the quotation should be construed to mean "nor." It was evidently the intention of the city council to conform the ordinance to the provision of the statute, which expressly declares that the license shall not extend beyond the municipal year in which it shall be granted, and a fair interpretation of the ordinance is that it does not authorize the issuing of a license to run beyond the close of the municipal year.

Another objection urged against the ordinance is that it does not specify the officer who shall sign or issue the license. While there is no provision in the ordinance which in express words declares who shall sign the license, the seventh section prescribes the form of the license, which shows that it is to be signed by the city clerk and attested with the city seal. This is a sufficient designation of the person who shall sign or issue a license which has been granted by the city council.

One of the grounds of the remonstrance is that the petition for the license is not signed by the requisite number of resident freeholders. It contains the signatures of only thirty persons, which would be sufficient if all the persons signing it were qualified petitioners. There is no competent proof in the record before us that any of the persons who signed the application were resident freeholders of the ward in which the business was to be carried on. The only evidence upon the subject is the certificate of the county clerk to the effect that the petitioners are resident freeholders of the ward, which testimony at the time of its introduction was objected to by the remonstrators. The

certificate of the county clerk, under the provisions of section 5 of the ordinance, would perhaps be sufficient to authorize the granting of a license where no remonstrance is filed; but where one of the grounds of a remonstrance is that the signers of a petition for a liquor license are not resident freeholders, the burden is upon the applicant to establish by competent evidence that the same is signed by the requisite number of qualified petitioners. (*Lambert v. Stevens*, 29 Neb., 283.)

Objection is made that sufficient notice of the application for a license was not given. It appears from the affidavit or proof of publication attached to the notice, made by the publisher of the *Geneva Democrat*, a weekly newspaper of general circulation in Fillmore county, that a notice of the filing of Frank Lutz's application for a license, in due form, signed by the city clerk, was published for two consecutive weeks in said newspaper, commencing on the 2d day of June, 1892. The remonstrance was filed on June 16, but by stipulation of counsel for the respective parties no action was taken thereon until June 21, when a hearing was had on the remonstrance before the city council. We think sufficient notice was given in this case, even though the paper in which it was published was not actually deposited in the post-office until June 3, as testified to by some of the witnesses, since more than two weeks elapsed after that date before the city council took any action upon the application for a license. Two weeks' notice is all the statute requires.

It is further claimed that the petition is defective because it does not state whether the applicant desires a license to sell at wholesale or retail. It was not necessary that it should so state. The statute does not require it. The law relating to the sale of intoxicating liquors applies to all persons engaged in the traffic, wholesalers and retailers alike. It makes no distinction between them, and a petition for a license need not state how the liquors are to be sold.

For the reason that it does not appear that the petition was signed by a sufficient number of resident freeholders, the judgment of the district court affirming the decision of the city council is reversed and the application for a license dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

JOHN S. GREGORY, EXECUTOR, v. THEODORE KAAR ET AL.

FILED MARCH 29, 1893. No. 5248.

1. **Assignments of Error:** REVIEW: PRACTICE. Assignments of error which are so vague and indefinite as not to indicate the rulings complained of will be disregarded in this court.
2. **Pleading:** NEW CAUSE OF ACTION IN REPLY: WAIVER OF OBJECTION. A new cause of action should not be presented in the reply, but when no objection is made on that ground in the district court and the issues presented are submitted on their merits, the objection that the cause of action was first stated in the reply will be held to have been waived.
3. **Bill of Exceptions:** COLLATERAL ATTACK. A bill of exceptions duly allowed and certified by the trial judge imports absolute verity and its truthfulness cannot be assailed collaterally.
4. **Mechanics' Liens:** EVIDENCE *held* to sustain the finding and judgment of the district court.

ERROR from the district court of Lancaster county. Tried below before HALL, J.

John S. Gregory, for plaintiff in error.

T. C. Munger, contra.

POST, J.

The National Lumber Company commenced an action in the district court of Lancaster county to foreclose a mechanic's lien against a certain lot in the city of Lincoln owned by John McAllister, who was made a defendant therein. The defendant in error, Theodore Kaar, who had filed a statement under oath claiming a lien against the same property, was also made a party defendant. The latter filed a cross-petition alleging that he had furnished stone for use in the construction of the building on said lot, under a contract with McAllister, the owner, and that there was due him a balance of $19.41, and praying for a foreclosure of his lien.

To this cross-petition McAllister filed an answer in which he alleged payment in full, also a cross-bill against Kaar for $327.34 on account of money advanced for stone by the terms of another and different contract, alleging as a breach thereof a failure to deliver said stone. To the cross-bill of McAllister, Kaar filed a pleading entitled an answer, in which he denies that he was in default of any of the provisions of the contract and alleging that all money paid him by McAllister was for stone before that time actually delivered.

During the trial Kaar, by leave of court, over the objection of McAllister, filed an additional pleading entitled "An amended reply and answer to cross-petition," which after a denial of payment of the bill set out in the original cross-petition is as follows: "By way of counter-claim and set-off, and in answer to the cross-petition of McAllister, defendant, the said Kaar denies that he agreed to furnish to said McAllister 700 perch of common rubble stone at an agreed price of $1.00 per perch; that this defendant did deliver to defendant McAllister a large amount of rubble stone under an oral agreement with the said McAllister, but at the agreed price of $1.20 per perch of 1,650 lbs., and

not as alleged in said McAllister's cross-bill, and that the payments made by defendant McAllister on said rubble stone were made at that price; that the defendant delivered to said McAllister under such agreement on or before April 20, 1887, $492\frac{29}{33}$ perch, amounting to $591.45 for rubble stone; that said defendant McAllister has paid in all for said rubble stone the sum of $570, and there is now due this defendant from said McAllister the sum of $21.45 with interest from April 20, 1887. This defendant further says that on or before July 23, 1887, he delivered to said McAllister under an oral agreement to pay therefor the sum of 25 cents per superficial foot, 12 pieces of stone 19 in. by 15 in. by 6 in., 8 pieces 20 in. by 20 in. by 8 in., 4 pieces of stone, dimensions 5 ft. 6 in. by 1 ft. 10 in., and 4 pieces of stone 4 ft. by 1 ft. 10 in., and 20 pieces of stone 5 ft. by 8 in., and 5 pieces 23 in. by 8 in. by 5 feet, of the total value of $81.47, and there is now due this defendant from said McAllister the sum of $81.47 and interest from July 23, 1887, therefor; in all the sum of $102.92, for which amount, with interest on $21.45 from April 20, 1887, and on $34 from July 23, 1887, and costs of suit, this defendant prays judgment."

A decree of foreclosure was entered in favor of Kaar for $25, evidently on the cause of action stated in his original cross-petition, and personal judgment against McAllister for $71 on the cause of action stated in his last pleading. McAllister having died in the meantime the action was revived in the name of Gregory, his executor, who filed a motion for a new trial on the following grounds:

1. The court erred in giving judgment in favor of the defendant Theodore Kaar, whereas under the pleadings and evidence said defendant's cross-petition should have been dismissed.

2. The judgment is contrary to the evidence.

3. The judgment is in excess of the amount claimed in defendant Kaar's cross-petition.

4. The judgment is not sustained by the law and evidence.

The motion for a new trial having been overruled, Gregory filed a petition in error in this court by which he seeks to have the judgment of the district court reversed for errors alleged therein, the first of which is that the court "erred in permitting plaintiff below to introduce evidence contradictory of the account rendered to the defendant on his demand before the trial." Such an assignment is too vague and indefinite to be considered upon petition in error and will be disregarded by the appellate court. (*Burlington & M. R. R. Co. v. Harris*, 8 Neb., 140; *Kroll v. Ernst*, 34 Id., 482.)

2. The second assignment is the order allowing the filing of the amended pleading above mentioned. The objection in the district court and also in this court goes only to the cause of action, and not the discretion of the court in allowing defendant in error Kaar to amend. Should the pleading in which the second cause of action is alleged be construed as entitled, viz., a reply, it is subject to the objection that a new and different cause of action cannot be presented by way of reply. (Maxwell, Code Plead., 558.) But it is evident, notwithstanding the title of the pleading, that it was treated by both parties and the court as an amended petition, and in the reply of McAllister thereto it is called an amended cross-petition. No objection having been made on the ground above named, it is plain that there is no prejudicial error in the order complained of. The court in its discretion may allow amendments and the exercise of that discretion is not ordinarily subject to review in this court. (Civil Code, 144.) The only other assignment of error which calls for notice is that the judgment is not sustained by the proofs. In his discussion of that question counsel for plaintiff in error assails the bill of exceptions, which he asserts is incomplete and untrue. It is needless to discuss the question further than to re-

mark that a bill of exceptions, when allowed and signed as provided by statute, is presumptively correct, and its veracity cannot be called in question in the manner attempted in this case. (Elliott, App. Proced., 811.) The evidence, as certified by the trial judge, is of such character as to render a summary thereof difficult, and, to state it intelligently, would practically require it to be copied at length. It is enough to say that the evidence is quite sufficient to sustain the findings of the district court. In fact we do not see how any other conclusion could have been drawn from the proofs. The judgment of the district court is

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. ALFRED L. SNOW, V. PETER FARNEY, TREASURER.

FILED MARCH 29, 1893. No. 5814.

1. **Tax Sales:** COMPETITION. It is the policy of the law to encourage competition at the sale of property for delinquent taxes.

2. ———: DUTY OF OFFICER. The provision of the revenue law for the keeping open of the public sale of lands for delinquent taxes is mandatory, and a substantial compliance therewith is demanded of the officer conducting such sale.

3. ———: ———: UNLAWFUL ADJOURNMENT. Where the public sale for delinquent taxes was opened at 9 o'clock A. M., and adjourned *sine die* at the expiration of an hour and a half thereafter, the property all remaining unsold for want of bidders, and the treasurer in charge thereof refused to entertain bids for the property advertised which were tendered at 3 o'clock P. M. of the same day, *held*, not a compliance with the statute which requires the sale to be kept open from 9 o'clock A. M. until 4 o'clock P. M.

4. ———: RIGHT OF PERSON DESIRING TO BID TO DEMAND OFFER TO SELL: MANDAMUS TO TREASURER. One who in good faith attends upon a public sale of property for delinquent taxes at the time named in the advertisement and requests the treasurer to offer the delinquent property for sale, and demands the right to bid therefor, has such an interest therein as will entitle him to prosecute proceedings by *mandamus* to compel the treasurer to discharge his duty by offering said property for sale.

ORIGINAL application for *mandamus* to compel the respondent, as treasurer of Hamilton county, to offer at public sale all lands and lots upon which the taxes assessed for the year 1891 remain delinquent. *Writ allowed.*

Harlan & Harlan and *A. W. Agee*, for relator.

J. H. Broady, contra.

POST, J.

This is an original application for a writ of *mandamus*, and is submitted upon exceptions by both the relator and the respondent to the findings of the referee to whom the issues were submitted for trial, also upon the motion of the relator for judgment upon the findings. The pleadings are too voluminous to be set out at length in this opinion, but the issues are apparent from the findings of the referee, which are as follows:

"1. That the defendant Peter Farney is now, and has been during all the times mentioned in the pleadings and testimony in this cause, the treasurer of Hamilton county, Nebraska.

"2. That taxes were duly levied for the year 1891 upon the several descriptions of lands and lots in said county after the same had been duly assessed, and that there were due and delinquent a large amount of taxes on said lands and lots as stated in the plaintiff's petition; that due and legal notice was published by the defendant that he would on the first Monday in November, to-wit, November 7,

1892, between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon, at the court house in said county, offer at public tax sale all lands upon which the taxes levied for city, county, and other purposes for the previous year remained due and unpaid; that said notice was in all respects as required by law.

"3. That at 9 o'clock, standard time, on November 7, 1892, in his office at the place mentioned in said notice, the defendant read in the ordinary tone of voice the formal part of said notice of tax sale, and also read the first description of lands mentioned in said notice and inquired if there were any bidders therefor. Receiving no bids for that tract, he enquired if there were any bidders for any other tracts mentioned in said notice. No bids were made. After waiting about one and one-half hours the defendant declared the sale closed, and made his return to the county clerk. A copy of said return is marked Exhibit A and attached to the defendant's answer. There were present during said one and one-half hours the defendant and his son Charles J. Farney. The testimony does not show that any other person was present. No public outcry of the sale was made other than as hereinbefore stated.

"4. That said Charles J. Farney represented at said time the following named loan companies having mortgages on real estate in Hamilton county, Nebraska, to-wit: Iowa Loan & Trust Company; De Witt Bank; Fidelity Loan & Trust Company; New England Loan & Trust Company; Nebraska Mortgage Company; Security & Investment Company; Equitable Loan & Trust Company; Grand Island Banking Company; L. W. Tulleys, Trustee Globe Investment Company; Eastern Banking Company; Omaha Loan & Trust Company; Nebraska Loan & Trust Company; Concordia Loan & Trust Company. That said Charles J. Farney was present to bid on said lands in case other bidders were present, his purpose and intention being to protect the interest of the loan com-

panies he was representing. Immediately after making his return to the county treasurer the defendant agreed with Charles J. Farney to make out, as soon as convenient, to the several loan companies represented, certificates of tax sale at private sale for lands in which they were so interested, and it was also agreed that in the meantime if any land-owner so desired, they might pay the taxes on the lands so owned by them and no certificates should be issued for lands on which the taxes had been so paid. No money was deposited or produced by the loan companies or either of them or by their representative. No certificates of tax sale have been made by the defendant to any one, the issuance of certificates having been prevented by the institution of these proceedings. Between the dates November 19, 1892, and December 27, 1892, both dates inclusive, the owners thereof have paid the taxes on the several descriptions of land set out in the certificate of the defendant Peter Farney shown in the transcript of this case marked Exhibit L.

"5. That on or about November 1, 1892, one Phillip Burt left with the defendant $500 under an agreement that he should bid on lands offered at public sale, and if not present and the lands were not sold at public sale the defendant would consider him as a bidder after the several loan companies had taken the lands upon which they had mortgages.

"6. On November 5, 1892, and being the Saturday before the time fixed for the sale, A. S. Harlan, representing the plaintiff, met the defendant in front of the court house and inquired as to the time of sale and practice of the defendant in making sale. He was then informed by the defendant that the sale would begin at 9 o'clock on the Monday morning following and would be kept open for an hour or two, when return would be made to the clerk, and sales made thereafter at private sale. Harlan replied, stating that he wanted to buy and would try and be there

by the time the sale opened. At the same time the defendant told Mr. Harlan that other parties had already filed lists for lands they desired. On Monday, November 7, 1892, Mr. Harlan arrived at Aurora about 11 o'clock in the forenoon, having been delayed by the lateness of arrival of train; he went directly to the treasurer's office and inquired of the person in charge if the sale was closed, and was answered that it was. He returned again to the treasurer's office at about 3 o'clock in the afternoon of the same day in company with Mr. Agee, attorney for relator. Both Mr. Harlan and Mr. Agee requested the defendant to open up the sale and give them a chance to bid for the relator. The defendant refused, saying that the sale had been closed and he had made his return to the county clerk. At this time both Mr. Harlan and Mr. Agee insisted that they had the right to bid and that the action of the defendant in the matter was illegal. The defendant insisted that his action was in accordance with custom and refused to open the sale or receive bids.

"7. On the following day, November 8, 1892, and being general election day, about 3 o'clock in the afternoon, Mr. Agee, representing the relator, accompanied by Messrs. Musser and Peterson, went to the office of the defendant in Aurora, which was then open with the defendant in charge. Mr. Agee produced a list of the lands upon which the taxes, as shown by the treasurer's book, were delinquent and unpaid, which list had been previously made from the treasurer's books by himself and Mr. Harlan, assisted by others, including the clerks in the office of defendant, and Mr. Agee also at the same time produced a large roll of money and asked that the sale be opened and that he be allowed to bid thereat, and offered to pay all taxes, interest, penalties, costs, and charges against each of the tracts of land mentioned in the list for the one-half portion of each of said tracts respectively, and asked that certificates be issued to the relator for the same. The defendant refused

to open the sale or to receive the bids, insisting that the sale was closed, and that the return had been made to the county clerk.

"8. On the day following, to-wit: November 9, 1892, Mr. Agee, attorney for relator, met the defendant in the hall of the court house and near the office of the treasurer and delivered to him the paper, a copy of which is attached to defendant's answer and marked Exhibit E, which exhibit is made a part of this report. The defendant at once read the paper, and in response to an oral question propounded to him by Mr. Agee, stated that he adhered to his former decision and that the public sale had been closed and that he would not reopen it.

"9. That the defendant had no pecuniary interest in refusing to open the sale as requested by relator nor in denying to him the privilege of bidding, and that the defendant acted throughout the entire transaction in good faith, in accordance with the custom of previous years, and as he honestly believed his duty required him to act, and so believing treated said loan companies and Phil. Burt as preferred and prior bidders.

"10. That Carl Farney, Charles Farney, and Charles J. Farney, mentioned in the pleadings and testimony, is one and the same person, and the son of the defendant herein.

"11. That Peter Farney, Jr., and P. A. Farney, mentioned in the testimony as deputy treasurer, is one and the same person, and son of the defendant herein.

"12. That during the times mentioned in the pleadings and testimony said P. A. Farney was the duly acting deputy treasurer of Hamilton county, acting under a written appointment bearing date January 4th, 1891, but which appointment was not filed in the office of the county clerk until the 30th day of December, 1892, and after the taking of the oral testimony in this cause. That said Charles J. Farney had also acted as deputy county treasurer prior

to the transaction which is the basis of this action. No revocation of the appointment of said Charles J. Farney as deputy treasurer of said county, nor any bonds for either of said deputies, are on file in the office of the county clerk of said county.

"13. At the hearing in this cause the relator, by his attorney, A. W. Agee, relinquished all claim to bid on any lands on which the owners thereof had paid the taxes thereon to the treasurer and for which receipts have been issued.

"14. By oral agreement of the parties the certificate attached to the oral testimony, marked Exhibit I, made by the county clerk of Hamilton county, Nebraska, under date January 6, 1893, was admitted in evidence and treated the same in all respects as if the facts therein stated had been orally testified to by said county clerk."

The exhibit to which reference is made in the 8th finding is the following:

"AURORA, Nov. 9, 1892.

"*Peter Farney, Treasurer Hamilton County, Neb.:* The undersigned, Alfred L. Snow, hereby requests that you offer for sale at public auction, as provided by law, each and every tract and parcel of land in said county upon which taxes remain delinquent for the year 1891, and which has been advertised for sale by you, and to give to the undersigned a reasonable opportunity to bid thereon by keeping said sale open by adjournment from day to day if need be, until each and every one of said tracts shall be offered for sale for all taxes, interest, penalties, and costs thereon, and the undersigned hereby now offers and agrees to pay all taxes, interest, penalties, and costs and charges chargeable against each of said tracts or parcels of land respectively, for the one-fourth portion of each of such tracts respectively, and he hereby requests that you issue to him certificates of purchase as required by law, unless a better bid is made, in

which event the undersigned desires an opportunity to and will make further or better bid.

"ALFRED L. SNOW,
"By A. W. AGEE,
"*His Attorney and Agent.*"

The exhibit mentioned in the 14th finding is a certificate from the county clerk of Hamilton county, under date of January 6, 1893, to the effect that the only appointment of P. A. Farney or Peter A. Farney, on file in his office as deputy county treasurer for said county, bears date of January 4, 1891, and filed December 30, 1892, and that there is on file in said office no evidence that the appointment of Chas. J. Farney, as deputy treasurer, has ever been revoked. It is not contended that the transaction on November 7 was a substantial compliance with the requirements of the law, and it is plain that it was not.

By section 109 of the revenue law it is provided: "On the first Monday of November in each year, between the hours of 9 o'clock A. M. and 4 P. M., the treasurer is directed to offer at public sale, at the court house, or place of holding court in his county, or at the treasurer's office, all lands on which the taxes levied for state, county, township, village, city, school district, or any other purpose for the previous year still remain unpaid, and he may adjourn the sale from day to day, until all the lands, and lots, or blocks have been offered."

That the foregoing provisions are mandatory does not admit of a doubt. Similar language will not be held to be permissive merely where it is plain that the legislature intended to impose a duty rather than confer a privilege. (*Kelly v. Morse*, 3 Neb., 224; *People v. Buffalo County*, 4 Id., 150; *Follmer v. Nuckolls County*, 6 Id., 204; Cooley, Taxation, 214.)

It is the policy of the law to encourage publicity and competition at the sale of property for delinquent taxes, for two sufficient reasons: first, to secure payment of the

taxes levied to carry on the state and municipal governments, and second, to prevent the needless sacrifice of the property of taxpayers. The sale is conducted by public officers sworn to faithfully discharge their duties, and generally in the absence of the owners of the property offered; hence the law exacts of such officers the utmost good faith. It has been frequently held that where a treasurer fails to publicly offer property but allows proposed purchasers to furnish lists in writing of the lands for which they wish to bid, with the price offered therefor, to be subsequently entered by him on his books, the transaction does not amount to a sale and is at least voidable at the election of the property owner, if not absolutely void. (Cooley, Taxation, 339; *Young v. Rheinecher*, 25 Kan., 366; *Butler v. Delano*, 42 Ia., 350; *Miller v. Corbin*, 46 Id., 150.) The treasurer in this case, while proceeding in good faith, seems to have acted upon an entire misconception of his responsibility to the public as well as his duty to taxpayers and bidders. The fact that his course was in accordance with the custom of the office is, upon legal grounds, no more defensible than such custom is creditable to the sagacity and business methods of his predecessors.

2. Assuming, as we must, that the failure to offer at public sale was a radical one, and the return made within two hours of the time for the opening thereof was without authority of law, what are the rights of the relator? It is argued by the respondent that a writ of *mandamus* will not be allowed on the application of a mere proposed bidder. It is said that since neither the taxpayers nor the public are complaining the loss of anticipated profits by one wishing to bid is at most *damnum absque injuria*. It was held by this court in *Richardson County v. Miles*, 7 Neb., 123, that *mandamus* will lie to compel a county treasurer to issue certificates of purchase to the best bidder at tax sale. See also to the same effect, Cooley, Taxation, 742, and authorities cited. It has also been frequently held that

mandamus is the proper remedy to compel public officers to let contracts to the lowest bidders. (See *People v. Buffalo County*, 4 Neb., 150; *Follmer v. Nuckolls County*, 6 Id., 204; *State v. Saline County*, 19 Id., 253; *Boren v. Commissioners of Darke County*, 21 O. St., 311.)

It does not appear, either from the pleadings or the findings of the referee, that the relator is a resident or taxpayer of Hamilton county. There is, in fact, no pretense by him of an intention to promote any interest of the general public or the taxpayers of the county. The right sought to be enforced is therefore essentially a private one, although the duty sought to be enforced is one imposed in the interest of the public at large. The rule is apparently well settled that a private individual will be entitled to the writ of *mandamus* only in case he has some private right or particular interest to be subserved, or some particular right to be preserved or protected, independent of that which he holds in common with the public at large. (*Wellington, Petitioner*, 16 Pick. [Mass.], 85; Maxwell, Code Pleading, 233; Merrill, Mandamus, 238.)

The application of the above rule to the case at bar is, however, attended with more difficulty. When the case was under consideration, the writer seriously doubted whether the relator had such an interest as would entitle him to maintain the action. But upon reflection we all agree that this case is within the reasoning of the cases cited from this court. We are not to be understood as intimating that every person proposing to purchase at treasurer's sale for delinquent taxes would be entitled to the writ. But one who in good faith, in person or by agent, attends on the day designated by statute for the public sale, with the intention of purchasing, is within the rule, and may by *mandamus* compel the treasurer to discharge his duty by opening the sale and affording bidders an opportunity to compete for the property advertised as delinquent. The reasoning of the present chief justice in *People v. Buffalo*

County, supra, is quite applicable to the controversy. For instance, he says: "To permit commissioners to accept plans and bids thereon at the same time, they accepting such as they approve, prevents all competition, and opens the door to corruption, favoritism, and fraud, and is against the policy of the law." A wanton refusal to expose property for sale after it has been advertised at the expense of the county would be a malfeasance in office, and a fraud alike upon the taxpaying public and parties who had attended with the intention of bidding therefor. The remaining question is how the respondent shall be required to proceed. It is plain that he was not a purchaser at the public sale, since it had been adjourned *sine die* before his arrival, and the treasurer refused to even consider his bids. He is not therefore entitled to certificates of purchase. The right of the treasurer to sell property at private sale for delinquent taxes depends upon a previous offer at public sale and a return by him to the county clerk as provided by sections 112 and 113, revenue law. Since there was a failure to offer at public sale, it follows that the treasurer is now without authority to sell at private sale. (*State v. Helmer*, 10 Neb., 25.) His fault was in the inception of the controversy when he summarily adjourned the public sale and refused to the relator an opportunity to bid for the property advertised. The argument that the power to offer at public sale has been exhausted, and that another sale at this late date would necessitate a needless expense to the respondent, is without force. Whatever costs or expenses may attend a second notice and sale are but the legitimate fruits of the disregard of a duty plainly enjoined by law, and of which the respondent cannot now complain. The character of the title which a purchaser would acquire through a sale in obedience to a judgment of the court is not necessarily involved in this controversy. It is sufficient that lapse of time is no obstacle to relief by *mandamus* when sought on the ground of

the refusal of a public officer to discharge so plain a duty. (Merrill, Mandamus, 79, 192.)

It follows that a peremptory writ of *mandamus* should issue requiring the respondent to offer at public sale, to the best bidders therefor, all lands and lots upon which the taxes assessed for the year 1891 remain delinquent, after giving notice for the time and in the manner provided by law.

WRIT ALLOWED.

THE other judges concur.

FRED H. GORDER, EXECUTOR, ET AL., APPELLEES, V. PLATTSMOUTH CANNING COMPANY, APPELLEE, AND WILLIAM WEBER ET AL., APPELLANTS.

FILED MARCH 29, 1893. No. 4709.

1. **Corporations:** EXECUTION OF DEED OR MORTGAGE: PRESUMPTION OF AUTHORITY. Where a deed or mortgage purporting to have been executed by a corporation is signed and acknowledged in its behalf by the president and secretary thereof, with the corporate seal attached, the presumption is that it was executed by authority of such corporation and the burden of proof is upon one who denies such authority.

2. ———: CONTRACTS ULTRA VIRES: BURDEN OF PROOF. Contracts of a corporation which are not contrary to the express provisions of its charter are presumed to be within its powers, and the burden is upon one denying their validity to prove the facts which render them *ultra vires*.

3. ———: ———: EVIDENCE *held* to sustain the findings of the district court that the indebtedness secured by the mortgage of the defendant corporation was not in excess of the limitation named in its charter.

4. ———: ———: DIRECTORS AND STOCKHOLDERS: FIDUCIARY RELATIONSHIP. The relation of the directors to stockholders of

a corporation is of a fiduciary character and their contracts and dealings with respect to the corporate property will be carefully scrutinized by the courts. Such contracts are not, however, necessarily void. Where it is clear that the transaction is in good faith on the part of the director and beneficial to the corporation which has with the sanction of the stockholders received and appropriated the consideration without offering to make restitution, it may be upheld when assailed even in a court of equity.

5. ———: ———: ———. EVIDENCE examined and *held* to sustain the finding that the indebtedness of the defendant company to the plaintiffs, directors thereof, was contracted with the knowledge and approval of the intervenors, who were stockholders, and that the execution of certain mortgages to secure such indebtedness was sanctioned by such stockholders.

6. ———: NOTICE OF INDEBTEDNESS: LIABILITY OF STOCKHOLDERS. In order to recover from stockholders of a corporation on account of a failure to give the statutory notice of its indebtedness, it must affirmatively appear that the credit was given to such corporation while it was in default of the required notice.

APPEAL from the district court of Cass county. Heard below before FIELD, J.

G. W. Covell and *Beeson & Root*, for appellants.

A. N. Sullivan, contra.

POST, J.

This is an appeal from a decree of the district court of Cass county. In the petition it is alleged that on the 25th day of November, 1887, the plaintiffs executed their joint note for $5,000 to the First National Bank of Plattsmouth, due in six months from date, and that on the 30th day of December, 1887, they executed a second note to said bank, due six months after date, for $4,500; that said notes were both executed for the accommodation of the defendant, the Plattsmouth Canning Company; that to secure the payment of said notes, and to indemnify plaintiffs as sureties thereon, the defendant company on the day last named executed and delivered to them a mortgage upon certain

real estate in the city of Plattsmouth; also a chattel mortgage upon all of the machinery, fixtures, and other personal property of said company. The petition, after an allegation of a breach of the conditions of the mortgage, contains a prayer for an accounting and foreclosure and for general equitable relief.

The canning company filed an answer, admitting all the allegations of the petition contained except as to the amount of indebtedness claimed therein. Shortly thereafter, and before trial, the court permitted the appellants to intervene and file answer, in which they allege, in substance, that they are stockholders in said company, and that it commenced business in 1885 with a capital stock of $18,000; that by the articles of incorporation it is provided that at no time shall the indebtedness of said company exceed one-half of the capital stock thereof; that the plaintiffs were elected directors of said company at its organization, and, with the exception of the plaintiff Lewis, have continued to act in such capacity; that the plaintiff Guthman has been the president of said company ever since its organization, and the plaintiffs Lewis and Gorder have been the only secretaries thereof; that at all times since the first year of the existence of said corporation its indebtedness has been largely in excess of the limit fixed by its articles of incorporation, and that said excess of indebtedness was incurred by the plaintiffs as directors of said company without any authority from its stockholders; that the notes and mortgages described in the petition were executed without any authority whatever, and that F. R. Guthman as president and E. B. Lewis as secretary, who pretended to execute said mortgages, are plaintiffs in this action; that the property described in said mortgages comprises the entire assets of said company, and that there are in addition to the amounts claimed on said notes and mortgages at least $4,000 of debts owing by said company, for which the stockholders are individually liable because

of the neglect of plaintiffs to comply with the laws in regard to corporations; that the debts owing by said corporation were all contracted while the officers thereof were in default in complying with the statutory provisions governing corporations, requiring them to publish annually a statement of all the existing debts of said corporation. The intervenors pray that plaintiffs' petition be dismissed with costs, that said mortgages and the record thereof be canceled, and for equitable relief.

During the progress of the trial, by permission of court, intervenors filed an amendment to their answer, setting up that they and each one of them are creditors of the defendant canning company, having advanced various sums from $25 to $300 each by way of loans to said defendant at its request, which sums are still due and unpaid. In addition to the relief asked in their answer they pray for a receiver of said company to take charge of its property and convert the same into cash, to be applied first in payment of the general indebtedness thereof exclusive of the amounts owing to its stockholders, and that the funds remaining be applied *pro rata* between the different stockholders.

On the hearing before the district court there was a general finding for the plaintiffs and a decree of foreclosure in accordance with the prayer of the petition, from which the intervenors have appealed to this court. The first proposition argued is that the evidence fails to show authority from the board of directors for the execution of the mortgages or either of them. Both mortgages purport to have been executed by the Plattsmouth Canning Company and acknowledged in behalf of said company by F. R. Guthman, president, and E. B. Lewis, secretary, and attested by the seal thereof. The genuineness of the signatures to the mortgage, as well as the official character of the signers, is specifically admitted, but we understand counsel for intervenors to contend that authority for the execution of the mortgages must affirmatively appear from the record of the board of directors.

To that proposition we cannot give our assent. The signatures of the officers with the corporate seal attached is *prima facie* evidence that the mortgages were executed by authority of the company, and the burden of proving want of authority is upon the intervenors. (Ang. & Ames, Corp., sec. 217; Boone, Corp., sec. 50; *Blackshire v. Iowa Homestead Co.*, 39 Ia., 624; *Whitney v. Union Trust Co.*, 65 N. Y., 577; *Davis v. Jenney*, 1 Met. [Mass.], 221; *Williamsburg City Fire Ins. Co. v. Frothingham*, 122 Mass., 391; *Murphy v. Welch*, 128 Id., 489; *Hamilton v. McLaughlin*, 12 N. E. Rep. [Mass.], 424; *Morris v. Keil*, 20 Minn., 531; *Musser v. Johnson*, 42 Mo., 74.)

2. It is claimed that the mortgages are void for the reason that they are in excess of the amount of indebtedness authorized by the articles of incorporation of the company. It is provided by article 4 that "the highest amount of indebtedness to which the corporation shall at any time subject itself shall not exceed one-half of the amount of its capital stock issued." It appears from the bill of exceptions that $5,000 of the indebtedness represented by the mortgages was incurred on the 18th day of August, 1885, on which day the plaintiffs executed their joint note to the First National Bank of Plattsmouth for the accommodation of the company, the note of like amount, described in the mortgages, being a renewal thereof. At that time the amount of stock issued does not appear, although it is alleged in the answer that the capital stock in February, 1885, was $18,000, nor is the amount of the company's indebtedness apparent from the record. It appears also, from the minutes of a meeting of stockholders held January 4, 1886, that 148½ shares of stock were represented thereat, from which it is evident that the stock at that date amounted to at least $14,850. The date when the additional indebtedness of $4,500 was incurred does not appear, but the note for said amount is in renewal of an accommodation note executed by plaintiffs for the benefit of the company long

prior to the execution of the mortgages. The presumption is in favor of the validity of the contract in question. It is not upon its face necessarily outside the scope of the corporate power of the defendant company. The recognized rule is that the contracts of a corporation not contrary to the express provisions of its charter are presumed to be within its powers, and the burden is upon one seeking to invalidate them to prove the facts which render them *ultra vires*. (*Ohio & M. R. Co. v. McCarthy*, 96 U.S., 267; *Curtis v. Gokey*, 68 N. Y., 300; *Elkins v. Camden & Atlantic R. Co.*, 36 N. J. Eq., 241; Wood, Law of Railroads, 526; Boone, Corp., 43.) This case is clearly within the rule recognized in the authorities cited. The district court evidently found against the intervenors on the question of the validity of the mortgages and with that finding we are entirely satisfied.

3. The next question, and the one to which most prominence is given in the brief of intervenors, is whether the mortgages are void by reason of the fact that the plaintiffs were directors of the company at the time the indebtedness was incurred and when the mortgages were executed. It should be observed in this connection that two of the plaintiffs, to-wit, Guthman and Lewis, were acting as president and secretary respectively, and as such executed the mortgages in behalf of the company. There is no claim made of fraud against the plaintiffs. In fact their conduct throughout proves that they were actuated by no motives but to promote the success of the company and the interest of the stockholders. It is not disputed that the business of the company was conducted from the beginning with money raised by these and other directors upon their personal obligations. And, from the facts disclosed by the record, the inference is irresistible that said money was advanced, and that the mortgages to the plaintiffs were executed with the knowledge and approval of the stockholders, including the intervenors. For instance, we find that

since the first day of August, 1885, thirty-five different notes were executed by these plaintiffs (with the exception of E. B. Lewis, whose name appears on but sixteen thereof), amounting in the aggregate to more than $150,000. Many of the notes mentioned, it seems, were renewals of others as they matured, and although the amount thus advanced upon the credit of the directors is not clear from the proofs, there is no doubt that said notes were all executed for the accommodation of the company, and the proceeds thereof used in the transaction of its business. At the regular meeting of stockholders in January, 1886, two of the intervenors, Wm. Nevill and C. M. Weed, were elected directors, and during the year following each signed a number of the notes above described, with other directors, and must have been aware of the resources of the company, and the advances which were being made to it on the credit of the directors. It is hardly an exaggeration to say that the lending to the company of their personal credit appears to have been one of the recognized duties of the managing directors.

On the 25th day of June, 1886, F. R. Guthman, E. B. Lewis, J. V. Weckbach, Fred Gorder, F. E. White, A. W. McLaughlin, C. M. Weed, and Henry Boeck being liable for debts of the company to the amount of $16,000, a mortgage was executed by it in favor of said parties on the following property, to-wit: "The whole plant of said Plattsmouth Canning Company, buildings, machinery, material on hand and manufactured and in process of manufacture, engines, boilers, and manufactured goods in store, and product of the works as rapidly as the same is manufactured." In said mortgage, among other recitals, is the following: "The said canning company being in need of money to enlarge and extend its works and business, and having borrowed the same upon notes with indorsements of the mortgagees, this mortgage is given to said mortgagees as indorsers and sureties for said canning company

to save them harmless upon such indorsements." Said mortgage was acknowledged in behalf of the company by F. R. Guthman, president, and C. B. Lewis as secretary, and filed for record in Cass county on the 28th day of June, 1886.

We also find the following record of a meeting of the directors under date of December 28, 1887: "Board met at 11 o'clock A. M., and was called to order by the president. Present, Guthman, Davis, Gorder, Weckbach Donnelly, and Lewis. Minutes read and affirmed. * * * Fred Gorder was appointed as a committee to attend to having a new mortgage made out to take the place of one now on file, securing F. R. Guthman, Fred Gorder, J. V. Weckbach, G. A. Davis, and E. B. Lewis in the sum of $9,500 on the entire plant and stock of the canning company, and they have personally secured to the First National Bank for a loan to the canning company for that amount. E. B. Lewis, secretary."

The mortgages set out in the petition were executed pursuant to the authority shown by the foregoing record, and the prior mortgage therein mentioned is the one bearing date of June 25, 1886, to which reference has been made. The only one of the intervenors who positively denies knowledge of the mortgages is Weber, and we think in view of the undisputed facts in the case he should not now be heard to question this legality. He, in common with other stockholders, must have known from the amount of the company's business that it was obtaining large sums of money from some source and beyond its power to secure except by mortgaging the canning factory and fixtures. It is also in evidence, and not seriously questioned, that at each annual meeting of the stockholders a statement of the assets and liabilities of the company was exhibited and the books examined. When we take into consideration also the fact the validity of the mortgages was first called in question by the intevenors' answer in April, 1890, it is evi-

dent that the claim of the latter that the execution thereof was without their consent is not entitled to serious consideration. There is no doubt that the relation of directors to the corporation of which they are officers is of a fiduciary character, and their contracts and dealings with respect to the corporate property will be carefully scrutinized by the courts. There are to be found cases in which it is asserted that such contracts are absolutely void and not enforcible, either in courts of law or equity, but the decided weight of authority, as well as the more satisfactory reasoning, sustains the view that they are voidable only.

It is frequently said in the reports and text-books that contracts between corporations and their directors will be set aside by courts of equity at the election of the stockholders, but such statement is not strictly accurate. Not every purchase of corporate property by the directors of the corporation will be adjudged void in an action by the stockholders even by courts of equity. On the contrary, the relation of directors to the stockholders of a corporation is not essentially different from that ordinarily existing between trustee and *cestui que trust.* Courts of equity will set aside such contracts on the ground of fraud, and generally upon slight showing of fraud or bad faith by the trustee. But where it is clear that the transaction was in good faith, and the *cestui que trust* being under no disability has received and retains the consideration paid for the trust property by the trustee, it will be upheld when assailed either at law or in equity.

In the case of *Twin-Lick Oil Co. v. Marbury,* 91 U. S., 589, which is directly in point, Mr. Justice Miller uses the following pertinent language: "While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corpora-

tion when the money is needed, and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given."

The view expressed in the foregoing quotation is abundantly supported by authority. (See *Buell v. Buckingham*, 16 Ia., 284; *Hallam v. Indianola Hotel Co.*, 56 Id., 178; *Garret v. Burlington Plow Co.*, 70 Id., 697; *Smith v. Lansing*, 22 N. Y., 520; *Duncomb v. New York, H. & N. R. Co.*, 84 Id., 190; *Welch v. Importers & Traders Nat. Bank*, 122 Id., 177; *Omaha Hotel Co. v. Wade*, 97 U. S., 13; *Stratton v. Allen*, 16 N. J. Eq., 229; *Sims v. Street R. Co.*, 37 O. St., 556; *Busby v. Finn*, 1 Id., 409; *Stark v. Coffin*, 105 Mass., 328; *Holt v. Bennett*, 146 Id., 437; *Saltmarsh v. Spaulding*, 147 Id., 224; Beach, Private Corp., 242, 245.)

There is nothing in the claim of the intervenors to entitle them to especial consideration at the hands of a court of equity. They, by their conduct, to say the least, sanctioned the use by the canning company for two years and a half of large sums of money procured on the credit of plaintiffs and the execution of the mortgages mentioned as security. Had the business continued prosperous as it was during the first year, when a dividend was declared and paid in stock of the company, it is not probable that the action of the directors would ever have been called in question. Having taken their chances of profits from the investment of money raised by pledging the company's property, they should not now, after misfortune has overtaken their venture, be permitted to repudiate the acts deliberately ratified if not induced by them.

4. There is a further contention by the intervenors, viz., that the plaintiffs, as managing directors, failed and neg-

lected to give notice as required by law of the indebtedness of the company, by reason of which they have become liable for the amount of its debts upwards of $4,000. We think the answer fatally defective for the reason that no facts are alleged therein to show that any part of said indebtedness was contracted during the time plaintiffs were in default of the statutory notice. (*Smith v. Steele*, 8 Neb., 115.) Nor is there any evidence in the record to support a finding that intervenors as stockholders have become liable for any indebtedness of the company by reason of the failure to give such notice. We are satisfied that the decree of the district court is right and should be

AFFIRMED.

THE other judges concur.

W. J. STEWART, APPELLEE, V. GEORGE A. STEWART ET AL., APPELLEES, AND THE GERMAN NATIONAL BANK OF HASTINGS, APPELLANT.

FILED MARCH 29, 1893. No. 4638.

Voluntary Assignments: CHATTEL MORTGAGES: FRAUD. Where a chattel mortgage was made and taken by a creditor of the mortgagor upon all his property, its purpose being not only to secure a debt due the mortgagee, but also to secure other creditors of the mortgagor not named therein, whose rights are not expressly reserved from the operation of the assignment law of this state, such mortgage is *held* void as an irregular, prohibited voluntary assignment.

APPEAL from the district court of Adams county. Heard below before GASLIN, J.

Batty, Casto & Dungan, for appellant.

Capps, McCreary & Stevens, Tibbets, Morey & Ferris, Hewett & Olmstead, M. A. & J. C. Hartigan, Bedford Brown, J. B. Cessna, and *W. P. McCreary, contra.*

RYAN, C.

On January 8, 1890, George A. Stewart executed upon his stock of furniture three several chattel mortgages, one to the German National Bank of Hastings, Nebraska, to secure the payment of $4,964.44; one to John R. Stewart, his brother, to secure payment of $2,150, the third to his father, W. J. Stewart, to secure the payment of $4,930, which several mortgages were the same afternoon duly presented for record by the same person, who, to emphasize the order of priority recited as coincident with above enumeration, and the recitals in the mortgages themselves of the priority of each, caused them to be filed by the county clerk with slight intervals between, in the order named. On the same day there was filed by W. J. Stewart his petition to foreclose said mortgage in his favor in the district court of Adams county, Nebraska, against George A. Stewart, the German National Bank of Hastings, and John R. Stewart. This petition recited that said mortgages were liens in the order of above enumeration, but that said mortgagees having gone into possession at one and the same time, each with the other, there was no priority of possession as between them, and furthermore the plaintiff made known that if either defendant mortgagee should obtain sole possession that such possession would be so used as to cause a sacrifice of the mortgaged property and render worthless the mortgage to the plaintiff. This petition further averred that George A. Stewart was wholly insolvent.

To this petition the defendants filed a written appearance by themselves or attorney on January 8, 1890. On the same day there was given defendants notice of an ap-

plication for a receiver to be presented to Hon. Wm. Gaslin at 6 o'clock P. M. of said day, by whom at said time a receiver of the mortgaged property was on said petition and due proofs appointed. As between the above named parties issue was duly joined by answers praying the foreclosure of the mortgage of each mortgagee above named.

In due time some twenty-seven different parties, claiming to be creditors of George A. Stewart, intervened in the action, and by pertinent pleadings challenged the *bona fides* and validity of said several mortgages. On the final hearing of the case the contention of the said intervenors was sustained, and the rights of said mortgagees to the proceeds of the sale of the mortgaged property in the hands of the receiver—said property meantime having been sold under order of said court—were decreed inferior to those of Stewart's unsecured creditors. The net proceeds of this sale do not equal the sum secured by the mortgage to the German National Bank, hence the controversy is narrowed down to a contest between the unsecured creditors of George A. Stewart and said bank as to the *bona fides* and validity of said mortgage.

The evidence shows that on January 8, 1890, there was due from George A. Stewart to Sandford Idell, one of his clerks, $95; to Frank Leonard, another clerk, about $764.60. Mr. Dietrich, president of said bank, testified that at said date he was getting uneasy as to the claim due from G. A. Stewart to the bank, and asked Stewart to give security, which Stewart agreed to, but wanted Leonard paid; that witness took his note for that amount and told the clerk to place it to Leonard's credit. The same was done as to Idell. Stewart said he owed Mr. Batty $400, which with an overdraft of $147.14, made up one note. These three items of $95, $764.60, and $547.14 were included in the mortgage to said bank. The trial of this cause was on September 18, 1890, and the president of said bank then testified that about six weeks before that time

witness had said to Mr. Leonard, in substance, that the bank had been forced to advance this money to Stewart to get him to give security. "Now," said he, "if you are willing to share the loss with us, as we are coming out short, we would like it." That Leonard said he would do what was fair, and he made his proposition and it was accepted. "He came," said the witness, "at my request to the bank after the receiver had made his report." W. H. Fuller, cashier of the German National Bank, testified that this $764.60 was placed to the credit of Mr. Leonard on December 12, 1890, and that on the 12th of the same month Mr. Leonard drew out $60. On July 31st he turned over to the bank $354.60, then on September 5 1890, he came in and said he had turned over to the bank more than he intended to by $40, and asked that the bank give him credit for $40, which was done. As to the claim of Mr. Idell, this witness testified that the amount due him ($95) was placed to his credit with the bank December 12, 1889; that on July 31, 1890, Idell took from the bank $50 and paid back the balance to the bank. He indorsed the certificate of deposit for $95. The bank had that certificate. Each amount retained from Leonard and Idell respectively was placed to the interest account of the bank. W. A. Dilworth testified that in June or July, 1890, he went to the bank on behalf of Mr. Idell; that the cashier, Mr. Fuller, said the money was secured in a mortgage from Stewart to the bank and would be paid as soon as the money was realized under the mortgage. Mr. Idell himself testified that he was never told that the $95 was deposited to his credit; neither did he know it was there to pay his account against Stewart. He was told at the bank that he would be paid when the goods were sold. He said, "I called at the bank after last court was over and Fuller offered me $50—did not tell me any money was there for me, and as I had waited so long I concluded to take $50. He said the matter was in litiga-

tion, and that the bank was coming out short and my account could not be paid in full."

In relation to his claim, Mr. Leonard testified that he was never told that it was deposited subject to his order; that he went into the bank to borrow $60, and asked the cashier first and was referred to the president, who said witness could have it. Witness offered to give security on a horse and buggy and anything else witness had. The president of the bank said to witness that he need give no security, just give his check for $60, which was done, and that amount was paid witness thereon. This witness said that the president of the bank told witness to hold on and he would secure him his money. After the goods had been sold the bank officers told witness sufficient money to pay witness was not there and that witness would have to lose it; afterward, being sent for, witness went to the bank and Mr. Fuller offered witness $350 for his claim; the president, upon his refusal to accept the above, offered $400; finally, being refused as to less, the president offered $450, and the witness, rather than take nothing, accepted that offer. Mr. Dietrich, the president of the bank, told this witness that possibly witness would get nothing out of the security taken by the bank. Mr. Dietrich informed this witness that his claim was secured in the mortgage shortly after the failure. Mr. Dietrich, being recalled, said that soon after Stewart had given the various notes witness told Mr. Leonard his account was taken care of.

As to the amount due Mr. Batty, there is no question made that the note of $547.14 secured by the mortgage to the bank was to cover $400 to be paid to Mr. Batty, and the balance was to take up an overdraft of Mr. Stewart due the bank. If this last was the only matter for consideration there would be no difficulty in upholding the mortgage to the bank. Unfortunately, the Idell and the Leonard matters present greater obstacles, for while the cashier and president would have it believed that this

mortgage was taken to secure money actually advanced by the bank for and devoted to the payment of these claims, the clear preponderance of the evidence is against them. Without doubt the mortgage was given and taken to secure not only debts due to the bank, but it was executed to secure the claims of Idell and Leonard. Had this been done by a mortgage to each party beneficially interested, the same questions need not have arisen as to the validity of the mortgage to the bank. But this was not done. The bank, as trustee for Idell and Leonard, received the mortgage in part to secure these two claims. There can be no question, upon the evidence, that the mortgage to the German National Bank covered all the property of George A. Stewart to which his creditors could resort for the payment of the several debts due them.

Commenting upon a similar state of facts in *Bonns v. Carter*, 22 Neb., 518, MAXWELL, J., said: "If a debtor is unable to pay his debts in full, it certainly is but justice that each creditor should be paid a fair proportion of the entire assets of such debtor. Any other rule carries upon its face the stamp of unfairness, and should as far as possible be discouraged. The general assignment law of the state prohibits preferences, except in certain trifling matters, and but for the first section of that act no doubt would control in this case. A debtor who by any instrument transfers all his property to one or more creditors or other persons for their benefit has in fact *assigned it*. So far as his right, control, and possession of the property are concerned they have passed to others and are not to be returned to the debtor until the purposes of the trust are accomplished; and then only the residue of the property is to be returned. No refinement of definition can make such a transfer essentially different from an assignment."

Obviously this language is applicable to the facts clearly established by the testimony in this case, and the mortgage in question, having been made, and taken upon all of the

mortgagor's property in secret trust for Idell and Leonard as well as to secure the bank's claim, was in contravention of the provisions of the assignment law of this state. It therefore follows that the judgment of the district court must be

AFFIRMED.

IRVINE C., concurs.

RAGAN C., having been of counsel, took no part in the consideration or determination of this case.

JOSEPH J. POUNDER ET AL., APPELLANTS, V. J. P. ASHE ET AL., APPELLEES.

FILED MARCH 29, 1893. No. 4973.

1. **Religious Societies:** REGULARITY OF ECCLESIASTICAL PROCEEDINGS: REVIEW. When rights of property are in queston, civil courts will inquire whether or not the organic rules and forms of proceedings prescribed by the ecclesiastical body have been followed.

2. ——: ——: ——: PROPERTY RIGHTS. When tested by such organic rules and forms, it is found that the proceedings of an ecclesiastical tribunal were without jurisdiction, such proceedings will be held void in so far as such proceedings necessarily and directly involve property rights.

3. ——: PROCEEDINGS TO REMOVE CLERGYMAN: REVIEW. The proceedings, whereby it was sought to exclude one of the defendants from his clerical functions, examined and *held* not to be in accordance with the procedure established by the church discipline in question.

APPEAL from the district court of Seward county. Heard below before BATES, J.

Norval Bros. & Lowley, for appellants:

The civil courts having no ecclesiastical jurisdiction, cannot review or question ordinary acts or church discipline, or excision, and only have judicial power in cases arising from conflicting claims of parties to the church property and the use of it. The civil courts cannot decide who should be members of the church, nor whether those excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church, and the decision of the church or church judicatory is binding upon the courts upon all such questions. (*Gaff v. Greer*, 88 Ind., 122; *State v. Farris*, 45 Mo., 183; *Robertson v. Bullions*, 9 Barb. [N. Y.], 64, 134; *German Reformed Church v. Seibert*, 3 Pa. St., 282; *Gibson v. Armstrong*, 7 B. Mon. [Ky.], 481; *Harmon v. Drehrer*, 1 Spear Eq. [S. Car.], 87.) It is the duty of a court of equity where a disturbance is threatened, or where the church is being used or attempted to be used for a different purpose than that for which it was intended, to interfere by injunction and restrain such unlawful use. (*Baker v. Ducker*, 79 Cal., 365; *Brown v. Monroe*, 80 Ky., 443; *Hackney v. Vawter*, 39 Id., 615; *Rottman v. Bartling*, 22 Neb., 375.)

Ed. P. Smith, *E. B. Esher*, and *E. C. Biggs*, *contra:*

Where property rights are involved civil courts have authority to inquire into the jurisdiction and regularity of ecclesiastical tribunals. The decree of a church judicatory is binding only when it is affirmatively shown that it has acted within the scope of its authority and has observed its own organic forms and rules. (Beach, Private Corporations, secs. 85–92; High, Injunctions, sec. 308; *Walker v. Wainwright*, 16 Barb. [N. Y.], 486; *Otto v. Journeymen Tailors' Protective & Benevolent Union*, 75 Cal., 308; *Smith v. Nelson*, 18 Vt., 511; *Watson v. Avery*, 2 Bush [Ky.], 335; *Fritz v. Muck*, 62 How. Pr. [N. Y.], 69; *Common-*

wealth v. German Society, 15 Pa. St., 251; *Keer's Appeal*, 89 Id., 112; *Jones v. State*, 28 Neb., 497; *Chase v. Cheney*, 58 Ill., 509; *O'Hara v. Stack*, 90 Pa. St., 490.)

RYAN, C.

This action was begun in the district court of Seward county by the appellants to restrain the appellees from using a certain church building for religious exercises conducted by defendant Ashe. The controversy focuses about the right of said Ashe to officiate as a clergyman of the church of Mount Zion of the Beaver Crossing Mission of the Evangelical Association of North America. It is not disputed that Mr. Ashe was assigned to this charge by the annual conference of said association in March of the year 1890, and that at the commencement of this action his term had not ended by its own limitation. Incidentally the regularity of the proceedings of said annual conference were questioned because, as insisted, the discipline of said association required the bishop, if present, to preside thereat, a requirement, if such it was, more honored in the breach than in the observance. This contention is noted, not because strictly necessary to a decision of the matters really in controversy, but that proceedings hereinafter referred to may be the better understood. There is no serious disagreement as to the facts of this case; at least such facts as are not controverted will suffice for the determination of this appeal.

From the pleadings it is not open to question that the annual conference aforesaid assigned Mr. Ashe to the charge now in controversy, and said pleadings admit that Mr. Ashe was exercising said functions until this action was begun. By injunction it was sought to terminate such functions upon the ground that Mr. Ashe had been subsequently to his said assignment duly suspended and himself deposed from his ministerial position. Involving as this does the conflicting claims of parties to the church property and the

use of it, civil courts have jurisdiction to try and determine such claims subject to certain limitations fixed and observed by such courts. It is indispensable to the existence of church organization, discipline, and efficiency that civil courts refrain from the usurpation and exercise of judicial functions properly inherent in ecclesiastical authorities, hence a reference to the decisions of some of the courts of last resort bearing upon that subject will not be unprofitable.

In *O'Hara v. Stack*, 90 Pa. St., 490, it was held that when rights of property are in question civil courts will inquire whether the organic rules and forms of proceedings prescribed by the ecclesiastical body have been followed.

The supreme court of Vermont has held that the proceedings of the synod of the Presbyterian church as a court of last resort are not absolute or conclusive when they come in question, whether directly or collaterally, in a court of law, but that such proceedings may be inquired into upon the same principles as subject the proceedings of voluntary associations to inquiry and adjudication. (*Smith v. Nelson*, 18 Vt., 511.) This doctrine was stated with approval in *Watson v. Avery*, 2 Bush [Ky.], 332, and is without doubt the consensus of judicial opinion.

There is not entire harmony as to the exact language of the charges and specifications upon which was predicated the removal of defendant Ashe, but as the difference is more in matters of mere form than in substance, the copy attached to the bill of exceptions is taken as sufficiently exact for the purposes under consideration. It is as follows:

"BEAVER CROSSING, June 4, 1890.

"I, A. W. Schenberger, presiding elder of the Blue Springs district of the Platte River conference of the Evangelical Association, do prefer charges against Rev. J. P. Ashe, for actions and sayings unbecoming a minister and which has caused dissensions and disturbed the peace,

and harmony, and prosperity of our society at Beaver Crossing.

"Specification A. In having certain resolutions passed by the board of trustees of the church which caused great dissatisfaction, which is contrary to the discipline.

"Specification B. In misrepresenting the interest and action of the Platte River conference, and especially at its last session, and the interest of the members of the society at Beaver Crossing by intimidating on the finance.

"Specification C. In neglecting or refusing to observe our book of discipline, as found on page 67, question 96, answer 2, also in answer 4, in lines 2 and 3 at the top of page 68, in book of discipline.

"A CHARGE FOR IGNORING HIS SUPERIOR IN OFFICE AND DECEPTION.

"Specification A. On Monday, June 2, he told me that he did not recognize me as a presiding elder nor a member of the church since last conference. Same night in the church he said I was no elder and that he would not accept any charge from me.

"Specification B. In practicing deception in keeping me ignorant of what he was influencing the trustees to do. Giving the wrong advice to the members, which is an open violation of discipline, as found on page 71, answer 8.

"Specification C. In practicing deception with me inasmuch as he was told by ex-Bishop Esher at the last annual conference that he, Ashe, should stay at Beaver Crossing Mission and then some time in the future he should come over to ——— and bring the church property and people with him.

"Specification D. In communing with me on Sabbath, the first of June, also recognized me to hold quarterly conference on Saturday previous and do business, and then on the following Monday told me I was no P. E., neither member of the church.

"To J. P. Ashe. A. W. SCHENBERGER."

Upon these charges and specifications a trial was had June 15, 1890, before a committee composed of five elders, presiding elder Anthony, of an adjacent district, presiding. The accused was by this committee found guilty upon each specification. These proceedings were afterward ratified by the annual conference, though no appearance thereto was made by Mr. Ashe, neither, so far as the record shows, had he any notice of such proposed action by the conference, nor was there any appeal.

This condition of affairs requires an examination of the discipline of the Evangelical Association of North America to determine which contention is correct as to the jurisdiction of the committee by whom Mr. Ashe was tried and suspended.

The appellants contend that the committee had jurisdiction to hear and determine these charges and specifications, and if they were sustained by proofs, to suspend Rev. Ashe from his official functions. On the other hand, the appellees deny this jurisdiction. These diverse views depend wholly for their importance upon the provisions of the "Discipline, part VI, ch. 2, sections 119 and 120 respectively. These sections, so far as applicable, are as follows:

"§ 119. Ques. What shall be done if an elder, deacon, or preacher is under report of being guilty of some crime expressly forbidden in the Word of God as an unchristian practice, sufficient to exclude a person from the kingdom of grace and glory?

"Ans. 1. In case there be no bishop present the presiding elder shall call in as many ministers of the church as he shall think proper, yet not less than three, and bring the accuser and accused face to face. If the accused be clearly convicted of the alleged crime, he shall be suspended from all his legal functions or excluded according to the nature of the offense until the next annual conference, which shall finally decide the case. * * * But in case a pre-

siding elder has charges against a preacher in his district the trial shall be conducted, in the absence of the bishop, by the presiding elder of an adjacent district.

"§ 120. Ques. What shall be done in case of improper words, actions, or temper?

"Ans. The accused shall be reprimanded by his senior in office. Should he repeat the same transgression, then one, two, or three preachers are to be taken along as witnesses to enforce a second reproof. If he be not then cured of the evil he shall be tried at the next annual conference. And if found guilty and incorrigible, he shall be excluded."

The language in section 119, *supra*, which follows the word "crime," requires that not only must the offense be a crime but it must be one expressly forbidden in the Word of God, as an unchristian practice, sufficient to exclude a person from the kingdom of grace and glory. Of these qualifications of the word "crime," civil courts obviously have no jurisdiction. The definition of the word "crime," however, is not peculiarly or exclusively of ecclesiastical cognizance. That word has a generally accepted, clear, legal meaning, and where individual rights or interests in property hinge upon the definition of this word such meaning must prevail.

In Anderson's Dictionary of Law the word "crime" is thus defined: "An act committed or omitted in violation of a public law either forbidding or commanding it" (citing 4 Blackstone's Commentaries, 5); "a wrong of which the law takes cognizance as injurious to the public, and punishes in what is called a criminal proceeding prosecuted by the state in its own name or in the name of the people or the sovereign." (Citing *re Bergin*, 31 Wis., 386.) "Crime and misdemeanor are synonymous terms; though in common usage 'crimes' denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors.' In short, the term 'crime' embraces any

and every indictable offense." (Citing *People v. Police Com'rs*, 39 Hun, 510; 7 Conn., 185; 60 Ill., 168; 32 N. J. L., 144; 9 Wend., 212; 9 Tex., 340; 24 How., 102; 26 Vt., 208; 41 Id., 511.) "Yet it is not synonymous with 'felony.'"

Other law dictionaries adopt the same definition as above given, hence it may be accepted that Blackstone's definition of the word as "an act committed or omitted in violation of a public law either forbidding or commanding it," is full and correct as applied to the charges and specifications upon which defendant Ashe was tried. The word "crime" is a gross misfit. In none of these is there found a single element of a crime, hence a committee constituted as was that which tried Mr. Ashe had no jurisdiction of the offenses charged under said discipline. Possibly the charges and specifications imputed to Rev. Ashe improper words, actions, or temper, in which event he should first have been reprimanded; upon a repetition of the impropriety he should have been reproved a second time in the presence of one, two, or three preachers as witnesses; then, *if found guilty and incorrigible at the next annual conference*, he should have been excluded. In cases of improper words, actions, or temper the discipline seems to contemplate serious, continued efforts to bring about penitence and reformation, and in case of utter failure in this commendable direction the *annual conference* must exclude the recalcitrant offender. On the other hand it is only when a crime has been committed that a committee summoned for the occasion may summarily eject the criminal, regardless of reformation or reproof. Improper words, actions, or temper, if not refrained from after due remonstrance, are to be inquired into at annual conference, and not by a committee; and in such class of offenses a committee is wholly without jurisdiction to suspend the offender. The defendant Ashe having been duly assigned to the charge of the church, and at the commencement of this

action being in the exercise of his official functions, it is not necessary to inquire further into the tenure of his office, for he could be excluded therefrom in the civil courts only by one or more persons showing better right thereto. It follows, therefore, that the judgment of the district court must be

AFFIRMED.

THE other commissioners concur.

HENRY T. CLARKE, APPELLANT, V. HERMAN KOENIG, APPELLEE.

FILED MARCH 29, 1893. No. 4816.

1. **Specific performance** is not generally a legal right, but rests in the sound, legal, judicial discretion of the trial court.

2. ——: CONTRACTS: EQUITY. A party invoking the equity powers of a court to enforce specific performance of a contract, which he claims is for the sale to him of real estate, must exhibit a contract unambiguous and certain.

3. **Contracts:** DEFAULT OF PARTY ASKING FOR SPECIFIC PERFORMANCE. He who asks a court of equity to specifically enforce what he claims are his rights under a contract, must not himself be in default in his promises in the same contract.

4. **Contract for Sale of Homestead:** SPECIFIC PERFORMANCE: HUSBAND AND WIFE. It is the settled law of this state that the courts will not specifically enforce a contract for the sale of the homestead of a married person, unless such contract is executed by both husband and wife.

5. ——: ——: ——: VALUE OF PROPERTY. The value of the property does not change this rule.

APPEAL from the district court of Lancaster county. Heard below before CHAPMAN, J.

Pound & Burr, for appellant:

When the mode agreed upon for fixing the price is not the essence of a contract to convey real estate, and the agreement is substantially for a sale at a fair price, upon a failure of the parties to determine the amount, the court, looking to the substance rather than to the form of the contract, will adopt some other means of arriving at the price, and of thus carrying out the agreement in its essential features. (*Coles v. Peck*, 96 Ind., 333; *Smith v. Peters*, L. R., 20 Eq. [Eng.], 511; *Kelso v. Kelly*, 1 Daly [N. Y.], 419; *Hermann v. Babcock*, 103 Ind., 461; *Hall v. Warren*, 9 Vesey [Eng.], 605; Waterman, Specific Performance, sec. 148; *Fugate v. Hansford*, 3 Litt. [Ky.], 262; *Brown v. Bellows*, 4 Pick. [Mass.], 189; Pomeroy, Contracts, secs. 94, 151; *Jackson v. Jackson*, 1 Sm. & Gif. [Eng.], 184; *Dunnell v. Keteltas*, 16 Abb. Pr. [N. Y.], 205.) A contract of sale, or mortgage, is void only as to the homestead value; as to any excess over this value a sale or mortgage is good, since, in respect to this excess, the property is not a homestead. (*Sargent v. Wilson*, 5 Cal., 504; *Kreamer v. Revalk*, 8 Id., 74; *Dye v. Mann*, 10 Mich., 291; *Ring v. Burt*, 17 Id., 465; *Wallace v. Harris*, 32 Id., 398; *Boyd v. Cudderback*, 31 Ill., 113; *Black v. Lusk*, 69 Id., 70; *State National Bank of Louisiana v. Lyons*, 52 Miss., 181; *Swift v. Dewey*, 20 Neb., 107.) Admitting that the contract was void as to the east half of the lot, still it was validated by the subsequent abandonment of that part of the lot as a homestead. (*Brown v. Coon*, 36 Ill., 243; *McDonald v. Crandall*, 43 Id., 231; *Hewett v. Templeton*, 48 Id., 367; *Vasey v. Board of Trustees*, 59 Id., 188; *Hall v. Fullerton*, 69 Id., 448; *Stewart v. Mackey*, 16 Tex., 56; *Jordan v. Godman*, 19 Id., 273.)

G. M. Lambertson, contra:

A court of equity will not enforce specific performance where the value of the land to be conveyed is to be fixed

by arbitrators. (*Greason v. Ketelas*, 17 N. Y., 499; *Hurst v. Litchfield*, 39 Id., 379; *Hopkins v. Gilman*, 22 Wis., 479; *Gourlay v. Duke of Somerset*, 19 Vesey [Eng. Ch.], 431; *Agar v. Maclew*, 2 Sim. & Stu. [Eng. Ch.], 419; *Milnes v. Gery*, 14 Vesey [Eng. Ch.], 400: *Blundell v. Brettargh*, 17 Id., 231; *Morgan v. Milman*, 17 Eng. L. & Eq., 203; *City of Providence v. St. John's Lodge*, 2 R. I., 46; *Dike v. Greene*, 4 Id., 286; *Coles v. Peck*, 96 Ind., 339.) A contract to convey the homestead will not be enforced unless signed by both husband and wife. (*Larson v. Butts*, 22 Neb., 370; *Betts v. Sims*, 25 Id., 175; *Aultman v. Jenkins*, 19 Id., 211; *Swift v. Dewey*, 20 Id., 107; *Bonorden v. Kriz*, 13 Id., 121.)

RAGAN, C.

This is a suit in equity for specific performance, brought in the district court of Lancaster county by Clarke against Koenig on a contract made between the parties, in words and figures as follows:

"Whereas, on or about the 22d day of June, 1887, the C., B. & Q. R. R. Co. caused to be laid on lot 2, in block 31, in the city of Lincoln, a railroad track, and across R street in said city; and whereas said lot 2 is claimed to be owned by Herman Koenig, and by virtue of a tax deed issued about twelve years ago to one George Dana, and said Koenig, having all the right, title and interest of the said tax deed, under and by virtue of *mesne* conveyance, and the said Koenig claims to be the owner of the said lot by virtue of the possession of the said premises under said tax deed, with all the improvements thereon, amounting as is claimed to about $800 or $900, and makes claim to ten years' actual possession of said lot; and whereas said railroad company built said track without obtaining right of way from said Koenig to occupy said lot or having said lot condemned according to law; and whereas one O. P. Dinges claims ownership of said lot by virtue of a

deed from Arta Morgan, of Denver, Colorado, and whereas the said Arta Morgan claims to be the owner of said lot, she having instituted a suit to set aside a deed made to said Dinges on the ground of fraud claiming to have been practiced by said Dinges, whereas H. T. Clarke is ready and willing to purchase said lot when he shall be able to procure a good title therefor from the legal owner; and whereas there are certain lawsuits now pending in the district court of Lancaster county, Nebraska, concerning the said lots and the titles thereto, between said Koenig, Dinges, and Morgan, wherein all of said claims are made: now it is stipulated on the part of the said Koenig and said Clarke that the said Koenig permits and allows the said track to remain temporarily on said lot for the use and benefit of the said C., B. & Q. R. R. Co., conditioned that the said Clarke, at the termination of the lawsuits concerning the said title to said lot, will pay to said Koenig all the damages he may be justly entitled to for the occupancy of said lot till the termination of the lawsuit, and will either purchase the said lot from the legal owner thereof at said time, or will induce said railroad company to have said lot duly condemned or purchased for the use of said road, said Clarke agreeing on his part not to obstruct or molest said Koenig in the occupancy of said lot any more than may be caused by the passing of cars over said lot, and will not allow said engines, cars, or other obstructions, other than the said track and ties thereunder, to remain standing on said lot. The damages and the amount to be paid said Koenig by said Clarke is to be determined by arbitrators, one to be selected by the said Koenig, and one by the said Clark, and these two to select a third in case of disagreement. This contract and memorandum is signed in duplicate this 22d day of June, 1887.

"H. T. CLARKE,
HERMAN KOENIG.

"In presence of
"L. C. BURR."

The answer sets up amongst others these defenses:

First—That the contract declared on is not one for the sale of the lot therein described, but for the arbitration and payment by Clarke to Koenig damages by reason of Clarke's temporary use and occupancy of said lot pending litigation over the title to the same.

Second—That the lot at the date of said contract was the homestead—occupied as such—of defendant, his wife, and children, and that defendant's wife was not a party to said contract and did not know of or assent to the same.

Third—A cross-claim for damages for the use and occupation of said lot by Clarke under the terms of said contract.

The court below entered a decree dismissing the suit, and rendered judgment in favor of Koenig on his cross-claim. Mr. Clarke brings the cause here by appeal.

The conclusion reached by us renders it necessary to pass upon only two of the many points presented by counsel in the case.

1. We are of opinion that by the terms of this contract, Clarke, when the courts should have decided in whom was the title, was to pay Koenig such damages as arbitrators might decide he was entitled to by reason of his permitting the railroad track to remain on said lot pending the litigation over the title to the same; and to these damages Koenig would be entitled, even if the courts should decide some one of the other claimants was owner of the lot. It follows, therefore, that the action of the court in rendering judgment for the defendant on his cross-claim was right.

Specific performance is not generally a legal right, but rests in the sound, legal, judicial discretion of the trial court. Did the court abuse this discretion in dismissing appellant's suit whatever may be the correct interpretation of this contract? A party invoking the equity powers of a court to enforce specific performance of a contract, which he claims is for the sale to him of real estate, must exhibit

a contract *unambiguous* and *certain;* in such a contract some one must expressly agree to buy and some one expressly agree to sell. The contract sued on is not such a contract. It is, to say the least, doubtful whether the purchase price of this lot was to be fixed by arbitrators. The appellant was allowed to testify that his understanding at the time was that arbitrators should determine both the purchase price of the lot and Koenig's damages for its occupancy by Clarke; while the defendant was allowed to testify that he understood the contract was only for the arbitration of the damages for its occupancy.

Another essential element is lacking in this contract, viz., the absence of an express promise by Koenig to sell and convey this lot to Clarke. How could he make such promise at the time? The courts might decide that Morgan and Dinges, the other claimants, owned it; so Clarke could not and did not under this contract agree to purchase this lot of Koenig, nor did Koenig agree to sell and convey to Clarke. If the parties had intended that if the litigation over this property terminated favorably to Koenig, then he should sell and convey to Clarke, and he should purchase of Koenig, they would doubtless have so expressed themselves in their contract. This court has no right, however, to so extend the contract of the parties by implication as to inject that clause into it.

By the terms of the contract, Clarke, "at the termination of the lawsuit concerning the title to the lot," was to pay Koenig such damages as he might be found entitled to for the occupancy of the lot by the railroad track during the litigation. This litigation terminated February, 1888, but Mr. Clarke did not pay these damages. He even refused to arbitrate them.

He who asks a court of equity to enforce what he claims are his rights under a contract must not himself be in default in his promises in the same contract. We think, therefore, that the learned judge who tried this case was

entirely justified in dismissing the appellant's case under any construction of the contract.

2. The undisputed evidence in this record is, that at the date of the contract sued on the lot in question was the homestead of Koenig, his wife, and five children; that they had a small dwelling on the lot in which defendant and his family resided; and that that was their only home. The wife of defendant was not a party to this contract, and there is nothing in the record before us showing any conduct on her part or that of her husband by which they are estopped from claiming this property as a homestead.

In *Larson v. Butts*, 22 Neb., 370, the defendant, a married woman, signed a contract in and by which, in consideration of $50 paid in cash and $3,700 to be paid to her, she agreed to sell and convey to plaintiff two lots. She resided on these lots with a minor child at the date of the contract. Her husband was not a party to the contract, and was not living with her. She refused to convey according to her agreement and Larson brought suit for specific performance and obtained a decree as prayed in the district court. Larson appealed here, and Chief Justice MAXWELL, speaking for this court, said: "A contract to convey a homestead entered into by a wife in her own name will not be specifically enforced, as the statute requires the instrument of conveyance to be signed and acknowledged by both husband and wife." This case is decisive of the one we are considering; and it is now the settled law of this state that the courts will not specifically enforce a contract for the sale of the homestead of a married person unless such contract is executed by both husband and wife. The value of the property does not change this rule.

It follows, therefore, that the decree of the district court was right, and the same is in all things

AFFIRMED.

THE other commissioners concur.

STATE OF NEBRASKA, EX REL. J. S. DALES, STEWARD OF THE UNIVERSITY OF NEBRASKA, V. EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED MARCH 30, 1893. No. 6073.

1. **Appropriation for Library Building for State University:** AUDITOR OF STATE: VOUCHERS. Under the provisions of the act making an appropriation for the current expenses of the state for the years ending March 31, 1892, and March 31, 1893, etc., approved April 6, 1891, whereby an appropriation of $37,000 was made for fire-proof library building at the state university, no part of said appropriation can be drawn except upon proper vouchers filed with the auditor of public accounts.

2. ———: DISBURSEMENT OF MONEY: DEFINITION OF VOUCHER. The term "voucher," when used in connection with the disbursement of money, means a written or printed instrument in the nature of a bill of particulars, account, etc., which shows on what account and by what authority a particular payment has been made.

3. ———: ———: VOUCHERS. There is no authority for the secretary of the board of regents of the state university to draw any money appropriated for the university or any of its buildings except upon vouchers, duly certified.

4. **Appropriations by Legislature:** LAPSE. No appropriations made by the legislature will lapse before the end of the first fiscal quarter after the adjournment of the next regular session, unless there is a special provision in the act itself providing that if it is not used by a certain time that it shall lapse.

5. **The fiscal year** begins on the first day of December of each year.

ORIGINAL application for *mandamus.*

J. S. Dales, relator, *pro se.*

W. S. Summers, Deputy and Acting Attorney General, contra.

PER CURIAM.

This cause is submitted to the court on the following agreed state of facts:

The relator sets forth:

"First—That he is the steward of the university of Nebraska, and secretary of the board of regents of said university, and as such is duly authorized and empowered to draw upon the auditor of public accounts of Nebraska, by proper certificates and vouchers, in due form, for amounts appropriated for the use of the university of Nebraska by the legislature of this state.

"Second—That the legislature of 1891, by a bill approved April 6, 1891, appropriated the sum of thirty-seven thousand dollars ($37,000) for the use and benefit of the university of Nebraska in the erection of a fire-proof library building (in part).

"Third—That under this appropriation the university authorities entered into a contract, bearing date the second day of July, 1892, with Abraham Rosenberry, of Omaha, Nebraska, in the sum of eighty thousand nine hundred and forty-eight dollars ($80,948), for the erection of a library building; such building to be completed on or before the first day of December, 1893.

"Fourth—That said Abraham Rosenberry has begun work under this contract, and has completed work and furnished materials and rendered services under said contract to the amount of about twenty thousand dollars ($20,000).

"Fifth—That the work upon said building was suspended about the middle of December last because of the cold weather, and has not since been resumed for the same reason.

"Sixth—That the said contractor, both by the terms of his contract and by special orders from the university authorities, will continue this work upon the said library

building under the said contract as soon as the weather will permit.

"Seventh—That there is still remaining unexpended of the thirty-seven thousand dollars appropriated by the legislature of 1891, for the purpose aforesaid, as above stated, the sum of twelve thousand nine hundred sixty-eight dollars and two cents ($12,968.02.)

"Eighth—That this amount will become due the said contractor under the said contract as the work progresses.

"Ninth—The relator further shows that on the 29th day of March, 1893, he drew a certificate, No. 6337, and voucher, in the usual and proper form, upon the auditor of public accounts for twelve thousand nine hundred sixty-eight dollars and two cents ($12,968.02), being the unexpended balance of said appropriation; that no objection is made by the said auditor to the form nor to the amount of said certificate and voucher.

"Tenth—That the said anditor has returned the said certificate and voucher with a communication in writing to the relator herein, which is as follows:

"'LINCOLN, March 29, 1893.

"'*J. S. Dales, Esq., Steward State University, City*—MY DEAR SIR: I return to you herewith university certificate No. 6337, drawn for $12,968.02, on account of the appropriation made by the legislature of 1891 for the erection of a fire-proof library building (in part). I must decline to pay the same at this time for the reason that it nowhere appears that the work has been done, materials furnished, or services rendered upon which this amount can apply, this being, as I am informed, the unexpended balance of the appropriation. As I understand it, the contract for the erection of this fire-proof library building does not provide for the payment of any moneys by the state in advance. It seems proper that I should also notify you at this time that I must refuse to issue any warrants against

this fund after March 31, 1893, for the reason that all unexpended balances will then lapse into the state treasury.

"'I am very cordially yours,

"'EUGENE MOORE,

"'*Auditor P. A.*'

"Eleventh—The relator further shows that under this ruling of the state auditor it is impossible for him to now withdraw the unexpended balance of the appropriation in question for the use of said university for payments upon the said contract after work has been resumed, and equally impossible for him to draw the said unexpended balance by other certificates and vouchers at other times hereafter during the progress of said work.

"Twelfth—The relator therefore asks for an order of this court that the said auditor shall pay the amount of twelve thousand nine hundred sixty-eight dollars and two cents ($12,968.02) upon the presentation of said certificate No. 6337 and voucher, to which reference is made above; or that the court shall order that the said auditor shall honor and pay such other certificates and vouchers as may be drawn upon this fund for payments under the said contract for said library building, as the work progresses, and at such times or within such limits as this court shall direct."

The act approved April 6, 1891, provides "that the following sums of money, or so much thereof as may be necessary, are hereby appropriated out of any money in the treasury, not otherwise appropriated for the payment of the current expenses of the state government for the years ending March 31, 1892, and March 31, 1893, and to pay miscellaneous items of indebtedness owing by the state of Nebraska. * * * "Fire-proof library building (in part), $37.000.00." * * *

Section 2 of the act provides that "The auditor of public accounts is hereby authorized and required, upon the

presentation of the proper vouchers, to draw his warrants on the state funds, and against the appropriations as made in section one (1) of this act, and in favor of the party performing the service, for the amount due; and such warrants shall give the name of the person and nature of the service."

"Voucher" is defined in the Century Dictionary as follows: "Book, paper, document, or stamp which serves to prove the truth of accounts, or to confirm and establish facts of any kind; specifically, a receipt or other written evidence of the payment of money." The term "voucher," when used in connection with the disbursement of money, means a written or printed instrument in the nature of a bill of particulars, account, etc., which shows on what account and by what authority a particular payment has been made. (*People v. Swigert*, 107 Ill., 495.)

It will be observed that the auditor is authorized to draw his warrant only in those cases where the proper vouchers are presented to him. The warrants are to be drawn from time to time as may be required, the filing of vouchers being the evidence upon which the auditor is to act. There is no authority for the secretary of the board of regents to draw any portion of the appropriation except as he may present vouchers for work or material expended in the prosecution of the contract. The agreed statement of facts, therefore, wholly fails to entitle the relator to draw the money in question and the writ is denied.

But the appropriation does not lapse on the 31st day of March, 1893. It is true the language of the act apparently restricts the appropriations to March 31, 1893, but section 19, article 3, of the constitution provides that "Each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal

quarter," etc. The construction of this section was before this court in *State v. Babcock*, 22 Neb., 33. In that case an appropriation was made by the legislature of 1885 for the purpose of sinking a well in the salt basin. The succeeding legislature adjourned *sine die* March 31, 1887, and it was held that the appropriation continued until August 31 of that year (citing *People v. Swigert*, 107 Ill., 494; *People v. Lippincott*, 64 Id., 256; *People v. Needles*, 96 Id., 575), unless there is a special provision in the act itself declaring that if the money is not used by a time stated the appropriation shall lapse.

Under the provisions of sec. 9, art. 4, ch. 83, Comp. Stats., the fiscal year commences on the 1st day of December in each year and ends on the 30th day of November. Under the provisions of the constitution, therefore, this appropriation is available until the end of the first fiscal quarter after the adjournment of the present legislature.

WRIT DENIED.

CORTELYOU, EGE & VANZANDT V. SARAH F. HIATT.

FILED APRIL 11, 1893. No. 4627.

1. **Action to Recover for Conversion of Note:** PETITION *held* to state a cause of action.
2. ——: TRIAL: OPENING AND CLOSING. Where it is necessary for the plaintiff to introduce any evidence in order to maintain his action he is entitled to open and close.
3. ——: ——: PURPOSE OF ASSIGNMENT MAY BE PROVED. Where a negotiable instrument is assigned as a mere security for a debt, the *purpose* for which the assignment was made may be proved to show the true nature of the transaction.
4. ——: EVIDENCE *held* to sustain the verdict.
5. **Instructions.** No error in the instructions.

ERROR from the district court of Holt county. Tried below before HOPEWELL, J.

H. M. Uttley and *E. W. Adams*, for plaintiffs in error:

The plaintiff nowhere alleges that she is or was at the time of the alleged conversion the owner or entitled to the possession of the note which she accuses the defendants of having wrongfully and unlawfully converted to their own use. The petition does not state a cause of action. (Cooley, Torts, secs. 442, 445; *Smith v. Force*, 16 N. W. Rep. [Minn.], 704; *Bond v. Mitchell*, 3 Barb. [N. Y.], 304; *Wright v. Field*, 64 How. Pr. [N. Y.], 117; *Johnson v. Oregon Steam Navigation Co.*, 8 Ore., 35; *Gage v. Allison*, 1 Brevard [S. Car.], 387; *Jones v. Sinclair*, 2 N. H., 319; *Ames v. Palmer*, 42 Me., 197; *Wilson v. Wilson*, 37 Md., 1; *Wheeler v. Train*, 3 Pick. [Mass.], 257; *Fairbank v. Phelps*, 22 Id., 538; *Winship v. Neale*, 10 Gray [Mass.], 383; *Clark v. Draper*, 19 N. H., 419; *Forth v. Pursly*, 82 Ill., 152; *Caldwell v. Cowan*, 9 Yerg. [Tenn.], 262; *Byam v. Hampton*, 10 N. Y. Supp., 372; *Chandler v. West*, 37 Mo. App., 631; *Gill v. Weston*, 110 Pa. St., 305; *Murphy v. Hobbs*, 11 Pac. Rep. [Colo.], 55; *Gates v. Rifle Boom Co.*, 38 N. W. Rep. [Mich.], 245; *Holmes v. Bailey*, 16 Neb., 305; *Bertholf v. Quinlan*, 68 Ill., 297; *Barton v. Dunning*, 6 Blackf. [Ind.], 209; *Kennington v. Williams*, 30 Ala., 361; *Hickok v. Buck*, 22 Vt., 149; *Clark v. Draper*, 19 N. H., 419.) It was error to deny the defendants the right to open and close. (*Osborne v. Kline*, 18 Neb., 351.) It was error to require the jury by special findings to pass upon the law as well as the facts. (Thompson, Trials, sec. 1017; Coke Lit., 155, 156; *Hickey v. Ryan*, 15 Mo., 63; *Fugate v. Carter*, 6 Id., 267; *United States v. Carlton*, 1 Gall. [U. S. C. C.], 400; Wells, L. & F., sec. 2; *Coquillard v. Hovey*, 23 Neb., 627; *Begg v. Forbes*, 30 Eng. L. & Eq., 508; *Etting v.*

U. S. Bank, 11 Wheat. [U. S.], 74; *First Nat. Bank of Springfield v. Dana*, 79 N. Y., 108; *Edleman v. Yeakel*, 27 Pa. St., 26: *Runge v. Brown*, 23 Neb., 826; *Herron v. Cole*, 25 Id., 704.)

Paris R. Hiatt and *O. A. Williams, contra:*

The holder of commercial paper pledged as collateral security is not authorized to sell it in the absence of special power. He is bound to hold and collect such paper as it falls due and apply the money to the payment of the debt. (Dan., Neg. Ins., sec. 833; Boone, Mort., sec. 315; *Wheeler v. Newbould*, 16 N. Y., 398; *Union Trust Co. v. Bigdon*, 93 Ill., 458; *Fletcher v. Dickinson*, 7 Allen [Mass.], 23; *Whittaker v. Charleston Gas Co.*, 16 W. Va., 717; *Zimpleman v. Veeder*, 98 Ill., 613; *Joliet Iron Co. v. Scioto Fire Brick Co.*, 82 Id., 548; *Nelson v. Wellington*, 5 Duer [N. Y.], 29; *Alexandria, L. & H. R. Co. v. Burke*, 22 Gratt. [Va.], 262.) The right of property does not pass to the pledgee, but remains with the pledgor, subject to the lien of the former. (Boone, Mort., sec. 309; Williams, Per. Pr., p. 26*; *Franklin v. Neate*, 13 M. & W. [Eng.], 481*; *Farwell v. Importers & Traders Nat. Bank*, 90 N. Y., 488.) If the pledgee of a note held as collateral security cannot collect it, he must return it to the pledgor; and if he surrenders it to the maker without payment, or makes use of it in any transaction of his own, he will be chargeable with its full amount. (Boone, Mort., sec. 311; *Wood v. Matthews*, 73 Mo., 477; *Union Trust Co. v. Rigdon*, 93 Ill., 458.) The mere acceptance by a creditor of a negotiable note of a third person makes it but collateral security. Such acceptance does not operate as payment, unless it be shown that such, at the time, was the agreement of the parties. It will be deemed a conditional and not an absolute payment of the original debt. This is the rule where the note of a third person is given and accepted for a pre-existing debt. (Boone, Mort., sec. 314; *Wilhelm*

v. Schmidt, 84 Ill., 183; *Noel v. Murray*, 13 N. Y., 167; *Tobey v. Barber*, 5 Johns. [N. Y.], 68; *Kephart v. Butcher*, 17 Ia., 240; *Guion v. Doherty*, 43 Miss., 538; *Shipman v. Cook*, 16 N. J. Eq., 251; *Prettyman v. Barnard*, 37 Ill., 105; *Whitbeck v. Van Ness*, 11 Johns. [N. Y.], 409.) Gross inadequacy of price is always a strong circumstance in favor of the supposition that a sale of the property was not intended. (Boone, Mort., sec. 39; *Campbell v. Dearborn*, 109 Mass., 130; *Reed v. Reed*, 75 Me., 264; *Langton v. Horton*, 5 Beav. [Eng.], 9.) There was a pre-existing debt. The relation of debtor and creditor existed between the grantor and grantee. In such cases the court will treat the conveyance as security. (*Saxon v. Hitchcock*, 47 Barb. [N. Y.], 222; *Hoopes v. Bailey*, 28 Miss., 328; *Henley v. Hotaling*, 41 Cal., 22.) It is competent to show by parol evidence that negotiable paper transferred by endorsement and delivery was intended to be held simply as collateral security, and not absolutely. (Boone, Mort., sec. 310.) The question whether a note or bond is given and accepted in satisfaction of the original debt is for the jury; and it is error for the court to decide it as a matter of law. (1 Thompson, Trials, sec. 1254: *Johnson v. Weed*, 9 Johns. [N. Y.], 310; *Stone v. Miller*, 16 Pa. St., 450; *Sellers v. Jones*, 22 Id., 423.) In case of a conflict of evidence as to whether a note was received as a payment, or merely as collateral, the question is for the jury. (Boone, Mort., sec. 314; *Atlantic Fire & Marine Ins. Co. v. Boies*, 6 Duer [N. Y.], 583.) A sale of collateral security and an appropriation of the entire proceeds amounts to a conversion. (*Cortelyou v. Lansing*, 2 Caine's Cas. [N. Y.], 200; *Clark v. Gilbert*, 2 Bing. N. C. [Eng.], 565; 1 Smith Lead. Case, [7th ed.], 385; Williams, Per. Pr. [3d Am. ed.], 27*; *Norton v. Kidder*, 54 Me., 189; *Farrand v. Hurlburt*, 7 Minn., 477; *Latimer v. Wheeler*, 30 Barb. [N. Y.], 485; *Robbins v. Packard*, 31 Vt., 570; *Graves v. Smith*, 14 Wis., 5; *Johnson v. Cumming*, 15 C. B., n. s. [Eng.], 330).

M. F. Harrington, also, for defendant in error.

MAXWELL, CH. J.

This action was brought by the defendant in error to recover for the conversion of a note, and on the trial of the cause the jury returned a verdict in her favor, upon which judgment was rendered. The first objection of the plaintiffs in error is that the petition fails to state a cause of action. The petition is as follows:

"1st. On or about the 2d day of September, 1885, Paris R. Hiatt executed and delivered to this plaintiff his promissory note, dated September 1, 1885, whereby he promised to pay the plaintiff on the 1st day of September, 1888, the sum of $3,800, with interest thereon at the rate of 10 per cent per annum, payable annually on the 1st day of September of each year. Said note was payable at the Bank of Neligh in the town of Neligh, Nebraska. Plaintiff cannot now give a more accurate description of said note for the reason that the same is not now in her possession, but is in the possession of one Hill, hereinafter named, through the wrongful acts of the defendants as hereinafter set forth.

"2d. To secure the payment of said note said Paris R. Hiatt, on the 2d day of September, 1885, executed and delivered to this plaintiff a mortgage deed, and thereby conveyed to plaintiff the following described premises, situated in the county of Wheeler and state of Nebraska, to-wit: The southwest quarter and the north half of the southeast quarter and the southwest quarter of the southeast quarter of section 2, and the northwest quarter of the northeast quarter of section 11, all in township 24, range 10, west 6 P. M., which premises were on said day owned in fee-simple by Paris R. Hiatt aforesaid.

"3d. Said mortgage deed was duly recorded in the office of the county clerk of Wheeler county, Nebraska, on the 3d day of September, 1885.

"4th. The only incumbrance upon said premises prior, senior, and superior to plaintiff's said mortgage was a certain mortgage for the sum of $600, hereinafter referred to, and upon which there was only $570 due February 28, 1887.

"5th. That said $600 mortgage on said premises was given about May 16, 1884, by the plaintiff and the said Paris R. Hiatt to these defendants for the purpose of securing a certain note for $600, dated May 16, 1884, and given by this plaintiff to the defendants. A more exact description of said note plaintiff cannot give for the reason that the said note is in the possession of the defendants.

"6th. On the 28th day of February, 1887, plaintiff was indebted to defendants in said sum of $570, and the said Paris R. Hiatt was indebted to the defendants in the sum of $48, and the said Paris R. Hiatt and this plaintiff were jointly indebted to the defendants in the sum of $145.

"7th. On the 28th day of February, 1887, plaintiff, being the owner of and in possession of said $3,800 note and mortgage securing the same, indorsed the said $3,800 note in these words: 'Pay to the order of Cortelyou, Ege & Vanzandt. Sarah F. Hiatt.' And plaintiff also assigned said mortgage to the defendants, and after indorsing and signing over said note to the defendants, delivered said $3,800 note and the mortgage securing the same to the defendants as security for the payment of the said indebtedness owing by the said Paris R. Hiatt to the defendants, and also for the securing the said indebtedness owing by said Paris R. Hiatt and plaintiff jointly to the defendants, and to secure also the payment of the said $600 note and obtain a release of said $600 mortgage, thus making the said $3,800 mortgage a first lien upon said premises, and to secure the payment of the further sum of $300 borrowed by plaintiff from defendants on the 28th day of February, 1887, but plaintiff never received but $231.50 of said $300.

"8th. No part of said $3,800 note has ever been paid

by said Paris R. Hiatt, nor any portion of the interest thereon, except the sum of $600, and said $3,800 note so secured by said mortgage on the 28th day of February, 1887, at the time plaintiff delivered it to the defendants, was worth the sum of $3,766.83⅓, and that was its value; and on August 3, 1888, said $3,800 note secured by said mortgage was worth the sum of $4,305.74, and that was then its value.

"9th. On the 8th day of March, 1887, defendants caused the said assignment of said mortgage by plaintiff to them to be recorded in the office of the county clerk of Wheeler county, Nebraska.

"10th. On the 3d day of August, 1888, the defendants, being then in possession of said $3,800 note and mortgage so assigned and delivered to them as security as aforesaid, wrongfully and unlawfully sold, assigned, and delivered the said note and the mortgage securing the same to Edward Hill for the sum of $4,305.74, and wrongfully and unlawfully converted the entire proceeds of said sale to their own use, to the damage of the plaintiff in the sum of $4,305.74, no part of which damage has been paid, and all of which is now due from the defendants to plaintiff.

"11th. The defendants are an association of persons doing business in Ewing, Holt county, Nebraska, under the firm name and style of Cortelyou, Ege & Vanzandt, and not incorporated.

"Wherefore plaintiff prays judgment against the defendants for the sum of $4,305.74, with interest thereon from the time of filing this petition, and costs of suit."

The objection urged to this petition is that it fails to allege that at the time of the alleged conversion of the note she was the owner thereof or entitled to the possession of the same. An examination of the petition however, shows that the objection is not well taken, and it is overruled.

It is claimed that under the issues the defendants below were entitled to open and close. The answer is as follows:

"1. Defendants admit the allegations in the 1st, 2d, and 3d paragraphs of said petition to be true in all respects.

"2. As to the 4th paragraph of said petition, defendants deny the allegations therein contained, and allege that there were taxes due on said premises at that time and that the land had been sold for taxes.

"3. Defendants answering the 5th paragraph of plaintiff's petition admit the facts therein stated.

"4. Defendants answering to the 6th paragraph of plaintiff's petition admit the allegations therein set forth and allege that the indebtedness was more than set out in plaintiff's petition, to-wit, about the sum of $2,000.

"5. Defendants answering to the 7th paragraph of plaintiff's petition admit that on the 28th day of February, 1887, the plaintiff was the owner of and in possession of a note for $3,800 and a mortgage securing the same, and that on the said date the plaintiff indorsed said note to the defendants in the words and language used in the plaintiff's petition, and that also, at the same time, the plaintiff assigned the mortgage securing the said note in writing, and delivered the said note and mortgage to these defendants; and defendants deny that said note and mortgage were delivered as security for payment of any indebtedness by said plaintiff, or by said Paris R. Hiatt, husband of the plaintiff, in any manner; but, on the contrary, allege the fact to be that said $3,800 note and mortgage referred to were, on the 28th day of February, 1887, sold, assigned, indorsed, and delivered to these defendants absolutely, and at that time became the sole and absolute property of these defendants.

"6. Defendants answering to the 8th paragraph of plaintiff's petition admit that no part of said $3,800 note has ever been paid by Paris R. Hiatt, except the sum of $600, which said payment was made prior to the time said note was sold and delivered to these defendants, to-wit, on the 1st day of February, 1887; and the defendants further answering to

the 8th paragraph of plaintiff's petition deny each and every allegation therein contained.

"7. Defendants answering to the 9th paragraph of plaintiff's petition admit the facts therein stated to be true.

"8. Defendants answering to the 10th paragraph of plaintiff's petition admit the facts to be that on the 3d day of August, 1888, the defendants sold, assigned, and delivered the said note and mortgage to one Edward Hill for a valuable consideration, but deny that they wrongfully and unlawfully assigned the same or converted the same to their own use, and deny each and every allegation in said paragraph contained except that in this paragraph admitted. Deny that they received the sum of $4,305.74 as the proceeds of sale of said note.

"9. Defendants answering to the 11th paragraph of plaintiff's petition admit the facts therein stated.

"Wherefore these defendants pray that they may have judgment against the plaintiff for the costs of this action and for such other relief as to the court may seem right."

The plaintiff below, in her reply, admits that certain taxes were due on said land but alleges that they were paid by Paris R. Hiatt; denies that the indebtedness set forth in the fourth paragraph of the answer was more than set forth in the plaintiff's petition, and denies each and every allegation contained in the fifth paragraph of the answer. It will thus be seen that the plaintiff below was required to prove certain facts to sustain her cause of action and therefore was entitled to open and close. The rule is this: "That where the plaintiff has anything to prove, in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and reply belongs to him." This rule has been generally adopted in this country. The unvarying test furnished by this rule is to consider which party would, in the state of the pleadings and of the record admissions, get a verdict for substantial damages, if

the cause were submitted to the jury without any evidence being offered by either. If the plaintiff would succeed, then there is nothing for him to prove at the outset, and the defendant begins and replies; if the defendant would succeed, then there is something for the plaintiff to prove at the outset, and the plaintiff begins and replies.

It is claimed that the court required the jury in the first and second of the special findings to pass upon the law as well as the facts. The special findings are as follows:

"1. Was the transaction between the parties of the 28th day of February, 1887, at the time the plaintiff Sarah F. Hiatt assigned and delivered the $3,800 note and mortgage to the defendants, intended by the said parties at the time as a *bona fide* and absolute sale of said note and mortgage to the defendants?

"Answer. No. B. F. COLBURN, *Foreman.*

"2. Was the transaction between the parties of the 28th day of February, 1887, at the time of the assignment and delivery by the plaintiff to the defendants of the $3,800 note and mortgage intended by the parties at the time and were such note and mortgage in fact given to and received by the defendants as collateral security for all indebtedness from the plaintiff and her husband?

"Answer. Yes. B. F. COLBURN, *Foreman.*

"3. What amount, if anything, was due and owing the defendants by the plaintiff and her husband on the 28th day of February, 1887, at the time of the assignment and delivery of the note and mortgage by the plaintiff to the defendants?

"Answer. $1,243. B. F. COLBURN, *Foreman.*

"4. What amount, if anything, was due and owing by the plaintiff and her husband, Paris R. Hiatt, to the defendants on the 3d day of August, 1888, at the time of the sale and conversion of the $3,800 note and mortgage by the defendants?

"Answer. $1,367.71. B. F. COLBURN, *Foreman.*

"5. What was the value of the $3,800 note and mortgage on the 3d day of August, 1888?

"Answer. $4,144.85. B. F. COLBURN, *Foreman.*"

It is evident that the court merely required the jury to find the purpose of the transaction, viz., was it a mere security or was it a sale? This purpose was a question of fact which the jury was to find from the evidence. There was no error, therefore, in submitting those questions. In *Collingwood v. Merchants Bank*, 15 Neb., 118, where certain drafts had been purchased from a bank, it was held proper to show by parol evidence the purpose for which they were drawn. The fourth and fifth assignments are merely a repetition of the alleged errors in submitting the questions for the jury to find the purpose. Suppose a deed absolute in form is given as surety for a loan. In form it is a deed, and if a conveyance is made by the grantee thereunder to an innocent purchaser without notice, actual or implied, the title will pass, but as between the parties and persons having knowledge of the nature of the contract the deed is a mere security for the loan, and the wrongful conveyance of the land by the grantee or mortgagee would render him liable. This rule is recognized in *Wilson v. Richards*, 1 Neb., 342, and is applicable to any transaction which in fact is a security. It is claimed that the verdict is contrary to the evidence. It appears that at the time the note and mortgage were assigned to the plaintiffs in error they executed a defeasance as follows:

"This to certify that Cortelyou, Ege & Vanzandt agree to sell said note and mortgage hereinafter described to Sarah F. Hiatt on or after the 1st day of March, 1888, for the sum of $1,843.58 in case she wants to buy the same by that time, but not afterwards, and it is further agreed that in case said note is not purchased by Sarah F. Hiatt that there shall not be any general judgment against P. R. Hiatt and Sarah F. Hiatt above the sale of said land named in the mortgage, that it shall be in full satisfaction of said

note which is dated September 1, 1885, due September 1, 1888, for $3,800 by Paris R. Hiatt to Sarah F. Hiatt secured real estate mortgage on land in Wheeler county, Nebraska, of even date.

"CORTELYOU, EGE & VANZANDT.

"Ewing, February 28, 1887.

"And it is further agreed that on payment of above sum a release of the $600 mortgage on said land preceding this mortgage shall also be given.

"CORTELYOU, EGE & VANZANDT."

While it is true that this instrument in circumspect language is designated a contract to repurchase the note in question, it is very clear from the accompanying testimony that its purpose was to enable the assignor to redeem upon paying the amount of the loan with interest. This fact is so clearly established that a finding against it would have been against the clear weight of evidence. There is nothing, therefore, in the objections. Objections are made to some of the instructions, but they seem to conform to the proof and it is unnecessary to review them at length. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

EDWARD HOOPER v. R. V. GREWELL ET AL.

FILED APRIL 11, 1893. No. 4847.

Negotiable Instruments: BONA FIDE PURCHASER: EVIDENCE: REVIEW. Where undisputed proof showed a want of consideration for a promissory note, and the proof fails to clearly establish the fact that the plaintiff was a *bona fide* purchaser for value before maturity, a verdict and judgment in favor of the defendant will not be set aside.

ERROR from the district court of Hall county. Tried below before HARRISON, J.

Abbott & Caldwell, for plaintiff in error.

Hastings & McGintie and *Thummel & Platt, contra.*

MAXWELL, CH. J.

On the 2d day of January, 1889, the defendant Grewell made and delivered a promissory note as follows:

"$90. PLEASANT HILL, Jan. 2, 1889.

"Six months after date I promise to pay to the order of P. Janss, M. D., ninety dollars, at Grand Island, Nebraska, value received, with interest at 10 per cent per annum. R. V. GREWELL."

There is an indorsement on the note of $15, February 9, 1889. The plaintiff alleges in his petition that he purchased the same before due for a valuable consideration. Grewell filed an answer as follows:

"Said R. V. Grewell, defendant, for answer to plaintiff's petition herein, says that true it is that this defendant on or about January 2, 1889, executed and delivered to the defendant P. Janss, M. D., his certain promissory note in writing of that date for the sum of $90, payable six months after date; that said promissory note, so made and delivered by this defendant, did not provide for the payment of any interest thereon, and was not drawn in the terms alleged in the said plaintiff's petition; and if the said note, signed and delivered by this defendant, now provides for the payment of ten per cent interest thereon, as alleged in said petition, then the said note has been falsely and fraudulently forged and altered, and the said note mentioned and described in plaintiff's petition was never signed or delivered by this defendant to any person whomsoever.

"2. This defendant denies that said promissory note, so

executed and delivered by him as aforesaid to the said P. Janss, was, before the maturity thereof, sold, indorsed, assigned, or transferred by the said Janss to said plaintiff for value, and denies the said plaintiff's purchase of the same, and denies that he, the said plaintiff, paid any value therefor, and denies that the said plaintiff is now the owner and holder of the said promissory note.

"3. This defendant, further answering, says that said promissory note for the sum of $90, given by this defendant as aforesaid to P. Janss, on or about January 2, 1889, was so given by this defendant on express agreement with the said P. Janss, M. D., that he, the said Janss, should treat medically the wife of this defendant for the period of six months for certain nervous effects and illness, to remove the effect of some severe shocks which this defendant's wife had sustained previously thereto, and that said treatment should be continued by the said Janss for the full space of six months, and if the defendant's wife aforesaid should not by that time become entirely well and cured, that the defendant Janss would continue said treatment till such time as defendant's wife should become entirely sound and well and cured, or should desire no further treatment from the said defendant P. Janss. And it was further agreed between this defendant and said defendant Janss that this defendant should pay to the said Janss for each month of such treatment the sum of $15, and that the same should be indorsed on the said note, and at the end of the said six months aforesaid the same should be fully paid. And the said defendant Janss did not treat this defendant's wife as had been agreed between the said parties, and did in fact treat her only during a single month after the giving of the said promissory note, for which month the sum of $15 was duly paid by this defendant, as was by the said parties' agreement provided as aforesaid. And after the said time said defendant Janss wholly failed and neglected and refused to treat the said wife of this de-

fendant, and wholly failed and neglected and refused to send any medicine or in any manner to carry out and fulfill his said agreement with this defendant, whereby the consideration for the said note has wholly failed, and there is no amount due thereon to the said plaintiff or any other person whomsoever.

"4. That the said plaintiff had full and actual knowledge and notice that the said promissory note was given as aforesaid without consideration received by this defendent long before the alleged purchase of the said promissory note by the plaintiff.

"Wherefore, this defendant asks judgment for costs."

The reply is a general denial. Janss was sued as indorser. The record, however, fails to show that he was served with summons. On the trial of the cause the jury returned a verdict in favor of Grewell, upon which judgment was rendered. It appears that the note in suit was given to Janss under the following agreement:

"PLEASANT HILL, Jan. 2, 1889.

"Received of R. V. Grewell $—— and a note for $90, for which I agree to treat Mrs. Grewell for six months, and if not cured at the expiration of that time I agree to treat her until cured, or so long as she may desire treatment, without extra charge. Mr. Grewell agrees to pay $—— monthly, to be indorsed on said note, and promises to give me timely notice if more medicine is desired, so as to enable me to supply same, and also prompt notice of any change of symptoms or of any change in the effect produced by such medicine. The medicine and appliances to be sent by express. P. JANSS."

The proof is that he made one visit after the note was executed, for which he was paid $15. He also sent medicine twice. What, if anything, this medicine was worth does not appear. It is also proved that the plaintiff signed Janss' note for the sum of $3,000, as surety at a bank

in Grand Island; that Janss promised to place notes to the amount of $7,000 in the bank as collateral security for the plaintiff; that notes for a very large amount were placed there for that purpose, but whether the note in suit was placed in the bank at the time the note for $3,000 was signed is not clearly shown nor perhaps is it material. It also appears that more than $2,000 was collected on these notes, but Janss was permitted to receive about $1,300 of the amount so collected. We are led to believe that the plaintiff was anxious to accommodate, if not aid, Janss, and therefore did not insist on a stringent application of the proceeds of the notes to the payment of the one in the bank. The plaintiff claims to be an innocent purchaser of the note in suit, but the proof fails to satisfactorily establish that fact, and the judgment is affirmed. Sufficient facts are alleged in the petition to entitle the plaintiff to a judgment by default against Janss, and if the records in the court below show either service or an appearance, it is probable that such judgment, upon a proper showing, might be rendered even now, but it cannot affect the verdict against the plaintiff in error.

AFFIRMED.

THE other judges concur.

EVA C. BARKER, APPELLANT, v. HENRIETTA E. AVERY ET AL., APPELLEES.

FILED APRIL 11, 1893. No. 4745.

1. **Action to Quiet Title:** DEED: FORGERY: EVIDENCE. In an action to set aside a deed as a forgery, the deed, together with a signature of the grantor, which was admitted to be genuine, and received in evidence, were examined through a micro-

scope and the signature of the grantor to the deed *held* to be genuine.

2. ——: ——: ——: ——. The oral testimony tended to prove that the deed was genuine.

3. **Deed:** CERTIFICATE OF ACKNOWLEDGMENT: IMPEACHMENT. Where a deed is acknowledged in due form before a proper officer, it can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent.

APPEAL from the district court of Hall county. Heard below before HARRISON, J.

John E. Kavanaugh and *Steele Bros.*, for appellant.

T. J. Doyle and *W. A. Prince, contra.*

MAXWELL, CH. J.

This is an action to quiet the title to lots 4 and 5, in block 22, in Russell Wheeler's addition to Grand Island. The plaintiff contends that a deed for the above lots, signed in her name and acknowledged before one Gearon, a notary public, is a forgery. This is denied by the defendants. On the trial of the cause the court found the issues in favor of the defendants and dismissed the action. The plaintiff testifies that she did not execute the deed in controversy. The original deed which purports to have been signed and acknowledged by her before a notary public is now before us; also her signature to a petition which is admitted to be genuine. We have examined both signatures with a good microscope, and we are constrained to believe that her name on the deed was written by herself. In addition to this a number of experts were called as witnesses in the court below, who, after comparing the signatures, pronounced the name of the plaintiff on the deed to be her genuine signature. In addition to this testimony, we have the certificate of the notary before whom the deed purports to have been acknowledged. In the case of *Phil-*

lips v. Bishop, 35 Neb., 487, it was held that 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. That in our view is a correct statement of the law. The judgment is right and is

AFFIRMED.

THE other judges concur.

JAMES L. RODGERS ET AL. V. MOSES H. LEVY.

FILED APRIL 11, 1893. No. 4668.

1. **Res Adjudicata.** One A brought an action of replevin against B, which was dismissed because A had not legal capacity to sue. *Held*, That the judgment of dismissal for the cause stated did not bar a future action for the same property.

2. ———. Where a cause is dismissed because the plaintiff has not legal capacity to sue, and the defendant thereupon has a jury impaneled to try the right of property which is awarded to him, he thereby cannot bar the plaintiff from maintaining a second action of replevin for the same goods.

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

Bowen & Bowen, for plaintiffs in error.

Capps & Stevens, contra.

MAXWELL, CH. J.

This is an action of replevin brought by Levy against Rodgers before J. E. Pierce, a justice of the peace. A change of venue was then applied for under the statute and the cause transferred to Geo. Lynn, a justice of the

peace. A transcript in the case from his docket is as follows:

"October 19, 1889. Come now the parties in this action, plaintiff and defendants in person, and by their attorneys. Defendants file their motion to dismiss said action for the reason that plaintiff has not legal capacity to sue. Motion sustained, with leave to plaintiff to amend by interlineation. To which defendants object. Defense thereupon demand a jury to determine the right of property in action commenced was in the defendants, and we assess the value of said property in the sum of $160. We also assess the damages sustained by said defendants by reason of the detention of the said property at the sum of $6.

"DANIEL C. BROWN, *Foreman.*

"It is thereupon considered by me that aforesaid defendants have a return of the property taken on said writ of replevin, and that they recover their damages for the withholding of the same assessed at $6, or in case a return of said property cannot be had, that they recover of said plaintiff, Moses H. Levy, the value thereof, assessed at $160, and costs of suit, taxed at $17.40.

"GEO. LYNN, *Justice Peace.*"

Levy thereupon brought a second action of replevin for the same property before a justice of the peace, and it was dismissed because the justice seems to have supposed he had no jurisdiction. The case was appealed to the district court, where Rodgers, in answer to the petition of Levy, filed a general denial. On the trial of the cause a jury was waived and the cause submitted to the court, which rendered judgment as follows:

"On this 7th day of June, 1890, this cause comes on to be heard, and by stipulation of parties in open court a jury is waived, and by agreement made as aforesaid cause is tried to the court on the petition, answer, and reply, and the evidence, and the same being submitted to the court, said court finds that at the commencement of this action the

plaintiff had a special ownership in the property described in the petition herein, to-wit: 1 black mare about 10 years old, 1 bay horse colt, 1 bay mare about 4 years old. The court further finds that said special ownership is had by virtue of a chattel mortgage given by the defendants herein to A. Loeb, or order, to secure two certain promissory notes of the said defendants herein payable to said A. Loeb, which amounts, principal and interest, to $89; the court further finds that after the maturity of said notes the defendants herein refused to deliver to plaintiff herein the property described in said mortgage in accordance with the conditions thereof. The court further finds that at the commencement of this action the plaintiff, by virtue of his special ownership, was entitled to the immediate possession of the same, and that the defendants wrongfully and unlawfully detained said property from the possession of this plaintiff. The court further finds that the plaintiff has been damaged by the wrongful detention of said property in the sum of one cent. It is therefore considered and adjudged by the court that the plaintiff recover from the defendants one cent as damages for the wrongful detention of the said property, also his costs herein expended taxed at $——."

The sole question presented to this court is, does the judgment of dismissal by the justice of the peace in the first action bar a recovery in this? It will be observed that the cause was dismissed for want of legal capacity of Levy to sue. This is not a judgment upon the merits but merely in abatement of that action. Thus, an answer that the plaintiff was *non compos mentis* presents matter in abatement only. (*Jetton v. Smead*, 29 Ark., 372; Cobbey, Replevin, sec. 773.) A judgment of nonsuit does not bar the plaintiff from another action for the same cause. (*Hackett v. Bonnell*, 16 Wis., 471; *Westcott v. Bock*, 2 Col., 335; *Daggett v. Robins*, 2 Blackf. [Ind.], 415; Wells, Replevin, sec. 781; Cobbey, Replevin, sec. 1191.) The action being dismissed as to Levy because of his want of legal capacity

to sue left the right to the property undetermined, and the fact that a jury was called after the cause was dismissed as to Levy did not operate as a bar to a future action. The judgment is therefore

AFFIRMED.

THE other judges concur.

ABBIA M. GEORGE, APPELLANT, V. T. EDNEY ET UX., APPELLEES.

FILED APRIL 11, 1893. No. 4444.

1. **Married Women:** LIABILITY FOR NECESSARIES FOR FAMILY. Under the provisions of section 1, chapter 53, Compiled Statutes, which declare "that all property of a married woman not exempt by law from sale on execution or attachment shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against her husband for such indebtedness has been returned unsatisfied," the wife is in fact surety for her husband and judgment must be recovered against her before her separate estate can be levied upon and sold for such necessaries.

2. ——: ——: PLEADING. If from the facts stated in a petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie.

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

Greene & Hostetler, for appellant.

F. L. Huston and *Evans & Thompson, contra.*

MAXWELL, CH. J.

A general demurrer to the petition was sustained in the court below and the action dismissed. The petition is as follows:

"The plaintiff complains of the said defendants and says that said defendants are husband and wife; that on the 17th day of December, 1889, plaintiff obtained a judgment against the said T. Edney in the court of James Nichols, justice of the peace in and for Buffalo county, for the sum of $200; that said judgment was for necessaries furnished by plaintiff's husband, T. Q. George, to said T. Edney, and used in the said family of T. Edney; that said account was duly assigned to this plaintiff before the action was commenced; that after the rendition of said judgment plaintiff procured an execution to be issued against said T. Edney, which said execution was placed in the hands of E. A. Cutting, a constable in said county, and was by him returned unsatisfied for the reason that no goods or chattels or other property of said defendant could be found on which to levy; that said defendant T. Edney has no real estate or other property on which a levy can be made in the state of Nebraska; that said defendant Ida M. Edney, the wife of the said defendant T. Edney, is the owner in fee of the following real estate situated in the county of Buffalo, and state of Nebraska, to-wit: the north half of lots 326 and 327, in school section addition to the city of Kearney, Nebraska. Plaintiff therefore prays the court that said judgment be declared a lien upon said real estate, and that the said land may be sold to satisfy same, and for such other and further relief as may be just and equitable."

Sec. 1, chap. 53, Comp. Stats., provides: "The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property notwithstanding her marriage, and shall not be subject to the disposal of her husband or liable for

his debts; *Provided,* That all property of a married woman not exempt by law from sale on execution or attachment shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands and tenements whereon to levy and make the same." In other words, the wife is made surety for her husband for the payment of all "necessaries furnished the family of said married woman." She is to be treated like any other surety and must have her day in court before a judgment can be recovered against her. She may be able to show that the goods furnished were not necessaries for the family, or that they were sold upon the exclusive credit of her husband, or she may plead and prove any fact that will show her exemption from liability. This being so, her property cannot be subjected to the payment of the claim until judgment is recovered against her. The petition, however, does not entirely fail to state a cause of action. It does appear that judgment was recovered against the husband for necessaries for the family; that an execution has been issued thereon and returned unsatisfied; that Ida M. Edney is the wife of T. Edney and possesses the property described which it is in effect alleged is not exempt. This being so, a general demurrer will not lie. It does appear that the plaintiff is entitled to some relief from the defendants, and therefore it must be overruled. The petition must be amended, however, and judgment sought against the wife. Our attention has been called to the case of *Frost v. Parker,* 21 N. W. Rep. [Ia.], 507, where judgment was recovered against the husband alone for necessaries furnished to the family and an execution returned unsatisfied, whereupon, without a judgment against the wife, her property was subjected to the payment of the judgment. The Iowa statute is somewhat broader than ours, but we are unable to assent to the reasoning in that case or the conclu-

sion reached. The wife certainly occupied the relation of surety for her husband, and was entitled to make any defense in her favor that was then in existence. This she seems to have been denied, which is a wide departure from the just rules that generally prevail in that able court. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

FIRST NATIONAL BANK OF DENVER v. HENRY C. SCOTT.

FILED APRIL 11, 1893. No. 4515.

1. **Bill of Sale**: GOODS SUBSEQUENTLY MINGLED WITH PROPERTY TRANSFERRED. The owner of a mill executed a bill of sale to a bank on a large quantity of flour, feed, and other property in the mill. Prior to the execution of the bill of sale the mill owner had ordered several cars of wheat from a warehouse-man in another county, and one car so ordered was shipped one day after the execution of the bill of sale and two days thereafter received at the mill, and a portion or all ground into flour and mixed with the stock in the mill. *Held*, That in no event did the bill of sale cover that wheat, and the person who claimed to be the owner of the mill was liable for the value of the wheat.

2. ———: ———: REVIEW: HARMLESS ERROR. Where the proof on the essential facts in the case is practically undisputed and the verdict conforms to the proof, the verdict will not be set aside even if some of the instructions are not entirely accurate.

3. ———: ———. Where personal property, such as wheat, has been delivered to a mill and wrongfully converted into flour and stored with other flour belonging to the mill owner, the owner of the wheat will be entitled to such portion of the flour as the wheat would probably produce.

ERROR from the district court of Webster county. Tried below before COCHRAN, J.

Case & McNeny and *J. S. Gilham*, for plaintiff in error.

St. Clair & McPheely, *contra*.

MAXWELL, CH. J.

On the 21st of December, 1888, the Red Cloud Milling Company executed a bill of sale to the plaintiff in error on "all the flour, feed, meal, and grain of all kinds, manufactured and unmanufactured, now in the mill, elevator, cribs, and warehouse of the Red Cloud Milling Company, at Red Cloud, Nebraska; 100 head of steers, cows, and calves now in the feed yards of the said milling company; one span of black mares, one set of double harness, one lumber wagon, all grain on track at Red Cloud, Nebraska." At the time this bill of sale was executed there were about sixty tons of flour and a large amount of bran and feed in and attached to the mill. There seems to have been no immediate change of possession. Prior to the execution of the bill of sale the milling company had ordered several cars of wheat from the defendant in error, and on the 22d of that month one car was shipped by him to the milling company from Axtell, Nebraska, and was received on December 24th of that year, and a portion, at least, was ground into flour and mixed with the other flour stored in the mill, and the like mixture seems to have been made of the wheat. The defendant in error thereupon commenced an action by attachment against the milling company to recover the value of the car of wheat, viz., $619\frac{50}{100}$ bushels of wheat at 90 cents per bushel, amounting to $557.85. The return of the sheriff on the order of attachment is as follows:

"December 29, 1888, received this order, and according to the command thereof I did on the same day, at 11 o'clock A. M., in the presence of H. H. Eckman and Wesley Street, two credible persons, residents of the county, attach the following goods and chattels, to-wit: About

300 bushels of wheat valued at 80c., $240; 1050 50-lb. sacks of R. C. flour, $1.37½, $1,443.75; 20 50-lb. sacks of White Loaf at $1.62½, $32.50; 130 50-lb. sacks of New Deal at $1 per sack, $130; and after administering an oath to said H. H. Eckman and Wesley Street to make a true inventory and valuation of said property in writing, I then with them made an inventory and appraisement of said property, which is herewith returned; I also, on the same day, delivered to said defendant, the Red Cloud Milling Company, by Dwight Jones, president, and R. D. Jones, secretary, a certified copy of this writ. After getting 1,200 sacks of flour I released all wheat, and it was turned back to Dwight Jones, president of the Red Cloud Milling Company.

H. C. SCOTT, *Sheriff.*

"By J. C. WARNER, *Dept.*"

The plaintiff in error thereupon brought an action of replevin and reclaimed the property. The defendant in answer to the petition alleged: "That on or about the — day of ——, 188–, the Red Cloud Milling Company, a corporation organized and doing business in and under the laws of the state of Nebraska, was indebted to A. G. Scott & Son in the sum of $1,000.35 in a cause of action arising upon the purchase by said Red Cloud Milling Company of a quantity of wheat from the said A. G. Scott & Son, and on said last named date the said A. G. Scott & Son commenced an action by attachment against the said Red Cloud Milling Company in the district court of Webster county, Nebraska, and caused an order of attachment for the sum of $1,000.35 to be issued in said cause and delivered to the defendant, as sheriff aforesaid, for levy; that under and by virtue of said order of attachment, and in pursuance of the command thereof the defendant, as such sheriff, levied upon 1,050 sacks of wheat flour 'Red Cloud Brand,' 20 sacks of wheat flour 'White Loaf Brand,' and 130 sacks of wheat flour 'New Deal Brand,' being the goods and chattels mentioned in said petition herein, and took the same into his custody;

that said flour was at the time of said levy and still is the sole property of the said Red Cloud Milling Company, and was liable to be levied upon for the satisfaction of said debt and taken under said order of attachment for the satisfaction of the same; that said action is still pending and undecided in said district court; that the defendant, under and by virtue of said writ of attachment, held the possession of said flour until on or about the 27th day of March, 1889, when the same was taken from his possession and custody by C. Schenck, coroner of said Webster county, Nebraska, by virtue of a writ of replevin in this action. Wherefore defendant prays a return of said goods, or if a return cannot be had, then for the value thereof to the extent of said order of attachment, to-wit, $1,000.35, with interest and costs of suit."

On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of $557.85 and 1c. damages. They also found the value of the property levied upon was $1,200.

A number of objections are made on behalf of the plaintiff in error to one of the instructions. In our view, however, these objections are not material, as it is evident that the verdict is the only one that should be rendered under the proof. It is clearly shown that a car of wheat containing $619\frac{50}{100}$ bushels was received and placed in the mill after the bill of sale was executed. This was not covered by the bill of sale, and therefore the party using it is liable for its value. The plaintiff in error claims to have been in possession of the mill and was running it when the wheat was received and therefore is liable for the same, and the jury so found. The case is simple and did not require a volume of instructions for the guidance of the jury. Judgment was rendered in the attachment case in favor of the defendant in error before the trial in this case took place, and $347.50 appears to have been realized from the property attached therein. The judgment

on the attachment in favor of the defendant in error, and against the milling company, was for the sum of $1,029.35 and costs, from which the sum of $347.50, amount due from garnishees, is to be deducted. The jury in the case at bar, however, found that as against the plaintiff in error the recovery should only be for the value of the car of wheat.

2. Objections are made to a general levy of the attachment upon the property of the plaintiff in error. We do not care to impute wrong motives to the plaintiff in error in appropriating the wheat. Where a confusion of goods is made fraudulently by one who owns a part thereof, and after being made it is impossible to identify or apportion the property of each owner, the one not at fault will be entitled to the whole. This is upon the principle that a party by wrongfully mixing the goods of another cannot thereby deprive the other of his property or profit by his own wrong. Therefore, it being impossible to separate the mass, he must lose the whole. (*Jewett v. Dringer*, 30 N. J. Eq., 291). But forfeitures are not favored in law, and it must be an extreme case that will justify the taking of the property of one person and giving it to another. Whenever it is possible, therefore, to make a division of the property and give to each one his share a court will make such division. Thus in *Chandler v. De Graff*, 25 Minn., 88, where the plaintiff delivered to the defendant about 20,000 railroad ties in excess of the contract, which the defendant refused to accept, but had mingled the same with those which were accepted so that they were undistinguishable, the plaintiff was permitted to take out of the mass of the ties the number of such excess. The same rule in substance was applied in *Stone v. Quaale*, 29 N. W. Rep. [Minn.], 326; *Arthur v. Chicago, R. I. & P. R. Co.*, 61 Ia., 648; *Inglebright v. Hammond*, 19 O., 337. Although the conversion of the wheat to flour was made without the consent of the defendant in error, yet the property in its changed form is susceptible of a fair division and this

seems to have been made by the jury. The property being susceptible of an equitable division, and being so divided, the plaintiff in error has no cause of complaint. The judgment is right and is

AFFIRMED.

THE other judges concur.

GUTHRIE & COMPANY v. M. ALICE RAY.

FILED APRIL 11, 1893. No. 5018.

Subrogation: PAYMENT OF NOTES BY SURETY. One A mortgaged her separate estate to secure loans from a bank in favor of a private corporation to the extent of $5,000. It was agreed that as each loan was effected the corporation should deposit notes held by it as collateral security for the loan, the security given by it to be merely contingent. A large number of loans were made in this way and notes as collateral deposited with the bank. Afterwards the bank required A to pay the amount due to it. This she did by mortgaging her separate estate, and she thereupon received from the bank the collateral notes held by it. *Held*, That the testimony clearly established the fact that the notes were held by the bank in good faith before due to secure a loan and debt, and that as A, as surety, had paid the same, she was subrogated to the rights of the bank and stood in its place.

ERROR from the district court of Lancaster county. Tried below before FIELD, J.

A. J. Cornish, for plaintiff in error.

A. G. Greenlee and *Marquett, Deweese & Hall, contra.*

MAXWELL, CH. J.

In December, 1883, the Ray Plow Company, of Burlington, Iowa, was anxious to obtain advances of money

from the Merchants National Bank of that place. To secure the bank it was proposed to deliver to the bank security upon the property of the defendant in error to the amount of $5,000, with this understanding: that the plow company should deliver to the bank from time to time, as it drew money, certain notes received by it in the course of its business. Under this arrangement the defendant in error gave the security, and the plow company from time to time deposited collateral notes with the bank and received money to be used in its business. Under this arrangement the following notes were delivered to the bank as collateral security for said loans: "Note for $400, dated December 1, 1883, and due June 1, 1884, executed by Guthrie & Co. to the Ray Plow Company. Note for $500, dated August 26, 1884, due October 1, 1885, executed by Guthrie & Co. to the Ray Plow Company. Note for $500, dated August 26, 1884, due October 1, 1885, executed by Guthrie & Co. to the Ray Plow Company. Note for $108.60, dated March 10, 1884, due October 1, 1884, executed by C. A. Hamilton to Guthrie & Co., and by them indorsed to the Ray Plow Company. Note for $256.50, dated March 10, 1884, due December 1, 1884, executed by Hayzlett & Green to Guthrie & Co., and by them indorsed to the Ray Plow Company. Note for $256.50, dated March 10, 1884, due January 1, 1885, executed by Hayzlett & Green to Guthrie & Co., and by them indorsed to the Ray Plow Company." The jury returned a verdict in favor of the defendant in error for the sum of $3,-177.63, upon which judgment was rendered. The testimony shows that prior to giving these notes Guthrie & Co. and the Ray Plow Company had entered into an agreement as follows:

"BURLINGTON, IA., Dec. 1, 1883.

"Agreement made and entered this day by and between the Ray Plow Company, of Burlington, Iowa, party of the first part, and Guthrie & Co., of Lincoln, Nebraska, party

of the second part, whereby the party of the first part does appoint the second party their agents for the sale of their products in the state of Nebraska, excepting ——, for a period of one year from this date, and subject to the following conditions: The party of the first part to use all diligence possible towards filling the orders of the said second party promptly and with goods made in a good and workmanlike manner, and subject to the usual printed warranties. To allow the second party a commission of ten per cent on the net sales, said commission to be retained from the proceeds of sales and in the proportion of cash and notes as received. It is agreed that commission on goods returned from any cause and upon such sales as are not collectible are to be refunded to first party. To allow also the amount of freights paid by second party in case quantities and rates to Lincoln, Nebraska, on such goods coming under this contract, said freights to be deducted from the proceeds of sales and allowed as credits on account at semi-annual settlements, July 1st and December 1st.

"The second party agrees to thoroughly canvass the trade in Nebraska covered by this contract, and does hereby make their order for 500 check rowers, including those now on hand, and to make further orders as the trade requires. To sell check rowers only to first-class dealers, both as to care of selling and of operating goods, and of good reputation and ability for payment of their debts. To take all orders upon the blanks furnished by the first party, and to send copies of such orders to first party from time to time. To sell check rowers at such prices as are ruling and current on such checks as the Haworth, Barnes & Joliet, procuring at all times as high prices and as short time as are obtainable. To do all expert work necessary in operating successfully without charge to first party, but to notify first party promptly of such check rowers as are unable to make work satisfactorily, and their failure or neg-

lect to make same work successfully, such check rowers are to be returned or held subject to order and expense of first party. Second party also agrees to make good any defect promptly and as cheaply as possible to the first party whose expense this is. To such first party, their note due October 1, 1884, for one-half of the amount of check rowers as received, but having the privilege of cash payment June 1, for a discount of 10 per cent to apply as credits on their October 1st note, all dealers' notes guaranteed by them at maturity on or about October 1, 1884. To tender an account of sales at close of each month and excess then due (less commission) over the amount of their notes, given to be settled by good dealers' notes, drawn up in good form, and to be sent in as promptly as possible. It is understood that commission allowed by first party to second party covers all charges for selling, receiving, handling, storing, insuring, forwarding, collecting, etc. Second party also agrees to look after and to procure best possible security on such accounts and notes as are given to first party when necessary and without expense to first party. The wagons now on hand to be sold at best prices and terms obtainable, for which a commission of six dollars is to be deducted on amount then due in excess of the $800 notes, given this day as an advance payment on the seventeen wagons now on hand, is to be settled by dealers' notes as heretofore. Other goods, now in store of Guthrie & Co., subject to the same commissions, terms, etc., and such other goods as may be ordered by Guthrie & Co. to be subject to a special agreement.

"Witness our hands this day above written.

"RAY PLOW COMPANY,
"By GEORGE O. RAY, *Treasurer.*
"GUTHRIE & COMPANY."

The notes in question were delivered to the plow company under said agreement, and by it delivered to the bank as collateral security. The bank required the defendant in

error to pay the amount due from the plow company, which she did by mortgaging her separate estate, and upon the payment of the debt the bank turned over the collateral notes in its hands to the defendant in error, and she brings this action thereon. There are many questions discussed in the brief of the defendant in error which do not arise in the case and therefore will not be considered. These facts are clearly established by the proof, viz., that the bank was a *bona fide* holder of the notes sued on, and that the defendant in error had in good faith mortgaged her separate estate as surety to secure the loans made by the bank to the Ray Plow Company, and that she, upon paying the amount due to the bank, had received from it the notes in question. These facts being clearly proved, she stands in the same position as the bank, and may recover on the notes. The judgment is right and is

AFFIRMED.

THE other judges concur.

MINNEAPOLIS HARVESTER WORKS v. A. SMITH.

FILED APRIL 11, 1893. No. 5109.

1. **Statute of Limitations:** FOREIGN LAWS. Where a person is a resident of another state when a cause of action accrued against him, and afterwards, but before the debt has become barred by the statute of such state, he becomes a resident of Nebraska, the statute of limitations will commence to run in his favor here from the date of his coming into the state, and not before.

2. ———: ———. In December, 1881, the defendant, a resident of the state of Iowa, gave the plaintiff his promissory note due January 1, 1884, and payable in that state. He removed to Nebraska in 1888, and suit was commenced on the note in this state on July 13, 1891. *Held*, The action was not barred.

3. ——: ——: PLEADING. In pleading the statute of limitations of a foreign state, it is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on.

4. ——: ——: ——. *Held*, That the petition states a cause of action.

ERROR from the district court of Boone county. Tried below before HARRISON, J.

N. C. Pratt, for plaintiff in error.

J. S. Armstrong, contra.

NORVAL, J.

Plaintiff in error instituted its action in the county court of Boone county, to recover the amount due on a promissory note executed by the defendant in the state of Iowa, on the 16th day of December, 1881. The county court sustained a general demurrer to the petition, and the plaintiff not desiring to amend its petition, the court dismissed the action. The plaintiff prosecuted a petition in error to the district court, where the decision of the county court was affirmed. The petition, omitting the title, is as follows:

"Comes now the plaintiff in the above entitled cause, and complains of the defendant, and alleges:

"First—That said plaintiff was on the 16th day of December, 1881, and still is a corporation, duly organized under the laws of Minnesota.

"Second—That the defendant on the 16th day of December, 1881, made his certain promissory note at Wheatland, Iowa, and delivered the same to the plaintiff; said note is hereto attached, marked Exhibit 'A,' and made a part of this petition.

"Third—That by the laws of Iowa the statute provides that an action of debt on a promissory note may be com-

menced within ten years from the time the cause of action accrued.

"Fourth—That the defendant has resided in the state of Nebraska, since the giving of said note and prior to the commencement of this action, for the space of three years only.

"Fifth—That no part of said note has been paid, and there is now due thereon the sum of $318.75, with interest at the rate of ten per cent per annum from the 16th day of December, 1881.

"Sixth—The plaintiff therefore prays judgment against the defendant for the sum of $624.41, and interest thereon at the rate of ten per cent per annum from the 13th day of July, 1891."

Attached to, and made a part of, the petition is a copy of a promisory note signed by A. Smith, dated at Wheatland, Iowa, December 16, 1881, due on or before January 1, 1884, payable to the order of the Minneapolis Harvester Works, and calling for the sum of $316.74, with interest thereon at ten per cent from date thereof until paid.

The sole question presented for review is whether the petition states a cause of action. Counsel for the defendant not having argued the case orally, or filed a brief in this court, we are not positive that we are apprised of the exact ground upon which the county and district courts decided that the petition was defective. Our understanding is that they held that the statute of limitations had run against the note.

We do not think that the action is barred by the statute of this state. By section 20 of the Code of Civil Procedure it is provided that "If, when a cause of action accrues against a person, he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed; and if after the cause of the action accrues he de-

part from the state, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

This action was instituted on the 13th day of July, 1891, which was more than seven years after the maturity of the note. But it appears from the petition that the cause of action arose in the state of Iowa, and that the defendant had resided in this state only three years prior to the bringing of this suit. Under the provisions of the section quoted, the statute of limitations did not begin to run against the note in this state until the defendant moved to Nebraska. Since he had not, when suit was brought, been a resident of the state for five years, the note was not outlawed here. The time the note had run after its maturity, until the defendant moved into the state, cannot be added to the time of his residence here in order to create a bar of the statute. (See *Edgerton v. Wachter*, 9 Neb., 500; *Harrison v. Union National Bank*, 12 Id., 499; *Nicholas v. Farwell*, 24 Id., 180.)

Sections 18 and 21 of the Code read as follows:

"Sec. 18. All actions, or causes of action, which are or have been barred by the laws of this state, or any state or territory of the United States, shall be deemed barred under the laws of this state.

"Sec. 21. When a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this state as though it had arisen under the provisions of this title."

It the statute of limitations of the state of Iowa had run in favor of the defendant while he was yet a resident of that state, then, under the provisions of the above sections, this action must fail. We concede that when a party relies upon a statute of another state to make out his cause of action or defense, he must plead the statute upon which

he depends in the same manner he would any other fact. It will be observed that in this case the petition alleges, and the demurrer admits the truth thereof, "That by the laws of Iowa the statute provides that an action of debt on a promissory note may be commenced within ten years from the time the cause of action accrues." Is the foregoing a sufficient pleading of the statute of Iowa? We think the allegations sufficient to authorize proof of the statute of limitations of that state. The averment is not the statement of a mere conclusion, but of a fact. While it is the better, and safer, practice in pleading the statute of another state to set out a copy thereof in the pleading, yet, we think, it is sufficient to allege the substance of the statute desired. That, at least, was done in the case at bar. If the defendant wished a more specific allegation, he should have moved to make the petition more definite and certain.

If the statute of Iowa is insufficiently pleaded, the presumption would then be, until the contrary was made to appear, that the statute of limitations of that state relating to promissory notes is the same as our own, viz., five years. Inasmuch, therefore, as the petition shows that only four years had elapsed between the maturity of the note and the time the defendant moved to this state, the action was not barred at the time he became a resident here.

It follows from what we have already stated that the judgments of the county and district courts must be reversed, the demurrer overruled, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

JOHN W. FINES V. TUCKER BOLIN.

FILED APRIL 11, 1893. No. 5070.

1. **Chattel Mortgage Upon Growing Crops:** NOTICE: LIEN: PURCHASER OF GRAIN WHEN HARVESTED. A mortgage upon growing corn is not constructive notice to a dealer in grain who, in good faith, in open market purchases such corn from the mortgagor after the same has been husked by the latter and placed in a pile or crib. But the rule does not prevail where the person who assisted in husking the corn afterwards becomes the purchaser, while it is yet in the same pile or crib, and receives it there, having at the time actual knowledge that it is the same corn he helped harvest. In such case the purchaser will take the corn subject to the lien of the mortgage.

2. **Joint Owners of Crop:** DEMAND FOR DIVISION: REPLEVIN. Where corn in a single pile or crib, owned by two tenants in common, is in the exclusive possession of one of such owners, but both being equally entitled to the possession thereof, the other joint owner, if his co-tenant refuses a division when properly demanded, may recover his portion of the grain by an action of replevin.

ERROR from the district court of Hall county. Tried below before HARRISON, J.

Thompson Bros., for plaintiff in error.

Dryden & Main and *W. A. Prince, contra.*

NORVAL, J.

The plaintiff in error was plaintiff in the court below. The action was to recover the possession of a quantity of corn undivided. The property was taken by the sheriff under the replevin writ, and delivered to the plaintiff. Upon the trial the jury returned a verdict for the defendant, upon which judgment was entered.

It appears from the bill of exceptions that the plaintiff is the owner of a farm of 160 acres in Hall county, which

he leased for the season of 1889 to the defendant and one Oscar Dewitt, jointly. By the term of the lease plaintiff was to receive as rent two-fifths of all the crops and the tenants were to have the remaining three-fifths thereof. About fifty-five or sixty acres were planted to corn, and the remainder of the land was put in oats. A few days after the corn was planted, Dewitt gave the plaintiff a chattel mortgage upon a threshing machine, and on his one-half of the undivided three-fifths of said crop of corn, to secure the payment of an indebtedness of $159.55 of Dewitt's to the plaintiff, which mortgage was duly filed in the county clerk's office on the day it was executed. There was testimony introduced on the trial tending to show that the defendant was present at the time the mortgage was taken, and that he had actual knowledge of its contents. The defendant, while admitting he was in the office of the notary when the mortgage was drawn, denies positively that he had any notice of what property was described therein.

It is undisputed that after the corn crop had been matured plaintiff's share was gathered by the tenants and delivered to him. The other three-fifths of the corn, amounting to about 1,900 bushels, was husked by Bolin and Dewitt, and piled upon the ground in a single heap; but there was never any division made of the corn belonging to the tenants. Bolin had also placed in the same pile 250 bushels of corn owned by him, which was raised on lands belonging to one Robbins.

On the 16th day of December, 1889, Dewitt sold his interest in the corn and some millet hay to the defendant, and executed a bill of sale for the same. Subsequently Bolin refused to deliver to plaintiff any portion of the corn covered by said chattel mortgage, and this action was instituted, plaintiff obtaining under the writ 1,051 bushels of said corn.

Objection is made to the 5th, 6th, and 7th paragraphs of the court's charge to the jury, which are as follows:

"5. The jury are instructed that the filing of a chattel mortgage upon personal property in the office of the clerk of the county where the mortgagor resides, is notice to all parties that there is such mortgage, and persons who buy the same take such property subject to such mortgage. You are instructed that the above is the general rule of law, and you are further instructed that if a mortgage is given upon a growing crop of grain, which is afterwards husked or harvested and placed in piles or cribs, that the filing of the mortgage in the office of the county clerk will not be constructive notice of such mortgage; and third, parties who purchased it after it is husked and placed in the piles or crib without actual notice of such mortgage will take it free from the lien of such mortgage.

"6. You are instructed that if you believe from the evidence in this case that Oscar Dewitt gave the plaintiff a chattel mortgage upon his share of certain corn when growing in the field, and that defendant and Dewitt raised said corn together, and after the giving of said mortgage husked the corn and piled it on the premises occupied by defendant without objection on the part of the plaintiff, and that subsequently defendant, in good faith and without actual notice of the mortgage of the plaintiff, purchased of Oscar Dewitt his share or portion of said corn, then you will find for defendant, even though you also find that plaintiff's mortgage was duly filed in the office of the county clerk of Hall county, Nebraska.

"7. If you believe from the evidence that Oscar Dewitt gave the plaintiff John F. Fines a mortgage upon the corn in controversy while growing in the field, that the same afterwards was husked and placed on the land of defendant, or in his possession, that defendant after the giving of said mortgage by Dewitt to plaintiff purchased the corn of Dewitt, and at the time he purchased it had actual knowledge, or notice, or knew that the plaintiff had a mortgage upon the corn, then your verdict will be for plaintiff, and

you will assess his damages, which, in this case, will be nominal."

This court in *Gillilan v. Kendall*, 26 Neb., 82, held that a chattel mortgage upon growing corn is not constructive notice to third parties of the mortgage upon the corn after it has been husked and placed in piles or cribs, and that where one, in good faith in open market, purchases such corn from the mortgagor without actual notice of the existence of the mortgage, will take it free from the lien of the mortgage. The case before us, in the facts, is clearly distinguishable from *Gillilan v. Kendall, supra.* In the case cited the corn was purchased by Kendall & Smith at their place of business, in good faith and in open market, and they had no knowledge of the existence of the mortgage upon the corn, except such constructive notice as the proper filing of the mortgage gave them. In the case at bar Bolin was not an innocent purchaser for value in the open market. He took the corn in payment of a pre-existing debt. He had helped to gather the corn and place the same in a pile. The filing of the mortgage was constructive notice to him of the lien of the mortgage while the corn was standing in the field, and the defendant having assisted in husking the corn, such filing of the mortgage was sufficient notice to him of the existence of the mortgage upon the same corn after it was harvested and while it was in the pile. The court failed to submit to the jury this view of the case, and the instructions were therefore erroneous.

But it is contended that the judgment should not be reversed for the errors in the charge to the jury for the reason that the verdict is the only one that could have been properly returned under the evidence. Stated differently, that the plaintiff cannot maintain replevin for an undivided interest in the corn. Doubtless, to recover personal property under a writ of replevin, the plaintiff must establish that he is entitled to the immediate possession of

the property, and that the same is wrongfully detained by the defendant. In this case the point is made that as the mortgage was given by Dewitt upon a growing crop of corn owned by the mortgagor and the defendant jointly, and as the uncontradicted testimony shows that there has never been any actual division of the corn, the defendant's possession was not wrongful, and that replevin cannot be resorted to as a means of partitioning property held in common. It is well settled by the authorities that the owner of an undivided interest in a chattel cannot maintain an action against a co-tenant to acquire its possession, for the reason that all joint owners, unless there is an agreement to the contrary, are equally entitled to the possession thereof, and neither has the right to the immediate and exclusive possession of the same as against the others. The doctrine above stated, that one joint tenant cannot sustain replevin against his co-tenant, applies more particularly to a single piece of property, or to things in their nature so far indivisible that the share of one is not susceptible of delivery without the whole. But it should not obtain in a case like this, where the property is absolutely alike in quality and value, and is readily divisible by measurement or weight, such as corn in the crib or pile. When a person is entitled to half of one hundred bushels of corn in a mass, he has a right to fifty bushels in severalty, and if his co-tenant refuse a division, when properly demanded, he may recover his portion of the grain by replevin. (Wells, Replevin, sec. 205; *Sutherland v. Carter*, 52 Mich., 151; *Kaufman v. Schilling*, 58 Mo., 219; *Wattles v. Dubois*, 34 N. W. Rep. [Mich.], 672; *Grimes v. Cannell*, 23 Neb., 187; *Ellingboe v. Brakken*, 36 Minn., 156.)

In the case at bar the defendant declined to give up any portion of the corn, and denied that plaintiff had any interest therein, but repudiated the co-tenancy and claimed to own the property in entirety. By such refusal to recognize the rights of the plaintiff the defendant ought to be pre-

cluded from now raising the point that there had never been any division of the crop, or that he held possession thereof as tenant in common.

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

REVERSED AND REMANDED.

THE other judges concur.

GOTHARDT FISCHER v. J. H. COOLEY.

FILED APRIL 11, 1893. No. 4163.

Justice of the Peace: CONTINUANCE: DISMISSAL. On application of the defendant, the plaintiff consenting thereto, a justice of the peace adjourned a suit pending before him for more than ninety days from the return day of the summons. Afterwards, on the day to which the cause stood adjourned, the defendant objected to the jurisdiction of the justice on the ground that the action had been continued beyond the ninety days limited by the statute, which objection was overruled. *Held*, That the adjournment did not operate as a discontinuance of the action, and that the defendant could not claim a dismissal by reason of the postponement of the trial at his own instance.

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

Bowen & Hoeppner, for plaintiff in error.

C. H. Tanner, *contra*.

NORVAL, J.

This suit was brought by J. H. Cooley against Gothardt Fischer, on the 17th day of August, 1888, before J. G. Hayzlett, a justice of the peace, to recover the amount due

upon a promissory note. A summons was issued returnable on the 21st of that month. The parties appeared on the day set for trial, and the defendant applied for and obtained a change of venue, the case being transferred to the docket of C. S. Wilson, a justice of the peace. The defendant then filed a motion for a continuance for thirty days, which was granted, and the time for trial was set for September 27th. On that day he made an affidavit for a second change of venue, and thereupon, by stipulation of the parties, the case was sent to Justice W. B. Burton, and the hearing set for the 20th day of November. On this day, by consent, the trial was postponed to November 30th, and afterwards, on said date, on the written stipulation of the attorneys of the respective parties, the case was again adjourned until February 1, 1889, at 1 o'clock P. M. On that day, by consent of parties, a continuance was had until the 4th day of that month at 2 o'clock P. M., on which day defendant appeared specially and objected to the jurisdiction of the court, on the ground that more than ninety days had elapsed since the return of the summons; which objection was overruled, and defendant making no further appearance, judgment was rendered against him for $131.90, besides cost. The defendant prosecuted error to the district court, where the judgment of the justice was affirmed, and he now brings the case to this court on error.

The contention of the plaintiff in error is, that the justice had no jurisdiction to try the case; in other words, that the postponement of the trial by successive adjournments beyond ninety days from the time of the return of the summons worked a discontinuance of the cause, and ousted the justice of jurisdiction.

Section 961 of the Code of Civil Procedure, relating to continuances before justice courts, provides, in effect, that an adjournment may be had on the application of either party at the return day, or at any subsequent time to which the cause may stand adjourned, for a period not to exceed

ninety days from the time of the return of the summons, upon the applicant making the showing required by the statute. Under said section, when a justice of the peace adjourns a suit pending before him, without the consent of parties, for more than ninety days from the return day, it operates as a discontinuance. But the rule is otherwise where such continuance is granted by consent or on the agreement of the parties. The party on whose application a cause in a justice court is adjourned beyond the period limited by the statute is estopped to claim a dismissal by reason of such adjournment. (*Jennerson v. Garvin*, 7 Kan., 136.)

While in the case under consideration the trial did not take place before the justice until more than ninety days after the return day of the summons, the record discloses that the cause was continued by successive adjournments until the day upon which judgment was entered, and that each adjournment was obtained, either on the application of the plaintiff in error, or by the consent of both parties. The justice had jurisdiction of the subject-matter, and jurisdiction over the person of the defendant below was not lost by the several continuances, since they were granted upon his procurement or with his consent. He cannot now take advantage of the error or irregularity in the adjournment of the cause. To permit him to do so would be to allow him to reap a benefit from his own acts. The judgment of the district court in affirming the judgment of the justice of the peace is

AFFIRMED.

THE other judges concur.

McKINNEY, HUNDLEY & WALKER v. FIRST NATIONAL BANK OF CHADRON ET AL.

FILED APRIL 11, 1893. No. 4617.

1. **Sale:** FRAUD BY PURCHASER: RESCISSION: REPLEVIN. **Where goods are sold upon credit induced by the fraudulent representations of the vendee as to his solvency, or ability to pay for the goods bought, the vendor may rescind the sale upon the discovery of the fraud and replevin the goods.**

2. ——: ——: ——: ——: PLEADING. ***Held*, That the petition in the case states a good cause of action in replevin.**

ERROR from the district court of Dawes county. Tried below before KINKAID, J.

Ledwich & Crow, Bartlett, Crane & Baldrige, and *Spargur & Fisher*, for plaintiffs in error.

Albert W. Crites, contra.

NORVAL, J.

This was an action brought by plaintiffs in error to recover the possession of certain goods, wares, and merchandise. The plaintiffs in their amended petition allege:

"First—That the plaintiffs are the owners and are entitled to the immediate possession of the following goods and chattels, to-wit: * * *

"Second—That defendant First National Bank of Chadron, Nebraska, is a banking association duly organized and incorporated under the laws of the United States, and doing business at Chadron, Nebraska. That the defendant the First National Bank of Chadron, Nebraska, wrongfully detains said goods and chattels from the possession of these plaintiffs, and has so wrongfully detained the same for the space of more than five days last past, to plaintiffs' damage in the sum of $50.

"Third—That on or about the 11th day of March, 1889, the plaintiffs sold and delivered to the defendant Charles F. Yates, pursuant to the order of said Yates, the goods above described, and that said goods were received by the defendant Yates; that at the time said goods were so ordered and received by the defendant Yates the said Charles F. Yates, as a firm and as an individual, was, and had for a long time prior thereto been, insolvent to his, Yates' own knowledge, and the said Yates ordered and received said goods while knowing his insolvency and his inability to pay for the same; that he ordered and received said goods with the intent not to pay therefor, and to cheat and defraud the plaintiffs of the purchase price thereof.

"Fourth—That the said Charles F. Yates concealed from the plaintiffs his insolvency and his inability to pay for said goods, and his intention not to pay for the same, and his intention to cheat and defraud the plaintiffs of the purchase price thereof; and the plaintiffs, relying on the solvency and good faith of said Charles F. Yates, and not knowing his fraudulent intention or of his insolvency, sold said goods and shipped the same as hereinbefore stated.

"Fifth—That on the bringing of this suit the plaintiffs elected to rescind said contract of sale without notice thereof and to bring this suit; that they so elected to rescind the same as soon as they were informed of the fraudulent intention and conduct on the part of said Yates; that by reason of such fraudulent conduct and intent, and said election to rescind said sale, the plaintiffs are the absolute and unqualified owners of said goods and merchandise."

The defendant bank answered by a general denial, and the other defendants, Charles F. Yates and Albert Yates, made no appearance in the case.

A trial was had to a jury, who, under the instructions of the court, returned a verdict in favor of the bank, assessing the damages at $765.50, and judgment was entered upon the verdict.

At the commencement of the trial, and before any testimony was received, the defendant bank objected to the introduction of any evidence in the case for the reason that the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against the bank, which objection was sustained by the court, and the plaintiffs took an exception. Thereupon counsel for plaintiffs offered certain depositions in evidence for the purpose of proving the allegations of the petition, to which offered testimony the bank objected on the ground that the petition fails to state a cause of action. The objection was sustained and the plaintiffs were not permitted to introduce any testimony and an exception was taken to the said ruling of the court.

But a single question is presented by the record for the consideration of this court, which is, Does the amended petition copied above state a cause of action against the bank? We are all agreed that the petition sets forth sufficient facts. The gist of the action is the unlawful detention of the property sought to be recovered. The petition specifically avers that the plaintiffs are the owners of the goods and entitled to their immediate possession, and that the defendant bank wrongfully detains the possession of the same from the plaintiffs. The value of the property is also stated. No other averments were necessary to constitute a good petition in replevin. (*Haggard v. Wallen*, 6 Neb., 271; *Daniels v. Cole*, 21 Id., 156.)

The petition also sets up the facts relating to plaintiffs' ownership and their right to possession of the property in dispute. It appears from the allegations that the plaintiffs were induced to sell the goods to Yates upon credit by the fraudulent representations of the latter as to his solvency; that Yates purchased them with the intention to defraud the plaintiffs out of the purchase price; that the plaintiffs delivered the goods in good faith in the belief of the purchaser's solvency, and as soon as they learned of his

financial condition they elected to rescind the contract of sale, and brought their action to recover back the goods. We are of the opinion that the petition charges such fraud as to authorize the vendors to rescind the sale. (*Tootle v. First National Bank of Chadron*, 34 Neb., 863.)

It is said in the brief of the defendant that the petition does not contain a single allegation of fact against the bank. While there is no averment in the petition as to how the bank obtained possession of the goods, the general allegations to the effect that plaintiffs were the owners of and entitled to the immediate possession of the property constituting the subject of the action, and that the same was wrongfully detained by the bank, sufficiently negatives its right to retain the goods. If the bank is a good faith purchaser or mortgagee without notice of the fraudulent purpose of Yates, that is a matter of defense to be established by proof upon the trial. A petition substantially like the one in the case at bar was upheld in *Tootle v. First National Bank, supra.*

For the error of the district court in refusing to permit the plaintiffs to introduce evidence to sustain the allegations of the petition the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOHN BARTON V. ALEXANDER S. MCKAY.

FILED APRIL 11, 1893. No. 4923.

1. **Continuance:** AFFIDAVITS: REVIEW. Affidavits used in support of a motion for a continuance in the district court, to be available in the appellate court, must be made a part of the record by a bill of exceptions.

2. ———: MOTION: COUNTER-AFFIDAVITS. Permitting counter-affidavits to be used on the hearing of such a motion is improper.

3. ———: ———: ———: HARMLESS ERROR. Where such affidavits are used, and the application for a continuance is denied, the judgment will not be reversed for that reason, where the showing of the party making the application, when considered alone, is insufficient to entitle him to a continuance.

4. **Conversion:** THE EVIDENCE in this case examined and considered, and *held* to support the judgment of the court below, and that the verdict is not excessive.

5. **Admissibility of Evidence.** The *ex parte* affidavit of W. S. L. was properly excluded from the jury on the trial of the cause, as it was inadmissible under the rules of evidence.

6. **Rulings on Admissibility of Evidence:** REVIEW. The rulings of the trial court, in not permitting the defendant to answer certain questions propounded to him by his counsel on direct examination, cannot be reviewed by this court, for the reason no offer was made in the trial court to prove the facts which the party complaining assumes the questions would have elicited.

7. **Instructions:** REVIEW. The supreme court will not review the instructions given to the jury by the court below, nor those asked and refused, where the attention of the court has not been called to them in the motion for a new trial.

8. ———: ———. The instructions to the jury in this case, when considered and construed together, fairly state the law applicable to the issues raised by the pleadings and proofs.

9. ———: ———. The defendant's third request to charge was properly refused, inasmuch as it was covered by other instructions which were given.

ERROR from the district court of Saline county. Tried below before MORRIS, J.

F. I. Foss, for plaintiff in error.

Hastings & McGintie and *A. S. Tibbets, contra.*

NORVAL, J.

This action was brought in the court below by Alexander S. McKay against John Barton, as sheriff, for the con-

version of a stock of goods seized on two writs of attachment against Lusk Brothers & Co. From a judgment on a verdict in favor of plaintiff for the sum of $2,331.10, defendant brings the cause to this court for review by petition in error.

The first ground upon which a reversal is asked is the overruling of defendant's motion for a continuance of the action on account of an absent witness. The record fails to disclose that there was any abuse of discretion in denying the application. That every presumption is in favor of the correctness of the decision of a trial court, until the contrary is made affirmatively to appear, is elementary. Error is never presumed. Tested by this rule, the decision under consideration must be upheld. The record fails to inform us upon what facts the trial court predicated its decision. It is true the journal entry recites that the motion for a continuance was heard upon affidavits, and the transcript contains a copy of an affidavit made by Mr. Foss, defendant's attorney, as well as copies of other affidavits, which latter, judging from their contents, were made in resistance of the motion, yet there is absolutely nothing to show that any of the affidavits were read or considered on the hearing of the application; hence, they cannot be considered by this court. Our decisions to the effect that affidavits used in the district court at the hearing of a motion, to be available in this court, must be preserved in the bill of exceptions, ought not to be misunderstood, inasmuch as we have so frequently passed upon the question. (*Walker v. Lutz*, 14 Neb., 274; *Tessier v. Crowley*, 16 Id., 372; *Graves v. Scoville*, 17 Id., 593; *Olds Wagon Co. v. Benedict*, 25 Id., 372; *Barlass v. Braash*, 27 Id., 212; *Burke v. Pepper*, 29 Id., 320; *Strunk v. State*, 31 Id., 119; *Van Etten v. Kosters*, Id., 285.)

Even though the affidavit of Mr. Foss should be considered by us, we think the court was justified in refusing to continue the case. Three continuances already had been

granted, one at the March, 1889, term, by consent, and at the October term of the same year and the March term, 1890, continuances were granted on motion of the defendant, for the purpose of obtaining the testimony of one William S. Lusk, who was absent from the state. The last application was based upon the absence of the same witness, and the affidavit fails to show that either the personal attendance of Mr. Lusk or his evidence would probably be obtained if the trial had been postponed or the cause continued until the next term of the district court. For that reason the affidavit was insufficient to justify a continuance. (*Polin v. State,* 14 Neb., 540; *Singer Mfg. Co. v. McAllister,* 22 Id., 359; *Rowland v. Shephard,* 27 Id., 494.)

Complaint is made because plaintiff was permitted to file affidavits in resistance of the motion for a continuance. It is not the proper practice to allow counter-affidavits to be read at the hearing of such a motion. (*Gandy v. State,* 27 Neb., 707; *Miller v. State,* 29 Id., 437.) But we are unable to see in what manner the defendant in this case was prejudiced by the use of counter-affidavits, since, upon his own showing, if the said affidavit in support of the motion be considered, he was not entitled to have the trial postponed. For another reason we cannot say that error, prejudicial to the defendant, was committed by the receiving of counter-affidavits, as we have no means of knowing what they contained, they not having been made a part of the record by a bill of exceptions.

It is insisted that the verdict is not supported by the evidence. It appears that the goods in controversy formerly belonged to the firm of Lusk Brothers & Co., of Friend, which firm was composed of Abner P. Lusk, William S. Lusk, and Joseph Boynton. On the 11th day of January, 1888, the partnership, by mutual agreement, was dissolved, and, by written contract signed by each partner, the partnership property was divided between them. Abner P. took the

real estate and assumed the incumbrances thereon, amounting to about $2,400; William S., for his share, received the goods in suit, of the value of $2,767.12, also certain notes and book accounts, and agreed to pay the firm indebtedness not secured by the real estate, aggregating over $2,100, and Boynton received notes and accounts of the value of some $700. The agreement for dissolution was duly recorded, and the property of the firm was divided according to the terms thereof. On the 14th day of January, 1888, William S. Lusk executed and delivered to the defendant in error, Alexander McKay, his promissory note for the sum of $2,000, and secured the payment thereof by giving a bill of sale on the stock of goods in dispute. McKay took possession under his bill of sale. Subsequently, on the 17th day of January, 1888, two creditors of the firm of Lusk Brothers & Co. sued out writs of attachment against the firm, and placed the same in the hands of plaintiff in error, who levied upon said stock of goods and sold the same under the writs. At the time of the levy, McKay was in possession of the stock.

Plaintiff in error insists that the goods were the property of Lusk Brothers & Co.; that the note and bill of sale were without consideration, and that they were given for the purpose of defrauding the creditors of said firm. So far as the question of ownership is concerned, the facts bearing thereon are substantially as given above, with the exception of what we are now about to state. At the trial Abner P. Lusk testified, on behalf of the defendant below, that the possession of the goods was never delivered to William S. Lusk, but that they were turned over to McKay with the distinct understanding that he should sell a sufficient amount to pay the unsecured debts of the firm, after which the goods remaining unsold were to be delivered to said William S. Lusk. This testimony is flatly contradicted by both McKay and Joseph Boynton. They deny that there was ever any such arrangement, or that it

was ever talked of or mentioned in their presence. It appears that the partnership was dissolved on account of differences which arose between the Lusk brothers. Prior to the dissolution, the firm was not being pressed by their creditors, but as soon as the partnership was dissolved the creditors took steps to collect their claims. We are convinced from a reading of the evidence that the possession of the stock was delivered to William S. Lusk, under and according to the terms of the contract of dissolution. It is uncontradicted that at the time the firm went out of business, it was indebted to McKay for money loaned, in the sum of $130. William S. Lusk, on the 12th of January, 1888, went to McKay, who is a grain dealer in the town of Friend, and informed him that he had been having trouble with his brother and that the firm had been dissolved; that his brother Abner was going to inform the creditors of the condition of affairs, and proposed, if McKay would make him a loan of $2,000, he would pay the creditors of the firm. McKay thereupon agreed to let him have $1,870, which sum, together with said indebtedness of $130, was to be secured by a bill of sale upon the stock of goods. McKay drew his check on the Merchants and Farmers bank of Friend for the sum of $1,870, payable to the order of W. S. Lusk, and gave the same to one H. J. Huffman, to be by him delivered to said Lusk on the execution of the note and bill of sale. The papers were executed on January 14, 1888, and the check was delivered by Huffman to William S. Lusk two days later.

H. J. Huffman testified that the payee of the check indorsed it to him, and requested him to draw the money thereon, as Lusk was sick and unable to go to the bank; that the witness indorsed the check, received the money from the bank, and immediately went to Mr. Lusk's house and gave it to him.

Frank Unckless, the assistant cashier of the bank, swears that Huffman presented the check at the bank and he paid

him the sum therein named on January 16. The check was produced on the trial and put in evidence, which contains the indorsements of both Lusk and Huffman, and bears the bank stamp of payment. There is not a syllable of testimony contradicting the payment of the money to William S. Lusk. True, the latter never paid the creditors of the firm, but subsequently absconded. But there is an entire failure of proof to show that McKay had any knowledge that there was any intention on the part of Lusk to defraud the creditors. On the contrary, it shows that McKay acted in the utmost good faith in the entire transaction. No suspicion of fraud can be imputed to him. He took possession under his bill of sale, and began selling, as had been agreed upon, and continued so to do until he was stopped by the attachments. He received from the sale of goods $112.08, and this is the only payment that has ever been made upon his claim of $2,000. From the testimony before us, there is no escaping the conclusion that plaintiff below had a valid lien upon the goods for the balance due him.

There is no foundation for the charge that the verdict is excessive. The sum assessed by the jury was considerably less than the amount of the $2,000 note with ten per cent interest thereon until the first day of the term, at which the cause was tried, after deducting the credit of $112.08. McKay was entitled to a judgment for the full amount of his lien, inasmuch as the same was less than the stipulated value of the property at the time the levies were made.

It is urged that the court erred in excluding from the jury the affidavit of William S. Lusk. Plaintiff in error procured from said Lusk, after he had absconded, and while he was in Colorado, an *ex parte* affidavit relating to the giving of the bill of sale and the payment of the money by McKay. The affidavit was inadmissible under the rules of evidence, and the court did not err in refusing to permit it to be read to the jury. Elaboration on this point is unnecessary.

Complaint is made because the court sustained objections to numerous questions propounded to plaintiff in error by his counsel on direct examination. None of these rulings can be reviewed, for the reason no offer of proof was made in the court below. It has been decided in a vast number of cases in this state that the refusal to permit a witness to answer questions propounded to him on his examination in chief cannot be considered by a reviewing court, unless the party calling the witness makes an offer to prove the facts which he assumes that his question will elicit. It is necessary for the party complaining to state and have the reporter take down what he proposes to prove by the witness, in order that the reviewing court may determine whether the testimony is competent and material. (*Roach v. Hawkinson*, 34 Neb., 658, and cases there cited.) During the entire trial but a single tender of proof was made, and that was upon a matter not discussed in the brief of counsel for plaintiff in error; hence it will not be considered.

Objection is made in the brief of counsel to the giving and refusing of certain instructions. The fourth and eighth paragraphs of the court's charge read as follows:

"4. If you shall find from the evidence that Lusk Bros. & Co. were in business in the town of Friend, and that they dissolved partnership, and that the stock of merchandise belonging to such firm was set over to William S. Lusk, subject to his payment of the debts of such firm of Lusk Bros. & Co., and possession of such stock of goods was under such dissolution agreement given to William S. Lusk, and that thereafter William S. Lusk procured a loan of the plaintiff and turned over to him to secure the payment of such loan the stock of goods in question, and that the plaintiff was in actual possession of such stock of goods, holding the same to secure the repayment of the loan made to William S. Lusk, then the plaintiff would be entitled to recover from the defendant the balance of said loan remaining unpaid, with interest thereon, as you shall find

the same from the evidence, unless you shall find from a preponderance of the evidence that the plaintiff had entered into a fraudulent conspiracy with William S. Lusk with intent to defraud the creditors of Lusk Bros. & Co., or that William S. Lusk borrowed the money of plaintiff and gave his note for the same and the bill of sale of the stock of goods to secure the payment of such notes and interest, to cheat, defraud, hinder, or delay his creditors, and that plaintiff McKay knew of such intent on the part of William S. Lusk.

"8. There is nothing unlawful nor improper for one person to advance or loan to another money, simply because the other is in financial difficulty. Ordinarily, that is the only time that one wants financial assistance; neither is it unlawful to require and receive security therefor. What the law condemns, and under which it affords no protection to a person loaning money or purchasing property, is that the loan or purchase be coupled with the intent to defraud, hinder, and delay the creditors of the party obtaining such loan or making such sale; hence, if you shall find the allegations of the petition to be sustained, as required by these instructions, the plaintiff would be entitled to recover, unless the allegations of the defendant's answer are by you found from the evidence to be sustained by a preponderance of the evidence. If you shall find from the evidence, by a preponderance thereof, that plaintiff had possession of the goods in question as trustee for the benefit of creditors, then the defendant would be entitled to a verdict, except as to any surplus that such goods have been shown by the evidence to have been worth over and above the amount of the attachments held by defendant, and under which he justifies the taking of the goods. And that brings our examination to the other defense, alleging a conspiracy of plaintiff and others to defraud the creditors of Lusk Bros. & Co., and upon this point I read you the instructions asked by the respective parties to this action."

It is believed that the foregoing instructions enunciate correct legal principles and that they were applicable to the issues raised in the case by the pleadings and evidence, especially when construed in connection with other paragraphs of the court's charge to the jury. The rule is that where the instructions, when considered as a whole, fairly state the law, it is sufficient. The objection urged against the fourth instruction is that it omitted to state that if McKay, when he made the loan and took the mortgage, had notice of such facts as would have put a person of ordinary prudence upon inquiry, which, if pursued, would have led to a knowledge of the fraudulent motive of the mortgagor, he would not be protected. A sufficient answer to this contention is that counsel for Barton requested no instruction covering that point. If he was not satisfied with the instruction given, on the ground above stated, he should have presented an instruction covering that question. (*Post v. Garrow*, 18 Neb., 688; *Woodruff v. White*, 25 Id., 753.)

The court gave two instructions numbered 8, while the giving of but one of that number is assigned as error in either the motion for a new trial or the petition in error, and they do not point out or specify the one relied upon. Exception was taken to but one paragraph numbered 8, when the charge was read to the jury, which is the one quoted above. We do not think it subject to just criticism.

It is argued in the brief of plaintiff in error that it was error to give plaintiff's request number 2, which is as follows:

"2. The jury are instructed that fraud is not to be presumed, but must be proved the same as any material fact; and unless the jury are convinced by the evidence deduced in this case, that the possession of McKay was fraudulent, and that said fraud was known and participated in by McKay, then, as to the defense of fraud, you should find for the plaintiff."

While this instruction was duly excepted to by the defendant, neither the giving of it nor the 9th instruction can be considered, for the reason they were not assigned for error in the motion for a new trial filed in the court below. (*Schreckengast v. Ealy*, 16 Neb., 510; *Omaha & R. V. R. Co. v. Walker*, 17 Id., 432; *Nyce v. Shaffer*, 20 Id., 507.)

There was no error in refusing to give to the jury the defendant's third request, since the substance of it was incorporated in other instructions requested by him, which were given.

The refusal to charge as requested by the defendant's fourth instruction will not be considered, inasmuch as no objection was made thereto in the motion for a new trial. (*Omaha & R. V. R. Co. v. Walker, supra.*)

A careful examination of the record shows a fair and impartial trial. We fail to discover any prejudicial error in the proceedings and the judgment will be

AFFIRMED.

THE other judges concur.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. MINNIE LANDAUER.

FILED APRIL 11, 1893. No. 4885.

1. **A new trial** should be allowed when it is clear that material uncontradicted evidence has been disregarded by the jury, and which, if considered and given due weight, would have required a different verdict from that returned.

2. **Negligence:** QUESTION FOR JURY. It is the settled rule in this state that where different minds may draw different inferences from the same state of facts, as to whether such facts es-

tablish negligence, it is a proper question for the jury and not for the court. But that rule is subject to the qualification that the inference of negligence must be a *reasonable* one. Where it is impossible to infer negligence from the established facts without reasoning irrationally and contrary to common sense and the experience of average men, it is not a question for the jury, and the court should direct a verdict for the defendant. MAXWELL, CH. J., dissenting.

3. **Carriers.** It is the duty of railroad companies to stop their trains at stations a sufficient length of time for passengers to get on and off, and it is negligence for the conductor or other servant of the company to start a train while passengers are obviously in the act of getting on or alighting therefrom.

4. ———: NEGLIGENCE. But when a train has made a reasonable stop and passengers have not given notice or other evidence of their intention to alight, the starting of the train is not *per se* negligence for which the company will be held liable.

5. ———: CRIMINAL NEGLIGENCE. The term criminal negligence, as used in sec. 3, art. 1, ch. 72, Comp. Stats., means gross negligence, such as amounts to reckless disregard of one's own safety and a willful indifference to the consequences liable to follow.

6. ———: PASSENGER ALIGHTING FROM MOVING TRAIN: PERSONAL INJURIES: CONTRIBUTORY NEGLIGENCE. It is not such contributory negligence for a passenger to jump from a moving train as will in every case prevent a recovery under the statute above cited; but where the circumstances are such as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby, such act amounts to criminal negligence as above defined. MAXWELL, CH. J., dissenting.

7. ———: ———: ———: ———: EVIDENCE. In an action to recover for personal injuries sustained by the plaintiff in jumping from a moving train, the undisputed evidence is that after the train stopped at C. station, for which she held a ticket, the conductor called out the name of the station, but did not leave the train, being engaged in collecting tickets; but by his order the brakeman got off at the rear of the train and walked along the station platform to the rear of the next to the last car, where, after assisting some passengers to alight, and seeing no others to get off, he gave the signal "all aboard." After the train had started, and was well under way, plaintiff, who had occupied the fourth seat from the front of the rear car, came out upon the front platform thereof, and after hurriedly stepping down one

step, and without warning to the conductor or brakeman, who both supposed the passengers for that station had all left the train, and without looking to see where she would land, jumped at a right angle from the train, and in falling was severely injured. Another passenger who had alighted on the opposite side had walked the length of a car, crossed over on the car platform and walked fifty feet to the gate of a park that distance from the station, while other passengers had walked to a point some distance inside the park fence before the train pulled out. It also appears that plaintiff was a young woman, seventeen years of age, of average intelligence, and well acquainted with the premises. *Held*, Not to sustain the negligence charged, viz., the negligent starting of the train without giving plaintiff sufficient or reasonable time to alight. *Held, further*, That plaintiff was guilty of such contributory negligence as will prevent a recovery for the injuries received in jumping from the train. MAXWELL, CH. J., dissenting.

ERROR from the district court of Lancaster county. Tried below before TIBBETS, J.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error.

Leese & Stewart, contra.

POST, J.

This is a petition in error by the Chicago, Burlington & Quincy Railroad Company, and brings into this court for review a judgment recovered by the defendant in error for personal injuries alleged to have been received by her in alighting from a train of the plaintiff in error at Cushman Park near Lincoln. It appears from the petition that the plaintiff below, Minnie Landauer, (now Minnie Parr), on the 5th day of July, 1889, purchased from the defendant below a first class ticket from Lincoln to Cushman park, and that upon the arrival of the train upon which she was a passenger at the last named station "she started to alight from said train, and while so attempting to alight the defendant, negligently and carelessly and without giving plaintiff sufficient or reasonable time in which to alight,

started its said train whereby plaintiff was thrown violently to the ground without any fault or negligence on her part," by reason of which she received severe personal injuries, etc. The only allegation of negligence is that included within the above quotation from the petition. In its answer the defendant below denies all allegations of negligence on the part of its servants and alleges that whatever injuries were received by the plaintiff therein were in consequence of her own negligent and careless act in jumping from the train while in motion. Cushman park is a flag station on the defendant's line of road three miles west of Lincoln, where trains are accustomed to stop during the summer months, principally for the convenience of persons from the city visiting the park. The platform where passengers enter and alight from the cars is 215 feet in length and 7 feet wide, its elevation being a few inches above that of the rails of the track. The plaintiff below was at the time of the injury a young woman seventeen years of age, evidently possessed of the average intelligence and who was acquainted with the premises, having frequently visited the park, going and returning on the defendant's trains. On the day in question there were an unusual number of passengers from Lincoln. The conductor, who was passing from the front to the rear of the train collecting tickets, had just passed the plaintiff, who was sitting three or four seats from the front door of the last or ladies' car when the train reached the station. He called out the name of the station, but kept on collecting tickets, having given orders for the brakeman to stop and start the train while he was thus engaged. It is clearly shown, and not disputed, that the brakeman got off at the rear end of the train and walked along the station platform to the rear of the smoking car which was the next in front of the ladies' car, where he signaled the engineer to start the train. He then entered the smoker from the rear, closing the door after him, at which time the train was in motion. It is evident

that the train had started before the plaintiff attempted to alight, as she testifies on her direct examination that before she left the car she saw the brakeman through the glass door in front of her. Her testimony, so far as it relates to the cause of the injury, is as follows:

When I supposed the train had stopped I walked out to the front. I was in the last coach and I walked to the front of the coach and looked behind me and seen the conductor talking to some one, and the aisle seemed to be filled with men as I looked back behind me. I think it was about the fourth seat from the front, and when I looked behind me I seen he was standing there, so I just went right out.

Q. Which way did you go out?

A. The front of the coach.

Q. How far did you sit from the front door?

A. About three or four seats back. I can't remember which, I think it was four. I went out, and just as I was going, before I opened the door, I looked through the door, and I could see, through the glass door, the brakeman—I could tell it was the brakeman by his cap, and just as I got out I looked down and I seen the platform just as I got out of the door. I don't remember looking toward the platform any more; I remember looking down to my feet where I was to step. I stepped one step, and as I stepped the other step—the wind was blowing real hard—and I raised my foot, and as I stepped, I did not step on the platform, and it threw me to the ground. I laid there until some one came and picked me up. I don't remember seeing the platform after I took the second glance out; I seen the step when I stepped, and then I stepped right off in the air.

Q. When did you first discover that the train was moving; that is, if it was moving?

A. I did not know that the train was moving; I did not realize that the train was moving at all; I supposed it had stopped.

Q. Had it stopped prior to this time?

A. They say that it had, but I could not state that it had. I have no knowledge of the train stopping whatever. So I was picked up and the train went on, and I remember the train backing back, and I remember the conductor saying, after they had carried me to the stile, he said: "If I had known you was on the train and wanted to get off I would have been glad to have helped you off." He seemed to be very sorry that I was hurt.

Q. Did the conductor get out of the car when the train stopped; I don't mean when they backed up?

A. No, sir; he was standing right there talking to the men.

Q. Did you not see either the conductor or the brakeman on the platform?

A. No, sir; I expected one or the other to help me off; it was quite a step, but I remember him saying, "if he had known it he would have been glad to help me off." There was a physician on the train that said my ankle was broken.

* * * * * * *

Q. About how many feet west of the platform was it that you fell?

A. I could not just exactly say, but I think it must have been between seven and eight feet, something like that.

Q. Mrs. Parr, as soon as you thought the train had stopped there at Cushman park, what did you do? Did you sit in your seat or did you get up and start to get off?

A. I started to get off when I thought the train was stopped.

Q. You have been there before?

A. Yes, sir.

Q. On that train to that station before?

A. Yes, sir.

Q. What was your age at that time?

A. I was seventeen years old.

And on cross-examination she testifies:

Q. Did the train stop at Cushman park? Can you say that it did?

A. I have no knowledge or anything.

Q. Did you not know at the time whether it was stopped or not?

A. No, I thought it was stopped, I naturally supposed it would stop.

Q. Can't you tell well enough whether a train is running or standing still?

A. The wind was blowing real hard, and from what some of the rest say it was pulling out real slow, as it always does when a train starts; I suppose it was just pulling out. I think it was stopped when I stepped because I could see the platform when I first looked out, but after that I don't remember seeing the platform. I expected, of course, to step on the platform, but I stepped right in the air.

Q. Did you see the platform when you looked out through the window?

A. When I went out on the step outside of the door.

Q. So you suppose the train was moving out slowly as they do when they start?

A. I say I thought it was stopped, but that is the way others say it was; I thought it was stopped.

Q. Did you stop when you went out on the platform or look to see what the train was doing or undertake to get off?

A. No, I just took a glance out and then just took a step. I just turned my head as I closed the door. I was looking to see if any one was there to help me off, that was my reason for looking.

Q. Did you see the brakeman in the car in front of you?

A. Yes, right in front of me; I seen him there through the doors; he was looking this way, or had his face turned sideways.

Q. Did you take hold of the railing to the car platform, or anything?

A. Yes, sir; you mean—I don't understand the question.

Q. You know on a car platform there is an iron railing on the outside and on the inside. Did you take hold of that?

A. Yes, sir; I took hold of the one on the inside.

Q. What did you have in your hands?

A. A parasol, that is all.

Q. Did you let go of that railing?

A. Yes, sir; I can't say, of course, I suppose, as I stepped—yes, I let go of the railing just as I stepped.

Q. Did you get down more than one step?

A. I stepped one step; you know there is only two steps, isn't there, that is one step and then a step to the ground?

Q. How many steps down did you go from the top?

A. I don't remember that.

Q. You took hold of the railing with the left hand and got off on the left-hand side of the train; that is you took hold of the railing next to the car?

A. Yes, sir; there was a kind of brass piece there.

Q. The train was headed west and you got off on the left-hand side of the train toward Cushman park?

A. Yes, the side that faces the gate; I don't remember about the direction. I am always turned around about directions.

Q. What I mean to say is—of course, we know when a train is going out of Lincoln that way is going west?

A. Yes, sir.

Q. And you got off on the left-hand side?

A. Yes, sir.

Q. When you first got out there to the station did you say you went back to the rear end of the coach?

A. No, I raised up and looked back to the rear end of the coach, as I showed you a while ago. I first looked out, then I looked up and seen the conductor standing there.

Q. He was back at the rear end taking up tickets?

A. He was right in the center or near the center of the

coach talking to some men, and I think the aisle was full and crowded with men. I think some of them were sitting with their feet in the aisle, sitting on the arms of the seats with their feet in the aisle. He was standing there.

Q. Is it not a fact now that you went back to get off that way; you went back to where the conductor was and saw that the aisle was crowded and then turned and went to the front?

A. No, sir.

Q. Did you not so tell the conductor after you was hurt?

A. No, sir.

Q. And the other people that were there?

A. No, sir.

Q. Did you not say that when you came out after it was over?

A. No, sir.

Q. What did you mean by saying you had no knowledge of the stopping of the car?

A. I said I supposed the train was stopped when I stepped off, and that I did not know it was moving; if it was moving I did not know it.

Q. You did not wait long enough to see whether it was going or standing still?

A. No, sir; I supposed it had stopped because I had only got to the outside, and I thought it would stop long enough to let me off, but I don't know that I thought anything about it, only I think now that I supposed at the time that it was stopped, and I stepped off in the air.

The only other witness who testified for the plaintiff with respect to the injury was Wm. Kendall, who was, according to his testimony, 600 or 700 feet south of the train at the time of the accident. On his direct examination he says:

Q. Was you looking at the train when it came in?

A. I was looking at the train just before it stopped, you might say.

Q. Did you see it stop? Did you see it when it was standing?

A. Yes, I did.

Q. Can you say about how long it stopped?

A. I don't think the train stopped to exceed forty seconds.

Q. You mean then just coming to a stop and starting right out?

A. Yes.

Q. Did you see anything of Mrs. Parr, then Minnie Landauer? Whereabouts was she when you saw her?

A. I did not see her until she was in the air, you might say.

Q. Describe how she appeared; whether she appeared to be jumping, or falling or how?

A. She appeared to be falling then.

Q. How far west of the platform did she fall, if you remember?

A. That I do not remember; it has been quite a while ago, and I have not been out there only two or three times since, and I never looked to see.

On his cross-examination he testified:

Q. You were looking at the train?

A. I was looking at it before it came in; that is, when it got within maybe fifty or sixty yards of the station.

Q. What made you take notice of the time it stood there?

A. Sir?

Q. Did it stop at all?

A. I did not take notice, you might say, but that is my idea; that it did not stop over forty seconds.

Q. The first you saw of her she was in the air?

A. When I seen her she was in the air.

Q. You did not see her at the time she leaped, or at the time she left the train?

A. When I seen her she was in the air. You know

yourself that all that distance away I could not tell—a lady having a dress on—whether her foot was on the step or not. I could not tell, nor you neither.

Q. You saw her in the air?

A. Yes, sir.

Q. She was out away from the car?

A. How far away I could not tell at that distance. She was in the air.

Q. And the train was doing what?

A. Now I could not say whether it was moving or standing still, or what you would call it.

Q. Still you say the train was not running at the time she got off.

A. I don't know what you would call it, whether you would call it stopped or running.

On the part of the defendant below, Lyman, the conductor, testified that being engaged at the time in collecting tickets and fares, he ordered the brakeman to start and stop the train at Cushman park; that he, witness, called out the station after the train stopped; that he also noticed just as the train started again some of the passengers who had left the cars over in the park some distance away; that very soon thereafter, having finished collecting tickets, he started forward and was met by the brakeman, who informed him that a woman had jumped from the train. Referring to the length of the stop he testifies:

Q. About how long did you stop at that station?

A. Not less than three minutes. It might have been more, but not less than that.

Q. Was the stop longer than usual?

A. Yes, sir; it was longer than usual.

Q. Why?

A. On account of the train being crowded and I not being able to get out and see the passengers get off myself, but I had my brakeman do it and he did not know when they were all off exactly, and he thought he had given

them ample time, and didn't see any more coming and he started the train.

Beck, the brakeman, testifies that he got off at the rear of the train and walked leisurely along the station platform to the rear end of the smoker and helped two men to alight who appeared to need assistance. As to what transpired immediately thereafter he testified as follows:

Immediately before I got on I gave the signal "all right, go ahead." I walked into the smoker—at that time the rear car door was closed and I saw nobody trying to get out, so I walked right into the smoker and I judge I had got three or four steps, probably ten or twelve feet, in the car, when somebody asked me a question and I turned sideways this way, to answer the question; as I did so I saw a black object—the lady had on a black dress—something came to me that something was wrong, and I made a rush to the door, and as I did, I just about got to the door as she went in the air. She jumped; I did not see her take a step down at all; she may have taken a step, but apparently she left the top of the platform and jumped right out in the air sideways. I looked out, I hung right out to see if she was hurt, and she fell and lay there. I made a rush right into the car and notified the conductor that there was a lady jumped from the train. He pulled the cord and stopped, and we backed up.

Q. Did you see her when she lit on the ground?

A. Yes, sir.

Q. How did she alight?

A. The train was headed in this way, and of course she jumped from the platform in this way. (Indicating at right angle to the direction of the train.) She struck right on her two feet and rolled right over about once and laid there.

Q. She fell right over?

A. Yes, sir.

Q. Did she take hold of anything?

A. Not that I know of—I don't believe she did.

Q. First was the black object and a rush to the door, and then you saw her jump from the platform?

A. Yes, sir.

Q. About how fast was the train going at that time?

A. I should judge we had gone about two car lengths, and the train would get under pretty good headway in that distance; it would be pretty hard for me to state the rate of speed we were running.

Q. Have you been railroading a good while?

A. It has been the heft of my life for eighteen years.

Q. What would you say as to the danger of a person jumping off in that way with that rate of speed?

A. I don't think it would be safe for me to jump off that way.

Foster Seacrest, a passenger, testified that he alighted on the north or right-hand side of the train and walked the length of the smoking car when he crossed to the south side of the train upon the forward platform of the smoker or the rear platform of the baggage car. He then walked over to the park steps where he stood engaged in conversation for two minutes or more before the train pulled out. He did not see the plaintiff jump and could not tell how far the train had gone when he saw her on the ground. He also testified that other passengers from the train were quite a distance inside of the park when the train started.

Mrs. Smith, who was occupying the last seat at the rear of the car, noticed the plaintiff, after the train stopped, leave her seat and go to the rear of the car where some men were standing, when she turned and walked forward and that the train started just as she got to the door.

J. C. F. McKesson, a passenger, was standing at the rear end of the car and testified as follows:

Q. What did you see Miss Landauer do?

A. I saw her coming through the train towards me, that is, towards the rear end of the car. She seemed to be some-

what bewildered and then turned around and went back the other way to the west door.

Q. How long did the train stop there?

A. I don't know. The usual length of time, I presume a minute or a minute and a half.

Q. What was the train doing with reference to being still or moving at the time she left the rear end of the coach to go to the front?

A. The train was in motion.

Q. What was its speed by the time she got out on the front platform?

A. I could hardly say—you mean per hour? It had started up from the station. I don't know just what rate it ran.

Q. How was it going with reference to a person safely jumping off or stepping off?

A. I should think it was running almost too fast for a woman to get off.

Q. Was there anybody in the front aisle to interfere with her going through that way in the first place?

A. I think not; although there might have been a person or two standing there. The car was crowded.

Q. Do you know about how long she stopped at the rear end of the coach before she turned around to go back, and what she did while she was there?

A. I could not say just how long. She came to the rear end of the coach evidently intending to go out there, I supposed at the time, and there were probably five or six parties standing up in the rear end of the coach, and I judged she changed her mind and thought she could not get through there, and went back to the other end. She came from the west end of the coach.

On cross-examination he testified:

Q. Did you take any special account of the time the train stopped there?

A. No, sir; I made no note of the time any more than I know that it stopped.

C. W. Hoxie, who was standing near the rear door of the smoking car and directly facing the front door of the ladies' car when the train pulled out, testified that after it had started a lady came rushing out of the ladies' car and, in the language of the witness, "she got on the platform and rushed right off." He further testifies:

Q. About how fast was the train going when she jumped off?

A. It was moving pretty fast—as fast as a train usually is when it pulls out of a place. I judge it was about 150 feet from the platform, it was very close to the creek I know.

Q. Explain what she did when she got out of the car.

A. I could not say, she came out of the car and seemed to be a little excited and just simply went right off of the train. She may have stepped down a step, but I just saw her a minute and she was going and went right off.

Q. Did she take hold of the hand rails?

A. No, sir; I did not notice that; it was done in a second really; she came out of the door there.

Q. I will ask you about how long the train stopped at the station?

A. It was about the usual time, a minute and a half or two minutes; it was not very long, about the usual time they stop at local stations; I did not pay attention to it; it was about the usual time trains stop, and the conductor got off; I presume it was the conductor, I heard him call "all aboard," and the train started.

Wm. Bougart, a passenger, testifies that the train stopped about two minutes; that after getting off he walked over to the park fence, where he saw the plaintiff fall from the front platform of the rear car.

The foregoing is believed to be a fair summary of the evidence; and such parts thereof as we are referred to by the defendant in error to support the judgment are set out at length. It has been repeatedly held that a verdict will not

be disturbed by this court where the evidence is conflicting, although the weight thereof may appear to be with the unsuccessful party. But that rule does not apply when it is clear that material undisputed evidence has been disregarded by the jury, and which, if considered and given due weight, would require a different verdict. (*Dunbier v. Day*, 12 Neb., 596.) If our conclusion is to depend upon the mere opinions of the several witnesses as to the length of the stop at Cushman park, this case might be held to be within the rule above stated. But it is impossible to reconcile the testimony of the plaintiff's witnesses with the facts disclosed by the uncontradicted evidence of the disinterested witnesses for the defendant below. The claim that she could not have reached the station platform in safety from her position, four seats distant from the door of the car, within the time required for one passenger to alight on the opposite side, walk the length of the car, and, after crossing between the cars, reach the park gate fifty feet distant, and for others to walk from the train to a point inside the park fence, is not only improbable but unreasonable and insufficient to warrant a finding in her favor upon that issue. It is by law made the duty of railroad companies to stop their trains at stations a sufficient time for passengers to get on and off the cars in safety. And it is universally held to be negligence for the conductor or other servant to start a train while passengers are obviously in the act of getting on or alighting thereform. But if the train has stopped a reasonable time and passengers have not given notice or other evidence of their intentions to alight, the starting of the train is not *per se* negligence for which the company will be held liable. (*Chicago, St. L. & N. O. R. Co. v. Scurr*, 59 Miss., 456; *Trigg v. St. Louis, K. C. & N. R. Co.*, 74 Mo., 147; *International & G. N. R. Co. v. Terry*, 62 Tex., 380; *Raben v. Central Ia. R. Co.*, 73 Ia., 579; *Clotworthy v. Hannibal & St. J. R. Co.*, 80 Mo., 220.)

It is argued that the duty of the conductor is to person-

ally assist passengers entering and leaving the cars. We have not, however, been referred to any authority for such contention. It is the duty of a railway company to give warning before starting trains, and to render passengers reasonable or necessary assistance in entering and leaving the cars; but we are aware of no rule which imposes such duty upon the conductor to the exclusion of other servants of the company. The only negligence charged in the petition is the starting of the train without giving the plaintiff therein sufficient or reasonable time in which to alight. But as appears from the record, it is impossible to reconcile that claim with the undisputed facts in the case. There was therefore a failure of proof to sustain the allegation of negligence and the motion for a new trial should have been sustained upon that ground. We have not overlooked the rule stated in *City of Lincoln v. Gillilan*, 18 Neb., 114, viz., that where the facts, although undisputed, are of such character that different minds may draw different inferences therefrom, as to whether such facts establish negligence, it is a proper question for the jury and not for the court. That is an old and sound rule, but is subject to the qualification that the inference of negligence must be a *reasonable* one. And the question of its reasonableness, that is to say, whether the particular act of negligence charged can be found from the established facts of the case, without reasoning irrationally and without rejecting common sense as well as the rules of cause and effect, is one exclusively for the court. No clearer or more accurate statement of the rule can be found in the books than that of Judge Thompson in his work on Trials, viz., "That the judge is authorized to nonsuit the plaintiff or direct a verdict for the defendant, according to the mode of practice in the particular jurisdiction, in either of the following cases:

"1st. Where all the facts which the plaintiff's evidence fairly tends to prove, if admitted to be true, would not authorize a conclusion that the defendant has been guilty of negligence as matter of law.

"2d. Where, either upon the plaintiff's evidence, assuming it to be true, or upon the state of facts shown by the evidence in the whole case, which stand undisputed and which ought not therefore to be left to the decision of the jury, an inference unavoidably arises that the person injured was guilty of negligence materially and directly contributing to produce the accident complained of." (Thompson, Trials, 1667.)

But aside from the question of negligence on the part of the defendant company, it is clear from her own testimony that the plaintiff was guilty of such contributory negligence as will defeat her right to recover. It was held in effect in *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143, that it is not in every case negligence *per se* for a passenger to jump from a moving train; but where the attending circumstances are such as to render the act obviously and necessarily perilous, the well established rule is that it is such contributory negligence as will bar a recovery. Cases almost without number might be cited in support of the rule just stated, but it is sufficient for our purpose to refer to the following text-books: Ray, Neg. of Imposed Duties, p. 390; Beach, Contributory Neg., secs. 146, 147; Deering, Neg., sec. 95; Wharton, Neg., sec. 369 *et seq.*; 1 Thompson, Neg., 459; 2 Am. and Eng. Ency. of Law, 765.

It is said by Mr. Beach, in section 146, cited above: "In a majority of instances, however, where the character of such an act has been an issue, it has been held contributory negligence. * * * The weight of authority is to the effect that while an attempt to board a moving train of cars is not *per se* negligence, it is nevertheless presumptively negligent, and in a majority of cases actually negligent to the extent of preventing a recovery." We have no occasion to discuss further the general rule, since it is evident that the effect of our statute has been to enlarge the liability of railroad companies for injuries to passengers.

It is provided by sec. 3, art. 1, of ch. 72, Comp. Stats., that "Every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the *criminal negligence* of the persons injured." The question to what extent, if at all, the common law liability of a railroad company for *its own* negligence has been enlarged by the statute quoted is not involved in this controversy. The term criminal negligence was held in *Omaha & R. V. R. Co. v. Chollette, supra,* to mean gross negligence, such as would amount to a flagrant and reckless disregard of one's own safety and a willful indifference to the injury liable to follow. Viewing the act of the plaintiff in its most favorable light, she was guilty of criminal negligence within the foregoing definition. She appears to have acted recklessly and without regard to the consequences, and to have jumped from the moving train without thought of where or how she would land.

Exception was taken to several of the instructions by the plaintiff in error, but as the judgment must be reversed for reasons stated they will not be considered. The judgment of the district court is reversed and the cause remanded for further proceedings therein.

REVERSED AND REMANDED.

NORVAL, J., concurs.

MAXWELL, CH. J., dissenting.

This action was brought by the defendant in error against the plaintiff in error to recover for personal injuries sustained by her in alighting from the plaintiff in error's train. On the trial of the cause the jury returned a verdict in her favor for the sum of $5,000, upon which judgment was rendered. The first objection is that the proof does not sustain the charge in the petition. The petition is as follows:

"Plaintiff for cause of action says that Charles E. Casey is her duly appointed, qualified, and acting guardian under appointment of the county court of Pawnee county, Nebraska.

"2. That the defendant is a corporation duly organized under the laws of Nebraska, and is a common carrier of persons and property for hire; that it owns and operates a railroad from the city of Lincoln through Cushman park, a station on the line of said railroad.

"3. That on the 5th day of July, 1889, the plaintiff purchased of defendant a ticket entitling her to a passage on its cars from Lincoln, Nebraska, to Cushman park; that plaintiff thereupon entered and became a passenger on the cars of defendant on said railroad and rode therein to said Cushman park station; that upon arriving at said station she started to alight from said train, and while so attempting to alight the defendant negligently and carelessly, and without giving plaintiff sufficient or reasonable time in which to alight, started its said train, whereby plaintiff was thrown violently to the ground without any fault or negligence on her part; that by reason of her being thrown to the ground as aforesaid, plaintiff was permanently injured, in that her leg was broken, her body bruised, and her spine injured; that by reason of her said injuries plaintiff was sick for several months, and necessarily expended for physicians' services the sum of $300, and her health has been greatly and permanently impaired, in all to her damage in the sum of $15,000. Wherefore the plaintiff prays judgment against the defendant for the sum of $15,000 and costs of suit."

There is a great conflict in the testimony, but the following facts appear to be sustained by the weight of the evidence. The defendant in error at the time of the accident was about seventeen years of age. She was a passenger on the train for Cushman park, about three miles from Lincoln. She was in the last car in the train and was sitting

in about the fourth seat from the front end of the car. The train was crowded with passengers, there being a number standing in the aisle in the last car back of the defendant in error. The conductor had not completed gathering the tickets when Cushman park was reached and did not go out of the car, but trusted to the brakeman to stop and start the train. The defendant seems to have risen from her seat when the train stopped and looked back towards the rear end of the car as though she would have gone out that way, but seeing the passage way blocked with passengers she went out of the front end of the car, alighting after it had passed the platform, and was very severely injured. If the plaintiff in error is liable the judgment is not excessive. But it is said that the testimony does not support the allegations of the petition. The defendant in her testimony says:

I got on the train. I bought my ticket at the B. & M. depot and got on the train. I had not rode very far until the conductor came and took up the ticket. He said something when he took up the ticket; he seemed to be vexed. I can't state just what he said, but he said he did not see why people bothered the company in riding such short distances; he did not see why there were not teams to take people such short distances in the country; he did not see why people should bother the B. & M. to stop at such places as Cushman park, because there was no station there. That was all he said, and I did not think anything about it, as I have heard other ladies say he had made the same remarks to them. I rode until I got to Cushman park, and as I got to Cushman's house, a white house this side of Cushman park—

Q. How far?

A. I should think it was a half of a quarter or a quarter of a mile. I raised up just about like that (witness raising up in chair and leaning forward) to look out towards the park to see—I expected to see Mr. Beerup's little children.

They had told me that day that my brother had been sunstruck and was real sick, and that was the reason I wanted to see him, and why I looked out, but I did not see them. So I supposed I could get off all right, so when the—when I supposed the train had stopped I walked out to the front. I was in the last coach, and I walked to the front of the coach and looked behind me and seen the conductor talking to some one, and the aisle seemed to be filled with men as I looked back behind me. I think it was about the fourth seat from the front, and when I looked behind me I seen he was standing there, so I just went right out.

Q. Which way did you go out?

A. The front of the coach.

Q. How far did you sit from the front door?

A. About three or four seats back. I can't remember which, I think it was four. I went out, and just as I was going, before I opened the door, I looked through the door and I could see, through the glass door, the brakeman—I could tell it was the brakeman by his cap, and just as I got out I looked down and I seen the platform just as I got out of the door. I don't remember looking toward the platform any more; I remember looking down at my feet where I was to step. I stepped one step, and as I stepped the other step—the wind was blowing real hard—and I raised my foot, and as I stepped, I did not step on the platform and it threw me to the ground. I laid there until some one came and picked me up. I don't remember seeing the platform after I took the second glance out; I seen the step when I stepped and then I stepped right off in the air.

Q. When did you first discover that the train was moving—that is, if it was moving?

A. I did not know that the train was moving; I did not realize that the train was moving at all; I supposed it had stopped.

Q. Had it stopped prior to this time?

A. They said it had, but I could not state that it had; I have no knowledge of the train stopping whatever. So I was picked up and the train went on, and I remember the train backing back, and I remember the conductor saying after they had carried me to the stile, he said, "If I had known you was on the train and wanted to get off I would have been glad to have helped you off." He seemed to be very sorry that I was hurt.

Q. Did the conductor get out of the car when the train stopped? I don't mean when they backed up.

A. No, sir; he was standing right there talking to the men.

Q. Did you not see either the conductor or the brakeman on the platform?

A. No, sir; I expected one or the other to help me off, it was quite a step, but I remember him saying if he had known it, he would have been glad to help me off. There was a physician on the train that said my ankle was broken.

On cross-examination she testifies:

Q. What did you have in your hands?

A. A parasol, that is all.

Q. Did you let go of that railing?

A. Yes, sir; I can't say; of course, I suppose as I stepped—yes, I let go of the railing just as I stepped.

Q. Did you get down more than one step?

A. I stepped one step; you know there is only two steps, isn't there, that is one step and then a step to the ground.

Q. How many steps down did you go from the top?

A. I can't remember that.

Q. You took hold of the railing with the left hand and got off on the left-hand side of the train; that is, you took hold of the railing next to the car.

A. Yes, sir; there was a kind of a brass piece there.

Q. The train was headed west and you got off on the left-hand side of the train towards Cushman park?

A. Yes, the side that faces the gate; I don't remember

about the direction, I am always turned around about directions.

Q. What I mean to say is—of course, we know when a train is going out of Lincoln that way is going west?

A. Yes, sir.

Q. And you got off on the left-hand side?

A. Yes, sir.

Q. When you first got out there to the station, did you say you went back to the rear end of the coach?

A. No; I raised up and looked back to the rear end of the coach, as I showed you a while ago; I first looked out, then I looked up and seen the conductor standing there.

Q. He was back at the rear end taking up tickets?

A. He was right in the center or near the center of the coach talking to some men, and I think the aisle was full and crowded with men; I think some of them were sitting with their feet in the aisle, sitting on the arms of the seats with their feet in the aisle. He was standing there.

Q. Is it not a fact now that you went back to get off that way; you went back to where the conductor was and saw that the aisle was crowded, and then turned and went to the front?

A. No, sir.

Q. Did you not so tell the conductor after you was hurt?

A. No, sir.

Q. And the other people that were there?

A. No, sir.

Q. What did you mean by saying that you had no knowledge of the stopping of the car?

A. I said I supposed the train was stopped when I stepped off and that I did not know it was moving; if it was moving I did not know it.

Q. You did not wait long enough to see whether it was going or standing still?

A. No, sir; I supposed it had stopped, because I had

only got to the outside and I thought it would stop long enough to let me off, but I don't know that I thought anything about it, only I think now that I supposed at the time that it was stopped and I stepped off in the air.

A disinterested witness who was near at hand testifies that the train did not stop to exceed forty seconds; it appears from other testimony that the train had three other passengers who evidently were near the door or on the platform, and alighted from the train, and it apparently started again before the defendant in error had an opportunity to get off. The testimony shows that the platform at Cushman park was 215 feet in length and about seven feet in width; that it was quite low down, not higher than the rails, if so high; that the wind was blowing quite strongly—almost a gale—so that it was difficult, apparently, for a woman to control her clothing.

The testimony of the plaintiff below appears to be truthful, and, fairly construed, amounts to this: that the train stopped at Cushman park; that she had been informed that her brother had been afflicted by sunstroke; that she was very anxious to stop at the park and that as soon as the train stopped arose up from her seat, looked back and went out of the front end of the coach to leave the car; that she expected the train to stop for a sufficient length of time to enable the passengers to leave the train without undue haste, and as she started down the step of the car she saw the platform but was carried by before she alighted, although she was not aware of the fact until she fell.

It is the duty of the conductor of a railroad train to look after the passengers that wish to get on or off at the various stations along his line. (Thompson, Carriers of Passengers, 369.) He represents the company; is its authorized agent in all matters connected with the receiving and discharging of passengers as well as the subordinate servants of the corporation. The company recognizes this obligation, and the conductor, in his testimony, after

stating that the stop was longer than usual, about three minutes in all, says:

A. Yes, sir, it was longer than usual.

Q. Why?

A. On account of the train being crowded and I not being able to get out and see the passengers get off myself, but I had my brakeman do it, and he did not know when they were all off exactly, and he thought he had given them ample time and did not see any more coming and he started the train.

Q. About how many passengers got off there, do you know?

A. I think there were five.

Q. Besides this girl?

A. Four, I think, besides the girl.

The brakeman did not know, he says, when the passengers were all off exactly, and started the train. This is evidence of negligence. (*Bucher v. New York C. & H. R. Co.*, 98 N. Y., 128; *Wood v. Lake Shore & M. S. R. Co.*, 49 Mich., 370; *Brooks v. Boston & M. R. Co.*, 135 Mass., 21; *Detroit & M. R. Co. v. Curtis*, 23 Wis., 152, 27 Id., 158; *Southern R. Co. v. Kendrick*, 40 Miss., 374; *Imhoff v. Chicago & M. R. Co.*, 20 Wis., 362; *New Orleans, J., & G. N. R. Co. v. Statham*, 42 Miss., 607; *Milliman v. New York C. & H. R. R. Co.*, 66 N. Y., 642; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St., 292; *Jeffersonville, M. & I. R. Co. v. Parmalee*, 51 Ind., 42; *Keller v. Sioux City & St. P. R. Co.*, 27 Minn., 178; *Swigert v. Hannibal & St. J. R. Co.*, 75 Mo., 475; s. c., 9 Am. & Eng. R. Cas., 322; *Wabash, St. L. & P. R. Co. v. Rector*, 104 Ill., 296; s. c., 9 Am. & Eng. R. Cas., 264; *Pennsylvania Co. v. Hoagland*, 78 Ind., 203; s. c., 3 Am. & Eng. R. Cas. 436; *Toledo, W. & W. R. Co. v. Baddeley*, 54 Ill., 19; *Fuller v. Naugatuck R. Co.*, 21 Conn., 557; *Davis v. Chicago & N. W. R. Co.*, 18 Wis., 185; *Paulitsch v. New York C. & H. R. R. Co.*, 26 Am. & Eng. R. Cas., 162; 2 Am. & Eng. Ency. of Law, 762.)

Had the conductor in this case done his duty there is reasonable ground to believe no accident would have happened. It may be said that the conductor delegated his authority to the brakeman, and that for that purpose he took the place of the conductor. It is sufficient to say that the proof fails to show that the plaintiff saw the brakeman, except at a distance. She did see the conductor on the same car with herself. He found fault with the inconvenience of stopping the train at that place. He had taken up her ticket but a short time before the train stopped, and it was his duty to see that she was permitted to leave the train safely. The train evidently stopped but a short time, not long enough for the passengers to alight safely, the testimony to the contrary notwithstanding. Where a conductor or person in charge of the train gives a signal to start while a passenger is obviously in the act of getting off the train the company will be liable if injury occurs. (2 Am. & Eng. Ency. of Law, 763; *Swigert v. Hannibal & St. J. R. Co.*, 75 Mo., 475; s. c., 9 Am. & Eng. R. Cas., 322; *Bucher v. New York C. & H. R. R. Co.*, 98 N. Y., 128; *Keating v. New York C. & H. R. R. Co.*, 49 Id., 673; *Mitchell v. Western & A. R. Co.*, 30 Ga., 22; *Chicago W. D. R. Co. v. Mills*, 105 Ill., 63; s. c., 11 Am. & Eng. R. Cas., 128; *Conner v. Citizens S. R. Co.*, 26 Am. & Eng. R. Cas. [Ind.], 210; *Eppendorf v. Brooklyn C. & N. R. Co.*, 69 N. Y., 195; *Nance v. Railroad Co.*, 26 Am. & Eng. R. Cas. [N. Car.], 223; *Straus v. Kansas City, St. J. & C. B. R. Co.*, 86 Mo., 421; s. c., 27 Am. & Eng. R. Cas., 170; 2 Am. & Eng. Ency. of Law, 762.) He testifies in regard to the plaintiff:

Q. Did you look out to see whether the lady got off?

A. The lady was a regular customer of ours and I supposed she knew enough to get off before the train started.

Q. How many times did she ever ride with you?

A. A dozen times I guess; not less than a dozen and probably more.

Q. And you thought she could take care of herself?

A. Yes, sir, I thought so.

Here is self-confessed negligence on his part. Here was a young girl, in experience but little more than a child, so far as appears, unaccustomed to travel, who had paid her fare to and desired to stop at the park, yet the man who had just taken up her ticket, and whose duty it was to see her safely on the platform, confesses that although in the same car with her and but a short distance away, he did not even look around to see if she had left the car. In the majority opinion great stress is laid upon the testimony of two or three witnesses called by the plaintiff in error as to the length of time the train stopped. The conductor had seven or eight tickets to take up and did not seem to have completed taking up the same when the train started, yet he testifies the train stopped three minutes, and some of the other witnesses for the plaintiff in error testify to substantially the same facts. That this testimony is not true is shown by all the circumstances of the case. The greatest distance any passenger is shown to have gone from the train when it started could have been traveled in much less than a minute—probably in one-half of that time. We must remember that these witnesses did not have any particular cause to note the length of time the train stopped—some or all of them evidently in conversation and probably scarcely conscious of the stoppage of the train; yet upon this kind of testimony it is proposed to establish a preponderance of the evidence against the verdict. The number of witnesses, where they have equal means of knowledge and are supported by all the circumstances of a case, no doubt should have great weight in arriving at a verdict, but ordinarily testimony is not given weight by the number of witnesses who testify to a particular fact, but by the means of knowledge of the witness, his apparent fairness and freedom from bias, and the support of circumstances. Thus a passenger who desires to stop at a station

and rises from his seat to leave the train as soon as it stops will know much more about what he did than passengers who have no interest in the matter and take no notice of so common an occurrence as a passenger alighting from a train. The evidence of the first witness is positive and direct, while that of other passengers is negative and unreliable. Now in the case at bar the plaintiff below testifies, in substance, that she rose from her seat and went out of the front door of the car, which could not have taken her more than half a minute, and in this she is corroborated by the circumstances heretofore spoken of. But there is another phase of this case which shows negligence on the part of the conductor and employes. In all parts of this country the rule is when a train approaches a station that a brakeman or some employe of the company appears at the door of the car, where passengers are expected to go out, and announces the name of the station. In most cases he opens the door as the train stops for such passengers as desire to leave to do so. In this case not only was this not done, but the conductor from the back part of the car called out the name of the station. This no doubt had a tendency to confuse the plaintiff below, if she was confused. The station being called from the hind end of the car, and no one appearing at the front end, she would be excusable if she supposed she was expected to get out there. Suppose either the conductor or brakeman had appeared at the front end of the car when the train stopped, and opened the door and called out the station, it is very evident to my mind that this accident would not have happened. That the plaintiff below was expected to go out at the front door of the car is shown from the fact that the brakeman walked along the platform from the hind end of the car to the front end, and apparently then signaled the engineer to start. The testimony, as I understand it, shows gross and inexcusable negligence on the part of the employes in control of the train. A great deal more testimony to the same

effect could be stated, but I do not care to discuss the subject further. It is very clear that the testimony fully sustains the cause of action.

2. It seems to be admitted that the instructions are predicated on the proof, and therefore they need not be set out at length.

3. In regard to the injury, a number of affidavits were filed by the plaintiff in error in support of a motion for a new trial, in which it is stated, in substance, that the verdict is excessive by reason of the injuries not being severe. These affidavits are exceedingly vague and indefinite and charge generalities and not specific facts. Dr. Crim, who has attended the defendant in error, testified on the trial as follows:

Q. I will ask you to describe what the injuries were.

A. The left ankle bore evidence of having been sprained; that is it was tender on the sides and was discolored about the ankle and for a distance of about five inches up the outer side of the leg. The point of greatest tenderness, however, was two and one-half inches above the ankle bone on the outer bone of the leg; at that point, on pressure, there was exquisite tenderness to the bone, going to show that the bone was cracked or partially fractured about two and one-half inches above the external malleolus, or the smaller of the two bones of the ankle. If she attempted to bear weight on the foot the foot turned in so that the ankle was not firm at all. The other injuries that she complained of at that time was some pain near the spinal column in the lower part of the back and she was also quite sick to her stomach; the injury of the spine at that time I did not give any special examination as I was called to see the ankle and to dress it. I put a water-glass dressing on the leg, which remained for two or three weeks and was then taken off. I think that covers the ground of the first examination.

Q. I was going to ask you how you knew that the bone was broken?

A. In examining the bone the first thing that drew my attention to it was the pain in one spot. The discoloration also pointed to a severe injury having taken place there at a previous date. Then I placed my thumbs on the bone and grasped the limb firmly and pressed with the thumbs and the bones would give together, and took the other limb and it did not give to any such extent, showing that the bone was not as strong as the one on the opposite side. If the bone had not been fractured it could not give.

Q. What kind of a fracture was it?

A. A green-stick fracture.

Q. Why do you call it a green-stick fracture?

A. Because the bone was not fractured clear across so as to cause displacement. It is the kind of a fracture that you have if you bend a twig and the fibres break on one side and hold on the other.

Q. Did you make any other examination afterward as to the spine?

A. I was called a month or so later to see her on account of her spine.

Q. Tell the jury what observations you made and what examinations you made in regard to that injury.

A. The patient was complaining of a great deal of pain in the lower two-thirds of the spine and with difficulty in walking; the pain was so severe that it bothered her about locomotion. At that time I was called to give an opinion as to whether a cautery would give her relief.

Q. Explain what a cautery is?

A. The cautery used is a piece of platinum heated to white heat by means of benzine blown through it so that this white heat would strike the back probably forty times lightly so as not to destroy the skin deep but to destroy the outer part of the skin and produce irritation. The pressure on the spinal processes, that is, the tips of the backbone, showed marked tenderness; I was informed by her attending physician that this operation was followed by

a great deal of relief, but I did not see her again for two months, or not to examine her carefully anyway.

Q. Go on and state what examination you made subsequent to that time.

A. The next time I was called was about the middle of October, or some three months after the time when I first saw her. At that time she was confined to the bed, and on being assisted out of the bed she could not walk without catching hold of something, she was then replaced in bed and the bed clothes thrown back over the lower extremities in such a way as to prevent her eye from seeing what manipulations I might make. I then took some steel pointers which we use for discovering whether a person has the natural sense of feeling pain, and found that she could not tell whether I had one or two points on any part of the leg below the knees, and I also forced the points of the pointer completely through the skin without any flinching or any sense of pain or reflex action on her part. I continued this examination, going above the knee, and when about half way between the knee and the hip, or one side of the thigh she began to show some signs of sensation; a like sensation extended just above the middle of the hip, but beyond that point the sensation increased rapidly so that by the time I reached the region of the waist the sensation was about normal. The tenderness of the spine extended up to about the neck; the entire region of the entire spinal column was tender, especially on pressure of the finger. I again applied the cautery from the neck clear down the whole length of the column. I saw her again in about a week and repeated the operation, and again about ten days later. At each subsequent cauterization I found the patient improved, so that at the third one she was able to walk fairly well and the sensation was nearly normal in the lower extremities; from that time I have seen her at periods varying from two weeks to three or four months up to the present time. I have repeated the cauterization at various

times. Sometimes the relief would extend over three or four months and sometimes not so long as that. The sensation of the limbs has been about normal since the third or fourth cauterization, but the tenderness of the spine has never completely disappeared.

Q. I would like to ask you if when a person receives a concussion of the spine it is always manifested immediately?

A. Symptoms may be manifest immediately in a severe concussion; on the other hand it may be several weeks before any symptoms appear.

Q. Why is that?

A. The hurt may be inflamed, and the injury which gave rise to the inflammation may not be severe enough to cause the patient much inconvenience at the time, but the coagulation of the blood may continue to work injury to the case from that time on.

Q. When was the last time you examined the plaintiff?

A. I should say about four to six weeks ago.

The affidavits do not dispute this testimony, and in addition to being cumulative are wholly insufficient. In the majority opinion the rules as to negligence and gross negligence as heretofore established by this court are approved, while the decision itself, in my view, practically overrules both. In a case like that under consideration the testimony should be submitted to the jury. If a court assumes to take testimony of this kind, where the principal question is the credibility of the witnesses, away from the jury and pass upon its sufficiency, the provision of our constitution that "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay," is a glittering generality—meaningless verbiage of no force or effect. But I think we have not yet reached that point. I believe this is a meritorious case where the plaintiff below, with-

out her fault, sustained severe and lasting injuries, and that she is entitled to compensation for the same. Many other reasons could be given why this judgment should not be reversed, but because of the great length of this opinion they will be omitted. I fear the general rule established will be productive of great injustice, not only in this case but generally. In my view the judgment is fully supported by the evidence and should be affirmed.

STATE OF NEBRASKA, PLAINTIFF, V. FARMERS & DROVERS BANK OF BATTLE CREEK, DEFENDANT, AND E. TILLOTSON, INTERVENOR.

FILED APRIL 11, 1893. No. 4821.

Evidence in the record examined, and *held* to sustain the finding of the referee in favor of the claimant.

ORIGINAL action to wind up the affairs of the Farmers & Drovers Bank of Battle Creek, Nebraska, under the banking law of 1889.

The receiver appointed by the court refused to allow the claim of E. Tillotson, and a referee was appointed to investigate the validity thereof. The finding was in favor of Tillotson, and the receiver excepted. *Exceptions overruled.*

Wigton & Whitham, for intervenor.

George H. Hastings, Attorney General, for receiver.

POST, J.

The Farmers & Drovers Bank of Battle Creek was impounded under the provisions of the state banking law, and is now in the hands of a receiver and under the jurisdiction of this court. Among the claims presented to the

receiver for allowance was one by E. Tillotson for $3,000 and interest at six per cent from February 24, 1891, on account of eight certificates of deposit of said bank for $375, each bearing the date above named. The receiver, for reasons which will appear from this opinion, refused to allow said claim, and referred it to the court for advice. By agreement of the claimant and the attorney general representing the receiver, the questions involved in the controversy were submitted to a referee with instructions to find the facts and state his conclusions of law, and who subsequently submitted the following report:

"First—That on or about the 24th day of February, 1891, the Farmers & Drovers Bank of Battle Creek, Nebraska, made and delivered to E. Tillotson its twelve certificates of deposit of three hundred and seventy-five dollars each, aggregating $4,500, due and payable, the first in one month, and the others at intervals of one month each thereafter, all drawing interest at six per centum per annum.

"Second—That said Farmers & Drovers Bank paid the first four of said certificates of deposit on the receipt of same by the bank in the usual course of business, and that E. Tillotson is the holder and owner of the remaining eight certificates of deposit, and that the same are due and wholly unpaid.

"Third—That the said certificates of deposit were presented to the Farmers & Drovers Bank, or the receiver thereof, at their maturity, and payment demanded, and refused for want of funds, or from want of an order of court directing payment.

"Fourth—That the consideration for the issuance of said certificates of deposit was two certain notes and mortgages, designated as the 'Dinkle and Tiedgen notes,' of a face value of $5,000, several small unsecured notes of a face value of about a thousand dollars, and a small balance on deposit with the bank amounting to $137.

"Fifth—That the sale of these securities was made by E. Tillotson in person, and on the faith of the solvency of the bank, with which he dealt, through its president, R. H. Maxwell.

"Sixth—That said certificates of deposit were never entered as a charge or liability of the bank on its books, but of this E. Tillotson had no knowledge until long after the issuance thereof, but had reason to believe and did believe that said certificates represented a *bona fide* indebtedness of the bank to the owners of said certificates.

"Seventh—That at the time of the issuance of the said certificates of deposit E. Tillotson had no knowledge of the insolvency of the bank issuing them, but took them in the ordinary course of business, in good faith, relying on the solvency of the bank and the *bona fides* of the whole transaction for his security.

"CONCLUSIONS OF LAW.

"That the amount of three thousand dollars, with interest thereon at six per centum per annum from and after the 24th day of February, 1891, is justly due and owing to E. Tillotson from the Farmers & Drovers Bank of Battle Creek, Nebraska, and that the receiver of said bank should enter for payment and pay the said certificates of deposit, as other claims not contested."

Upon the coming in of the above report a motion for confirmation thereof was made by the claimant, and exceptions thereto were filed by the receiver, which are submitted together. In considering the questions presented by the exceptions it is necessary to refer to some facts disclosed by the record in addition to those found by the referee. From some time in the year 1887 until the 1st day of July, 1890, R. H. Maxwell was conducting a private bank at Battle Creek, Nebraska, known as the Farmers & Drovers Bank, and also engaged in negotiating loans upon real estate. Among his clients was Tillotson, the claimant, for whom he negotiated several loans, the mort-

gages, notes, and coupons, so far as the record shows, being executed in favor of Mary E. Tillotson. About the date last named said bank was incorporated under the laws of the state, Maxwell being at all times thereafter its president, and B. Meyel its cashier. About the 24th day of February, 1891, Tillotson, who was then a resident of Chicago, visited Battle Creek for the purpose of closing up his business there. At that time he had a conversation with Maxwell, at which was discussed the sale to the latter of the securities described in the referee's 4th finding, the Dinkle mortgage being for $2,000 and the Tiedgen mortgage for $3,000, both maturing June 1, 1893, and both bearing interest at eight per cent per annum. He admits that Maxwell proposed to give his individual note for the agreed amount of $4,500 and that he offered to accept a note with either of two persons named as security. The secured note not being given, it was agreed that Maxwell should issue twelve certificates of deposit payable to Tillotson's order for $375 each, the first payable one month after date and one maturing on the 24th day of each month thereafter. In pursuance of that agreement the twelve certificates of deposit were issued and delivered. As to the exact terms of said contract there is a sharp conflict of testimony. Maxwell testifies that he did not represent the bank, but on the contrary it was well understood by Tillotson to be his individual venture, and that the certificates, although issued in the name of the bank, were accepted as his personal obligation. He further testifies that they were to be secured by stock of the bank of face value twice the amount of the certificates. Tillotson on the other hand testifies that his agreement was with the bank alone and asserts that he did not at any time agree to accept Maxwell's personal obligation. The attendant facts, so far as they shed any light upon the subject, are as follows: Upon the conclusion of the agreement between them, Tillotson indorsed each of the mortgages, notes, and coupons attached thereto as follows:

"Pay R. H. Maxwell, or order, without recourse on me.
"MARY E. TILLOTSON, per E. T."

The certificates of deposit do not bear the then current numbers, but appear to have been issued out of the regular order in that respect, and were never entered upon the books as liabilities of the bank; nor were the securities assigned by Tillotson to Maxwell entered at the time of the transaction upon the books of the bank, but on the 27th day of February, according to the testimony of both Maxwell and Meyel, the cashier, they were discounted by the bank; and the several notes and coupons appear upon the discount register under the date last named. There is also upon the daily cash book, under date of February 27 and 28, the following entry:

"Maxwell, R. H. Tillotson, Disc.....$1,000."

It also appears from the books that four of the said certificates were paid by the bank as they matured and the amount thereof charged to Maxwell's account. The certificates of deposit are *prima facie*, the obligation of the bank, and the burden is upon the receiver to show that they were issued without authority. The material question is therefore one of fact. It is not contended that the purchase of the securities by Maxwell in behalf of the bank would be *ultra vires*. On the other hand it is quite as clear that if the latter, and not the bank, was the purchaser, the certificates of deposit are without consideration and void in the hands of the payee. Although the testimony of Maxwell is corroborated by many of the facts we have mentioned it fails to sustain the claim of the receiver. The proposition that Tillotson would exchange $5,000 in notes amply secured by mortgage bearing interest at eight per cent, not to mention $1,000 in notes held by the bank for collection for Maxwell's personal obligation for $4,500, at six per cent, and that after the latter had confessed his inability to give personal security, is too unreasonable to be accepted upon a bare preponderance of the evidence. The proofs fail to

satisfy us that the certificates of deposit are not what they appear to be, the obligations of the bank. It follows that the exceptions of the receiver should be overruled and the report of the referee confirmed.

REPORT CONFIRMED.

THE other judges concur.

AULTMAN & TAYLOR COMPANY V. FRED P. FINCK ET AL.

FILED APRIL 11, 1893. No. 4899.

Contracts: FALSE REPRESENTATIONS: EVIDENCE: REVIEW. This cause involving only the question whether or not, justifiably relying upon the representations of plaintiff's agent as to the contents of a written contract, the defendants signed the same, and whether or not said representations were false, the verdict of the jury in favor of the defendants will not be disturbed.

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

C. Gillespie and *Edwin Falloon*, for plaintiff in error.

Frank Martin, contra.

RYAN, C.

This suit was brought by the plaintiff in error to recover of the defendants in error the sum of six hundred dollars for their failure to settle for an engine in accordance with the terms of a written contract, made a part of the plaintiff's petition. By the terms of this writing the defendants were to deliver to plaintiff an old engine of which they were the owners and execute notes to aggregate amount of eleven hundred dollars.

The answer alleges that the defendants are not able to understand the English language sufficiently well to read the contract in question; that the agent of plaintiff who prevailed upon them to affix their signatures thereto did so by misrepresenting to them the terms of said contract which they were asked to sign; that the warranty given by plaintiff's agent to defendants in respect to said engine was that the engine to be furnished by plaintiff would operate the threshing machine of defendants better than the engine which defendants already had and were using—if not, defendants were not to pay for the new engine; that having reached this agreement plaintiff's agent said to defendants that it would be necessary for them to sign an order for the engine and presented to defendants a paper which plaintiff's agents represented contained the terms agreed upon as above set forth, and the defendants, relying upon said representations, signed said paper; that upon due trial had of the new engine it did not meet the requirements of the above warranty and defendants refused to accept and settle for the same. To these defenses there was a reply in general denial of the above averments. The warranty actually printed in the contract to which the signatures were affixed was radically different from that recited in defendants' answer. The printed warranty was that the "engine is capable of supplying as much power as any engine of the same horse-power made in the United States, and that it is constructed of first-class material throughout." This was conditioned, however, upon notice of failure to work as required being sent to plaintiff by registered letter, etc.

It is not necessary to state the manner in which the questions considered arose, for, as is evident from the pleadings, the main controversy was as to the correctness of defendants' averments as to the execution of the contract sued upon. That there may be no misunderstanding of the history of these transactions, it is proper to say that the

evidence shows that the new engine was taken to the defendants and attached to the separator and failed to work as well as the old engine had done—defendants claiming that the failure was due to general inefficiency of the engine—plaintiff's witnesses excusing the failure as being attributable to only the want of a proper pulley which could easily have been supplied and to improper feeding of the threshing machine, the alleged fault of defendants. At any rate the defendants refused to receive the engine and it was soon thereafter taken away by plaintiff's agent and sold at a less price than that which it is claimed defendants were to pay, hence this action in the main for the difference.

There was evidence that defendants were Germans, who did not understand the meaning of the language of the printed contract; that there was within reach no one better qualified in this respect than themselves, except plaintiff's agent, who misrepresented the terms of said printed contract, as to the alleged warranty; that deceived by these misrepresentations defendants affixed their signatures to the printed contract. This was denied by plaintiff's agent, who insisted that before the printed contract was signed he read to the defendants the dates, description of the engine, and the warranty which was in the printed contract as above recited, and with which there is no claim of compliance. The matters in controversy were submitted to the jury upon competent evidence and correct instructions tested by the principles laid down in *Cole Bros. v. Williams*, 12 Neb., 440, and the verdict sustained the defenses set up in the answer. The judgment of the district court must therefore be

AFFIRMED.

THE other commissioners concur.

JOHN FITZGERALD ET AL., APPELLANTS, V. REINHOLD BRANDT ET AL., APPELLEES.

FILED APRIL 11, 1893. No. 4741.

1. **Bill of Exceptions:** SUBMISSION TO ADVERSE PARTIES: Counsel for appellants, in a case where the appellees were numerous, whose interests were diverse, and represented by different counsel, left the draft of a proposed bill of exceptions at the office of counsel for one of the appellees, and notified counsel for the others that the proposed bill of exceptions was there for their inspection, and would remain for the time allowed by statute. *Held*, That this was not such a submission of the exceptions as required by section 311 of the Civil Code; and that the bill of exceptions would be quashed as to the appellees, to whom it was not otherwise submitted.

2. ———: AMENDMENTS: RETURN. Section 311 of the Civil Code makes it the duty of a party to whom is submitted a draft of exceptions for examination to return it with his proposed amendments, if any, within ten days from its submission.

3. **Appeal:** TIME: JURISDICTION. The time fixed by section 675 of the Civil Code for perfecting appeals in equity cases is jurisdictional; and this court cannot extend it unless it clearly appears that the failure to perfect the appeal is in nowise attributable to the laches of appellants.

4. **Motion for New Trial:** REVIEW. Unless a motion for a new trial is made within three days after the verdict or decision, this court cannot examine any of the errors which it is alleged occurred at the trial.

5. ———: NEWLY DISCOVERED EVIDENCE. A motion for a new trial on the ground of newly discovered evidence was properly denied, when such new evidence was competent under the pleadings in the case; and the witness who was to furnish the new evidence testified on the trial, was examined by the applicant for the new trial, and in which examination no effort was made to elicit any of the facts now claimed to be newly discovered evidence.

6. ———: ———: GROUNDS FOR NEW TRIAL. To entitle a party to a new trial on account of newly discovered evidence, it is not enough that the evidence is material and not cumulative; it

must further appear that the applicant for the new trial could not, "by the exercise of reasonable diligence, have discovered and produced such evidence at the trial."

7. **Equity**: REVIEW: DECREE: PRESUMPTION OF CORRECTNESS. When it is sought to review a decree in equity by error proceedings, and the only error alleged is that the pleadings do not support the decree, every reasonable presumption must be indulged in support of the correctness of the decree; and unless it *certainly* appears that no such decree as rendered could lawfully be pronounced on the pleadings, it will not be disturbed.

APPEAL and error from the district court of Platte county. Heard below before POST, J.

Lamb, Ricketts & Wilson, C. J. Garlow, Burke & Cunningham, for appellants.

M. Whitmoyer, McAllister & Cornelius, W. H. Munger, and *Sullivan & Reeder, contra.*

RAGAN, C.

The appellant John Fitzgerald brought suit in the district court of Platte county to recover a sum of money from appellees Brandt and Fleming, for brick furnished them for the erection of a brick hotel on lot 8, block 85, in the city of Columbus, Nebraska, with a prayer for a material-man's lien on the property. In addition to Brandt and Fleming the following parties were made defendants to the suit, and filed answers, most of them for material furnished for the erection of said hotel, viz.: C. A. Mast, August Boettcher, Thomas Price, Hugh Hughes, Charles Schroeder, August Deitrichs, Pomerene & Percival, William Geizer, Hooker & Orr, Peregoy & Moore, and The Adamant Wall Plaster Company.

On October 3, 1890, the court entered a decree, to which John Fitzgerald, The Adamant Wall Plaster Company, William Geizer, Thomas Price, Hooker & Orr, Pomerene & Percival duly excepted, and, at the same time, obtained

from the trial court forty days in which to reduce their exception to writing, which time was on December 22, 1890, at request of appellants, by the trial judge, extended forty days; and on the 22d day of October filed with the clerk of the district court their bond for the appeal of the case to the supreme court.

On December 5, 1890, appellants filed their motion for a new trial. On December 24, 1890, the official reporter of the trial court filed with the district court clerk a duly certified transcript of all the evidence had at the trial. On January 17, 1891, the motion for a new trial was overruled. On April 25, 1891, the trial judge allowed and signed the bill of exceptions, and on May 7, 1891, the appellants filled in this court their petition in error, and submitted a motion to docket the case as an appeal. Appellees Deitrichs and Boettcher at the same time filed a motion to quash the bill of exceptions, on the ground that it was not submitted to them or their counsel for examination before its allowance by the trial judge.

The appellees were represented in the case and on the trial as follows: C. A. Mast, Brandt & Fleming, and August Deitrichs, by Sullivan & Reeder; August Boettcher, D. S. Morgan & Co., and Peregoy & Moore, by McAllister & Cornelius; Columbus State Bank and Hugh Hughes, by M. Whitmoyer; all of whom appear to reside in the city of Columbus and to be members of the Platte county bar.

We will now dispose of the motion of appellees Deitrichs and Boettcher. There is no pretense that this bill of exceptions was ever submitted to either of the appellees or either of their counsel for examination before being signed and allowed by the judge. By the affidavit of one of the counsel for appellants it appears that on February 18, 1891, all the appellees "*interested in the defense on appeal*" were notified, through their counsel, "*That this bill was, or would be, left at the office of Sullivan & Reeder for*

their inspection and examination and that it would remain there for the time allowed by statute." It does not appear, however, that any of them consented to this. This was not such a submission of the exceptions as is required by the Code, sec. 311. The motion of the appellees Deitrichs and Boettcher to quash the bill of exceptions is therefore, as to them, sustained.

The grounds on which appellants ask to have this case docketed as an appeal are:

"First—For the reason set forth in the affidavit of C. J. Garlow, hereto attached."

I quote the substance of all the affidavits filed for and against this motion, omitting the formal parts.

AFFIDAVIT OF MR. GARLOW.

"C. J. Garlow, being first duly sworn, deposes and says that he is one of the attorneys of the Adamant Wall Plaster Company, one of the defendants in the above entitled cause; that on or about the 18th day of February, 1891, he presented the draft of the bill of exceptions in said cause to M. Whitmoyer, one of the attorneys for Hugh Hughes and Columbus State Bank, defendants also in said cause, and requested the said Whitmoyer to receipt for the same, but he refused to do so, and assigned for his reason that he had been advised by his associate counsel not to do so; that said Whitmoyer retained said bill for about one-half day, and said that he had examined, or partially examined, same, and that there were errors in it which should be corrected; that on the 18th day of February, 1891, the said bill was presented to John J. Sullivan, one of the attorneys for C. A. Mast; that all of the defendants interested in the defense on appeal, or proposed appeal, were notified through their attorneys that the bill, was or would be, left at the office of Sullivan & Reeder for their inspection and examination, and that it would remain there for the time allowed by statute, and that this affiant never refused to receive said bill from the said Sullivan & Reeder, when properly tend-

ered; that he has no recollection of having the alleged conversation with J. G. Reeder at the foot of the stairs of Sullivan & Reeder's office; that the said Whitmoyer was never present at a conversation between this affiant and said John J. Sullivan, concerning said bill of exceptions, to this affiant's knowledge, except when the same was talked over in open court at the court house long after the time mentioned by said Whitmoyer; that the said Whitmoyer spoke to this affiant two or more times concerning the errors in said bill; that said John J. Sullivan never tendered said bill of exceptions to this affiant until the 20th day of April, 1891, nor did he, or any of the other attorneys who make affidavits in this matter, demand of this affiant a receipt for said bill or bring or offer to bring the same to his office and leave it; that the said Sullivan & Reeder may have said that it was ready to return, but if they did so state, they, nor either of them, said that it had been examined by the attorneys interested for other defendants, nor did they offer to return it on behalf of all the parties on whom service had been made and who were equally interested so far as the rights of their clients were concerned; that some of the attorneys claimed that the bill should be left with each firm for the period of ten days, to which affiant remarked that he did not so understand the law, and that he should expect the bill returned to him as required by law, or words to that effect."

AFFIDAVIT OF MR. WHITMOYER.

"M. Whitmoyer, being first duly sworn, deposes and says that in the latter part of February or the first part of March, 1891, this affiant was in the office of Sullivan & Reeder, where C. J. Garlow and J. J. Sullivan were present, and the bill of exceptions in the above entitled action was spoken of, and a conversation held about the same between J. J. Sullivan, C. J. Garlow, and myself, at which time said J. J. Sullivan told said Garlow that he would give him the bill of exceptions in the above stated case and

he could take it with him, when said Garlow replied that he did not want it at that time, that he could get it at any time he did want it."

AFFIDAVIT OF MR. SULLIVAN.

"J. J. Sullivan, being first duly sworn, says that he is one of the attorneys for C. A. Mast, one of the defendants in said action; that the bill of exceptions in this case was served on affiant as stated in the affidavit of C. J. Garlow; that for the purpose of serving said bill of exceptions said Garlow summoned affiant to the office of said Garlow by telephone; that affiant received said bill when tendered to him and examined same and made the indorsement now appearing thereon; that said indorsement was made on the day it bears date, which is, as affiant now remembers, February 21, 1891, that within a week after said indorsement was made, as shown by the date thereof, affiant tendered said bill of exceptions to said Garlow at the office of affiant in the city of Columbus which said office is only one block distant from the office of said Garlow; that said Garlow stated that he did not want said bill of exceptions at that time and refused to receive it; that said Garlow then and there further stated that he would take said bill of exceptions some other time; that said Garlow never did afterwards, until April 20, 1891, call for or ask for said bill of exceptions, although in meantime he was very frequently in affiant's office and saw and talked with affiant almost daily; affiant further states that prior to April 20, 1891, no person representing any of the appellants herein ever asked for or requested the return of said bill of exceptions."

AFFIDAVIT OF MR. M'ALLISTER.

"W. A. McAllister being first duly sworn says he is one of the attorneys for August Boettcher and August Deitrichs, two of the defendants in the foregoing action; about the latter part of February, 1891, C. J. Garlow, attorney for the Adamant Wall Plaster Company, one of the defend-

ants herein, requested the affiant to accept service of the bill of exceptions in this action, without delivering said bill of exceptions to the affiant, saying at the time: 'I am too busy to carry this bill of exceptions to all the attorneys interested, I want you all to receipt for it now, and I will leave it at some central place where you can all get it or examine it,' or words to that effect."

AFFIDAVIT OF MR. REEDER.

"J. G. Reeder, being first duly sworn, deposes and says that he is one of the attorneys for C. A. Mast, one of the defendants in the above cause; that about ten days after the bill of exceptions in this case had been served on the firm of Sullivan & Reeder, affiant met C. J. Garlow at the foot of the stairway leading to the office of the said Sullivan & Reeder; that said Garlow inquired of affiant if the said bill of exceptions was ready; that affiant informed him that the bill was ready for him and offered to go upstairs and get it for him, but was informed by said Garlow that he did not want it at that time, but would call for it when he wanted it; that about a week or ten days after said conversation said Garlow was in the office of Sullivan & Reeder and in a conversation then had between said Garlow and affiant relating to said bill of exceptions affiant offered to give said bill to said Garlow, but said Garlow stated that he did not want it then, and would come after it when he wanted it; said bill was not again mentioned to said affiant by said Garlow until April 20, 1891, although affiant met him daily upon the streets and at other places, and held frequent conversations with him."

We have come to the conclusion that the failure of the appellants to procure from the clerk of the district court and file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the court below, within six months after the date of the decree, cannot be attributed to the act of the appellees, or any of them.

As a matter of law, appellants' contention that it was the duty of Sullivan & Reeder to return the draft of exceptions to appellants within ten days after its submission is correct; but this evidence falls far short of establishing the fact that appellants were deprived of the opportunity to file their transcript here in time for appeal, by reason of Sullivan & Reeder's not returning the draft of exceptions in ten days after its submission.

"Second—For the further reason that the court took said cause under advisement and had it under advisement for about —— days, and during the time it was under advisement the court received further evidence on which said judgment was rendered."

Appellants offer no proof of this, and were it admitted, it would not confer any authority on this court to extend the time for appeal. The motion of appellants to docket this case as an appeal must therefore be overruled.

Appellants' motion for a new trial, *for errors occurring thereat,* not having been made within three days after the rendition of the decree, "we are precluded from examining any of the errors which it is alleged occurred during the trial." (*Carlow v. Aultman,* 28 Neb., 672.) Appellants insist, however, that the court erred in overruling their motion for a new trial on the ground of newly discovered evidence. The affidavits filed in support of and against this motion are very numerous and very voluminous, and it would subserve no useful purpose to quote them here. Appellants' affidavits in support of this were directed to the point that appellee Mast was given a lien on the property; and that since the decree the appellee Fleming had told one of the connsel for appellants that he, Fleming, would now swear that Mast was interested in the hotel; as owner, I suppose—though the record does not say —that he, Fleming, was Mast's agent in overseeing the erection of the same; that Mast furnished money and material used in its erection, and that the appellants had no

knowledge until after the decree that Fleming would testify as alleged.

The affidavits and other evidence of appellees used on the hearing of this motion not only contradicted the affidavits of appellants, but affirmatively showed that Mast had no such interest in the property as was claimed. In addition to this, the records disclose the fact that appellants in their pleadings claimed that Mast was interested in the hotel; and on the trial Mr. Mast and Mr. Fleming both testified and were cross-examined by counsel for appellants—their examinations in full were used on the hearing of this motion—and no inquiry was made of Fleming or Mast as to their business relations, or as to the latter's interest in the hotel. This new evidence then was material, and, so far as we know, not cumulative; but appellants "by the exercise of reasonable diligence could have discovered and produced it at the trial." The action of the court in refusing to grant appellants a new trial on the ground of *newly discovered evidence* was entirely correct.

Finally, appellants insist that the decree rendered is not supported by the pleadings. We think differently. Without an examination of the evidence, we cannot say that either appellants or appellees were entitled to liens, much less determine their order. Every reasonable presumption must be indulged in support of the correctness of the decree; and unless it *certainly* appears that no such decree as rendered could lawfully be pronounced on the pleadings, it will not be disturbed. The decree of the district court is therefore in all things

AFFIRMED.

THE other commissioners concur.

NELSON WESTOVER ET AL V. HENRY E. LEWIS.

FILED APRIL 11, 1893. No. 4326.

1. **Finding in Case Tried to Court:** REVIEW. The finding of a court, in a case tried without the intervention of a jury, has the same force as a verdict and will not be disturbed where the evidence is conflicting.

2. **Dismissal.** Where testimony has been introduced justifying the granting of any relief, and in support of any issue, the court cannot dismiss the action because of a failure of proof upon other issues.

3. **Finding in Support of Temporary Injunction:** REVIEW. A judgment containing a finding that a temporary injunction was properly allowed will not be reversed where such finding does not prejudicially affect the rights of the party complaining, and the judgment is otherwise correct.

ERROR from the district court of Lancaster county. Tried below before FIELD, J.

Billingsley & Woodward, J. E. Philpott, and *W. H. Westover*, for plaintiffs in error.

Henry E. Lewis, Frank W. Lewis, and *Robert Ryan, contra.*

IRVINE, C.

This is a proceeding in error seeking to reverse a judgment of the district court of Lancaster county entered in two cases which had been consolidated and tried together. One of these cases was brought by the defendant in error against Nelson Westover, John Fisher, A. H. Westover, and Jennie Westover, upon a bond executed by Nelson Westover as principal, and the other defendants named as sureties, which bond recites an agreement between Nelson Westover and Lewis, contemplating the sale by Westover to

Lewis within a period of two years from the date of the bond and agreement, of promissory notes secured by chattel mortgages or otherwise, and the indorsement of such notes to Lewis; Westover guaranteeing to Lewis and his assigns payment within thirty days after maturity of each and every of the promissory notes so sold and indorsed with interest, and agreeing to collect said notes without expense to Lewis, and agreeing that if any note should not be paid within thirty days after maturity to forthwith pay said note to Lewis or his assigns. The condition of the bond was for the payment by Westover to Lewis within thirty days after maturity of each and every of said notes so sold with interest, and generally for the performance of the contract. The petition sets up the purchase by Lewis from Westover of certain notes, the failure to pay the same, and prays judgment accordingly. The second action was brought by Lewis against Westover alone, alleging that in 1885 he placed in the hands of Westover a large number of notes theretofore purchased from Westover with the agreement on the part of Westover to collect and remit. That Westover collected a large sum on the notes, failing to remit the proceeds, and in some cases taking horses and cattle in payment of the notes, and investing the proceeds of other notes in horses and cattle, and when requested to pay over the proceeds, that he gave Lewis security on said horses and cattle through an instrument, in form a bill of sale, attached to the petition. Lewis alleges that said instrument was given to secure the payment of the money so collected, and for no other purpose. The petition in the second case further alleges that Westover was threatening and about to sell said property, declaring Lewis to be its owner, and claiming the right to sell the same to pay costs of keeping said stock, and bringing from Boone county to Lancaster county; further, that there was a large amount of money due to Lewis from Westover secured by said instrument. The petition prays that Westover be enjoined

from selling and disposing of said stock; that an accounting be had, and the property sold and proceeds applied to the payment of the amount found due the plaintiff.

In this second action an injunction seems to have been granted *pendente lite.* Subsequently the defendant moved to modify the injunction so as to allow him to sell the property and bring the proceeds into court, subject to its further order. Thereupon an order was made directing the property to be sold by the sheriff and the proceeds brought into court; this was done. Thereafter John Fisher and Jennie Westover intervened in this action by a petition setting up an agister's lien upon the stock. It is unnecessary for the purposes of this decision to state the nature of the other pleadings in the two cases, except to say that by appropriate pleadings the whole subject-matter of the actions was substantially put in issue, except that the agreement and bond alleged in the first petition was admitted, and that in the second case Nelson Westover by answer alleged that the bill of sale referred to was in pursuance of an absolute sale of the stock in question to Lewis and was not given as security.

Upon the trial of the case the court found due Lewis from Westover $3,054.65, and the same amount due from John Fisher and A. H. Westover as sureties upon the bond. The court further found in favor of the defendant Jennie Westover, upon the defense of coverture set up by her, and dismissed the action as against her. The court further found that the injunction had been properly allowed; that Nelson Westover was the owner of the stock, subject to a lien of Lewis by virtue of said bill of sale for any indebtedness existing, and that Lewis was entitled to the proceeds of the sale of the cattle then in the hands of the clerk. Judgment was rendered accordingly.

The assignments of error are quite general in their terms, and for the most part raise no questions except as to the sufficiency of the evidence. The principal conten-

tion is against the finding of the court whereby the transfer of the stock from Nelson Westover to Lewis was declared to be a mortgage. Another assignment relates to the finding of the amount due. Upon these questions the briefs are voluminous, and the testimony relating thereto, preserved in the bill of exceptions, is of very considerable bulk. It would serve no useful purpose to expand this opinion by a review of the evidence. This court, in the exercise of its appellate jurisdiction, is not a court for the determination of issues of fact where the evidence is conflicting. A careful examination has been made of the record, and it very clearly discloses sufficient evidence to sustain the findings of the trial court in both particulars. It is indeed admitted in the brief of plaintiff in error that Lewis's testimony shows the transfer of stock to be a mortgage. The testimony offered on his behalf, as to the amount of indebtedness, is as clearly sufficient upon that point.

It is also contended that the court erred in overruling a motion made when Lewis rested his case in chief; that the equity branch of the case should be dismissed for the reason that no evidence had been offered in support thereof. The argument upon this point is directed to the fact that all the evidence offered at that time had related to the indebtedness from Westover to Lewis, and that no evidence had been offered to sustain the allegations as to Westover's threatening to dispose of the live stock. The object of the equity case was not, however, merely to obtain the injunction. It sought an accounting and a foreclosure of the instrument claimed by Lewis, and found by the court to be a chattel mortgage. The action might well have been maintained as one for an accounting alone. The first action was one at law upon the bond. The second was for an accounting upon an indebtedness arising in the same manner, but to enforce different security. The plaintiff had a right to maintain both actions, and the testimony offered by him

in chief tended to support both cases. There was, therefore, no error in overruling this motion. Indeed, it may be doubted whether error can be predicated in any case upon such a ruling where the party moving for a dismissal, instead of resting upon his motion, proceeds to introduce evidence, and the whole evidence in the case supports the cause of action.

The only other error of law specifically referred to is the finding of the court that the injunction was properly granted. If this was an error, it was without prejudice. The court found that Lewis had a mortgage upon the cattle for more than they proved to be worth. Westover had no right to sell them, and furthermore, upon Westover's own motion, a sale was made under the direction of the court, and the proceeds held to await the determination of the action. We cannot see how this finding as to the right of plaintiff to an injunction at the institution of the suit in any way affects the rights of the defendants. The judgment of the district court was right and is

AFFIRMED.

RAGAN, C., concurs.

RYAN, C., took no part in the decision.

CITY OF GRAND ISLAND V. HANNAH OBERSCHULTE.

FILED APRIL 26, 1893. No. 5031.

1. **Municipal Corporations:** LIABILITY FOR FAILURE TO KEEP STREETS AND SIDEWALKS IN REPAIR: INSTRUCTIONS set out in the opinion *held* not calculated to mislead the jury, and that the verdict is sustained by the evidence.

2. **The verdict** conforms to the proof.

ERROR from the district court of Hall county. Tried below before HARRISON, J.

O. A. Abbott, for plaintiff in error:

The city is under no obligations to make its sidewalks *convenient;* is under no obligation to any private individual to lay down any walks. The duty imposed upon it by law to repair streets, like its duty to light them, is a duty which courts cannot enforce, although a citizen may suffer injury from the non-action of the city. (*City of Freeport v. Isabell*, 83 Ill., 442; *City of Joliet v. Verley*, 35 Id., 58; *Sparhawk v. City of Salem*, 1 Allen [Mass.], 30; *Macomber v. City of Taunton*, 100 Mass., 255.)

Thompson Bros., contra, cited: *City of Lincoln v. Walker*, 18 Neb., 250; *Palmer v. City of Lincoln*, 5 Id., 136; *City of Lincoln v. Smith*, 28 Id., 762; *City of Omaha v. Randolph*, 30 Id., 699.

MAXWELL, CH. J.

This is an action brought by the defendant in error against the plaintiff in error for damages caused by injuries received by her from a fall or sudden jar received while passing along the sidewalk on one of the streets in the city of Grand Island on the night of the 11th day of February, 1890. This street had been graded during the fall of 1889, and in grading the same an embankment was left on the west side thereof over or through which a person would be compelled to cross in passing from the east to west along the sidewalk on the north side of Sixth street, which excavation was perpendicular, and as shown by the evidence, was at least from one and a half to two feet deep; that there were no guards, lights, or other protection to a traveler passing along and over the said excavation; that the rain and melting snow had deepened this

excavation so that at the time of the receiving of the said injuries the depression was at least two feet deep, and that the city had carelessly, knowingly, and negligently permitted the said street to remain in such dangerous condition; that on the night in question the defendant in error with her husband and a lady friend were passing along Sixth street, and on arriving at the said excavation the defendant in error, without knowing the bad condition of the street, stepped suddenly down in said excavation, the defendant in error receiving serious internal injuries caused by such sudden fall or jar. The night was extremely dark and there was nothing to warn the said defendant in error of the dangerous condition of the street, and she and each of her said companions being unacquainted with the street. The testimony also shows that prior to receiving the injury Hannah Oberschulte was a stout, able-bodied woman, able to do all her own work and work for other people, but from the time of receiving the said injury she was unable to work, the injury being of a permanent nature and was caused without any fault or negligence on her part. The cause was tried to a jury; verdict and judgment in favor of the said defendant in error for the sum of $1,000.

The ground assigned for a reversal of the case is that the court erred in giving instruction No. 7, which is as follows:

"You are further instructed that if you find from the evidence that the defendant did not exercise reasonable care and supervision over that portion of the street where the injury in question was alleged to have occurred, to keep it in good and safe condition, and by that means allowed it to become defective and unsafe, and if you further believe from the evidence that the plaintiff, in attempting to walk along that portion of the street, by reason of such defect, was injured and has sustained damage thereby, as charged in the petition, and that she was at the time exercising reasonable care and caution in walking on said

street, then the defendant is liable. It is the duty of the defendant city to keep and maintain its sidewalks in good repair for the safe use and the convenient use of the traveling public walking and passing thereon; and if the city authorities, knowing that said street is defective and unsafe, or after having sufficient time in exercising of reasonable diligence or ordinary care to discover and repair the defect complained of, suffers it to remain in an unsafe condition, and if the plaintiff, while lawfully and in the exercise of ordinary care, passed over the said street in such unsafe condition, and was injured by reason of the defective condition of the said street, then the city is liable for her damages sustained at the time of such accident."

The objection in the plaintiff in error's brief is "that the city is under no obligations to make its sidewalks convenient." The first definition of "convenient" given by Webster is, "fit or adapted to an end; suitable; becoming; appropriate." Fit or suitable is probably the proper meaning as applied to a sidewalk. This does not necessarily apply to any particular material out of which it is to be constructed, but it must be placed in such condition that people in the exercise of ordinary care will not in the night season fall into an excavation or place left in a dangerous condition. It is evident that the instruction in question did not mislead the jury, and the verdict conforms to the proof. The judgment is therefore

AFFIRMED.

THE other judges concur.

JOSIE JOHNSON, APPELLANT, V. JONAS P. JOHNSON, ADMINISTRATOR, APPELLEE.

FILED APRIL 26, 1893. No. 5046.

1. **Creditor's Bill:** GIFT: LIABILITY OF THIRD PARTY: EVIDENCE. The testimony tends to show that in 1882, one C., then worth at least $5,000, erected a house and made improvements on the land of his mother, which cost to exceed $2,000. He continued to assist her in a limited degree until 1886, when he died insolvent. In an action by a creditor whose claim had nearly all been contracted after 1882, and who received payment of her share of the assets of the estate of C. *pro rata* with other creditors, to subject the estate of the mother to the payment of the residue of her claim, *held*, that the proof failed to show that C. was insolvent when he assisted his mother, or that his assisting her caused his insolvency, and that the mother's estate was not liable.

2. ———: EVIDENCE. There is proof that would warrant the court in finding that his mother, about 1880, loaned C. $1,050.

APPEAL from the district court of Howard county. Heard below before COFFIN, J.

O. A. Abbott and *A. A. Kendall*, for appellant.

Paul & Templin, contra.

MAXWELL, CH. J.

This is an action to subject certain real estate to the payment of the claims of the plaintiff. The testimony shows that Chris Johnson died in the year 1886; at that time he was indebted to the plaintiff in the sum of $922.50, which was allowed against his estate. The estate proved to be insolvent, and the plaintiff only received the sum of $577.31, leaving due to her on said claim $453.60, for which it is sought to subject the real estate in question. On the trial of the cause in the court below the issues were found in favor of the defendant and the action dismissed.

The testimony tends to show that one Sarah C. Johnson, the mother of Chris Johnson and Jonas P. Johnson, removed to this state about the year 1881 and settled upon government land, and that Jonas P. Johnson had removed to this state one or two years before that time; that his mother's claim was near his; that Chris Johnson, who had been doing business in Illinois, commenced the erection of a house and other improvements on the land for his mother; that the value of the house and other improvements exceeded $2,000; that the house and improvements were made in 1882 and 1883. There is some proof, however, that Chris continued in a limited degree to assist his mother up to the time of his death in 1886. There is also proof tending to show that prior to 1880 Chris had been conducting a grocery and failed in business; that afterwards he obtained $1,050 from his mother and started a saloon in Quincy, Illinois. In this he succeeded and sold out in 1882 for $5,000.

The plaintiff's claim is for service and for keeping house for Chris, which began about 1882 and continued up to the time of his death. She claims that Chris put his money into the estate of his mother and thereby became insolvent; that the mother's estate is liable for her claim. The proof fails to show that Chris Johnson was insolvent when he made the improvements in question for his mother, or that he made the improvements in contemplation of insolvency. A person who is apparently able to pay his debts and believes himself to be so, and has no design to defraud his creditors, may make a valid gift to a relative. The gift, however, must not be disproportionate to his means, nor such as will produce insolvency. The proof fails to show that this gift, if such it was, produced the insolvency of Chris Johnson. The proof is meager upon this point and very unsatisfactory. The right of the plaintiff to reach the assets in the hands of a fraudulent grantee is undoubted, but the proof fails to sustain the charge. This is

upon the theory that Chris made a gift of the house and improvements to his mother, but, as heretofore stated, the court would be justified in finding that Chris was indebted to her for $1,050. In any view of the case, therefore, the judgment is right and is

AFFIRMED.

THE other judges concur.

GEORGE BEDFORD V. STATE OF NEBRASKA.

FILED APRIL 26, 1893. No. 4978.

1. **Criminal Law:** ADMISSION OF INCOMPETENT EVIDENCE: ERROR NOT CURED BY ORDER TO STRIKE OUT. In a criminal prosecution, evidence which on its face is clearly incompetent and prejudicial to the accused should not be introduced, and if the prosecution, without a promise to prove other facts to render it competent, is permitted to introduce such evidence and it is thus placed before the jury, an order of the court afterwards made to strike it out does not wholly cure the wrong and may be cause for reversing the judgment.
2. **Letters written by third parties** in another state to third parties in this, but not in answer to letters written by the accused nor connected therewith, are not admissible in evidence against the accused to prove a material fact in the case.

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

W. A. Prince, for plaintiff in error.

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

MAXWELL, CH. J.

The plaintiff in error was informed against under section 164 of the Criminal Code, upon the charge that "On

the 14th day of May, 1891, in the county of Hall and the state of Nebraska aforesaid, did then and there unlawfully, willfully, and maliciously attempt to corrupt and influence one Clara Bedford a material and important witness in an action pending in the district court of Hall county, Nebraska, wherein the state of Nebraska was plaintiff and one Hezekiah Bedford, defendant, charged with incest committed with his daughter, the said Clara Bedford, in said county, and she, the said Clara Bedford, was a material and important witness for the state of Nebraska in said case against the said Hezekiah Bedford, as he, the said George Bedford, then and there well knew. And he, the said George Bedford, did in said county and state then and there attempt to corrupt and influence the said Clara Bedford, witness as aforesaid, by offering to buy her clothes, pay her traveling expenses to the state of Illinois, and to keep her there if she, the said Clara Bedford, would leave the said county of Hall and state of Nebraska and go to the state of Illinois and secrete herself so she could not be procured as a witness on the part of the state of Nebraska in the said action against the said Hezekiah Bedford, 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 plaintiff in error, defendant below, pleaded not guilty, whereupon a jury was impaneled and he was found guilty as charged, and sentenced to imprisonment in the county jail for seven days and to pay a fine of $50 and costs.

Three errors are assigned which will be noticed in their order.

1. The testimony tends to show that on the 30th day of December, 1890, one Clara Bedford, a girl fourteen years of age, filed a complaint before a justice of the peace of Hall county in which she charged her father, Hezekiah Bedford, with the crime of incest; that an examination was had on the charge and the justice found probable cause

to hold the accused to answer to the district court; that thereupon the bail was fixed at $500, which the accused was unable to furnish, and he was therefore imprisoned in the jail of Hall county. It also appears that Hezekiah Bedford is very poor and that upon his imprisonment, if not before, his family received aid from Hall county. It also appears that the plaintiff in error is a resident of Decatur county, Illinois, and appears to be in prosperous circumstances; that he owned one or more farms about nine miles northwest of Grand Island, near Abbott station, and Hezekiah Bedford and his family resided on one of his farms. It also appears that the plaintiff in error had, before the difficulty spoken of, assisted his brother's family in a limited degree by providing clothing for them; that in the spring of 1891 he came to this state to look after his farms and perhaps assist his brother, although the proof upon that point is very meager. It does appear, however, that his brother was then in jail; that the family had been receiving aid from the county; that he carried some clothing to the house for the younger children, but that he carried the complaining witness to Grand Island, as he alleges, that she might procure some clothing for herself. He admits having taken her to a certain store (naming it) to procure certain needed articles of clothing for which he was to pay. This girl appears to be the oldest child, and the reason he gives for not taking clothing for her to the house is, in effect, that it was difficult to procure the proper size. No one seems to have seen Clara Bedford leave Grand Island, although, as will presently be seen, parties were watching the trains to see that she did not leave. The plaintiff in error seems to have expressed considerable anxiety about his brother, and had a conversation with several persons in regard to the same, among others Daniel Ramsa, called as a witness on behalf of the state, and after testifying to various conversations he had with the plaintiff in error he was permitted to testify as follows against the objections of the plaintiff in error:

Q. Dan, do you remember coming to my (the prosecuting officer's) room one morning early, about 5 or 6 o'clock and telling me to watch the trains, that George Bedford was going to run the girl out of the country?

Objected to, as immaterial, calling for a conclusion of the witness, and for the further reason that there is no proper foundation laid. Overruled and exception taken.

Q. Can you remember doing that—yes or no; can you remember?

A. It was later than that.

Q. I want to know if you can remember that occurrence?

A. Yes.

Q. You remember that occurrence?

A. I don't remember stating it just like that.

Q. You remember coming to my room that morning?

A. Yes, sir.

Q. When was that in relation to the conversation you had with George Bedford at Whitney's stairs; before or after?

Objected to, as immaterial. Overruled and exceptions taken.

A. Mr. Ryan had notified me that they were attempting to run the girl out of the country, trying to do so, and he wanted me to—if I knew anything about it, found out anything about it at all—to let him know; and I merely mistrusted that evening from my conversation with Mr. Bedford——

Objected to, as immaterial. Overruled and exceptions taken.

A. I went and told Mr. Ryan that I thought——

Objected to, as immaterial.

A. That I thought that they was going to. I didn't know for certain, but I thought they were going to. If they hadn't, I thought they would that day.

Q. Who do you mean by "they"?

Objected to, as calling for an opinion of the witness and no foundation laid. Overruled and exceptions taken.

A. Mr. Bedford's folks.

Q. What Bedford's folks?

A. Well, Mr. George Bedford and family up there, I suppose.

Q. Now, Dan, what county and state did these conversations that you have just related take place in?

A. This county, Grand Island, Hall county, Nebraska.

CROSS-EXAMINATION.

Q. You expected to be a witness in the case of the state of Nebraska against Hezekiah Bedford, didn't you?

A. I did.

Q. And have you ever told Mr. Bedford and myself that you didn't think there was any case there?

A. I might have said so.

Q. You told us that you thought you could bring evidence that would acquit Mr. Hezekiah Bedford, didn't you?

A. I have said lots of times, and would say it now, that I think there can be evidence fetched to impeach what evidence has been given.

Q. And that you thought——

COURT: This part of Mr. Ramsa's testimony with regard to his going and telling Mr. Ryan, unless there is some further foundation for it than has been given, may be stricken out.

We know of no rule that will permit the admission of evidence plainly incompetent on its face over the objection of the party accused where there is no promise by the party offering it to connect with other evidence so as to render it competent; and after it is before the jury strike it out. The court may be deceived as to the effect of certain evidence offered, or may believe that it is properly admissible, and after it is before the jury see that it is not, and therefore order it stricken out; but a court cannot deliberately permit a large amount of damaging evidence to be

admitted and have its effect on the jury and then cure the wrong by merely striking out the testimony improperly received. The state should not resort to questionable practices to secure conviction. Constitutional guarantees of a fair trial before an impartial jury amount to but little if tricks are sanctioned in the progress of a trial. It is very evident that merely withdrawing the evidence from the jury did not remedy the wrong.

2. A letter from the wife of the plaintiff in error to the wife of Hezekiah Bedford, and also from the daughter to her mother, were offered and introduced in evidence against the objection of the plaintiff in error. These letters were not written to the plaintiff in error, nor in answer to letters sent by him, nor are they in any way connected with this case. Upon what theory they were admitted we are at a loss to know. Letters of third persons are receivable in evidence as merely collateral, introductory, or incidental to or in illustration of the testimony which the witness gives. (1 Chitty, Cr. Law, 368, 369; 1 Phillips, Ev. [4th Am. ed.], 170.) As, where a witness testified that he was induced to institute proceedings by letters of a third party. (*Lewis v. Manly*, 2 Yeates [Pa.], 200.) But the letters could not be received as evidence of the facts stated in them. (5 Am. Law Reg., 468.) "All acts, declarations, etc., made by third persons are obnoxious to two objections. 1. That they are *res inter alios acta*, and therefore irrelevant. 2. That they are mere hearsay, the assertions of parties without the sanction of an oath and an opportunity for cross-examination. But entries against interest and in the course of business have always been considered as limitations of the rule excluding the first, and they are admitted not because the acts or admissions of third parties can bind others, but because they are evidence, just as the same party's oath would be, of the facts therein stated. The peculiar circumstances under which they are made are considered quite as efficient a safeguard against falsehood as an oath, and

when the opportunity for cross-examination is forever lost by the party's death, such entries and declarations are freely admitted in evidence in suits between other parties." Letters of third parties in a foreign country in the ordinary course of business offering to sell goods of a certain grade for a price named have been received in evidence. (*In re Fennerstein's Champagne*, 5 Am. Law Reg., 464, and cases cited.) The case cited was decided by a divided court—three of the judges dissenting. No case has been cited, however, and we have been unable, after a pretty thorough search to find one, where letters of third parties addressed to third parties, and having no connection with the accused, were admissible in evidence to prove an essential fact in the prosecution of the case. It is very evident that these letters were improperly admitted and that the court erred in its ruling thereon.

3. As there must be a new trial we will not discuss the evidence. It rests largely in inferences. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

WOOD RIVER BANK OF WOOD RIVER V. FREEMAN C. DODGE ET AL.

FILED APRIL 26, 1893. No. 4674.

1. **Review.** Where from an examination of the evidence it is apparent that the verdict is wrong, it will be set aside.

2. **Misconduct of Juror:** STATEMENT OF FACTS WHILE CONSIDERING VERDICT. A juror will not be permitted to state to his fellow-jurors, while they are considering their verdict, facts

in the case within his own personal knowledge but not given in evidence. He should make the same known during the trial and, if desired, testify as a witness in the case.

ERROR from the district court of Hall county. Tried below before HARRISON, J.

J. H. Woolley and *Thompson Bros.*, for plaintiff in error.

Thummel & Platt, contra.

MAXWELL, CH J.

The plaintiff brought an action against the defendants to recover the sum of $1,884.25 with interest. To the petition the defendants filed an answer as follows:

"Come now the above defendants and for answer to the petition of plaintiff say, that they formed a limited partnership in the transaction of purchasing and selling hogs and conducted said business in the name of Dodge Bros.; that they kept the account with the said plaintiff in all the transactions done, and banked with this plaintiff as Dodge Bros. for this business; that Freeman C. Dodge had a personal account with said bank, so did the said George F. Dodge, for their own personal transaction of business which had no connection whatever with the said Dodge Bros.' business; that these defendants made all deposits done under the business in the name of Dodge Bros., and drew on the said plaintiff all the checks on the said plaintiff's bank in the name of Dodge Bros., and none other; that George F. Dodge did all the business transactions for the said firm and deposited all the funds for the sale of the property and drew all the checks and money from the plaintiff in the name of Dodge Bros., and none other; that these defendants admit they drew from the said plaintiff the said sum of $21,993.21, and no more; they also admit they deposited the sum of $20,108.96, as credited to

them in the petition, and also claim the fact to be that they paid or deposited the additional sum of $7,832.47 to the said plaintiff, which the said plaintiff has neglected and refused to give them credit for as follows: On or about June 30, 1887, the United States National Bank deposited or paid to the plaintiff, to be placed to the credit of Dodge Bros., the sum of $5,812.89; that on the 18th day of July, 1887, the said Dodge Bros. deposited or paid into plaintiff's bank, to be credited to the said Dodge Bros., the sum of $600, on September 5, $789.23, and September 9, $629.65; that the said defendants are not indebted to said plaintiff in any sum whatever, but that the plaintiff was indebted at the commencement of this action on the said account the sum of $5,812.89, which sum the defendants claim justly due and wholly unpaid; therefore pray judgment against said plaintiff in the said sum of $5,812.89 over and above all claims so as aforesaid mentioned in plaintiff's petition, with interest thereon at seven per cent per annum from the 18th day of January, 1888, and costs."

The plaintiff filed the following reply:

"Now comes the above named plaintiff and for reply states: That it denies that the said defendants, or either of them, are entitled to the credit of $7,012.89, the same being the $5,812.89 and $1,200, mentioned in said defendants' answer, or any other or different amount than as mentioned in the said plaintiff's petition, or that the said plaintiff received the said amounts, or either of them, except in said petition mentioned and herein stated, and as further reply states that the $5,812.89 was received by the said plaintiff in draft in favor of said Dodge Bros. at the time in said answer mentioned, but that the same was claimed by the said Freeman C. Dodge to be his property or mostly so, and the said Freeman C. Dodge then and there ordered the same placed to his credit on his individual account with the said bank, which the said bank then and there did; that the same was done

by and with the knowledge and consent of the said George F. Dodge, and was afterwards by him ratified and adopted with the full knowledge of all the foregoing facts; that the plaintiff has since the said time made and effected a settlement with the said Freeman C. Dodge, and by and with the consent of the said George F. Dodge allowed and given the said Freeman C. Dodge entire and full credit for the said sum of $5,812.89, and that neither of said defendants are entitled to the said credit of the said amount on the account sued on in this case; that as to the facts as to whether or not the said defendants are partners or were at the time the said account was made and business transacted this defendant has neither knowledge nor information sufficient to form a belief and therefore denies the same and puts said defendants upon their proof. Wherefore the said plaintiff demands judgment against the said defendants as in its petition prayed."

On the trial of the cause the jury returned a verdict for the defendants for the sum of $4,719.71, upon which judgment was rendered.

Two errors are relied upon for a reversal of the judgment: First, that the verdict is against the weight of evidence; and, second, misconduct of certain jurors.

1. The testimony is undisputed that about the 1st of July, 1887, a large number of hogs were shipped in the name of Dodge Bros. to South Omaha; that the amount realized from these hogs was $5,812.89, which was placed to the credit of the Wood River Bank in the United States National Bank of Omaha. Up to this point there is no dispute. It is claimed on behalf of plaintiff that the hogs in question were the property of Freeman C. Dodge and paid for by him out of money obtained from the plaintiff, and that he directed the plaintiff to place the same to the credit of his individual account, which was done. This is denied by the defendants. Both of the defendants testify that the money was deposited to the credit of Dodge Bros.,

and not to the credit of Freeman. All the officers of the bank, some of whom seem to be disinterested, testify that such was the arrangement. We also find that in the bank book of George Dodge with the plaintiff, which is here in the record, these hogs were not credited to Dodge Bros. The officers of the bank testify that this book was delivered to George Dodge a few weeks after the transaction; that he returned and stated that he and his wife had looked over it and found it correct, except an item of $20. George denies receiving the book until about the month of January after the transaction. He in effect admits the $20 mistake. The mode of doing business with the bank seems to have been as follows: When a shipment of hogs was about to be made the defendants would receive credit for the supposed value of the hogs and were permitted to check the same out. It appears that about the 5th of September of that year Dodge Bros. made, or were about to make, a shipment of hogs to South Omaha and received credit at the bank for $600, a duplicate deposit slip being made. It is claimed by the plaintiff that the same day a second duplicate deposit for $600 was made. The defendant George Dodge testifies, in effect, that this was a second deposit and that it was received from a second shipment of hogs. On the other hand the cashier testifies that original credit was given in the morning and the duplicate slip given to the defendant; that in the afternoon he came into the bank and stated that he had not received a duplicate in the morning and that thereupon the cashier issued a second duplicate slip for $600, and wrote the abbreviated word "dupl." instead of triplicate on it. The agent of the railroad company at Wood River was called and stated, in substance, that a record was kept in his office of all shipments made from there and but one car of hogs was shipped by Dodge Bros. at the time stated, and he in effect corroborates the testimony of the cashier. It is very evident, therefore, that Dodge is mistaken in his testimony, and

that the cashier's testimony on that point is correct, and the verdict is against the weight of evidence.

2. The affidavit of one of the jurors was filed in support of one of the grounds of the motion for a new trial for the misconduct of certain jurors. It is as follows:

"P. F. McCullough, being first duly sworn, deposes and says that he was a member of the jury to whom the above case was tried on February 15, 1890; that during the discussion of the case in the jury room the question came up as to whether Freeman C. Dodge did authorize the Wood River Bank to place the said $5,812.89 to his own individual credit, when Mr. Hollister and Mr. Hockenberger both swore he did so authorize, and F. C. Dodge swore he was not in Wood River, Nebraska, on July 2, 1887, the date of said credit, but was in Omaha, Nebraska; that many of the jury were in doubt as to who was mistaken on this point, and so expressed themselves; that thereupon one C. C. Robinson, a member of said jury, stated that he knew Mr. Hollister and Mr. Hockenberger were mistaken as to that point, for he was in Omaha, Nebraska, and saw the said Freeman C. Dodge there himself on July 2, 1887, and he could not have been present in Wood River, Nebraska, on that day and ordered said credit; that many of said jury, and especially this affiant, having confidence in and relying upon the statement of said C. C. Robinson, became satisfied that said Hollister and Hockenberger were mistaken on this point, and so may be mistaken on other points, and thereupon he changed his vote from the plaintiff's favor to and for a verdict for these defendants." There is also an affidavit of W. H. Thompson to the same effect. There is also an affidavit of J. H. Woolley that the jury were sent out Saturday evening; that a number of them resided in the western part of the county and were very anxious to return home; that they inquired of the bailiff the time when the last train would be due going west, and having ascertained the time, the verdict was returned

before that hour and presumably without proper deliberation.

The counter-affidavit of Robinson is in the record as follows:

"Chan C. Robinson, being sworn, deposes and says that he was one of the panel in the case of the Wood River Bank of Nebraska against Freeman C. Dodge and George F. Dodge, which case was tried and submitted to the jury on the 15th day of February, 1890; that affiant has heard read the affidavit of P. F. McCullough filed in and attached to the motion in this case for a new trial; that the matter in said affidavit wherein said McCullough swore that this affiant said in the jury room while deliberating on their verdict that he, Freeman C. Dodge, could not have been at Wood River on the 2d day of July as he, Chan C. Robinson, saw him in Omaha on that day is wholly without foundation and untrue; that affiant did not say he saw said Dodge on the 2d day of July as aforesaid, in Omaha, all affiant did say on this subject in the deliberation of said jury was wholly in regard to the evidence introduced on the trial. Affiant further says that the jury, and each of them, so far as he knows and was informed, tried all honest means to impress others differing with them as to their views in the evidence and the instructions of the court; that after deliberating several hours on the matter they finally agreed upon their verdict brought into court and affiant did not in any way attempt (except by argument) to convince others differing with him as to what he thought was right on the evidence in the case."

It will be observed that Mr. Robinson does not make a full, unequivocal denial of the charge against him. The affidavit in fact is a skillful evasion of the matter in issue. His statement that what he said was wholly in relation to the evidence in the case, and that he did not in any way attempt, except by argument, to convince others differing from him, falls far short of a denial of the charges.

In *Richards v. State*, 36 Neb., 18, it was held that a juror will not be permitted to state to his fellow-jurors, while they are considering their verdict, facts in the case within his own personal knowledge. He should make the same known during the trial and testify as a witness in the case. It is for the court to say what evidence is admissible in a case, and the adverse party may desire to cross-examine him. In any event it is his duty to be governed by the evidence introduced on the trial and the instructions of the court; otherwise, in case of an erroneous verdict, it would be impossible to review the same. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ALBERT B. OGDEN ET AL. V. NATHAN H. WARREN ET AL.

FILED APRIL 26, 1893. No. 4797.

1. **Replevin:** TITLE: CONTRACT set out in the opinion construed, and *held* that W. & Co. had a lien upon the corn for the purchase money and their share of the profits and were entitled to immediate possession.

2. ——: DEMAND. Where a defendant lawfully in the possession of property denies the title and right of possession of the owners no demand is necessary.

3. ——: RIGHTS OF RECEIVER IN ANOTHER STATE: PARTIES. A receiver appointed by a court of record of another state to take charge of a business of a partnership there and to wind up its affairs may take charge of property of the firm in this state, but in such case there is a mere substitution of parties and the receiver has no greater rights in such property than the parties themselves.

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

Teller & Orahood and *Batty, Casto & Dungan,* for plaintiffs in error.

Sedgwick & Power, contra.

MAXWELL, CH. J.

This is an action of replevin brought by Warren & Co. against Ogden and others to recover the possession of 14,996 bushels of ear corn of the value of $5,248.60, or in case said property cannot be returned, the value of the same. In answer to the petition Robert E. Foot, one of the defendants, denies "that the plaintiffs, or either of them, were at the time of the commencement of this action, or at any time were the owners of the property set out in the complaint or petition, to-wit, about 14,996 bushels of ear corn, more or less, and being all the corn in the cribs numbered 1, 2, 3, 4, situate near the B. & M. R. R. track in the town of Brickton, in said Adams county, Nebraska; that the plaintiffs, or either of them, were at the time of the commencement of this action, or at any time were entitled to the immediate possession or possession of said above described property; that at the time of the commencement of this action, or at any time, he wrongfully detained said property from the possession of the plaintiffs, or either of them, for fifteen days, or for any time; that plaintiffs, or either of them, have been damaged in the sum of $500, or any sum whatever; that on the 10th day of May, 1890, the district court of the state of Colorado, sitting in and for the county of Arapahoe, the same being a court of record and duly established under the laws of said state, entered of record in said court on said day, the same being one of the judicial days of the April term, 1890, thereof, a decree in the suit of one Albert B. Ogden,

plaintiff, against Lorin Butterfield, defendant, wherein and whereby among other things it was adjudged and decreed by said court that the plaintiff and defendant in said action had been partners in business under the firm name of L. Butterfield & Co., and that said partnership from and after said date was dissolved; and further did adjudge and decree that this defendant, Robert E. Foot, be and he was appointed by said decree receiver of the partnership, stock, premises, outstanding debts, and effects thereof, and did duly qualify as such receiver; that the defendant Robert E. Foot, as he was in duty bound as such receiver, did enter upon his duties and take into his possession all the property of the said firm of L. Butterfield & Co., and did, on or about the 12th day of May, 1890, in the town of Brickton, in the county of Adams, in the state of Nebraska, find in the lawful possession of L. Butterfield & Co. the property mentioned herein and in said petition, and did then and there take possession of said property and was, as such receiver, in the peaceful, quiet, and lawful possession thereof at the time of the commencement of this action, and entitled at all times to retain possession thereof and protect said possession in the discharge of his duties as such receiver; that said property was in the possession of L. Butterfield & Co., as aforesaid, under and by virtue of a contract in writing, wherein and whereby the plaintiffs and said L. Butterfield & Co. owned said property in common, and passed to this defendant as receiver as aforesaid; that the defendants F. H. Felt and C. J. Barnes were acting under instructions of this defendant, as receiver aforesaid, in maintaining and protecting said possession at the time of the commencement of this action. Wherefore defendant prays that this action may be dismissed at plaintiffs' cost and that he be decreed entitled to the return of said property as such receiver, and upon the failure of plaintiffs to return the same that he may have judgment for the full value thereof."

Albert B. Ogden, one of the defendants, filed an answer in which he denies that Warren & Co., or either of them, at the commencement of the action, was the owner of the property or entitled to the possession thereof, or that the property was wrongfully detained from said party. He also alleges the dissolution of the firm of L. Butterfield & Co. and the appointment of Foot as receiver, and that the acts done by the defendants below were to protect the possession of the receiver against the unlawful attempts of the plaintiffs below forcibly to take possession of the corn.

Warren & Co. in their reply in effect deny all the facts in the foregoing answers.

On the trial of the cause the jury found that Warren & Co. were, at the commencement of the action, the owners of and entitled to the immediate possession of the corn, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The corn was purchased under the following agreement:

"Memorandum of agreement, made this 6th day of November, 1889, between Nathan H., Cyrus, I., and Chas. C. Warren, composing the firm of N. H. Warren & Co., of Chicago, Illinois, party of the first part, and L. Butterfield & Co., of Denver, Colorado, party of the second part, witnesseth: The party of the second part agrees to buy and store in cribs belonging to them at Inland, Saronville, and Brickton, Nebraska, ear corn to the amount of 50,000 bushels, more or less, and to pay the expense of cribbing, insurance, shelling, and other necessary expenses, to the time of shipment of said corn. The party of the second part further agrees to put a sign bearing the name of the first party (N. H. Warren & Co.), on each crib of 5,000 bushels, and to shell and ship said corn only by and under the direction of said first party. They also agree to furnish the use of said cribs free of charge—it being understood that the meaning of their contract is that the party of the first part shall furnish the money free of interest to

pay for the corn, and the party of the second part shall furnish the cribs and labor, and expense of buying, cribbing, shelling, preparing for market, if needed, loading on the cars, and insuring the corn, which is to be the property of N. H. Warren & Co., and at all times under their control and direction. Furthermore, that all profits and losses arising from the handling and sale of the corn are to be equally divided between the parties of the first and second part after the parties of the first part have received the amount furnished to pay for the corn without interest. It is further agreed that the party of the second part shall furnish crib receipts.

(Signed) N. H. WARREN & Co.
"L. BUTTERFIELD & Co."

It will be observed that Warren & Co. were to furnish the money to purchase the corn and Butterfield & Co. were to purchase the same, place it in cribs, insure it, and incur all lawful expenses of buying, cribbing, shelling, and preparing for market. It is provided, however, that the corn was to be the property of Warren & Co. at all times under their control. The profits above the actual cost of the corn and expenses were to be equally divided. A fair construction of this contract gave Warren & Co. a lien upon the corn for the purchase money and one-half of the profits. To that extent, without doubt, they were the owners and entitled to the possession. Had the answer of Foot been of such a character as to show the exact interest of Butterfield & Co. in the corn in dispute, it is probable that the whole controversy might have been adjusted in this action. The answer, however, simply puts in issue the rights of Warren & Co. to either the title or possession of the property. Therefore it will be necessary for the receiver to bring an action against Warren & Co.

The defendant in error insists that the receiver has no jurisdiction in this state, having been appointed by a district court in Colorado. We think differently, however,

but he simply steps into the shoes of Butterfield & Co., and has no greater rights than they possessed.

The plaintiffs in error contend that there was no demand before bringing the suit, and therefore replevin will not lie. In their answer, however, they deny the right and title of Warren & Co., and claim that they are in the receiver. In such case no demand is necessary. (*Homan v. Laboo*, 1 Neb., 204.) Upon the whole case it is apparent that the judgment is right and it is

AFFIRMED.

THE other judges concur.

JOHN F. WHIPPLE v. PAULINA A. HILL.

FILED APRIL 26, 1893. No. 4876.

1. **Affidavit for Attachment.** The affidavit upon which the attachment in this case was issued examined, and *held* sufficient.

2. **Attachment:** MOTION TO DISCHARGE: REVIEW OF ORDER MADE UPON CONFLICTING AFFIDAVITS. Where a motion to discharge an attachment on the ground that the facts stated in the affidavit are untrue is heard upon conflicting affidavits, the decision of the trial court on the motion will not be disturbed unless it is clearly against the weight of the evidence.

3. **Attachment on Claim Past Due:** VALIDITY OF ORDER ISSUED ON HOLIDAY: MINISTERIAL ACT. Section 38, chapter 19, Compiled Statutes, providing that "no court can be opened nor any judicial business be transacted on Sunday, or any legal holiday," etc., does not prohibit a county judge from issuing, on a legal holiday, an order of attachment on a debt past due, since that is purely a ministerial, and not a judicial act.

ERROR from the district court of Greeley county. Tried below before COFFIN, J.

Henry Nunn, for plaintiff in error.

T. J. Doyle, contra:

The issuance of an order of attachment is a ministerial duty and not prohibited on legal holidays by statute. (*Place v. Taylor*, 22 O. St., 322; *In re Worthington*, 7 Biss. [U. S.], 455; *Glenn v. Eddy*, 17 Atl. Rep. [N. J.], 145; *Weil v. Geier*, 21 N. W. Rep. [Wis.], 246; *Smith v. Ihling*, 11 Id. [Mich.], 408; *Spaulding v. Bernhard*, 44 Id. [Wis.], 643; *Green v. Walker*, 41 Id. [Wis.], 534; *Johnson v. Day*, 17 Pick. [Mass.], 109; 29 Am. Law Reg., p. 140, and cases cited.)

NORVAL, J.

The defendant in error commenced an action by attachment in the county court of Greeley county against plaintiff in error to recover the sum of $205.95 on a promissory note. The affidavit for the attachment was filed and the writ issued on the 1st day of September, 1890. Service was had on the following day. Subsequently defendant filed a motion in the county court to discharge the attachment upon the following grounds:

1. Because the allegations in plaintiff's affidavit are insufficient to sustain the attachment.

2. Because the allegations in said affidavit are untrue.

3. Because the writ of attachment was issued and served on the 1st day of September, 1890, which was a legal holiday.

This motion was overruled by the county court, and the attachment sustained. Thereupon the defendant prosecuted error to the district court to reverse said ruling, which resulted in affirming the decision of the county court.

The objections urged by the plaintiff in error, in his motion for a dissolution of the attachment, will be noticed in the order in which they are stated therein.

The first point made is that the allegations in the attachment affidavit are insufficient to sustain the attach-

ment. The following is a copy of the affidavit upon which the attachment was granted, omitting caption and title of the cause:

"STATE OF NEBRASKA, }
GREELEY COUNTY. } ss.

"Henry A. Hill, being first duly sworn, says he is the duly authorized agent of plaintiff; the said plaintiff makes oath that the claim in this action is for two hundred and five and $\frac{95}{100}$ dollars, due under contract on promissory notes. And the said Henry A. Hill also makes oath that said claim is just and that Paulina A. Hill, plaintiff, ought, as he believes, to recover thereon two hundred and five $\frac{95}{100}$ dollars. He also makes oath that said defendant, John F. Whipple, is about to remove his property, or a part thereof, out of the jurisdiction of the court with the intent to defraud his creditors, and is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; that the said John F. Whipple has property and rights in action which he conceals, and has assigned, removed, and disposed of, and is about to dispose of, his property, or a part thereof, with the intent to defraud his creditors; and fraudulently contracted the debt for which suit is brought.

"H. A. HILL.

"Subscribed in my presence and sworn to before me, this 1st day of September, A. D. 1890.

"N. H. PARKS,
"*County Judge.*"

It is contended that the affidavit is insufficient, because the allegation therein as to plaintiff's claim is not sworn to either by the plaintiff or her agent. The objection is not good. True, the affidavit states "the said plaintiff makes oath that the claim in this action is for two hundred and five and $\frac{95}{100}$ dollars due under a contract on promissory notes." But immediately following said averment the affidavit contains this language: "And the said Henry A.

Hill also makes oath that said claim is just, and that Paulina A. Hill, plaintiff, ought, as he believes, to recover thereon two hundred and five and $\frac{95}{100}$ dollars," from which it sufficiently appears that the affiant, H. A. Hill, makes oath to the statement in the affidavit relating to the nature of the plaintiff's claim. A printed form was used in preparing the affidavit, and, manifestly, it was an oversight on the part of the draftsman in not erasing the printed word "plaintiff" and inserting the word "affiant." But the affidavit is not for that reason defective. We think it sufficient to support the attachment.

In *Jansen & Co. v. Mundt*, 20 Neb., 320, an affidavit for an attachment was made by plaintiffs' attorney, wherein he swears "that he is the authorized attorney of the plaintiffs in the above entitled action; that he has commenced an action," etc. It was ruled that the defect in omitting to state that plaintiffs commenced the action did not render the affidavit void, inasmuch as it appeared from the whole affidavit that the suit was brought by the plaintiffs. In principle, the case at bar is not distinguishable from the case cited.

The second objection is that the facts stated in the affidavit for the attachment are untrue. The defendant filed an affidavit denying the grounds of the attachment, and on the hearing of the motion to dissolve, numerous affidavits were filed in support of, and in resistance of, said motion. From an examination of the several affidavits it appears that there is a sharp conflict of evidence, but we are convinced that a preponderance thereof supports the original affidavit for the attachment. The rule long adhered to in this court is, that where a motion to discharge an attachment, on the ground that the allegations in the affidavits are not true, is decided upon conflicting testimony, this court will not disturb the ruling unless the preponderance of the evidence against it is clear and decisive. (*Mayer v. Zingre*, 18 Neb., 458; *Grimes v. Farrington*, 19 Id., 44;

Holland v. Commercial Bank, 22 Id., 571; *Johnson v. Steele*, 23 Id., 82.)

The remaining question to be considered is whether or not the attachment is void, because the order was issued on a legal holiday. The solution of the question necessitates an examination of two sections of the statutes.

By section 9, chapter 41, Compiled Statutes, it is provided that "the first Monday in the month of September in each year shall hereafter be known as 'Labor Day' and shall be deemed a public holiday, in like manner and to the same extent as holidays provided for in section eight (8) of chapter forty-one (41) of the Compiled Statutes of 1887." A reference to the calendar will disclose that the first day of September, 1890, on which date the attachment in question was issued, was Monday; therefore, under the foregoing provision, was a public or legal holiday. The objection to the issuance of the writ of attachment in this case on Labor Day is based upon section 38, chapter 19, of the Compiled Statutes, which declares that "No court can be opened, nor can any judicial business be transacted, on Sunday, or any legal holiday, except—1st. To give instructions to a jury then deliberating on their verdict. 2d. To receive a verdict or discharge a jury. 3d. To exercise the powers of a single magistrate in a criminal proceeding. 4th. To grant or refuse a temporary injunction or restraining order." The legislature, by the section quoted, has prohibited the courts of the state from being opened and from the transaction of any judicial business, with certain well-defined exceptions, on any day declared by statute to be a public or legal holiday.

It will be observed that the prohibition of the statute, so far as the transaction of business on holidays is concerned, relates to acts which in their nature are purely judicial, and does not apply to such as are merely ministerial. The language of the section is plain and unambiguous, and should not be extended by judicial interpretation beyond

the plain import of the words used. Had the legislature intended to debar courts, or court officers, from performing ministerial acts upon holidays, words suitable to express such an intention would have been employed. If the transaction of all legal business was forbidden on such days, as is the case in some of the states, we would grant that the order in question would be void; but the statute fails to so provide. It is the opening of courts and the transaction of judicial business on legal holidays which the law forbids. This intent is clearly manifest. We search in vain for any words which indicate a different purpose. The issuance or service of legal process, such as a summons, execution, or writ of attachment, is merely a ministerial act, and therefore is not within the inhibition of the above section of the statute, and is valid, although done on a legal holiday. (*Glenn v. Eddy*, 17 Atl. Rep. [N. J.], 145; *Kinney v. Emery*, 37 N. J. Eq., 339; *In re Worthington*, 7 Biss. [U. S.], 455; *Weil v. Geier*, 61 Wis., 414; *Smith v. Ihling*, 47 Mich., 614; *Hadley v. Musselman*, 104 Ind., 459; *Whitney v. Blackburn*, 17 Ore., 564.)

The supreme court of New Jersey in *Glenn v. Eddy*, *supra*, under a statute quite similar to our own, held that a summons might be legally issued and served on the day of a general election, which day is by law made a legal holiday. Magie, J., in delivering the opinion of the court, says: "When the statute declares them to be legal holidays it does not permit a reference to the legal *status* of Sunday to discover its meaning, for it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done. The plain intent of the statute, therefore, is to free all persons, upon the days named, from compulsory labor, and from compulsory attendance upon courts as officers, suitors, or witnesses. Its true interpretation will limit the prohibition, with respect to the courts,

to such actual sessions thereof as would require such attendance."

In *Weil v. Geier, supra,* the supreme court of Wisconsin, in construing a statute almost identical with the one under consideration, held that the issuance of a summons by a justice of the peace on a legal holiday is permissible, because a ministerial act. To the same effect is *Smith v. Ihling,* 47 Mich., 614.

We are convinced that a county judge in issuing an attachment exercises no judicial functions, and such a writ is not void because issued on a legal holiday. The conclusion reached does not conflict with the case of the *Merchants National Bank v. Jaffray,* 36 Neb., 218. It was there held that an order made by a district or county judge on a legal holiday, allowing an attachment in an action on a debt not due, is void. That decision was placed upon the ground that the granting of such an order is a judicial act. As was said by Judge POST in his opinion in that case, "when the application is made, the court or judge must determine judicially that the action is one of those contemplated by the statute, and that the showing is sufficient to entitle the plaintiff to an attachment."

The issuance of a writ of attachment on a debt past due, as already stated, is a purely ministerial act. When the proper affidavit and bond are filed, it is the imperative duty of the county judge to issue the attachment. He has no discretion in the matter. The judgment of the district court is right and is

AFFIRMED.

THE other judges concur.

JOSEPH PARRISH ET AL. V. JAMES R. MCNEAL.

FILED APRIL 26, 1893. No. 4983.

1. **Witnesses:** COMPETENCY OF TESTIMONY CONCERNING TRANSACTIONS WITH DECEDENT. A person having a direct legal interest in the result of an action in which the adverse party is an administrator of a deceased person is not precluded by section 329 of the Code from testifying to a transaction between himself and such deceased person in case such administrator has first introduced a witness who has testified in regard to the same transaction.

2. ———: ———: EVIDENCE: WAIVER OF OBJECTION. When a person, who is precluded by the provisions of said section from testifying against the representative of a deceased person, is permitted, without objection, to testify to a conversation or transaction had with such deceased person, it is a waiver of the benefit of the statute.

3. **Verdict:** OMISSION OF ADMINISTRATOR'S NAME FROM TITLE OF CAUSE. *Held*, The verdict is sufficient, both in form and substance.

ERROR from the district court of Pawnee county. Tried below before APPELGET, J.

J. L. Edwards, for plaintiffs in error.

J. K. Goudy and *W. W. Giffen*, *contra*.

NORVAL, J.

This action was brought by James R. McNeal against Joseph Parrish to recover for the alleged conversion of a mule. The suit was commenced in justice court. From a judgment in favor of the defendant plaintiff appealed to the district court, where, after the plaintiff had introduced his testimony in chief and a portion of the testimony for the defense had been received, on motion of the defendant, and over the objection of the plaintiff, the court permitted

G. J. Morton, administrator of the estate of Joseph B. Morton, deceased, to be made a party defendant. The jury returned a verdict for the plaintiff for the sum of $87.50, upon which judgment was rendered. Defendants bring the case to this court for review on error.

It appears from the bill of exceptions that on the 25th day of January, 1889, James R. McNeal gave a chattel mortgage upon the mule in dispute to Joseph B. Morton, to secure the payment of a promissory note for $60, due on the 25th day of January, 1890. Afterwards, but before the maturing of the note, the payee thereof, J. B. Morton, died. Subsequently, G. J. Morton was appointed administrator of his estate. The note and mortgage came into the hands of the administrator as a part of the assets of the estate, without any credits or other evidence of the same having been paid. The mortgage was placed in the hands of Parrish by the administrator, with instructions to take the property therein described, and sell the same. Plaintiff claims, and upon the trial he introduced evidence tending to show, that the note and mortgage had been paid to J. B. Morton in his lifetime; that the last payment was made in July or August, 1889, and that the note and mortgage were not delivered up, for the reason that the payee and mortgagee did not have them with him at the time the last payment was made. This evidence was contradicted by the defendants. It is unnecessary to give a detailed statement of the testimony. There was sufficient evidence given by disinterested witnesses, if believed by the jury, to justify them in finding that the mortgage debt had been fully paid before the property was seized.

It is urged that the trial court erred in permitting the plaintiff below, McNeal, to testify that he had paid the note in full to J. B. Morton. This testimony was objected to, at the time it was given, on the ground that the adverse party is a representative of a deceased person.

Under the provisions of section 329 of the Code a per-

son, having a direct legal interest in the result of a suit in which the adverse party is the representative of a deceased person, is precluded from testifying to any transaction or conversation had between himself and such deceased person, unless the evidence of the deceased person relating to such conversation or transaction has been taken and read on the trial by the adverse party, or unless such representative has produced a witness who has testified in regard to such transaction or conversation. This case falls within the exception of the statute. The administrator introduced evidence on the trial to show that McNeal had never paid the note. He even proved statements made by his intestate, in his lifetime, after the date of the alleged payment and not in the hearing of the plaintiff, that the note was unpaid. It was not until after such evidence had been received that the plaintiff was allowed to give the testimony complained of. It related to the identical transaction had with the deceased, which the witnesses for the administrator had testified in regard to, and was therefore competent.

The next error relied upon for a reversal is the permitting of the witness Ben Hur, who was a surety on the appeal bond given by the plaintiff in the justice court, to testify as to a conversation had by the witness with J. B. Morton, relating to plaintiff's indebtedness to him. A sufficient answer to this contention is that no objection was made in the trial court to the competency of the witness. The protection of the statute was therefore waived. (*Bartlett v. Bartlett*, 15 Neb., 593.)

Objection was made to the form of the verdict. It reads as follows:

"STATE OF NEBRASKA, } ss. November term, A.D. 1890,
PAWNEE COUNTY. } to-wit: November 15, 1890.

"JAMES R. MCNEAL, PLAINTIFF,
v.
JOSEPH PARRISH, DEFENDANT.

"We, the jury in this case, being duly sworn, do find

for the plaintiff, and assess the amount of his recovery at $87.10. J. W. HOIG,

"*Foreman.*"

The only criticism upon the verdict, urged by counsel, relates to the title of the cause. No such objection was called to the attention of the court at the time the verdict was returned into court. Had it been, the defect, if any, doubtless would have been corrected before the jury were discharged. The title of the cause was not changed by permitting the administrator to appear and defend. The verdict was returned and filed in the proper action, and the title was sufficient to identify the verdict with the case. The omission of the name of the administrator as a defendant from the title was not such a defect as to prevent the entry of a judgment on the verdict. (*Morrissey v. Schindler*, 18 Neb., 672.)

Finding no error in the record, the judgment of the court below is

AFFIRMED.

THE other judges concur.

ALEXANDER RODGERS V. J. H. GRAHAM.

FILED APRIL 26, 1893. No. 4092.

1. **Replevin by Mortgagee:** SUFFICIENCY OF PETITION. The petition examined, and *held*, sufficient; also, that it is not objectionable because it fails to allege that the note, for the payment of which the mortgage set forth in the petition was given to secure, was due, since it states the date the note matured, which was prior to bringing of the suit.

2. ———: COSTS: DEMAND FOR POSSESSION. When the defendant in an action of replevin contests the case in the trial court on the merits, wholly on an affirmative claim of ownership and

right of possession of the property in himself, no proof of demand and refusal is necessary to entitle the plaintiff to recover costs in case the verdict is in his favor.

3. ———: USURY: COSTS. Where, in an action by a mortgagee against the mortgagor to recover the mortgaged chattels, it is established that the mortgage was given to secure a usurious loan of money, the defendant is entitled to recover costs, although the verdict is in favor of the plaintiff.

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

Bowen & Hoeppner, for plaintiff in error.

Capps, McCreary & Stevens, contra.

NORVAL, J.

This is an action brought by J. H. Graham in a justice court for the recovery of possession of specific personal property in the hands of Alexander Rodgers. The appraised value of the property taken under the replevin writ being in excess of $200, the justice certified the proceedings to the district court, where the case was tried without the intervention of a jury, which resulted in a judgment in favor of the plaintiff. The defendant prosecutes error.

The first ground urged for reversal is that the petition fails to state facts sufficient to constitute a cause of action. The petition is as follows:

"The plaintiff complains of the defendant for that on the 19th day of October, 1888, the defendant made, executed, and delivered to the plaintiff a chattel mortgage in words and figures following, to-wit:

"'Know all men by these presents, that Alexander Rodgers, of Adams county, Nebraska, for the consideration of five hundred and fifteen dollars, have mortgaged to J. H. Graham the following chattel property, to-wit: * * *

"'This mortgage is intended to secure the payment of

one promissory note of even date herewith, made by the said Alexander Rodgers, and payable to the said J. H. Graham, or order, as follows:

"'One for $515, due the 19th day of Dec., 1888.

"'And it is hereby agreed that if default be made in the payment of any part of said debt when due, or in case of an illegal removal or disposal of any of said property, then the whole sum hereby secured shall at once become due; and if default shall be made in the payment of any part of said debt when due, or if the holder thereof shall at any time feel insecure, he may take possession of said property, sell the same according to law, and apply the proceeds thereof on said debt. Such sale shall be held in ———, Nebraska, in Adams county.

"'Signed this 19th day of October, 1888.

"'Attest: ALEXANDER RODGERS.

"'J. A. TOWNSEND.'

"2. That no part of the debt secured by said chattel mortgage has been paid.

"3. That affiant has especial ownership in the above described property, and is entitled to the immediate possession of the same. That said goods and chattels are wrongfully detained from him by said defendant, and that said goods and chattels were not taken in execution or on any order of judgment against plaintiff, or for the payment of any tax, fine, or amercement issued against him; or by virtue of any order of delivery issued under the chapter of the Code of Civil Procedure providing for the replevin of property, or on any other *mesne* or final process issued against said plaintiff.

"Wherefore the plaintiff prays for judgment against the defendant for the possession of the said property, or, in case possession thereof cannot be had, for a judgment against the defendant for the value thereof and for the costs herein expended."

Counsel insist that the petition does not allege any

breach of the conditions of the mortgage, and that it does not state that the indebtedness secured by the mortgage was due. The petition charges, in effect, that the note for which the mortgage was given to secure matured on the 19th day of December, 1888, and that no part of the mortgage debt has been paid. The action was instituted on the 13th day of February, 1889, which was nearly two months after the note had matured. It was unnecessary to allege specifically in the petition a breach of the conditions in the mortgage, inasmuch as it fully appears from the facts contained in the pleading that at least one of the conditions in the mortgage had been broken, by the mortgagor making default in the payment of the note. Nor was it necessary that the petition should state specifically that the note was due, since it fully appears from the record that the same had matured long prior to the commencement of the action. The petition discloses that the plaintiff below, by the terms of his mortgage, was entitled to the immediate possession of the property in controversy when the suit was instituted, and that the defendant wrongfully withheld possession of the same; therefore the petition is sufficient.

It is urged that the judgment for costs should not have been rendered against the defendant below because no demand for possession of the property was made before the suit was commenced. The evidence establishes that a demand was made before the replevin writ was served, but after it was issued. Whether a demand for the property after the issuance of the writ is sufficient the authorities are conflicting. We are satisfied the better rule is that when the defendant refuses to surrender the property on demand of the plaintiff made after the bringing of the action, but prior to the execution of the writ, it is a good demand. It is convincing proof that had a demand been seasonably made it would have been unavailing. (*Badger v. Phinney*, 15 Mass., 359; *Grimes v. Briggs*, 110 Id.,

446; *O'Neil v. Bailey*, 68 Me., 429.) Had the defendant surrendered the property when demand therefor was made, it would have prevented the rendering of a judgment against him for costs. This he failed to do, but contested the case through the entire trial in the lower court upon the theory that the plaintiff had no right to the property and that the defendant's possession was rightful. Such being the case, it was unnecessary to prove a demand and refusal. (*Homan v. Laboo*, 1 Neb., 209; *Aultman v. Steinan*, 8 Id., 109.)

The case of *Peters v. Parsons*, 18 Neb., 191, cited in brief of plaintiff in error, is not in conflict with the conclusion reached. It was in that case decided that an answer in an action of replevin, which is a mere general denial of the facts stated in the petition, is not a waiver of a demand for the property by the plaintiff before bringing the action. Such an answer puts in issue every fact necessary to be established by the plaintiff, including a demand, and under it the defendant may prove any matter which tends to defeat the cause of action. He may offer evidence to establish ownership and right of possession of the property in himself; and if he tries the case upon that theory, he ought not, on a review of the case in the appellate court, to be heard to say that the plaintiff never demanded the property. Had Rodgers, in the case at bar, offered no testimony under the general denial for the purpose of establishing property in himself, the case cited would be on all fours with this, but as he contested the case on a claim that he had a right to detain the property, the decision in 18 Nebraska lacks analogy.

It is finally insisted that the plaintiff was not entitled to a judgment for costs for the reason that the mortgage was given to secure a usurious loan of money. The uncontradicted evidence shows that the note, for which the mortgage was given to secure, was usurious to the extent at least of $15. The plaintiff having planted his right to

recover upon a contract confessedly usurious, the defendant was entitled to recover his costs. (See *Omaha Auction & Storage Co. v. Rogers*, 35 Neb., 61.)

The judgment of the district court is affirmed, except as to costs, which is reversed, and judgment for defendant below for his costs in both courts will be rendered against the plaintiff.

JUDGMENT ACCORDINGLY.

THE other judges concur.

LINCOLN NATIONAL BANK, APPELLANT, V. A. C. VIRGIN ET AL., APPELLEES.

FILED APRIL 26, 1893. No. 5010.

1. **Mortgage Foreclosure:** EFFECT OF DECREE BY DEFAULT. The rule is that a default by a party defendant is a confession only of such matters as are properly alleged in the petition or complaint. But a recognized exception to that rule is that where in a foreclosure or other kindred proceeding a defendant, who is called upon to disclose and set up his supposed but unknown interest in the subject of the action, makes default, he will be held to have admitted that his interest therein is subject to that of the plaintiff.

2. A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties, and is foreign to the issues submitted for its determination, is a nullity.

3. **Mortgage Foreclosure:** DEFAULT: DECREE. In a foreclosure proceeding by N. against the M. Bank, a subsequent mortgagee, and V., their common mortgagor, it was alleged that "The M. Bank claims some interest in the premises, the nature and extent of which is to the plaintiff unknown, but is subordinate to plaintiff's claim, wherefore plaintiff asks that it be compelled to set the same up or be forever barred." The defendants all having made default, a decree of foreclosure was entered in

which it was found that the M. Bank had no right, title, or interest in the mortgaged property. In a subsequent action by the M. Bank to foreclose its mortgage, *held*, that the former decree cannot be pleaded as a bar by V. or his grantees.

APPEAL from the district court of Seward county. Heard below before BATES, J.

Norval Bros. & Lowley, for appellant.

Colman & Colman, Geo. B. France, and *D. C. McKillip, contra.*

POST, J.

This action was commenced in the district court of Seward county to foreclose two mortgages executed by A. C. Virgin and wife on the 24th day of September, 1888, to the Merchants Bank of Utica, to secure payment of a note of the mortgagors of that date for $2,500, due six months after date. It is alleged in the petition that said note and mortgages were assigned by the Merchants Bank to the plaintiff for value before maturity. Upon a hearing before the district court, all of the defendants being in default, except Severin & Schark, a decree of foreclosure was entered as prayed upon the mortgage described in the second cause of action, but as to the first cause of action, viz., the mortgage covering the west half of the southwest quarter of section 20, township 11, range 1 east, there was a finding for the answering defendants, and a decree dismissing the petition, from which the plaintiff has appealed. The execution of the mortgage for the consideration alleged by Virgin and wife, who were at the time the legal and equitable owners of the property, is not denied.

The defendants above named, by their answer, deny the assignment of the note and mortgage to the plaintiff and allege that the Merchants Bank is still the owner and holder thereof. They further allege that they are the owners in fee-simple of said property by deed from Virgin

and wife bearing date of August —, 1889; that on the 16th day of March, 1889, one Neir, the holder of a prior mortgage upon said premises, which was executed March 12, 1887, commenced thereon an action of foreclosure in the district court of Seward county, to which the Merchants Bank of Utica, while still owning and holding the note and mortgage in controversy, was made a party defendant, but made default; that upon a final hearing in said action there was a finding and decree for the defendants Virgin and wife against the Merchants Bank as to the mortgage now in question, and a decree declaring it void as to the land in controversy, by reason of which the Merchants Bank and the plaintiff, as its assignee, are now estopped as against them to assert any claim under or by reason of the mortgage described in the petition.

For a second defense it is alleged that the defendants purchased for value in good faith, relying upon the representations of the Merchants Bank that it claimed no interest in, or lien upon, the land in controversy by virtue of the mortgage upon which this action is based.

The reply is, in effect, a general denial.

The evidence with respect to the date of the assignment of the note and mortgage is voluminous and conflicting, but in view of our conclusion upon the other propositions it is unnecessary to critically examine that question.

The plea of *res judicata* is clearly insufficient as a defense. The decree relied on, assuming that it is a determination in favor of Virgin and wife that the mortgage under consideration is not a lien upon the premises, is not responsive to any claim or allegation in any pleading before the court, and is for that reason *coram non judice.* The petition filed by Neir contained the following allegation only with reference to the Merchants Bank: "The defendant, the Merchants Bank of Utica, has, or claims to have, some lien or interest in said premises, the nature of which is to plaintiff unknown, but plaintiff avers that the

same is subordinate and junior to plaintiff's claim, and plaintiff asks that it may be compelled to set the same up or be forever barred from asserting the same." The foregoing allegation is followed by a prayer for an accounting, order of sale, and deficiency judgment. In that proceeding, as already said, Virgin and wife, as well as the Merchants Bank, made default. In the decree, which is in the ordinary form, immediately following the finding for the plaintiff therein, is the entry upon which defendants rely, viz., "The court further finds that the defendant, the Merchants Bank of Utica, has no right, title, or interest in the land in controversy herein."

This case rests upon an entirely different principle from those cases in which the court had acquired jurisdiction over the subject of the judgment or decree. In such cases the determination of the court, however erroneous, can be called in question only by direct proceedings. We are aware that Mr. Freeman in his work on Judgments, sec. 135*a*, expresses a preference for the view that a judgment is erroneous merely, and not necessarily void, although not responsive to any issue of law or fact. We are, however, unable to perceive wherein a judgment entered by a court confessedly outside of the issues submitted for its determination can be said to rest upon any other or different principle than one in which the subject-matter is entirely foreign to the jurisdiction conferred upon it. In the language of the supreme court of Ohio, in *Spoors v. Coen*, 44 O. St., 497, "A judgment by a court of competent jurisdiction in a case before it, however erroneously that jurisdiction may have been exercised, is one thing, and a judgment by a court of like jurisdiction in a case not before it, is another and quite a different thing. In *Sheldon v. Newton*, 3 O. St., 494, Judge Ranney uses this language: "It is *coram judice* whenever a cause is presented that brings this power into action. But before the power can be affirmed to exist it must be made to appear that the law has given the

tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred," etc. The distinction above noted is abundantly sustained by authority. See, in addition to cases cited, *Strobe v. Downer*, 13 Wis., 11; *Straight v. Harris*, 14 Id., 553; *Lewis v. Smith*, 9 N. Y., 502; *Williamson v. Probasco*, 8 N. J. Eq., 571; *Steele v. Palmer*, 41 Miss., 89; *Armstrong v. Barton*, 42 Miss., 506; 1 Black, Judgments, 183, 184.

There is no doubt of the jurisdiction of a court of equity upon proper pleadings in a foreclosure proceeding, to determine the rights of all parties thereto with respect to the subject of the controversy, whether plaintiffs or defendants. But the power to conclude parties not claiming adversely to the plaintiff, whether subsequent mortgagees, or mortgagor and mortgagee, so as to prevent them from afterwards asserting their rights as against each other, depends upon whether such power has been invoked by one or more of the parties thus interested. In the judgment pleaded as a bar in this case, the only relief sought was the foreclosure of the Neir mortgage. In his petition the plaintiff therein alleged, in effect, that his mortgage was the prior lien. That was a proposition which the Merchants Bank could not controvert. It is true it might have answered (assuming that it was still the owner of the mortgage) and by cross-bill secured an accounting and decree against the mortgagors, and an order for payment from the proceeds of the mortgaged property after the satisfaction of the prior lien. The general rule is that a default is an admission of such facts only as are properly alleged in the petition or complaint. (Herman, Estoppel, sec. 53.) A recognized exception, however, is that where, in a foreclosure or other kindred proceeding, a defendant who is called upon to disclose his supposed but unknown interest in the subject of the action makes default, he will be held thereby to have admitted that his interest therein is subordinate to

that of the plaintiff. (*Barton v. Anderson*, 104 Ind., 578.) The Merchants Bank, by its default, must be held to have confessed the cause of action of the plaintiff therein, and to that extent the decree is conclusive. But the question of the validity of the mortgage now under consideration, as a second lien, was not presented by the petition, and the bank, as a defendant in that action, was justified in assuming that Neir, the plaintiff, was merely seeking to assert his own lien. The judgment described in the answer not being conclusive as against the Merchants Bank, it follows that the question of the good faith of the assignment of the mortgage to the plaintiff is not material. (*Mc Williams v. Bridges*, 7 Neb., 419.)

2. The plea of estoppel *in pais* is not sustained by the proofs. Not only was the mortgage to the Merchants Bank of record and unsatisfied in Seward county, but the answering defendants are conclusively shown to have had actual notice of it and to have taken counsel as to its validity. One of them, Mr. Severin, on his cross-examination, admits that previous to the purchase of the land he had a conversation with reference to the mortgage in question with Mr. Hurlburt, president of the bank, in which he was informed by the latter that said note and mortgage had been pledged to the plaintiff herein for money advanced by it. He testifies among other things as follows:

Q. You know at the time you bought the land that he had put up these notes at the Lincoln National Bank before you took the deed and paid the money?

A. The abstract showed the mortgage on it.

Q. Notwithstanding that decree Mr. Hurlburt told you that he had put that mortgage up at the Lincoln National Bank?

A. He said he had put it up as collateral security.

Q. You knew that when you bought the land?

A. Yes, sir.

It is very evident that the defendants were fully aware of the facts with reference to the mortgage, and purchased the property in the mistaken belief that, by reason of the decree above referred to, it was no longer a lien thereon—a claim which, so far as the record discloses, had never been made by their grantors. The court therefore erred in dismissing the petition of the plaintiff. The decree of the district court will be reversed and the case remanded with instructions to enter a decree of foreclosure in accordance with the prayer of the petition.

REVERSED AND REMANDED.

THE other judges concur.

S. S. SMITH ET AL. V. BENJAMIN GARDNER ET AL.

FILED APRIL 26, 1893. No. 4975.

1. **Promissory Note:** POSSESSION BY MAKER AFTER MATURITY: PRESUMPTION OF PAYMENT. The possession of a promissory note by the maker after maturity thereof is *prima facie* evidence of payment.

2. ———: ———: ———: INSTRUCTIONS. But the force of the presumption of payment from the possession of a note by the maker depends upon the circumstances of the particular case. It is error, therefore, to instruct the jury that possession of a note raises a strong presumption of payment or is a strong circumstance to prove payment.

ERROR from the district court of Greeley county. Tried below before HARRISON, J.

T. J. Doyle, for plaintiffs in error.

G. C. Wright and *E. E. Wright*, *contra*.

POST, J.

This action was commenced in the county court of Greeley county by the plaintiffs in error to recover on a note for $75, executed by Margaret Green and Benjamin Gardner, payable to the order of E. D. Barrett, and taken to the district court of said county by appeal. Mrs. Green having died in the meantime, the action was revived in the name of the other defendant as her executor.

There are two defenses suggested by the answer: First, failure of consideration; and, second, payment; but inasmuch as the first defense was abandoned at the trial, it does not call for further notice in this connection. A trial in the district court resulted in a verdict and judgment for the defendants, which it is sought to reverse by petition in error to this court.

The first contention of the plaintiff in error is that there is no sufficient allegation of payment in the answer, which is as follows: "And the defendants as a separate defense say that the note declared upon has been fully satisfied and delivered to the defendants for cancellation." It must be confessed that the foregoing allegation is exceedingly indefinite and ambiguous when construed as a plea of payment. The statement that the note has been fully satisfied is certainly a conclusion of law, but we think from the allegation that it was delivered up to defendants for cancellation, the inference of payment is warranted. The proof relied upon to sustain the claim of payment is the fact that after the death of Mrs. Green the note in suit was found among her papers, while Mr. Smith, one of the plaintiffs, testified positively that the note had never been paid, but that the deceased obtained it from his possession on the pretense that she wished to examine it and fraudulently refused to surrender it. Upon the introduction of the foregoing evidence the court, among others, gave the following instruction, to which exception was taken:

"You are further instructed that the possession of the note by Margaret Green is a strong circumstance to show payment unless explained by the plaintiffs in the action."

We think the giving of the above instruction was error. We do not question the soundness of the proposition that possession of a note by the maker thereof after maturity is *prima facie* evidence of payment, but what is denominated a presumption of payment in such a case is a mere logical inference from the fact of possession, and may be strong or weak, according to the circumstances of the particular case.

Wharton defines a presumption of fact as "a logical argument from fact to fact." (2 Wharton, Ev., sec. 1226.) And in the same volume, section 1237, the author in defining presumption of law as distinguished from presumption of fact uses this language: "The conditions to which are attached presumptions of law are fixed and uniform, those which give rise to presumptions of fact are inconstant and fluctuating."

Prima facie evidence is defined by Starkie as "that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail if it be credited by the jury, unless it be rebutted or the contrary proved." (Stark., Ev. [10th Am. ed.], 818.)

Possession of the note by the deceased at the time of her death is not only a circumstance tending to prove payment; but from which payment would ordinarily be the logical inference. It is, therefore, proper in such a case to instruct the jury that possession is presumptive or *prima facie* evidence of payment, which will, if uncontradicted or unexplained, warrant a verdict in favor of the party alleging it. But the force of such presumption must always depend upon the circumstances of the case. (*Larimore v. Wells*, 29 O. St., 13.) It is error, therefore, to advise the jury that possession of a note by the maker raises a strong presump-

tion of payment, or is a strong circumstance to prove payment.

An important question presented by the record is not discussed in the briefs of counsel, and is, for that reason, not determined, viz., whether the identification of the note by executor and its introduction in evidence for the purpose of proving payment by deceased to the plaintiffs is such a foundation as will qualify the latter, under section 329 of the Code, to testify as a witness, and to explain the means by which the deceased obtained possession of the note.

REVERSED AND REMANDED.

THE other judges concur.

WOOD RIVER BANK OF WOOD RIVER V. FIRST NATIONAL BANK OF OMAHA.

FILED APRIL 26, 1893. No. 4596.

1. **Inland Bills of Exchange:** PROTEST. The term "protest," as applied to inland bills of exchange, includes only the steps essential to charge the drawer and indorser.

2. **Bank Checks:** LIABILITY OF INDORSER: DISHONOR: NOTICE. Bank checks in this country are regarded as inland bills of exchange for the purpose of presentment and demand, and notice of dishonor, and do not require a formal protest in order to charge the indorsers.

3. ———: DAYS OF GRACE: PRESENTATION. They are also due upon presentation, and not entitled to days of grace.

4. ———: LIABILITY OF INDORSEE FOR COLLECTION FOR FAILURE TO PROTEST: TIME FOR NOTICE. A bank receiving for collection from a correspondent checks drawn upon it by a customer with instructions to protest in case of non-payment, is required, in case payment is refused for want of funds, to give notice to the bank from which they were received not later than the next

day after the dishonor. And when they are held for two days in order to enable the drawer to provide funds for payment thereof a jury will be warranted in finding that the bank intended to accept them and become liable thereon.

5. ———: ———: EFFECT OF DELIVERY TO NOTARY. The general rule is that where a bank delivers a note or bill to a notary public for demand, protest, and notice, it will not be liable for the default of the latter.

6. ———: ———: ———: NOTARY AGENT OF BANK. But where such bill remains in the bank to be protested for non-payment by the president and manager thereof, a notary public, and who, although aware of the instructions to the contrary, delays noting for protest or giving notice, in consequence of which the indorsers are discharged, such notary will be held to be the agent of the bank, and the latter will be liable for his negligence.

ERROR from the district court of Hall county. Tried below before HARRISON, J.

James H. Woolley, for plaintiff in error.

W. H. Thompson, contra.

POST, J.

This was an action in the district court of Hall county to recover for the failure of the defendant below, plaintiff in error, to give notice of the dishonor of certain checks received by it for collection from the plaintiff below, by reason of which certain indorsers thereon were discharged, to the damage of the latter. The facts as they appear from the pleadings and proofs are substantially as follows:

About the 11th day of January, 1887, at Ravenna, in Buffalo county, one Hillebrandt drew eleven checks to the order of as many different payees upon the defendant, the Wood River Bank, doing business at Wood River, Hall county, amounting in the aggregate to $737.28. The checks aforesaid were all cashed by the Farmers Bank of Ravenna, upon the indorsement of the several payees, and upon the day above named were transmitted by it with

proper indorsements for collection to the First National Bank of Omaha. On the evening of the next day, January 12, the last named bank forwarded them by mail, properly indorsed, for collection to the defendant bank at Wood River, with instructions to protest unless promptly paid.

The evidence is conflicting with respect to the time of the receipt of the checks by the defendant. If we regarded that question as decisive of the case, we would feel constrained to resolve it in favor of the defendant, notwithstanding the finding of the jury that they were received by it on the evening of the 13th. Both Hockenberger, the cashier, and Hollister, the president, testify positively that the checks were received by the bank on the afternoon of the 14th. But the judgment is right nevertheless. It is evident from their testimony that the checks were received at the bank before the close of its business on the 14th; that they were opened and examined by the witnesses, who were both aware that there were no funds to the credit of the drawer, and who delayed giving of notice or taking of any steps for the protection of the plaintiff below, in order to enable Hillebrandt to provide funds to balance his account the next day. It is admitted also that the defendant bank continued to pay Hillebrandt's checks in favor of home customers, although no entries appear to his credit on its books subsequent to the 13th. The jury were warranted upon the admitted facts in finding that the bank intended to accept the bills and that by its delay it became liable thereon. (*Northumberland Bank v. McMichael*, 106 Pa. St., 460.)

Checks like those in question are to be regarded as inland bills of exchange, therefore protest is not essential in order to preserve the rights of antecedent parties (*Hughes v. Kellogg*, 3 Neb., 194; Daniel, Neg. Insts., 926; Chitty, Bills [8th ed.], 500, 501), although the holder is required to exercise the same degree of diligence in giving

notice of dishonor as in cases where a formal protest is necessary. The term protest as applied to inland bills is used in its popular sense and means the steps essential in order to charge the drawer and indorsers. (Daniel, Neg. Insts., 929; *Ayrault v. Pacific Bank*, 47 N. Y., 570.) It was the duty of the defendant bank to promptly give notice of the non-payment of the checks, either directly to the bank from which they were received, or to place them in the hands of a notary public for protest and notice. Bank checks, unlike bills of exchange, are due on the day they are presented for payment and not entitled to days of grace. (Boone, Bkg., 165, 250; *Morrisons v. Bailey*, 5 O. St., 13; *Champion v. Gordon*, 70 Pa. St., 474; *Fletcher v. Thompson*, 55 N. H., 308; 2 Am. & Eng. Ency. of Law, 398.) The checks in question were dishonored on the 14th when received through the mail, and payment refused for want of funds. Both the president and cashier, the only managing officers, knew that Hillebrandt's account was overdrawn; there was, therefore, no occasion for time to examine their books.

It is said by Chancellor Kent, 3 Kent's Com., 105: "According to modern doctrine, the notice must be given by the first direct and regular conveyance. This means the first mail that goes after the day next to the third day of grace; so that if the third day of grace be on Thursday, and the drawer and indorser reside out of town, the notice may indeed be sent on Thursday, but *must* be put into the post-office or mailed on Friday so as to be forwarded as soon as possible thereafter."

The next inquiry is whether by delivering the checks to the notary public on the 15th for protest the defendant discharged its duty to the plaintiff, for it is clear, upon authority, that that was the latest day on which notice could have been given in order to charge the indorsers. The rule sanctioned by the weight of authority is conceded to be that a bank which places paper in the hands of notary

public with directions to proceed in such manner as to protect the rights of the beneficial owner and indorsers will not be held liable for the failure of the notary to discharge his duty. (See Boone, Bkg., 205; 2 Am. & Eng. Ency. of Law, 113.) But this case cannot be held to be within the rule just stated. Here the notary was the president and managing officer of the bank and who, being aware of the dishonor of the checks on the 14th, did not protest them for non-payment or notify the plaintiff or other indorsers of that fact until the 17th. It is evident, too, that the cashier was aware of the dereliction of the president, for the checks appear to have remained in the bank during all the time, and whatever was done by the latter by way of noting protest, giving notice, etc., was with the knowledge of the former. It is true the 16th was Sunday, but the default occurred on the 15th. It was the duty of the notary on that day to notify the plaintiff by mail of the dishonor of the paper. The failure to protect the plaintiff as an indorser is directly attributable to the fault of the managers of the bank and it will not be permitted to take refuge behind the notary, and to interpose his negligence as a defense. Upon the facts of this case, the notary will not be held to be the agent of the plaintiff but rather of the defendant. (*Commercial Bank v. Barksdale*, 36 Mo., 563.)

2. The plaintiff below assumed the burden of proving the solvency of the first indorsers, the payees of the several checks. For that purpose Mr. Davis, the cashier of the Farmers Bank of Ravenna, was called as a witness and testified that he was acquainted with the financial standing of the parties named and that he considered them good for the amounts named in the checks bearing their respective indorsements. From his cross-examination it appeared that one or more of them were somewhat embarrassed financially. It is now urged that there is not sufficient evidence of the solvency of the indorsers, hence it cannot be said

that the plaintiff has been damaged. This argument is fully answered by the opinion of Judge LAKE in *Steele v. Russell*, 5 Neb., 211. The fact that the indorsers may have been unable to meet all obligations at maturity does not conclusively establish their insolvency such as to constitute a defense in this action.

The judgment of the district court is right and is

AFFIRMED.

THE other judges concur.

W. J. CONNELL, APPELLEE, V. ELIZABETH GALLIGHER ET AL., APPELLANTS.

FILED APRIL 26, 1893. No. 4780.

1. **Deeds:** DEFECTIVE CERTIFICATE: EFFECT AS BETWEEN GRANTOR AND GRANTEE. A deed in other respects sufficient and regular is effective, as between the grantor and grantee therein, to pass complete title even though executed in a foreign state it is there acknowledged before only a purported justice of the peace as to whose genuine signature, official character and power, there is no accompanying certificate of a proper officer having a seal.

2. ———: ———: ———: DECREE TO REMEDY DEFECT: STRANGERS TO SUIT. A decree obtained for the purpose of obviating the objection that the acknowledgment of a deed was not shown to have been proved by the certificate of a duly authorized officer is operative only against parties to the action and others in privity with such parties. Whatever rights are held by a stranger to such a suit are unaffected by such a decree.

3. **Summons:** OFFICER'S RETURN: EVIDENCE TO IMPEACH. To impeach the return of an officer of the due service by him of a summons, the evidence must be clear and satisfactory.

4. **Attorney's Appearance:** AUTHORITY: BURDEN OF PROOF. Where want of authority to appear for a defendant against whom

judgment has been rendered is alleged to invalidate such judgment, the burden of proof of such want of authority is upon the party asserting the same.

5. **Power of Attorney:** CONVEYANCE OF REAL ESTATE: DESCRIPTION. In a power of attorney to convey real property the true function of the description is not necessarily to identify the land, but may be only to furnish the necessary means of identification. If such description can be made complete by an examination of the public records, and the records of judicial proceedings clearly indicated in such description, it is a sufficient identification of the subject-matter of such power of attorney.

APPEAL from the district court of Douglas county. Heard below before TIFFANY, J.

Gregory, Day & Day and *George M. O'Brien*, for appellants.

Connell & Ives, contra.

RYAN, C.

The real property which is the subject-matter of this action is lot 6 in Smith & Griffin's addition to the city of Omaha. This lot is a part of the northwest quarter of section 28, in township 15 north, range 13 east of the 6th principal meridian. The opinion of the supreme court in *O'Brien v. Gaslin*, 20 Neb., 347, settled several questions as to lots 8, 9, and 12 in this same addition, thereby eliminating similar questions from this action. In the case just cited will be found an abstract of the title of the above described 80-acre tract, covering many of the conveyances hereinafter discussed, which it is not deemed necessary now to reproduce. To the understanding of the discussions hereinafter it is believed that supplementary to the reference to the above plat it will be sufficient to give the following description of the parties, their interests, the source of their claims, and their several contentions:

Augustus Graeter, Jr., was the owner of the whole 80-

acre tract on October 20, 1857. On that day he conveyed the undivided one-half of said property to James E. North, and the other undivided one-half he conveyed to Augustus Graeter, Sr. Each conveyance was by warranty deed, which deeds were recorded on the last date above named. James E. North, by warranty deed, on January 9, 1858, conveyed back to Augustus Graeter, Jr., the undivided one-half of said property of which he had been vested with title as above stated. On January 12, 1858, Augustus Graeter, Sr., executed a warranty deed to Augustus Graeter, Jr., for the undivided one-half of said property which he held by virtue of the conveyance aforesaid. This deed was executed in Ohio and acknowledged before a purported justice of the peace, and did not have a certificate of the proper certifying officer of the county where the acknowledgment was taken, under seal of his office, showing that the officer who took the acknowledgment was in fact the officer he assumed to be; that such certifying officer was acquainted with the handwriting of said justice of the peace, and believed his signature to be genuine, and that the execution and acknowledgment were according to the laws of the state wherein the execution thereof took place. A decree was relied upon to obviate these objections, to which further reference will be made hereafter.

In the suit of Wood v. Baugh, Dawkins, and Graeter a judgment was recovered against each of the defendants, including Augustus Graeter, Jr., upon alleged personal service of summons upon him, and the appearance of George B. Lake as attorney for the defendants. Under this judgment a sale of the premises was made to J. M. Woolworth, by whom a deed of the entire property was executed to Robert K. Woods, who, by power of attorney, authorized said J. M. Woolworth to convey the property therein irregularly described. (There arises upon this power of attorney a serious contention as to the sufficiency of the description of the property in respect of which the attorney

in fact was authorized to make conveyance.) Under this power of attorney J. M. Woolworth made conveyance of the entire property, whereunder, by *mesne* conveyances, the appellee W. J. Connell derives his title.

By reason of the defective proof of the power of the justice of the peace to take the acknowledgment as above noted, the appellants claim that Graeter, Jr., at the time of said sheriff's sale, owned only an undivided one-half of the property described in the sheriff's deed, the other half (as to which, as appellants insist, the defective acknowledgment avoided the deed) appellants maintain is held by the grantees of Graeter, Jr., by an equitable title, whatever may be held as to the other points upon which they rely. The appellants further contend that the court obtained no jurisdiction of Graeter, Jr., in the case of Woods v. Baugh, Dawkins, and Graeter, for that no summons therein was ever served on said Graeter, Jr., and because the appearance of Judge Lake for defendants in said cause was without authority from Augustus Graeter, Jr. As the result of these contentions appellants assert that the title to the whole property was held by Graeter, Jr., on December 9, 1874, by whom on that date it was by quitclaim deed conveyed to James E. North, by whom by quitclaim deed of date, March 16, 1886, Elizabeth Galligher derives whatever title she has to the premises aforesaid, and that by reason of the defects, hereinafter to be considered, in appellee's chain of title her title is unaffected by appellee's claim of title. To the proper settlement of these contentions it will be necessary to consider the following questions:

First—What was the effect of the failure to show the due execution of the certificate of acknowledgment of the deed of Augustus Graeter, Sr., to Augustus Graeter, Jr., and how far was this irregularity cured by decree?

Second—What jurisdiction had the court of Augustus Graeter, Jr., personally, when it rendered judgment in favor of Woods v. Baugh, Dawkins, and Graeter?

Third—Was the subject-matter of the power of attorney of Robert K. Woods to J. M. Woolworth so defectively described that, thereunder, said attorney in fact could convey no title?

1. The first question was in fact considered in *O'Brien v. Gaslin, supra,* which was an action of ejectment brought by Gaslin against the other parties to the suit. Plaintiff's chain of title, and consequent right of possession, in that case, could be made complete only by introducing in evidence the record of the deed, as to which there was no proof that the acknowledgment was taken by a justice of the peace authorized to take such acknowledgments. It was therefore held that as the record of the deed under such circumstances was a nullity and inadmissible against a subsequent purchaser of the land, it devolved upon the plaintiff to offer a deed properly certified as part of his chain of title, and until he did do this, the adverse party might rely upon his possession alone as a defense. Like the above, the case at bar was begun by ejectment simply for the possession of the property in dispute. On motion of the appellants it was upon equitable issues, which involved as well the title as the right of possession, tried as an equitable action. It well might be that under such circumstances the want of certification noticed would be of different effect in a cause wherein all questions of title were at issue, as compared with one wherein was involved only the right of possession, such right depending upon the introduction in evidence of a deed imperfectly proved as such. The decision of this case, however, does not require us to determine what if any difference should be observed, and no such determination will be attempted.

Appellants contend that at least the defect in the proof of due acknowledgment of the deed from Graeter, Sr., to Graeter, Jr., was to vest in Graeter, Jr., a mere equitable title, and that such a title could not be divested by the sheriff's sale made under the judgment rendered in the case

of Woods v. Baugh et al. This, it is claimed, results from the holding of this court that a judgment lien cannot attach to a mere equity. (*Nessler v. Neher*, 18 Neb., 649.) In *Rosenfield v. Chada*, 12 Neb., 25, it was held, however, that an equitable interest in real estate, coupled with actual possession, could be sold under an ordinary execution, and from the proofs adduced as to possession in this case by appellants, it would not be wholly without warrant to find such possession as would be necessary to bring this case within the rule in the last cited case upon appellants' own theory. But it is not believed correct to assume that by reason of the defective proof of the powers and acts of one who assumed to take, as an officer, the grantor's acknowledgment of the deed in question, an equitable interest in any way resulted by operation of this deed. An equitable interest is one that can be made available, effective, or sustained in a court of equity, is the definition given by Webster and Abbott. In *Harrison v. McWhirter*, 12 Neb., 155, it was held that neither acknowledgment nor recording is necessary to pass the title from the grantor to the grantee. As between Graeter, Sr., and Graeter, Jr., therefore, the deed as to which there was defective proof of acknowledgment operated to vest in the grantee whatever title was held by the grantor, in this case an undivided one-half of the real property in the deed described. The defect was simply as to proof of an incident to the due acknowledgment of a deed executed in another state. As between the grantor and grantee the contract of conveyance was complete when the deed was signed and delivered. Section 50, chapter 73, Compiled Statutes, provides that "every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." The deed under consideration was in form a warranty deed, from which no intent other than to convey all the interest of the grantor could be inferred. Therefore, it necessarily follows that

no mere equitable interest as distinguished from the legal title passed by operation of this deed.

To obviate the want of proof of the official capacity of the person who, as justice of the peace, made the certificate of acknowledgment of the Graeter, Sr., deed, and of the due execution of such certificate, the appellee, on December 3, 1886, filed his petition in the district court of Douglas county against the heirs of Augustus Graeter, Sr., who had meantime died; in which petition the appellee set forth the history of the execution of the deed from Graeter, Sr., to Graeter, Jr., with the failure properly to prove the facts necessary to render valid the acts of the alleged officer who certified to such acknowledgment, and after describing the *mesne* conveyances by which the title as alleged had vested in him, the appellee prayed that he be decreed the legal and equitable owner of the real estate involved, and that within a time to be fixed by the court the defendants be decreed to convey such real estate to him; that in default of such conveyance within the time required, the clerk of said court make such deed with the same effect as though executed by the defendants.

Service by publication was duly had upon all the defendants, who were non-residents of Nebraska, and in due time a decree by default was taken against each of them as prayed. The appellants contend that this decree and deed is not operative as to their rights, for the decree was against parties other than appellants, and with whom appellants were not in privity as to the property affected. The appellee insists that the decree was but a link in his chain of title, admissible as against a stranger, and that it cannot be attacked collaterally. In support of his contention the appellee cites *Barr v. Gratz*, 4 Wheat. [U. S.], 220; *Lessee of Buckingham v. Hanna*, 2 O. St., 551; *Den v. Hamilton*, 12 N. J. L., 109; *Baylor's Lessee v. Dejarnette*, 13 Gratt. [Va.], 152; *Barney v. Patterson*, 6 Har. & J. [Md.], 182; *Secrist v. Green*, 3 Wall. [U. S.], 744; *Gregg v. Forsyth*,

24 How. [U. S.], 180; *Freydendall v. Baldwin*, 103 Ill., 325; *Lathrop v. American Em. Co.*, 41 Ia., 549; Freeman, Judgments, sec. 416. Each of these cases merely recognizes the principle that, where the decree formed a link in the chain of title, it was neither more nor less *res inter alios acta* as to third parties than would be a deed supplying the necessary link. The deed under which appellant Elizabeth Galligher claims title was dated March 16, 1886, and was filed for record the same day. Let us suppose, now, that on the date when the above petition was filed, December 3, 1886, or on the day when the decree thereon was obtained, March 18, 1887, all the heirs of Augustus Graeter, Sr., had joined in a deed of the property to appellee, upon what principle could it be claimed that such deed would affect the rights of said appellant? And yet the authorities cited only sustain the proposition that the decree would operate to the same extent as would a deed, as furnishing a necessary link in the chain of title. In either case, as against whatever rights appellant Elizabeth Galligher then held, a decree or deed under the circumstances was not binding. If the action had been one to establish appellee's title as against Elizabeth Galligher and incidentally to prove the qualifications of the alleged justice of the peace to certify an acknowledgment of the deed, another question would have been presented. But to allow proof of title so as to affect the existing rights of one not a defendant, or in privity with a defendant, would be fraught with serious danger of rank injustice perpetrated under the forms of law.

The case at bar is, however, in effect, an equitable action to quiet, as against the appellants, the legal title which, as between the grantor and grantee, was vested in the grantee, under whom appellee claims his title. The judgment in case of Woods v. Baugh, Dawkins, and Graeter was rendered on the 1st day of November, 1859, from which date, if the court had jurisdiction to render such judgment, it became a

lien upon the property under consideration. Under this judgment there were two sheriffs' deeds, one of date August 14, 1861, the other of date January 22, 1870, each founded on the sheriff's sale made on March 15, 1861. The first of these sheriffs' deeds was recorded on August 14, 1861; the last on January 22, 1870. As against the title derived through these sheriffs' deeds, appellants claim by virtue of a deed executed by Augustus Graeter, Jr., to James E. North December 9, 1874, who conveyed to Elizabeth Galligher March 16, 1886. Each of these conveyances was by quitclaim deed. The holder of a title under a quitclaim deed is not a *bona fide* purchaser. (*Lavender v. Holmes*, 23 Neb., 345.) The effect of a quitclaim deed is only to pass the naked legal title of the grantor. It changes no equities. (*Lincoln B. & S. Ass'n v. Hass*, 10 Neb., 581.) Elizabeth Galligher is entitled to assert only such rights as Graeter, Jr., could if he had not conveyed, and it therefore results, if the execution sale aforesaid was effective to vest J. M. Woolworth with the title which we have already found was in Graeter, Jr., that, in the absence of any defect in his chain of title from Woolworth, appellee's title must be held superior to that of appellants.

2. This leads to the consideration of the objections urged as to the binding force of the judgment in favor of Woods as against Augustus Graeter, Jr., one of the defendants. The district court found that "in the action of Woods et al. v. Dawkins, Graeter et al., referred to in the defendants' answer and cross-bill, A. F. Graeter was duly served with summons in said action and appeared in the court, and that the court had jurisdiction in the action of the said parties thereto and the subject-matter thereof." This finding of fact might be sustained upon the presumption in its favor equally with that in favor of the special verdict of jury, yet, as it is earnestly combated, it will not be amiss upon appellants' invitation to examine fully the objections urged. The summons in the case of Woods et

al. v. Baugh, Dawkins, and Graeter was introduced in evidence, indorsed as served upon Baugh, Dawkins, and Graeter by delivering to each of them personally a true copy thereof on the 5th day of March, 1859. It was signed J. C. Reeves, sheriff, by R. Kimball. It was shown by extraneous evidence that at that time R. Kimball was deputy sheriff of Douglas county, Nebraska. The appellants introduced the testimony of Graeter, taken by deposition June 20, 1889, to the effect that he had never been served with summons in the case last named and had never employed or authorized the employment of an attorney to appear in said cause in his behalf. The testimony of six other witnesses, with more or less directness, is to the effect that at the time of said purported service Graeter was at or on his way to Pike's Peak; at any rate he was not in Douglas county. In addition to this there was given the testimony of one or more witnesses that Kimball, upon the above return being shown him, had said that the signature thereto was not his signature. In passing, it may not be amiss to remark that this is not shown to be admissible as evidence by the authorities cited by appellants, and we believe that it was inadmissible for lack of the very essential element, *that it was against Kimball's interest* at the time he made the statement. On the other hand the return itself was relied upon as the foundation for the judgment rendered about thirty years before, supplemented by the evidence of competent experts, who each swore unhesitatingly that the signature was that of Richard Kimball. In addition to this George B. Lake testified that he was duly employed on behalf of the defendants to appear for them in said suit, and that he did so for the purpose of delay, there being no meritorious defense. He did not undertake to say that he was specially employed by Graeter, but that the other defendants were copartners with Graeter, and he could say no more than that he was employed by some member of the firm—he could not say which. The judg-

ment was rendered November 1, 1859, and thereunder an execution sale was had, which was duly confirmed, and sheriff's deeds were issued pursuant thereto, and no question has been made as to the regularity and effectiveness of any of these proceedings until the lapse of over thirty years, and even now it is in a purely collateral proceeding.

A careful examination and consideration of the adjudged cases satisfy us that this attempt should not be successful. In one of them cited by appellants in support of their contention (*Murphy v. Lyons*, 19 Neb., 689) the rule is laid down that the decrees and judgments of a court of general jurisdiction and power are presumed to have been made in causes in which the court had jurisdiction until the contrary is proved.

In *Wyland v. Frost*, 75 Ia., 210, Rothrock, J., delivering the opinion of the court, said: "The return shows that the notice was personally served on the plaintiff and her husband on the 26th day of July, 1882, at Harlan, in Shelby county. The plaintiff and her husband, and others, testify that neither the plaintiff nor her husband was at Harlan on that day. None of the witnesses produced any record, memorandum, or circumstances tending to verify or support their testimony. Their statements are founded upon mere recollection, and suit was not commenced until about three years and a half after the judgment was rendered. On the other hand we have the return of the constable who made the service, and his testimony, in which he states positively that he made the service at the house of the plaintiff and her busband at Harlan on the day named in the return. He is corroborated by evidence that the notice was actually delivered to him for service on the morning of that day, and the plaintiff and her husband are contradicted in reference to incidental facts which tend to show that the claimed absence on the day of service was a mistake. A careful examination of the whole evidence in the case leads us to the conclusion that the district court cor-

rectly found that the evidence introduced by the plaintiff is not of that clear, conclusive, and satisfactory character required to overthrow the return of the officer. It has been held in some jurisdictions that the only remedy for a false return of service is an action upon the bond of the officer claiming to have made the service. (*Slayton v. Chester*, 4 Mass., 478; *Bott v. Burnell*, 9 Id., 96; *Messer v. Bailey*, 31 N. H., 9; *White River Bank v. Downer*, 29 Vt., 332.) But conceding the rule to be otherwise for the purposes of this case, we think that the evidence of the plaintiff falls far short of establishing the falsity of the return. Upon grounds of public policy, the return of the officer, even though not regarded as conclusive, should be deemed strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof. (*Jensen v. Crevier*, 33 Minn., 372; *Starkweather v. Morgan*, 15 Kan., 274; Wade, Notice, sec. 1380.)"

In *Randall v. Collins*, 58 Tex., this language occurs on page 232: "But assuredly if equity will allow one who has been guilty of no fault or negligence to contradict the sheriff's return by parol ovidence, for the purpose of having an unjust judgment by default set aside, we are of the opinion that it should require the evidence to be clear and satisfactory. It is not like an ordinary issue of fact to be determined by a mere preponderance of testimony."

As to the effect of the appearance by Judge Lake, the following language quoted from *Winters v. Means*, 25 Neb., 242, is applicable: "Where the court acquires jurisdiction solely by the appearance of an attorney, the party for whom the appearance was made may, no doubt, deny the authority of such an attorney, and if the appearance was unauthorized, vacate the judgment. The want of authority, however, should be clearly made to appear, and particularly is this the case where the action is against a firm, one of whose members long afterwards seeks to escape liability

on the ground of want of such authority. The proof on this point is not satisfactory, and does not clearly show want of authority."

An abundance of authorities could be cited in support of this proposition stated by the present chief justice, but in the same measure as that statement is authoritative it is conclusive. The conclusions inevitably resulting in respect to the jurisdiction of the court are, first, that as opposed to the recitations of an officer as to the time and mode of service of summons, the evidence to overcome the same, must be clear and convincing; second, that where want of authority to appear is alleged as against such appearance by attorney, the burden of proof of such want of authority is upon the party asserting the same. In this case neither of these requirements were satisfactorily met, and it therefore results that after the lapse of these many years Augustus Graeter, Jr., and those claiming title under him, must be held concluded by the judgment of the court against him and by such proceedings thereunder as were duly had.

3. In the order of discussion laid down in the earlier part of this opinion the next question for consideration is, whether or not the power of attorney from Robert K. Wood to J. M. Woolworth so defectively described the subject-matter thereof that, thereunder, said attorney in fact could convey no title.

In said power of attorney said subject-matter was described as follows: "Sixty-three acres of land near Omaha, in Douglas county, in said territory, title to which was by said Woods acquired by sale thereof on execution against one Augustus Graeter and others." The deed executed by sheriff Grebe to J. M. Woolworth described the property as "the west half of the northwest quarter of section twenty-eight (28), in township fifteen (15) north, range thirteen (13) east of the sixth principal meridian, situate in said county of Douglas, excepting therefrom seventeen

acres of said land, title to which never was in said defendants."

Appellants insist that the power to convey land must possess the same requisites as are necessary in the deed directly conveying the land, citing *Clark v. Graham*, 6 Wheat. [U. S.], 577, in support of this view. This principle is therefore accepted as correct, and we shall now examine the adjudicated cases confined as they are to deeds.

In Devlin, Deeds, sec. 1012, it is said that "the rule may be stated to be that the deed will be sustained if possible from the whole description to ascertain and identify the land intended to be conveyed."

Where the description alludes to facts beyond the deed, parol evidence may be offered, not to contradict the deed, but to locate the deed upon the land. (*Eggleston v. Bradford*, 10 O., 316.) It is undoubtedly essential to the validity of a conveyance that the thing conveyed should be described so as to be capable of identification, but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence. (*Stanley v. Green*, 12 Cal., 166.) As illustrative of the application of the principles above enunciated the following descriptions, and the opinions in which they have been approved, are set out: "All my right, title, and interest in and to any lands and tenements the title to which is in the said S. D. Munger, and in which I have any interest as being the wife of him, the said S. D. Munger." (*Munger v. Baldridge*, 41 Kan., 236.) "Also 960 acres of land, being the divided one-half of two tracts of land of 960 acres, out of patents 278, 279, granted by the state of Texas to A. B. Watrous, assignee of A. McDonald and J. Wishart, situate in Navarro county, Texas, on Richland creek, and set apart to George Butler by commissioners appointed by the district court of Navarro county March 19, 1869, recorded in county records, book D, p. 352." (*Harvey v. Edens*, 69 Tex., 420.)

"That certain piece or parcel of timber land lying and being about forty-five miles in a northerly direction from the town of Eureka, * * * and the said timber land being known as McLeod Wood ranch, and containing about 500 acres, more or less." (*Paroni v. Ellison*, 14 Nev., 60.) "One hundred acres lying in Carrituck township, near the head of Smith creek, it being the eastermost portion of the farm purchased from my brother, and known as the Russel land." (*Warren v. Makeley*, 85 N. Car., 12.) "All the right, title, interest, and claim of the grantor in and to the farm of J. A., deceased, in W. township." (*Bailey v. Alleghany Nat. Bank*, 104 Pa. St., 425.) "All my right, title, and interest in Sacramento City, Upper California, consisting of town lots and buildings thereon." (*Frey v. Clifford*, 44 Cal., 342.) "All our right, title, and interest, and all real estate which we own or have claim to, situate in Belfast, situated in said county of Waldo, and particularly all that belongs to us as the heirs or legal representatives of Andrew Bird, formerly of Belfast, now deceased." (*Bird v. Bird*, 40 Me., 398.)

As was said in *Works v. State*, 120 Ind., 119, the true function of the description is not to identify the land but to furnish the means of identification, and this is done by the description here challenged. It furnishes the means of making the description certain, and that which can be made certain is certain. No question is raised as to the sufficiency of the description adopted by the attorney in fact in the deed by him as such executed, it therefore results from the foregoing considerations that the description of the subject-matter of said power of attorney must be deemed sufficient—the recital, that the title to the land had been by said Woods acquired by sale thereof, not being so misleading as to render inapplicable the principles above discussed.

The foregoing discussion covers all the questions which arose upon the record claim of title of each of the parties to this action. There was a large amount of evidence di-

rected to the appellants' claims founded upon the occupancy, cultivation, use, and possession of the premises in dispute, but as these questions were settled as facts by the findings of the district court upon conflicting testimony, they must stand as should the special verdict of a jury on the same propositions. They, therefore, will not be inquired into in this court. In the district court the appellants were found entitled to one undivided fourteenth part of the lot in controversy, as to which finding no complaint is made by appellee. It was rendered unnecessary, therefore, to inquire into the derivation or history of this fractional interest, hence it has not before been referred to, or commented upon. From the foregoing considerations it results that the judgment of the district court is in all respects

AFFIRMED.

RAGAN, C., concurs.

IRVINE, C., as district judge, having passed upon another banch of this controversy, took no part in the consideration or decision of this case.

MCCORD, BRADY & COMPANY V. PHILIP KRAUSE.

FILED APRIL 26, 1893. No 5091.

1. **Attachment:** CHATTEL MORTGAGES. In the action of an attaching creditor against the debtor, the validity of chattel mortgages made by the debtor to other parties cannot, as against such mortgagees, be adjudicated.

2. ——: HEARING OF MOTION TO DISSOLVE: RIGHTS OF MORTGAGOR OF ATTACHED CHATTELS. As between plaintiff and defendant alone, upon motion to dissolve an attachment of the chattels mortgaged, the defendant can be heard only because of his residuary, contingent interest which may remain after the said mortgages are satisfied.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J.

Jeffrey & Rich, for plaintiff in error.

Byron Clark, *contra*.

RYAN, C.

On August 14, 1891, Philip Krause, a merchant at Plattsmouth, Nebraska, made the first mortgage hereinafter referred to, and on the 15th day of August, 1891, made the other chattel mortgages in the order given, upon the entire merchandise composing his stock of goods, to secure severally the parties and amounts following, to-wit: Bank of Cass County, $1,000; Meyer & Raapke, $330.73; Tootle, Hosea & Co., $677.82; D. M. Steele & Co., $311.37; McCord, Brady & Co., $331.67; Kasper Bros., $354.35. These mortgages practically covered all the possessions of defendant Krause, and each provided that it was "lawful" for the mortgagee to take immediate possession of said goods and chattels wherever found, the possession of these presents being his sufficient authority therefor, and to sell the same at public auction or private sale, or so much thereof as shall be sufficient to pay the amount due or to become due," etc. After reciting the statutory provision for advertising the sale, each mortgage provided for sale without notice at continuous private sale at option of the mortgagee. Each mortgagee, through W. H. Miller, as agent, upon the making and filing of said mortgages went into possession, and private sales of the stock began under the provisions aforesaid.

It is a disputed proposition whether or not the plaintiff in error McCord, Brady & Co. accepted the mortgage in favor of that firm. Certain it is, however, that on August 24, immediately following the making of said mortgage, the plaintiff in error repudiated the same by attaching the

mortgaged property in this suit brought in the district court of Cass county. The petition and affidavit for an attachment were in due form for the indebtedness not yet due, as well as for a part already due, and there was on the same day made by the presiding judge of said district court the following order:

"On application of the plaintiff, and it appearing from the affidavit of the plaintiff that the claim is just and that there is cause for granting an attachment, an order of attachment in the sum of $396.56, and $50, probable costs of the action, is therefore allowed to issue in this case, upon the plaintiff giving an undertaking in the sum of $800, with approved security as provided by law.

"(Signed) SAMUEL M. CHAPMAN,
"*Judge of the District Court.*"

An undertaking was filed as required by this order, and duly approved, whereupon an order of attachment issued against the property of defendant Krause, and was at once levied on the mortgaged property by the sheriff of said county, in whose possession said property remained, at least until after the dissolution of the attachment.

W. H. Miller, on the hearing and determination of the motion hereinafter referred to for the dissolution of the attachment, in his affidavit, stated that on August 15 he was by the mortgagees put in possession of the mortgaged property with instructions to remain in possession of said goods for all of said parties until their respective claims were paid out according to the priority just stated, and accordingly proceeded to sell the mortgaged property at retail without advertising; that at the time of the levy he had collected on the books of account and so sold goods to the aggregate amount of $447.93, to apply on the mortgage of the bank of Cass county. This agent, W. H. Miller, further stated that at the time the said goods were attached he informed the sheriff, prior to the levy, that he was in possession of said mortgaged property for the mort-

gagees, giving him a list of the names hereinbefore set forth, and surrendered said goods and chattels under protest.

Neither of the mortgagees have in any way attempted further to assert a right to the possession of the property levied upon, and to this action neither has been a party nor in privity, so far as the record discloses, with the defendant in resisting the attachment upon these goods. This is very important, for our consideration of this case is thus limited exclusively to a determination of the rights and remedies proper as between plaintiff and defendant as debtor and creditor. Whatever rights or remedies the mortgagees may have in respect to the mortgaged property are in no way determined in this proceeding, because impossible in their absence as parties, and upon the record unnecessary.

On August 29, 1891, the defendant in said attachment proceedings filed in said court a motion to vacate and discharge said attachment on various grounds, only two of which are deemed important to the proper decision of the matters presented for review. This motion was presented upon affidavits of various parties, with which were presented several chattel mortgages containing the provisions above recited. A clear preponderance of the evidence showed that these mortgages covered all of Krause's property, and that he admitted to plaintiff's agent and to plaintiff's attorney that these mortgages were given to satisfy his largest creditors so they would not attach, that the smaller ones would not attach, and that he intended to settle with his creditors; though the defendant denies making the statements. Upon this motion the following order was made:

"And now on this 7th day of November, 1891, this cause came on for hearing upon the motion of the defendant to vacate and discharge the attachment heretofore granted in this cause and was submitted to the court, on consideration whereof it is ordered that the attachment heretofore granted in this action be and the same is vacated and discharged, and the sheriff is required to return to the

defendant all the property taken by him under said order of attachment; to all of which the said plaintiff duly excepts, and plaintiff is granted twenty days in which to perfect exceptions and prepare and file petition in error in supreme court."

As between plaintiff and defendant, the only parties to this litigation, the learned district judge erred in making the above order dissolving the attachment and returning the property attached to the defendant Krause. The question was simply whether or not sufficient grounds of attachment existed as against Krause. He had disposed of all the property, and, as he admits in his own affidavit, was slightly insolvent, the parties to whom his property was turned out were authorized to and in pursuance of this authority in fact were disposing of Krause's property at retail by private sales. Chapter 12 of the Compiled Statutes of Nebraska prescribes the manner in which chattel mortgages may be foreclosed. It is not deemed necessary to decide at present whether an advertisement and public sale is absolutely essential to a foreclosure as against creditors of the mortgagor; suffice it to say that a mortgagor who consents to a private sale of all his property, though under the guise of a chattel mortgage, to prevent large claim holders from bringing suit, with a view to settling with his creditors, is not in a position to insist that said property shall not be attached at the suit of one of his creditors. (*Wyman v. Mathews*, 53 Fed. Rep., 678.) His interest in the attached property is limited to such residue as may remain after the mortgages are fully satisfied, and as to such interest defendant's conduct and standing are not such that upon his application the attachment should have been dissolved. The order of dissolution of the attachment is therefore vacated, and this cause is remanded for further proceedings.

REVERSED AND REMANDED.

THE other commissioners concur.

ISABEL WAGNER v. B. B. HAINES.

FILED APRIL 26, 1893. No. 4586.

Forcible Entry and Detainer: INSTRUCTIONS. In an action for the recovery of possession of farm lands and a dwelling house from defendant's alleged forcible detention of both conjunctively, plaintiff's request for an instruction which defined the rights of defendant to the whole subject of controversy, as though to be tested by his right to the possession of the dwelling house alone, was properly refused.

ERROR from the district court of Gage county. Tried below before BRODY, J.

Griggs & Rinaker, for plaintiff in error.

R. S. Bibb, contra.

RYAN, C.

The plaintiff in error brought an action before a justice of the peace of Gage county against the defendant in error, alleging plaintiff's present right of possession as against the defendant, who unlawfully, as plaintiff alleged, held possession of certain real property. Upon appeal to the district court of that county a verdict was returned and judgment rendered in favor of the defendant.

There was not much conflict as to the facts, though not all detailed by any one witness. About August 30, 1889, plaintiff agreed to lease the real property in question to the defendant for a term of three years. Afterwards, in October, defendant, with his family, at the suggestion of plaintiff, moved into the dwelling house occupied by plaintiff, and began preparation for cropping next year the land of which the right of possession was litigated afterwards. For this purpose the defendant plowed from twelve to fourteen acres some time in the fall of 1889. No attempt

was made to reduce the terms of the lease to writing until December of that year, when the plaintiff caused a draft of the lease, as she understood it, to be prepared. The defendant refused to sign this because its terms were not in all respects as he understood those agreed upon in August preceding, and the parties were never able to formulate in writing a common understanding of the terms of the lease. In March, following, this action was begun. The theory of the plaintiff was that the transaction had in August was merely an agreement to execute a lease at a subsequent date, while defendant just as strenuously insisted that it was a lease *in præsenti;* the requirement of a writing for a term of more than one year to be met by subsequently reducing to writing and signing the terms agreed upon.

The necessity of considering the merits of these claims arises only upon the instructions given and refused. The court instructed the jury that a parol lease for more than one year is not good for more than one year, but is good for one year; also as follows:

"3. An agreement to enter into a written contract of lease is not a lease; but a parol lease, with a further agreement to reduce the terms of the parol lease to writing, is a lease so far as it is competent to make a parol lease. This is a distinction you will bear in mind in considering this case. The defendant claims under a parol lease; the plaintiff claims that there was no parol lease. This is a controlling question of fact for you to determine; that is whether or not the defendant was in possession of the premises under and by virtue of a parol lease from the plaintiff at the commencement of this action."

Plaintiff in error does not question the correctness of this instruction so far as it goes, but insists that the following instruction upon her request should have been given the jury:

"2. You are instructed that if you find from the evi-

dence that it was agreed between the parties that a lease should be executed to commence March 1, following, and that plaintiff allowed the defendant to go into a part of the house prior to said March 1, then the plaintiff had a right to make defendant vacate said premises at any time prior to said March 1, and recover possession thereof; and after the defendant had been notified to leave said premises he was a wrong-doer, as he had no right to remain there after such notification."

This instruction by its terms was limited to "a part of the house," as "the premises," in regard to which alone the right of possession was to be determined by the jury. The petition upon which the cause was tried claimed the right of immediate possession of the northwest quarter of section 19, town 4, range 6, conjunctively with the dwelling house; its prayer was for the restitution of said premises. Manifestly this instruction, which ignored the rights of the defendant as to the tillable land of which he had already plowed twelve or fourteen acres for the following year's crop, was, in an action of this character, too restricted in its scope, and plaintiff's request to so instruct was therefore properly denied. The record presents no other question than upon the instructions; it therefore results that the judgment of the district court is

AFFIRMED.

THE other commissioners concur.

SIMON OBERNALTE V. JAMES JOHNSON.

FILED APRIL 26, 1893. No. 4989.

1. **Malicious Prosecution:** PLEADING. O. charged J. before a justice of the peace with the commission of a criminal offense. The jury found J. not guilty, and made a special finding in these words: "and that the complaint was made without probable cause." J. then sued O. for damages, alleging that the prosecution was malicious and without probable cause, and set out in his petition the special finding of the jury. *Held*, That it was error to everrule O.'s motion to strike such special finding out of the petition.

2. ———: EVIDENCE. On the trial J. offered in evidence the verdict of the jury acquitting him of the offense with which O. charged him before the justice of the peace. *Held*, That that part of the verdict acquitting him was competent, although O.'s answer admitted that J. had been tried and acquitted. *Held further*, That it was error to permit the said special finding to be read in evidence to the jury.

3. ———: ———: HARMLESS ERROR. The foregoing errors were, however, cured by the instructions of the court, and in this case were held to be without prejudice.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J.

J. H. Haldeman, for plaintiff in error.

Wooley & Gibson, contra.

RAGAN, C.

James Johnson sued Simon Obernalte in the district court of Cass county for damages for malicious prosecution, alleging that on the 2d day of September, 1889, Obernalte falsely and maliciously, and without probable or reasonable cause, charged the plaintiff before a justice of the peace with a crime, and caused said justice to make out a warrant and arrest the plaintiff, by which he was deprived of his lib-

erty; that on the 5th of September, 1889, the plaintiff was tried on the charge before said justice of the peace and acquitted, and that said prosecution is now ended and wholly determined; that by means of said false arrest, trial, and imprisonment, the plaintiff had been damaged. Petition also contained this clause: "And the jury in said cause found the complaint was made without probable cause." To this petition the defendant below filed a motion to strike out the words: "And the jury in said cause found said complaint was without probable cause." This motion the court overruled. The defendant then answered, admitting that he made the complaint before the justice of the peace, had the plaintiff arrested as alleged in the petition, and averred that the charges made against the plaintiff were true; that in the month of August or September, 1889, he was reliably informed that plaintiff was guilty of the offense with which he charged him before the justice of the peace; that he consulted the county attorney and truthfully laid all the facts before him, and thereupon caused the plaintiff to be arrested, and denied "that such arrest was made through malice or without probable cause, and denied that plaintiff had been damaged thereby." There was a trial to the jury, with a verdict and judgment for Johnson, and Obernalte brings the cause here for review.

There are only three assignments of error which we notice:

1. The overruling of the motion of the defendant below, to strike out of plaintiff's petition the words: "And the jury in said cause found said complaint was made without probable cause." This motion should have been sustained. It was not a material allegation in the petition, and no evidence could be adduced on the trial in support of such an allegation.

2. The introduction in evidence of the verdict of the jury in the criminal trial before the justice of the peace. This verdict was in these words:

"In Justice Court, before L. C. Stiles, Justice of the Peace.

"THE STATE OF NEBRASKA
v.
JAMES JOHNSON, CHRIS NELSON. } Verdict.

"We, the jury, duly impaneled and sworn in the above entitled cause, do find the defendants not guilty, and that the complaint was made without probable cause.

"C. H. SMITH,
"*Foreman.*"

It is true the answer of the defendant admitted that he had caused Johnson's arrest, that he had been tried and acquitted. Nevertheless, that part of this verdict finding Johnson not guilty was competent evidence, but the words "and the jury in said cause found said complaint was made without probable cause" were clearly incompetent. The very question the jury, to whom this verdict was read in evidence, was sitting to determine was whether Obernalte, in the prosecution of Johnson in the case wherein the jury had acquitted him, had probable cause to believe him guilty of the offense with which he charged him before the justice of the peace, or whether his prosecution of Johnson was malicious and without probable cause. To permit this part of the verdict to be read was in effect to put in evidence against Obernalte the opinion of the jurymen in the state case that in causing Johnson's arrest Obernalte was actuated by malicious motives. We know of no rule of evidence under which that part of the verdict was competent, and it should have been excluded. (*Sweeney v. Perney*, 40 Kan., 102.)

3. The giving of instruction No. 8 by the court. That instruction is as follows: "The record and verdict of the criminal trial had before Justice Stiles, and which has been received in evidence before you, are proper to be considered by the jury only so far as it tends to show the institution and final determination of said criminal prosecution in the

court below." We do not think there was any error in this instruction. On the contrary, if it was out of the record, the case would have to be reversed. The court by giving it cured the other errors complained of and reviewed herein.

The plaintiff in error assigns as error the giving of other instructions by the court, but these are not insisted on in the brief of counsel. We have, however, carefully examined them and think the plaintiff in error has nothing of which to complain. The trial judge seems to have taken great pains to fully, fairly, and carefully instruct the jury on all the points in the case. The judgment of the court below is

AFFIRMED.

THE other commissioners concur.

LUELLA GILLESPIE ET AL., APPELLEES, V. PHILIP H. COOPER ET AL., APPELLANTS.

FILED APRIL 26, 1893. NO. 4794.

1. **Creditor's Bill:** STATUTE OF LIMITATIONS. Under section 12, Civil Code, an action for relief on the ground of fraud can only be commenced within four years after a discovery of the facts constituting the fraud.

2. ——: ——: FRAUDULENT CONVEYANCES: ATTACHMENT OF PROPERTY FRAUDULENTLY CONVEYED. The cause of action mentioned in said section is the fraudulent act complained of; and the cause of action accrues when discovered, and it is discovered when the party seeking relief is in possession of sufficient facts to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to a discovery of the fraud; and the statute begins to run against a creditor from the discovery of the fraudulent act on the part of his debtor, whether the creditor's claim has been reduced to

judgment or not, as he is not limited to a creditor's bill in order to obtain relief on the ground of fraud, but may attach the property fraudulently conveyed. IRVINE, C., dissents.

3. ———: ———: ———: DISCOVERY OF FRAUD BY CREDITOR. A party defrauded must be diligent in making inquiry. Means of knowledge are equivalent to knowledge. A clue to the facts which, if followed up diligently, would lead to a discovery, is, in law, equivalent to a discovery. Accordingly, where a party was known by her creditors to have recently failed in business and to be insolvent, conveyed all her real estate by deed recorded October 28, 1884, in the county where she resided; and she, in conversation with her creditors at that time, said that the object of the conveyance was to beat her foreign creditors; that she had been advised to put her property out of her hands; that she intended to put her property in other hands until she could settle matters; that she had made arrangements by which she could pay all her home creditors; that there were some debts she did not feel bound to pay; that the object of the deed was to secure a debt to the grantee, and the surplus to be paid her; it was *held*, that these facts were a discovery by the creditors on the date of the recording of said deed that the same was fraudulent.

4. ———: ———: ———: ———: REGISTRATION OF FRAUDULENT DEED. It seems that the fraud, within the meaning of said section 12, is discovered when the fraudulent deed is recorded in the county where the debtor lives.

5. ———: ———: ———: ———. On the 28th day of October, 1884, C., being largely indebted to various parties, conveyed all her property, four city lots, to one R., with a secret agreement between them that R. should sell the lots and retain the amount of the debt owing him by C., and return the surplus property, or proceeds thereof, to C., or such person as she might designate. *Held*, That this was a fraud on the other creditors of C., but, as this fraudulent conveyance was discovered by them on the date of its record, their suit to set it aside, commenced more than four years thereafter, was barred; but where it also appeared that while R. held the title to the said four lots, he agreed with C. that if she would find a purchaser for, or sell them, he would pay her, as commissions, all that remained of the lots or their proceeds after the payment to him of her debt. Two of the lots were sold, R.'s debt paid, and at C.'s request the remaining two lots were conveyed to her husband without consideration. *Held*, That the two lots thus conveyed were C.'s property, acquired from R. by purchase, and were conveyed to C.'s husband for the purpose of defrauding her creditors. *Held further*, That this was

not a continuation or consummation of the fraud of October 28, 1884, but a new and independent one, and as the suit of C.'s creditors to set aside the conveyance of October 28, 1884, also assailed this conveyance of the two lots purchased by C. from R., and conveyed to her husband, and was commenced within four years of the recording of such conveyance, it was not barred as to the lots purchased by C. of R.

APPEAL from the district court of Lancaster county. Heard below before CHAPMAN, J.

Lamb, Ricketts & Wilson, for appellants.

Harwood, Ames & Kelly, Stevens, Love, Cochran & Teeters, and *W. S. Summers*, for appellees.

RAGAN, C.

In 1883 the appellant Sarah Cooper was the owner of lots Nos. 4, 5, 6, 7, 8, and 9, in block No. 124, in the city of Lincoln, and, together with her husband, the appellant Philip H. Cooper, occupied of said lots as a homestead Nos. 8 and 9. Mrs. Cooper was engaged in the mercantile business, and about October 1, 1884, failed, owing appellees debts contracted on the faith and credit of her property and business. On January 8, 1883, Mrs. Cooper conveyed by quitclaim deed said lots Nos. 8 and 9 to the State National Bank of Lincoln, to secure the payment of a debt she owed it. On January 7, 1884, she was still indebted in the sum of $4,500 to said bank, as an evidence of which said debt she executed and delivered to it her note due in sixty days, on which, prior to October of said year, there were indorsed $1,300. At this date all these lots were incumbered by a mortgage of $3,500, held by one Bowles. On October 27, 1884, Mrs. Cooper and her husband, by a warranty deed, and for the expressed consideration of $5,200, conveyed to John R. Richards, then president of said bank, four of said lots, namely, Nos. 4, 5, 6, and 7. This deed contained this clause: "The party

of the second part, as a part of the purchase money of said premises, agrees to pay and have applied on a certain mortgage executed by the parties of the first part to one Kate Bowles the sum of $2,000, and which said mortgage also covers lots 8 and 9 in said block, and is to secure $3,500, and is recorded in book V of mortgages, in Lancaster county, Nebraska. The balance of said mortgage, being $1,500 and interest, the parties of the first part are to pay, and if not paid and is enforced by foreclosure, said lots Nos. 8 and 9 are to be first sold and the proceeds to be applied to the payment of said balance of $1,500 and interest." On the day of the execution of this deed to Richards the State National Bank executed and delivered to Mrs. Cooper a quitclaim deed for the said lots Nos. 8 and 9 previously conveyed by her to the bank as security.

The deeds of Mrs. Cooper and husband to Richards, and from the bank to Mrs. Cooper were both recorded October 28, 1884. About this last date Mrs. Cooper and husband conveyed said lots Nos. 8 and 9 to one Hyde, and he at once conveyed them to appellant Philip H. Cooper, who thereupon gave his wife a written receipt, or paper reciting that he accepted said conveyance from Hyde in full payment of $1,300 before then loaned by Mr. Cooper to his wife, and agreeing to hold said lots as the homestead of the family. It appears that this $1,300 was the money indorsed on the $4,500 note.

Some time after the date of the deed from Mrs. Cooper and husband to Richards he was succeeded as president of the bank by one Brown, and at that time Mr. Richards conveyed said lots Nos. 4, 5, 6, and 7 to him, Brown. About April 1, 1886, Mr. Brown sold and conveyed two of said lots, namely, lots Nos. 4 and 5, to one Patrick for $4,500; and, on April 14 of the same year, Brown conveyed to appellant Philip H. Cooper the other two lots, namely, lots Nos. 6 and 7, the consideration expressed in the deed being one dollar.

The appellees brought this suit, a creditor's bill, in the district court of Lancaster county, alleging their judgments against Mrs. Cooper; that the debts on which they were based were contracted while she was owner of the record title of said lots Nos. 4, 5, 6, 7, 8, and 9, and on the faith and credit of the same; her insolvency; that said lots Nos. 8 and 9 were of the value of $9,000, the homestead of herself and husband; that they had conveyed them to Hyde and caused him to convey them to Philip H. Cooper without consideration and for the express purpose of defrauding the creditors of Mrs. Cooper. As to said lots 4, 5, 6, and 7, appellees in their amended petition alleged that on October 27, 1884, the appellant Mrs. Cooper was indebted to the State National Bank of Lincoln in the sum of $3,200, and to secure the payment of the same she and her husband conveyed all said lots to said Richards, president of said bank, and that it then was, and at all times prior and subsequent thereto continued to be, well understood and agreed by and between the said Coopers and the said Richards and the bank of which he was president that Richards received said deed and the title to said lots in trust only and by way of mortgage to secure an indebtedness of $3,200 from the said Sarah Cooper to said bank, and that upon the payment of said indebtedness, said lots should be reconveyed to the said Sarah Cooper or to such person as she might direct; or that in case said lots should be sold, that the bank should be first paid out of the proceeds of the sale, and the residue, if any, should be paid over to the said Sarah Cooper, or to such person as she might direct.

Appellees further alleged that some time after that one Brown succeeded Richards as president of said bank, and that thereupon Richards conveyed said lots to Brown on the same terms under which they were conveyed to him by the Coopers, and that, in pursuance of the trust and agreement between the said Coopers and the said Richards

and Brown and the bank, in April, 1886, Brown sold of said lots Nos. 4 and 5 to one Patrick for a sum of money sufficient to pay the indebtedness of Mrs. Cooper to the bank, and did, with the proceeds of said sale, pay off and discharge Mrs. Cooper's indebtedness to the bank; and thereupon, on the 14th of April, 1886, at the request of Mrs. Cooper, and with the intention to hinder, delay, and defraud her creditors, and without consideration, conveyed said lots Nos. 6 and 7 to the appellant Philip H. Cooper. The appellees further alleged that they had no knowledge of the facts set forth in their amended petition as to the fraudulent intent and purpose of the conveyance of the lots by the Coopers until long after said conveyance. The prayer was that all of the conveyances, so far as the same affected said lots 6 and 7, be set aside, canceled, and annulled.

The answer of the appellants alleged that as to lots 8 and 9 they were conveyed to the appellant Philip H. Cooper, in consideration of the $1,300 which he had loaned his wife, and which she had paid on the note held by the State National Bank. As to lots 4, 5, 6, and 7, the answer alleged that the deed made by the Coopers of said lots to Richards on the 27th of October, 1884, was an absolute sale and conveyance of the property, and made in good faith. The appellants also pleaded the statute of limitations, viz., that the cause of action of the appellees accrued more than four years prior to the bringing of this suit.

The judgment of the court, found in the record, makes no disposition whatever of said lots Nos. 4, 5, 8, or 9. The court found and decreed, however, that the conveyance made by the Coopers on the 27th of October, 1884, to Richards of lots 4, 5, 6, and 7 was made to secure the payment of $3,200, then owing by Mrs. Cooper to the State National Bank, and in trust for Mrs. Cooper, with an agreement on the part of Richards that after the debt was paid the remaining property, or the proceeds of the

sale of the property, if it should be sold, should be returned to Mrs. Cooper, or to such person as she might designate; and that both the conveyance of October 27, 1884, of Coopers to Richards, and the conveyance of April 14, 1886, of Brown to appellant Philip H. Cooper, were made for the purpose of hindering, delaying, and defrauding the creditors of Mrs. Cooper, and the court decreed that the said conveyance of April 14, 1886, by Brown to Cooper be set aside, and the property subjected to the payment of the debts of appellees. The court further found that the appellees were ignorant of all said fraudulent transactions and agreement and intent until within four years prior to the bringing of this action.

The appellants filed the usual bond in the court below and bring the case here on appeal.

The finding of the court, that the conveyance made by the Coopers to Richards on the 27th of October, 1884, and the subsequent conveyance of Brown to Cooper in April, 1886, were fraudulent and made for the purpose of hindering and delaying the appellees in the collection of their debts, is supported by the evidence. But we are of the opinion that the finding of the court, that the appellees were ignorant of both these fraudulent transactions until within four years next prior to the bringing of their suit, is not supported by the evidence in the record. This suit was brought more than four years after October 28, 1884. Now, when did appellees discover the fraud perpetrated October 27, 1884, within the meaning of section 12 of the Civil Code, as construed by the courts?

The parties all lived in the city of Lincoln, in Lancaster county, Nebraska. The lots fraudulently conveyed were situate in said county and city. The fraudulent deed was recorded in said county and city October 28, 1884. Mrs. Cooper had failed in business and was known to be insolvent. The fraudulent grantors remained in possession of the property conveyed to Richards. The appellees testify:

Mrs. Gillespie:

Q. You are one of the plaintiffs in this case?

A. Yes, sir.

Q. Are you acquainted with the defendants Cooper and his wife?

A. Yes, sir.

Q. How long have you known them?

A. I should say about fourteen years.

Q. Did you know or hear about the conveyance of Coopers to J. R. Richards?

A. Yes, sir; I did.

Q. Of the property in question in October, 1884?

A. Yes, sir.

Q. At that time Mrs. Cooper then was or had been in the grocery business?

A. Yes.

Q. It was about the time of the failure of that business, was it not?

A. Yes, sir.

Q. At or about that time, or immediately afterwards, did you have any conversation with Mrs. Cooper in reference to the transaction?

A. Yes, sir.

Q. State when and where that conversation was.

A. It was at Mrs. Cooper's house.

Q. On what date?

A. I could not say the date.

Q. With relation to the transaction, on what date?

A. It was the day that those deeds were to be made. I met her son and I think the attorney—I was not acquainted with the gentleman—as I went up.

Q. Was that this gentleman, Mr. ———.

A. I could not identify him now, but she told me that Mr. ——— had advised her to deed the property out of her hands.

Q. Where did that conversation occur?

A. At Mrs. Cooper's house.

Q. Did you have any further conversation with her at that time and at that place?

A. Yes, sir; she asked me if I had taken any action in the matter as soon as I went in, and I told her no; that I called to see her to see what she had to say about it, and she said they intended putting the property into Mr. Richards' hands until they could settle the matter and straighten themselves. She said of course she intended to pay me and she said she intended to fix it so the creditors of Willie could not get hold of it. And she said when that property was sold Mr. Richards had entered into an agreement with her that she would have all over and above her indebtedness to Mr. Richards, and that she would have ample means to pay all her debts of honor, as she termed them, when that was fixed up.

Q. Willie was her son?

A. Yes, sir.

Q. He had been conducting her business in the grocery?

A. Yes, sir; he had been conducting the grocery business.

Q. That was the business that failed about that time?

A. Yes, sir.

Q. That business was conducted in her name—it was her business?

A. Yes, sir; that was my understanding.

J. H. McClay:

Q. Where do you reside?

A. Lincoln.

Q. Are you acquainted with the defendants?

A. Yes, sir.

Q. You are one of the plaintiffs in this action?

A. Yes, sir.

Q. You may state whether you had any conversation with the defendants, or either of them.

A. I have had conversation with them at different times

about this matter. I have had conversation with Mrs. Cooper in reference to this matter in controversy.

Q. State when and where they were and what they were.

A. Very soon after her failure and the transfer of this property in these deeds offered heretofore.

Q. What was said?

A. It was after the quitclaim deed and prior to the 1884 deed; it was between that time; it was just after the failure of the grocery business that I had the conversation.

Q. Fix the date.

A. I could not do that. It was just after the failure of the grocery business. My conversation with Mrs. Cooper was about some money that she owed me that I had paid as security on a note, and she said she had made arrangements by which she could pay all her debts to the people here in Lincoln; that there were some debts that she did not feel bound to pay; she had plenty of property to pay them with. I asked her where the property was. She refused to tell me where it was. She said she had made such arrangements as would protect her interests and she thought it would protect the rest of us.

W. W. Holmes:

Q. You are one of the plaintiffs?

A. Yes, sir.

Q. You live in Lincoln?

A. Yes, sir.

Q. You are acquainted with the defendants?

A. Yes, sir.

Q. You have heard the testimony in this case so far?

A. Yes, sir.

Q. Did you at any time, about the time of the transfer or conveyance of these lots to Richards, have any conversation with the defendants, or any of them, in reference to it?

A. I had with Mrs. Cooper.

Q. When?

A. It was on Monday following the conveyance.

Q. What day of the week were the conveyances, do you know?

A. She said she had been up all night Sunday night making them.

Q. It was the day following that you had that conversation with her?

A. Yes, sir.

Q. Where was that conversation?

A. At her house.

Q. What was it?

A. She said she had turned the property over to Richards to beat her foreign creditors, and all the home creditors were to be paid.

Q. Was there any further conversation?

A. Yes, sir; I had a long conversation with her.

Q. State the substance of it as near as you can.

A. I don't know as she said anything more about that. She said she was most sick, she had been up all night.

Q. Did she say what the object of the transfer to Richards was, what office that was intended to perform?

A. It was to secure the bank; the bank was to be paid first.

Q. What was to become of the residue?

A. That was to go to her.

J. H. McClay recalled:

Q. Did you have any such conversation as that with Mrs. Cooper?

A. Yes, sir; I had that kind of a conversation with her, and she told me that the lands were hers after the bank had been paid off—the State National Bank was paid—the balance belonged to her.

Were these facts a discovery by appellees of the fraud of October 27, 1884, within the meaning of section 12 of the Civil Code and the construction placed thereon by the courts? Part of that section is as follows: "An action for

relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." The settled rule is that the party defrauded must be diligent in making inquiry; that means of knowledge are equivalent to knowledge; that a clue to the facts, which, if followed up diligently, would lead to a discovery, is in law equivalent to a discovery, equivalent to knowledge. (*Norris v. Haggin*, 28 Fed. Rep., 275, and cases there cited; *O'Dell v. Burnham*, 61 Wis., 562; *Kuhlman v. Baker*, 50 Tex., 630.)

In *Parker v. Kuhn*, 21 Neb., 413, this court said: "An action for relief on the ground of fraud may be commenced at any time within four years after the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery."

Hellman v. Davis, 24 Neb., 793, was a creditor's bill, alleging that in 1873 the defendant was a member of an insolvent copartnership, and on said date caused certain lands to be purchased with his money and title taken in his wife's name for the purpose of defrauding his creditors; that the plaintiff had no knowledge of the fraud until within four years prior to the bringing of the suit. It appears from the evidence quoted in the opinion that the fraudulent deed was recorded in 1873; that the plaintiff knew that the defendant and his wife were living on the land, and that the defendant was insolvent, and the only other fact of the fraud that plaintiff had learned since its perpetration was that within four years before the suit was brought his attorney had told him his claim against the defendant could be made. Justice COBB, speaking for this court, with those facts before him, held that the action was barred by the statute of limitations, citing and affirming *Parker v. Kuhn*, 21 Neb., 413.

In *Wright v. Davis*, 28 Neb., 479, a creditor's bill, it was alleged that the defendant became indebted to the

plaintiff in the year 1868; that the plaintiff's claim was reduced to judgment, became dormant, and was revived in 1885; that the defendant, about the date of the incurring of the indebtedness, contemplated utter insolvency, and with a view to defraud his creditors purchased certain real estate with his own money and caused the title to the property to be taken in the name of his wife; that subsequently, in 1879 and 1880, she conveyed the real estate to certain other persons, and they afterwards reconveyed the same to her; that such conveyances by her and to her were made for the purpose of covering up and hiding the title, and that during all these times the defendant was the sole owner of the real estate. The plaintiff also alleged that aside from what was shown by the records of Douglas county, the fraud was discovered and made known to plaintiff within a year prior to the bringing of the suit, and not before, and that the cause of action accrued upon the discovery of the fraud. The plaintiff on the trial testified:

Q. You knew this land had been bought and stood in the name of Mrs. Davis?

A. I presume I did. I don't think I ever looked at the records, but I was satisfied that was the case.

It also appears that he testified on the trial that he had seen the defendant frequently after the recovery of his judgment, had conversed with him about the payment of it, had received assurances that it would be paid, and that he was to be taken care of. Chief Justice REESE, speaking for this court with these facts before him, said: "There is no question but that the plaintiff's right to apply the property to the payment of his claim was barred by the statute of limitations if the statute began to run upon the filing for record of the deed by which the real estate was finally conveyed to Mrs. Davis, for by section 12 of the Civil Code the statutory limit is four years after the discovery of the fraud." He then cites *Helman v. Davis*, *supra*, and *Parker v. Kuhn*, *supra*, and continues: "By

these cases it is pretty well settled in this state that while a person against whom a fraud has been perpetrated has four years from the discovery of the fraud in which to commence his suit, yet the fraud will be deemed to have been discovered when such facts are known, either actually or constructively, as would amount to knowledge, or which would naturally suggest such inquiries as, if followed up, would lead to such knowledge. * * It clearly appears that the conveyances were made and placed on record at a time when the defendant was known to be insolvent; that defendant resided upon the land and made improvements thereon; * * * that it was claimed by some of the (deendant's) family and was charged by the record with knowledge of the condition of the title as it then appeared. * * * It appears from all the evidence that the plaintiff was fully aware of the financial condition of the defendant, and that the conveyances to his wife could not be otherwise than fraudulent. Or, if this cannot be said to have been fully established, that by the most superficial examination, suggested by facts within his knowledge, he might have had full and con p'ete knowledge of the condition of the title. * * * This was sufficient to cause the statute to run."

In *Laird v. Kilbourne,* 70 Ia., 83, the supreme court of Iowa say: "An action to set aside a fraudulent conveyance of real estate is barred in five years after the fraud is discovered, and it is conclusively presumed to be discovered when the fraudulent conveyance is filed for record." (See also *Humphreys v. Mattoon,* 43 Ia., 556.)

In *Rogers v. Brown,* 61 Mo., 187, the supreme court of Missouri say: "They (the appellees) are chargeable by law with notice of the recorded conveyance. * * * The statute must be held to have commenced to run against them on the 26th day of October, 1857, the day on which the deed was recorded."

In *Cockrell's Ex'r v. Cockrell,* 15 S. W. Rep., 1119, a creditor's bill, the supreme court of Kentucky say: "The

statute of limitations was pleaded and the reply attempted to avoid it by saying that the appellant * * did not know that the deed was made and recorded. This is no excuse for the delay, and besides the land was conveyed and the deed recorded in the county where the debtor lived, and where the suit was instituted, and all the party had to do was to examine the county records, and there the deed could have been found."

The foregoing facts, looked at in the light of the authorities just quoted, were sufficient to put appellees on an inquiry, which, if pursued, would have led to the discovery of the fraud in the conveyance by the Coopers to Richards, and appellees must be held to have discovered that fraud October 28, 1884. The statute then began to run in favor of Mrs. Cooper's grantees and against her and her creditors.

Appellees, however, claim that their cause of action did not accrue until they recovered their judgments against Mrs. Cooper. What was appellee's cause of action? Evidently the fraudulent conveyance between the appellants. When did it accrue? When *discovered*, and it was *discovered* when appellees were in possession of sufficient facts to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would have led to the discovery that the conveyance to Richards was fraudulent. What facts were in possession of appellees October 28, 1884? The fraudulent conveyance from the Coopers to Richards was of record. The appellees and appellants all resided in the same county and city. Appellees knew that Mrs. Cooper had failed in business and was insolvent. The appellees knew that the Coopers continued in possession of the property conveyed to Richards. Appellees had been told by Mrs. Cooper that she had conveyed her property to Richards to defeat her creditors, or some of them. These facts were sufficient for appellees to have maintained an attachment suit against this property October 28, 1884, whether their claims against her were due

or not, and their right to relief against this fraudulent conveyance was an accrued right when they could, by *any form of action*, set the courts in motion to relieve them from this fraud.

Were the appellees limited to a *creditor's bill* in order to obtain relief from this fraudulent conveyance? We think not. Appellees could have attached the property on the ground that it was fraudulently conveyed to Richards for the purpose of delaying Mrs. Cooper's creditors. (Civil Code, sec. 198, subd. 8; *Keene v. Sallenbach*, 15 Neb., 200; *Brown v. Brown*, 11 S. W. Rep. [Ky.], 4; *Rogers v. Brown*, 61 Mo., 187.)

For this court to hold that appellees' cause of action did not accrue—the fraud discovered—until appellees were in a position to file a creditor's bill, would be to judicially amend this statute and leave it to the discretion of creditors to fix the time of the accrual of their cause of action by hastening or delaying the recovery of judgment. A case might arise where, by reason of the debtor being a non-resident, a personal judgment could not be obtained. In such case would appellees have no cause of action for relief on the ground of fraud until the debtor became a resident and a personal judgment was rendered against him? It is an old maxim that for every wrong the law affords a remedy, but if one effectual remedy is afforded by the law the maxim is complied with.

The final contention of the appellees is, that if the October, 1884, conveyance was fraudulent, and discovered by them in such time as to make the statute of limitations a bar, yet the conveyance by Brown of lots Nos. 6 and 7 in April, 1886, to Mrs. Cooper's husband gave appellees a new cause of action. In this view we concur. From the evidence of Mr. Brown in the record it appears that during the time *Richards held the title* to these lots he agreed with Mrs. Cooper that, if she would sell them, or find a purchaser for them, he would allow her as commissions what-

ever surplus remained after the satisfaction of her debt to the bank. The record does not expressly show that a purchaser was procured by Mrs. Cooper for the property, but sufficient of the lots were sold to pay her debt to the bank, and Mr. Brown, in fulfillment of Richards' agreement, conveyed these lots to Mrs. Cooper's husband at her request. Here, then, Mrs. Cooper became the owner of property which, if conveyed directly to her, appellees would have been able to levy upon. She had it conveyed to her husband for the very purpose of preventing this levy. This was a fraud; not a continuation of the old fraud of October, 1884; not a consummation of that fraud, but a *new* and *independent* one; and appellees' cause of action for relief therefrom did not accrue until the filing for record of the deed from Brown to Mr. Cooper. (See *Piper v. Hoard*, 107 N. Y., 73.) The claim of appellants, that Mr. Cooper paid anything for this property, is not supported by the evidence.

Complaint is made by appellants because the decree is silent as to said lots 8 and 9, and no account taken of taxes and interest on the Bowles mortgage paid by Mr. Cooper on lots 6 and 7. As to lots 8 and 9 we think the statute of limitations precludes appellees from questioning Cooper's title to the same. The decree of the district court will be so modified here as to dismiss the petitions and cross-petitions of appellees as to said lots 8 and 9. As to interest and taxes paid on lots 6 and 7 by Mr. Cooper, he accepted the title to these lots without consideration and for the purpose of defrauding the creditors of his wife, and is therefore in no position to ask a court of equity to relieve him from burdens he voluntarily and fraudulently assumed. A decree will be entered in this court dismissing the petitions and cross-petitions of appellees as to lots 8 and 9, block 124, in the city of Lincoln, and as thus modified the decree of the district court is in all things affirmed.

DECREE ACCORDINGLY.

RYAN, C., concurs in the affirmance of the decree of the district court.

IRVINE, C.: I concur in the conclusion reached, but not in the construction given the statute of limitations. I think the statute means that in such cases the cause of action shall not be deemed to accrue until the discovery of the fraud, but not necessarily that it does accrue upon such discovery. The cause of action in this case was the right of the creditors to proceed against the fraudulent grantee, and was not complete until judgments were recovered. I therefore think that the statute began to run upon the recovery of judgments, when the creditors were for the first time in position to institute the action.

THOMAS L. CAMPBELL V. FRANK BROSIUS.

FILED APRIL 26, 1893. No. 5108.

Assumpsit: QUANTUM MERUIT: PLEADING: PROOF: INSTRUCTIONS. Allegations of value in a pleading are not to be taken as true by a failure to deny them; and in all cases founded upon a *quantum meruit*, where the value of the services is not expressly admitted, the question of value is in issue and must be proved, and submitted to the jury.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J.

Byron Clark, for plaintiff in error.

Beeson & Root, *contra*.

IRVINE, C.

This action was brought by the defendant in error against the plaintiff in error to recover upon a *quantum meruit*

for digging two wells for the plaintiff in error. The petition alleged that the reasonable value of digging the first well was $75, and of the second $35. The answer did not deny these allegations of value, and the only evidence in any way relating to the value of the work is found in the testimony of the defendant in error, where he states that a fair compensation for the first well would be seventy-five cents a foot, the well being 100 feet deep. The evidence shows that this well was dug with a spade, while the second was bored with a machine, and there is no testimony at all as to the value of the work on the second well. The court instructed the jury, stating the elements necessary for them to find in order to return a verdict for the plaintiff, and that, if they so found, their verdict should be for the sum of $110, less what they might find plaintiff had received or had damaged the defendant in and about the work—there being a counter-claim for damages, and a plea of payment.

Section 134 of the Code of Civil Procedure provides that allegations of value or of amount of damage shall not be considered as true by failure to controvert them. It therefore became necessary for the plaintiff, notwithstanding the answer contained no denial of his allegations as to the value of the work performed, to prove the reasonable value thereof. And it was error for the court to instruct the jury that they should assume the amount alleged as the value of the work.

The plaintiff in error contends that the court erred in several other particulars. In view of the conclusion above stated it is not now necessary to pass upon the other assignments of error; but as the case must be remanded for a new trial, it is proper to say that upon the principal questions in dispute in the case the rulings of the trial court were substantially correct.

REVERSED AND REMANDED.

THE other commissioners concur.

HAMILTON W. HEWITT V. JOHN EISENBART.

FILED APRIL 26, 1893. No. 4922.

1. **Physicians and Surgeons:** MALPRACTICE: EXPERT WITNESSES: HYPOTHETICAL QUESTIONS: REVIEW. A judgment will not be set aside because an expert witness was permitted to answer a hypothetical question assuming a fact unsupported by the evidence, where such fact was the only hypothesis of the question, not combined with others based upon evidence, and the answer could not mislead the jury.

2. ———: ———: ———. It is not prejudicial error to permit an expert to state what steps he would take in a given case if the question does not refer to any matter in dispute but is merely introductory in its character.

3. ———: ———: PHYSICAL CONDITION: DECLARATIONS OF A PARTY to the suit, explanatory of his physicial condition at the time the declarations are made, are admissible where the circumstances warrant the inference that they were made spontaneously and not with a view to their effect upon the controversy. Whether or not they fall within this rule must be left largely to the discretion of the trial court.

4. ———: ———: ———: TESTIMONY as to the physical condition of a plaintiff in a malpractice case just before the trial, and two or more years after undergoing the treatment complained of, is competent where such condition is shown to be the result of the injury in question and is of a permanent nature.

5. ———: ———: TREATMENT: DEGREE OF SKILL. The law requires of a surgeon in the treatment of his patient the exercise of that degree of knowledge and skill ordinarily possessed by members of the medical profession.

6. ———: ———: EXPERT WITNESSES: TESTIMONY. In a malpractice case it is not necessary to sustain a verdict for the plaintiff, that all the expert witnesses called should consider the treatment pursued by defendant improper; nor will the fact that all such witnesses agree that a portion of such treatment is proper under some circumstances, in itself defeat a recovery.

7. ———: ———: EXPENSE OF EFFORTS TO CURE INJURY: RECOVERY. There can be no recovery for expense incurred in efforts to cure an injury, unless it be shown that the expense so incurred was reasonably necessary.

ERROR from the district court of Saline county. Tried below before MORRIS, J.

F. I. Foss and *Robert Ryan*, for plaintiff in error.

J. D. Pope and *Hastings & McGintie*, *contra*.

IRVINE, C.

This action was begun by defendant in error against plaintiff in error to recover damages on account of the alleged negligent and unskillful setting, dressing, and caring for a broken leg of defendant in error by plaintiff in error, a physician and surgeon. The answer admitted the treatment of the broken leg, but denied negligence and want of skill, and alleged that any injury sustained by defendant in error was due to his own negligence and disobedience of plaintiff in error's instructions. This the reply denied. A verdict was found and judgment rendered for defendant in error.

It appeared that defendant in error suffered an oblique fracture of both tibia and fibula at the junction of the middle and lower third of those bones. The accident occurred in the country at night, and plaintiff in error called the following morning. He reduced the fracture, having the assistance of defendant in error's son at least. There is some testimony that another person also assisted. He then placed the limb in splints made at the time from pieces of a light packing box. A posterior splint was used extending from about six or eight inches above the knee to below the heel. This was padded with cotton and wrapped with cloth. To this splint was attached at right angles a foot-board. Two lateral splints were used extending from below the knee to the ankle. Bandages were placed around all these splints, including one binding the foot to the foot-board. A space seems to have been left at the seat of fracture, whereby some local treatment was there-

after applied without removing the splints. The splints were not removed until about the third week after the injury. On the thirty-second day the splints were finally removed and plaster of Paris dressing applied, which was renewed once or twice thereafter. After the first plaster of Paris dressing was applied Eisenbart got crutches and moved about somewhat. The final result was the shortening of the leg about one inch and a half, caused by a displacement of the fragments of the bones, the lower pieces extending up alongside the upper and all four ends uniting laterally. This tendency towards shortening seems to have been first observed when the first plaster of Paris dressing was removed. When it was renewed a weight was attached, apparently to the lower part of the new dressing, by means of a cord and pulley. Upon all other points at all material to the case there is a marked conflict of evidence. A great deal of expert testimony was taken which, as seems to be usual in such cases, is bewilderingly inharmonious.

A great many exceptions were taken to the admission and rejection of testimony. We shall notice only those specifically referred to in the briefs, simply observing that the other exceptions are of minor importance and not well founded.

Dr. Beghtol, a witness for defendant in error, was asked: "Can a limb be extended in the kind of a fracture we speak of, and properly set, without the assistance of some other than the surgeon?" This was not founded upon any evidence in the case, all the witnesses agreeing that Dr. Hewitt had *some* assistance. If this element had been interjected in a question containing any other elements founded upon the evidence, the overruling of an objection thereto would certainly be prejudicial error. We cannot see, however, how, standing alone, its answer could prejudice plaintiff in error. If an element not within the evidence be combined with others supported by evidence, an

answer to the question might be founded in part or entirely upon the hypothesis improperly assumed, and be referred by the jury to the proper hypothesis. But where the improper hypothesis stands alone, no such result can follow. The objection should have been sustained, but the error was without prejudice. Similar questions were put to the other witnesses without objection.

Dr. Beghtol was also asked in effect what would be the result of a proper reduction and improper dressing of such a fracture, and complaint is made of the admission of his answer, on the ground that it assumed facts not proven. There is testimony in the record tending to show an improper dressing, and the overruling of the objection was right.

Dr. Watson was asked, "What would be your first steps in a fracture of that character, if it was at the juncture of the lower and middle third of the tibia and fibula, or both bones of the leg?" Other similar questions were put, but called forth no answer except in accordance with the steps actually taken by Dr. Hewitt.

These questions were introductory, and when the witnesses were called upon for a professional opinion upon the case, the form of the interrogatory was changed so as to call for a description of "what would be proper" treatment. What course a particular surgeon would take would not be competent evidence upon an issue in the case, but such questions, when purely of a preliminary character and not calling forth evidence upon contested points, are not prejudicially erroneous.

A witness, called to show the extent of Eisenbart's injuries, testified that he employed Eisenbart to work for him and directed him to do some spading; that Eisenbart failed to make proper progress with this work, and on witness asking him the reason, Eisenbart explained that his inability to use the spade was due to the then condition of his leg. The admission of this declaration is assigned as error.

There can be no doubt that the declarations of a party as to a past occurrence would be inadmissible, unless in the nature of admissions, but here the question under investigation was the physical condition of the plaintiff at the time the declarations were made. Statements made to physicians called upon for treatment have been held admissible even when they referred to past occurrences, and declarations to others are admissible when confined to present feelings or conditions. They may of course in some cases be simulated, but they must from necessity be admitted in evidence, especially where, as in this case, there are no grounds shown for believing they were made for an ulterior purpose. The trial court must be permitted to exercise its discretion, very largely, in determining whether the declarations were made under such circumstances as to permit the inference that they were genuine expressions, and the jury must be left to determine whether or not such inference shall be drawn. (Greenleaf, Ev., 102; *Carthage Turnpike Co. v. Andrews*, 102 Ind., 138; *Cleveland, C., C. & I. R. Co. v. Newell*, 104 Id., 264; *Blair v. Madison County*, 46 N. W. Rep. [Ia.], 1093; *Eckles v. Bates*, 26 Ala., 655; *Howe v. Plainfield*, 41 N. H., 135; *Towle v. Blake*, 48 Id., 92; *Kennard v. Burton*, 25 Me., 39; *Elliott v. Van Buren*, 33 Mich., 49.)

Complaint is made in a general manner of the court's allowing the general result of the injury to be shown instead of confining the proof to the excess of injury and suffering beyond that necessarily entailed by such an accident. There was evidence as to the extent of shortening ordinarily to be expected in such cases, and as to the length of time usually occupied in the healing process. In such cases the exact *quantum* of damages is not susceptible of direct and exact proof, but must be left for the jury to admeasure under appropriate instructions. By an instruction correct in its terms and not excepted to by plaintiff in error the jury was limited in admeasuring damages to the pain, suffering, and injury caused by the negligence of

plaintiff in error. It is also contended that testimony of surgeons as to the condition of Eisenbart's leg shortly before the trial was improperly admitted. This testimony relates to the length and shape of the leg, and it was shown that this condition was due to the position in which the bones had united after the fracture. The condition of the leg at the trial was thus clearly connected with the injury and the testimony was properly admitted.

It is urged that the eighth instruction was misleading as to the *onus probandi*. The giving of this instruction was not objected to in the motion for a new trial, nor is it assigned as error. Errors in the giving of instructions will not be considered unless specifically assigned. This has been repeatedly decided. (*Russel v. Rosenbaum*, 24 Neb., 769.)

The errors specifically assigned in the giving and refusing of instructions relate only to those requested by the parties. The transcript of the record fails to group the instructions in such a manner as to distinguish very clearly those given by the court of its own motion and those requested by the parties. Objection is made to the giving of those numbered 1, 2, and 3, asked by defendant in error. Numbers 2 and 3 appear from the record to have been *refused*. Number 1 is as follows: "When a surgeon undertakes a case of a fracture or broken limb the implied contract on his part is that he possesses the ordinary skill and ability in his profession, and that he will use that skill and ability with diligence in and about the cure of his patients such as surgeons ordinarily employ." While the language of this instruction is not so well chosen as might be desired, it fairly states the rule governing such cases and is not erroneous.

The refusal to give a number of instructions asked by plaintiff in error is assigned as error. The law is for the most part stated correctly in these instructions, but the points covered were all substantially embraced in the in-

structions given by the court of its own motion. There was no error in refusing them.

It is urged that the evidence is not sufficient to sustain the verdict. It is not contended that Dr. Hewitt's treatment of the injury, as enlightened by the testimony of *some* of the experts, would not amount to negligence, but the point urged seems to be that the experts disagreeing among themselves, and all of them indorsing a *portion* of the treatment pursued as proper *under some circumstances*, it cannot be said that Dr. Hewitt failed to exercise that degree of skill *ordinarily* possessed and exercised by members of his profession. In other words, that if in such cases the testimony shows that some surgeons consider the treatment adopted as proper, there can be no recovery. The adoption of this view would be to change the rule of liability so as to hold a surgeon responsible only when his acts evidence a want of skill below that of the most unskillful surgeon whom the defendant might be able to produce. The jury must judge of the skill and qualifications of the expert witnesses as well as of the defendant in the action, and it is for the jury to say upon all the evidence what treatment amounted to negligence under the rule of skill required.

Only one other question remains for consideration. The petition alleges, in laying the damages, that by reason of the wrong complained of defendant in error had *unnecessarily* incurred great expense in endeavoring to be cured of the defect. This was undoubtedly a clerical error in drawing the petition, and did the evidence sustain any claim for damages of that character an amendment might at this time be permitted. (*Homan v. Steele*, 18 Neb., 652.) The only testimony upon this point is as follows:

Q. Were you at any expense for medicine and treatment?

A. Only a doctor's bill.

Q. How much was that?

Objected to, as immaterial and irrelevant. Overruled and defense excepts.

A. About $85.

There is nothing to show when or how this expense was incurred, whether it was due to injuries produced by defendant's negligence, whether the expense was necessary or the amount of the bill reasonable. No recovery could be based on such evidence, and as it was probably considered by the jury in estimating the amount of damages sustained, the case should be reversed and remanded, unless within thirty days defendant in error file a remittitur to the amount of $85 and interest at seven per cent from the date of the judgment. Should this be done the judgment will be affirmed.

JUDGMENT ACCORDINGLY.

RAGAN, C., concurs.

RYAN, C., took no part in the decision.

ROCKFORD WATCH COMPANY, APPELLANT, V. WILLIAM C. MANIFOLD ET AL., APPELLEES, AND CITIZENS BANK OF WYMORE ET AL., APPELLANTS.

FILED APRIL 26, 1893. No. 4716.

1. **Chattel Mortgages:** AGREEMENT OF MORTGAGEES AS TO PRIORITY: FRAUD. A junior mortgagee of chattels, who agrees with the senior mortgagee and the mortgagor that the goods mortgaged may be sold and the proceeds applied to the payment of the mortgages in the order of their priority as disclosed by the records, cannot, after such sale and appropriation of the proceeds, maintain an action to avoid the senior mortgage for fraud in its inception without proof that the facts constituting the fraud were discovered after the agreement and sale.

2. ——: ACTION TO AVOID FOR FRAUD: PLEADING. In an action to avoid a conveyance or mortgage for fraud the facts constitut-

ing the fraud must be specifically pleaded; a general allegation of fraud is insufficient.

3. ——: FORECLOSURE: AN AGENT FOR THE PURPOSE OF SELLING GOODS will not be permitted to sell to himself, even though the sale be public, and no actual fraud appear. In case he do so, he will be required to account to his principals for any profit he may have realized.

4. ——: ——: PLEADINGS: DECREE: REVIEW. The findings and judgment in a case must be based upon the pleadings. A decree in an action between a mortgagor and certain mortgagees of chattels, whereby a mortgage not attacked by the pleadings, and the holder whereof is not a party to the action, is declared void, is erroneous.

5. ——: ——: UNLAWFUL SALE: RIGHTS OF UNSECURED CREDITORS: CONVERSION. Unsecured creditors of a mortgagor of chattels are entitled to have the mortgages foreclosed as required by law, and a sale otherwise than as the law provides, although in accordance with an agreement of the mortgagor and mortgagees, is no protection to those participating in the proceeds of the sale. They are liable to account to such creditors for the value of the goods, less the valid liens thereon.

6. ——: LIEN UPON STOCK OF MERCHANDISE: GOODS SUBSEQUENTLY PURCHASED. A mortgage upon a stock of merchandise, under that general description, attaches only to such merchandise as was in the stock when the mortgage was executed, and not to any afterwards purchased.

APPEAL from the district court of Gage county. Heard below before APPELGET, J.

C. S. Otis and *E. O. Kretsinger*, for appellant Rockford Watch Company.

A. D. McCandless, for appellant Citizens Bank of Wymore.

Griggs, Rinaker & Bibb, for appellant Baldwin & Co.

T. F. Burke, for appellants J. A. Norton & Son.

Hazlett & Le Hane, for appellee O. P. Newbranch.

Winter & Kauffman, for appellees Max Meyer & Bro.

IRVINE, C.

William Manifold and Charles B. Heistand were engaged in the jewelry business in Wymore, and on the 17th day of June, 1889, executed a chattel mortgage upon their stock of merchandise, tools, and fixtures in favor of the Citizens Bank of Wymore, to secure a note of $600. This mortgage was in the ordinary form, and was filed for record on the 18th day of June, 1889. The mortgagors were, however, permitted to remain in possession and to deal with the stock of goods mortgaged in the ordinary course of business until February, 1890. On the 23d day of February, according to the parol evidence, chattel mortgages were executed bearing date the 24th day of February, and recorded on that date in favor of the following persons, and in the order stated, for divers amounts: N. G. Levinson & Co., William Heistand, Max Meyer & Bro., Baldwin & Co., and J. A. Norton & Son. At about this time the defendant Newbranch took possession of the stock of goods, tools, and fixtures on behalf of the Citizens Bank and proceeded to advertise the same for sale. On the 29th day of March a public sale was had of the goods. Prior thereto, however, an agreement in writing was entered into on behalf of Levinson & Co., Baldwin & Co., Max Meyer & Bro., and the Citizens Bank, by their respective attorneys, and also by Manifold & Heistand, and by William Heistand, through C. B. Heistand, whereby it was agreed among them that the entire stock of goods and fixtures conveyed to the different mortgagees should be sold under the advertisement of the Citizens Bank, and the proceeds paid to said mortgagees in the order of their priority, as shown by the records of the county clerk's office; and that said goods should be sold in bulk. There was also a separate agreement signed for Norton & Son by their attorney, similar to the above, except that it contained no provision for a

sale in bulk. These agreements were handed to Newbranch, who, at the time and place advertised, offered the property for sale. After several bids had been received, Newbranch stepped from the chair upon which he stood to cry the goods, and negotiated a purchase for himself of the Levinson mortgage from the agent of Levinson & Co., who was present. This mortgage was to secure a debt of $345, and was purchased by Newbranch for $275. The sale was then resumed, the bidders thereafter being Newbranch and one Bromwell. Newbranch became the purchaser. He drew his check for the purchase price, and gave it to the cashier of the First National Bank of Wymore, who also seems to have been acting for the Citizens Bank in the matter, and the cashier, after deducting the expense of foreclosure, and the amount of the Citizens Bank debt, paid to the agent of Levinson & Co. the amount of its mortgage, and the agent then deducted the $275 which Newbranch had agreed to pay for the mortgage, and paid the balance remaining to Newbranch. There then remained of the purchase money $150, which was paid to C. B. Heistand, ostensibly towards the satisfaction of the William Heistand mortgage. Newbranch, a few days after the sale, disposed of the property to Bromwell at a profit of some $275. Some days afterwards the plaintiff obtained judgment against Manifold & Heistand upon an account for goods sold, and execution having been returned unsatisfied, commenced this action to declare the mortgages void and compel an accounting. William Manifold and Charles B. Heistand, the partners who composed the firm doing business as the Citizens Bank, the First National Bank of Wymore, Newbranch, Baldwin & Co., Norton & Son, and Max Meyer & Bro. were made defendants. Cross-petitions were filed by Baldwin & Co. and Norton & Son. Upon trial a decree was entered, establishing the liens of the Citizens Bank, of Levinson & Co., of Baldwin & Co., and of Norton & Son, in the order

named; also finding that the William Heistand mortgage was fraudulent and void, and the Max Meyer & Bro. mortgage paid. There was also a finding generally in favor of Newbranch, Bromwell, and the First National Bank. The decree ordered the payment by the Citizens Bank of the $150 paid upon the Heistand mortgage to apply upon the Baldwin claim. The Citizens Bank, Norton & Son, Baldwin & Co., and the plaintiff all appealed.

The appeals of Baldwin & Co. and Norton & Son will be first considered. Their cross-petitions are substantially alike, and are based upon the allegations that they signed the agreements in regard to the sale of the goods, believing the mortgage of the Citizens Bank a *bona fide* mortgage, but they have since ascertained it to be fraudulent. The cross-petitions contain no allegations of fraud except that they charge, upon information and belief, that the bank's mortgage "was fraudulent and void." This is not a sufficient pleading of fraud. It is too well settled to require any reference to authorities that a general allegation of fraud is insufficient. The facts constituting the fraud must be specifically pleaded. Furthermore, the evidence shows that no facts were discovered after signing the agreement, and whatever is now known to these cross-petitioners was known at that time. Their agreement expressly recognized the validity of the bank's mortgage and provided for its payment, and estops them from now attacking it.

The cross-petitions of these appellants also attack the sale, alleging that Newbranch acted as the agent of all the mortgagees, and while sustaining that relationship bid the property in himself and resold at a profit. Newbranch denies that he acted as agent for any others than the Citizens Bank, but this denial is, for the most part, merely his own conclusion as to the legal effect of his acts. There is some contradictory evidence as to certain conversations alleged to have taken place between him and the attorneys for these appellants, but we do not think these conversations very

material. It clearly appears that Newbranch was in possession of the stock of goods on behalf of the Citizens Bank when the agreements above referred to were made; that these agreements came to his notice, and that he proceeded to sell the property, and disposed of the proceeds, with knowledge and with the purpose of complying with these terms of the agreements. If he was not acting under these agreements, he had no authority from any one to dispose of more of the stock than would be sufficient to satisfy the bank's mortgage. Whatever his own understanding may have been, the undisputed evidence as to his acts places him in a fiduciary relationship to all the mortgagees, including the appellants. He not only cried the sale, but he assumed its conduct absolutely, including the care of the property beforehand, the direction of the sale and looking after the proceeds thereof. He did bid the property in for himself, and he did resell after a very few days at a considerable profit. The evidence does not disclose any fraud or even unfairness in his conduct, but such transactions upon the part of an agent are voidable at the option of the principal without regard to the existence of actual fraud. They are voidable not because there *was* fraud, but because there *might be*, and because the law, upon grounds of public policy, will not permit an agent to assume a position where conflicting interests will expose him to the danger of sacrificing his principal to himself. The doctrine extends to all cases of agency with almost the same force as to cases of trusts, and has been applied in every adjudicated case, so far as we are aware, to agents for the purpose of selling goods or land. It has been held to apply to public sales as well as private, and even to an agent empowered to sell at a stipulated price. The principle is well stated in Pomeroy's Equity Jurisprudence, 2d ed., sec. 959, where a vast number of authorities are collated. Among the numerous cases, some of those presenting features similar to those of the

case at bar are as follows: *Davoue v. Fanning*, 2 Johns. Ch. [N. Y.], 252; *Brock v. Rice*, 27 Gratt. [Va.], 812; *Ruckman v. Bergholz*, 37 N. J. L., 437; *Bain v. Brown*, 56 N. Y., 285; *White v. Ward*, 26 Ark., 445; *Newcomb v. Brooks*, 16 W. Va., 32; *Martin v. Wyncoop*, 12 Ind., 266; *Mason v. Martin*, 4 Md., 124; *Brothers v. Brothers*, 7 Ired. Eq. [N. Car.], 150; *Patton v. Thompson*, 2 Jones Eq. [N. Car.], 285. In all such cases the agent will not be permitted to realize for himself a profit, and must account to his principals for all profits realized. The district court erred in not so holding.

The Citizens Bank bases its appeal upon that part of the decree which directs it to pay over the $150 paid upon the Heistand mortgage. In none of the pleadings is the Heistand mortgage attacked, and while the evidence was certainly sufficient to justify the finding of the court that this mortgage was void, such a finding cannot be sustained, as it is irrelevant to any issues in the case. The validity of the Heistand mortgage was not in issue, and William Heistand was not a party to the suit. The finding and judgment of the court in that respect were erroneous.

The plaintiff stands in an attitude different from that of the mortgagees and attacks both the mortgages and the sale. It is unnecessary to refer to the grounds upon which the validity of the bank's mortgage is attacked. We have held that the parties to the agreements in regard to the sale are bound by those agreements. The plaintiff was not a party to them, and had a right to insist that the mortgages should be foreclosed as the law requires. Unless the sale was made in accordance with law it amounted to a conversion of the goods. So far as the bank is concerned, the sale was properly advertised and publicly held, but it had no right to proceed beyond the satisfaction of its own mortgage. Moreover, the bank's mortgage was upon the stock of goods as it existed at the time the mortgage was given. It did not, and could not, attach to after-acquired property, and

did not, upon its face, purport so to do. The plaintiff offered to prove that the bank seized and sold goods purchased by the mortgagors from the plaintiff after the mortgage was given. This evidence was excluded, and in this we think the court erred. It is probable that the court's action was based upon the theory that the other mortgages did cover the property acquired by the firm in the period intervening after the execution of the mortgage to the bank. But there was no valid foreclosure of these later mortgages; and as to all property not covered by the bank's mortgage, and as to all property covered by that mortgage beyond such as would be sufficient to discharge the debt secured thereby, the plaintiff has the right to insist upon foreclosure by junior mortgagees in accordance with law and to hold the recipients of the proceeds of an unlawful sale responsible for the value of the goods.

In view of the conclusion reached, no decree can be rendered in this court which we can be assured will do justice to the parties. The case is therefore reversed and remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

THE other commissioners concur.

THOMAS BAILEY V. STATE OF NEBRASKA.

FILED APRIL 26, 1893. No. 4518.

1. **Information:** DEFECT IN VERIFICATION: WAIVER. A defect in the verification of an information is waived by pleading to the information.

2. **Marriage:** VALIDITY: PROOF. Marriage is a civil contract requiring in all cases for its validity only the consent of parties

capable of contracting. The fact of marriage may be proved by the testimony of one of the parties.

3. **Adultery**: EVIDENCE. Where a defendant is charged with adulterous cohabitation while living with his wife, proof of such adulterous cohabitation during any portion of the period laid in the information is sufficient to sustain the charge.

4. ———: ———. A single act of adultery at a time outside of the period of adulterous cohabitation thus proved is a separate offense, for which the defendant may be punished, although committed within the period of adulterous cohabitation laid in the information.

5. ———: MARRIAGE WITHOUT SOLEMNIZING OFFICER: PROOF: NEWLY DISCOVERED EVIDENCE: NEW TRIAL. In a prosecution for adultery the only evidence of defendant's marriage was that of the complaining witness, the woman alleged to be defendant's wife. The marriage relied upon was by words of consent without the presence of a solemnizing officer or of witnesses. A new trial was asked on the ground of newly discovered evidence, the affidavits removing every question of negligence in procuring the evidence. The newly discovered evidence alleged consisted of the declaration of the complaining witness contradicting her testimony as to the marriage. *Held*, That under these circumstances the motion should have been sustained.

6. **Motion for New Trial**: NEWLY DISCOVERED EVIDENCE. A motion for a new trial should be granted on the ground of newly discovered evidence tending to impeach a witness by showing declarations contradicting his testimony, where such evidence is of so controlling a character that it would probably change the verdict.

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

Norval Bros. & Lowley, for plaintiff in error.

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

IRVINE, C.

The plaintiff in error was informed against in three counts, the first charging him with deserting his wife, Matilda Bailey, on the 1st day of January, 1887, and from

that day until March 1, 1888, living and cohabiting with one Della Brong in a state of adultery. The second count charges him with committing adultery with Della Brong on February 18, 1888; the third, with keeping Della Brong and wantonly cohabiting with her in a state of adultery from November 7, 1886, to March 1, 1888, while being with his lawful wife, Matilda Bailey. He was acquitted upon the first count and found guilty upon the second and third. The sentence was that plaintiff in error should pay a fine of $200 and be committed to the county jail for the period of three months upon the second count, and also that he pay a fine of $200 and be committed for a like period upon the third count.

1. The first question presented relates to the sufficiency of the information, which was verified by the oath of Matilda Bailey before a notary public in Lancaster county. It is urged that a valid oath is essential to an information, and that the district court acquired no jurisdiction under an information not verified before a magistrate. There can be no doubt that a verification before a notary public is insufficient (*Richards v. State*, 22 Neb., 145), but this was a defect open merely to a motion to quash and was waived by pleading to the information. It was not jurisdictional. (*Davis v. State*, 31 Neb., 252.)

2. The next point urged is that there was not sufficient evidence to establish a marriage between plaintiff in error and Matilda Bailey, who is alleged in each count to be his lawful wife. It appears that plaintiff in error and Matilda Bailey, then known as Mrs. Tyson, met at Lyons, Iowa, in 1866, plaintiff in error going to the house of Mrs. Tyson to board. They lived together in Lyons until about 1869, when they came to Nebraska together and soon after took up a homestead. They seem to have lived together until 1887, when Matilda left him. One child, still living, was born to them. Matilda testifies in one place that plaintiff in error came to board and "promised that he would be

my husband and I should be his wife as long as we lived. He promised to be true to me." Again: "He said he would be true to me; that if he married me he couldn't be truer to no one than he would be to me, and that it was just as good as to go and get married." Again:

Q. Will you state to this jury how you were married?

A. Yes, sir.

Q. How?

A. Why, he promised that he would be my husband and I promised to be his wife.

Q. Is that all of it?

A. Yes, sir, and we talked together.

Q. You talked together?

A. Yes, sir.

Q. And you thought you were married?

A. Yes, sir.

Further: "He said it was a mere matter of form getting married, and if I would live with him he would live with me, and I told him I would, I guess." "Yes, sir, I told him I would." This conversation, she says, occurred upon a Sunday afternoon, about the middle of August, 1866. She also says that their relations were kept secret in Iowa because of the opposition of her older children. They certainly lived from that time until the separation in 1887 as man and wife, and she has been known to neighbors and friends as Mrs. Bailey ever since coming to Nebraska. There is also some evidence of Bailey's introducing her to strangers as his wife. It cannot be denied that there are many things in her own testimony and elsewhere in the record tending to discredit her story, but it is the province of the jury to pass upon the credibility of witnesses, and if her testimony above quoted establishes a marriage the verdict cannot be disturbed on the ground of insufficient evidence. (*Dutcher v. State*, 16 Neb., 30.)

Marriage is, in Nebraska, a civil contract to which the

consent of parties capable of contracting is essential. (Comp. Stats., ch. 52, sec. 1; *Gibson v. Gibson*, 24 Neb., 394.) When contracted in another state a marriage must here be held valid if valid by the laws of the state where contracted. (Comp. Stats., ch. 52, sec. 17.) There was no proof of the law of Iowa, and in the absence of proof it will be presumed to be in accord with our own. (*Lord v. State*, 17 Neb., 526.) Wherever treated as a civil contract it is sufficient to constitute a marriage that the minds of the parties meet in a common consent at the same time. No particular form of expression is required.

It is claimed that in cases like that at bar there must be direct evidence of the marriage. This may be true, but Mrs. Bailey's testimony is direct evidence of the fact. The rule, when examined in the light of the authorities, only forbids in such cases the establishing of a marriage by proof of cohabitation, reputation, and "holding out." The reason is that while ordinarily such evidence is sufficient because the law places that interpretation upon ambiguous acts which favors innocence, and will not assume that a cohabitation is illicit if by presuming marriage it would be lawful, yet in a prosecution for adultery this presumption conflicts with the presumed innocence of the prisoner of the crime of which he is charged, and therefore such evidence in such cases cannot alone establish a marriage. The essentials of a valid marriage are in all cases the same, the distinction being in the mode of proof alone. Mrs. Bailey's testimony is direct and competent evidence in this case, and if believed, establishes a contract as binding for all purposes as if made in the presence of chosen witnesses at the altar.

3. Plaintiff in error contends that there was no evidence of his cohabiting with Della Brong until after Matilda Bailey ceased to live with him, and that therefore no conviction could be had on the third count. Matilda Bailey testified that she left him in February, 1887; that "he went with Della Brong and staid there the winter before I

left him; from November until I left him in February he frequently staid at their house three days in the week." This, together with the other evidence as to the relations between plaintiff in error and Della Brong, was sufficient to justify the jury in finding an adulterous cohabitation before Matilda left and within the period laid in the information. Time is not of the essence of the offense and proof of adulterous cohabitation during any portion of the period charged is sufficient. (*State v. Way*, 5 Neb., 283.)

4. It is further contended that the second count, alleging a single act of adultery, was founded upon a portion of the offense charged in the third count, and that therefore a conviction and sentence upon each count would amount to a double punishment for the same offense. We need not inquire whether or not this point would be well taken, provided the single act of adultery were within the period of adulterous cohabitation proved. It is not contended that two such counts may not be joined in one information and a conviction had upon either according to the evidence. As already said, the evidence shows, and without contradiction, that plaintiff in error and Matilda Bailey have not lived together since February, 1887. The offense charged in the third count—keeping another woman and cohabiting with her in a state of adultery while living with one's wife—must therefore have been complete at that time, and an act of adultery later would constitute a distinct and separate offense under another clause of section 208 of the Criminal Code.

5. A motion for a new trial was overruled and sentence passed December 5, 1889, and on January 18, 1890, a supplemental motion for a new trial was filed, supported by affidavits of newly discovered evidence. The affidavit of R. H. Woodward is to the effect that he met Matilda Bailey at the state fair grounds in Lincoln in 1887 and in a conversation, narrated at length in the affidavits, she declared that she had come to Nebraska with Bailey and had

here lived with him; that after some time they had discussed the matter of marriage and decided that having lived so long together without being married they might still continue in the same course. The affidavits of defendant and of each of his counsel show that this evidence was not known to any of them until after the sentence was imposed, when it was disclosed by Woodward in the course of a casual conversation with one of the attorneys upon a railway train. This supplemental motion was overruled, and in this we think the court erred. There was no laches in failing to produce the testimony upon the trial. While the general rule is established that a new trial will not be granted because of newly discovered evidence impeaching a witness, this rule has its limitations. This court has stated the doctrine as to cumulative evidence to be that a new trial will not be granted unless such evidence be of so controlling a character as to probably change the verdict. (*Flannagan v. Heath*, 31 Neb., 776; *Keiser v. Decker*, 29 Id., 92.) The same principle should apply here. The only direct evidence of the fact of marriage was the testimony of the prosecuting witness. While the jury was justified in believing it, there are many facts tending to its discredit. The evidence of Woodward as to a contrary statement made to him before this prosecution was begun would be a very material fact for the consideration of the jury in weighing her testimony and would very probably have led to a different result. Moreover, this testimony would not be entirely in the nature of impeachment. The question of marriage depended largely upon the intention of the parties, and this testimony tends to show that Mrs. Bailey had not in fact regarded their relations as those of husband and wife. Under the circumstances of this case a new trial should have been allowed.

REVERSED AND REMANDED.

THE other commissioners concur.

HELEN F. REED, APPELLANT, v. JOHN N. SNELL ET AL., APPELLEES.

FILED MAY 1, 1893. No. 4231.

Partition: PARTNERSHIP: PARTIES: EVIDENCE. **In an action for partition the defendant alleged a partnership between himself and one R., who had conveyed to the plaintiff. The court below found such partnership to exist and that the plaintiff had no rights in the premises, and that one R., husband of the plaintiff, was a necessary party for an accounting. *Held*, That the testimony failed to show a partnership in the land but merely in the stock and improvements, and that the plaintiff could maintain the action, subject to the payment of the improvements made by the firm.**

APPEAL from the district court of Howard county. Heard below before TIFFANY, J.

T. R. Wallace and *Thomas Darnall*, for appellant.

A. A. Kendall and *Paul & Templin*, *contra*.

MAXWELL, CH. J.

This action was brought by the plaintiff against Snell and wife for a partition of certain real estate in Howard county. The defendants answered separately, that of John N. Snell being as follows:

"Comes now John N. Snell, and for himself answering plaintiff's petition in this behalf says:

"1. He denies each and every allegation in said petition contained except such as may herein be explained or expressly admitted or denied.

"2. Defendants admit that Isabel Snell is the wife of this defendant and that J. E. Reed is the husband of the plaintiff.

"3. Denies that plaintiff is the joint owner with this defendant in the real estate described in plaintiff's petition,

or that she has any interest therein whatever against this defendant as owner or purchaser thereof.

"4. And further answering, this defendant avers that on or about the 30th day of August, 1883, the said J. E. Reed, husband of plaintiff, being then and there the owner of certain real estate described in plaintiff's petition, as well as the growing crops thereon, and of certain cattle, horses, and other live stock on said premises, and other personal property thereon used in and upon said lands, represented to this defendant John N. Snell, that the business of stock growing and raising in Nebraska was very profitable; that this business was prosperous and productive; and said J. E. Reed then and there solicited defendant John N. Snell to enter into a copartnership with the said J. E. Reed for the purpose of buying, raising, breeding, feeding, and selling of cattle, horses, and hogs, and the raising of hay and grain, and said J. E. Reed represented that his profits were large in said business.

"5. That by reason of said representations of said J. E. Reed to this defendant, this defendant was induced to and did enter into a copartnership with said J. E. Reed, by the terms of which it was mutually agreed to and with each other, by verbal contract of partnership, that the said firm should be composed of J. E. Reed and said John N. Snell, under the firm name of Reed & Snell, and that said partners should share alike in all expenses of said business, and also should share and share alike in the profits and losses of said business aforesaid.

"6. And defendant avers that he was unacquainted with the said business, and relying solely upon the representations aforesaid of said J. E. Reed, this defendant entered into the agreement of copartnership aforesaid.

"7. That in pursuance of their agreement made and entered into, and for the purpose of carrying the same into effect, said J. E. Reed sold and conveyed to this defendant a one-half interest in the real estate described in plaintiff's

petition, in consideration whereof this defendant then and there paid said J. E. Reed the sum of $5,300; and also, in consideration of the sum of $3,212, said J. E. Reed sold and delivered to this defendant a one-half interest in all crops then growing on said real estate in plaintiff's petition described, and a like interest in 166 head of cows, heifers, steers, and bulls, and it was mutually agreed and understood by and between said J. E. Reed and this defendant that all of said property, real and personal, and the increase thereof, should be and constitute the assets and capital of said firm, with the further agreement that said capital might be added to at any time as said J. E. Reed and this defendant might agree.

"8. That afterwards, to-wit, on or about the — day of ——, 1883, there were added to the stock of said firm one boar pig and ten brood sows of the aggregate value of $100, of which sum this defendant paid $65, an excess of $15 over and above the legitimate and proper share of this defendant in pursuance of said partnership agreement, which said sum of $15 has not been returned or paid to this defendant by said firm of Reed & Snell.

"9. That before said partnership was formed said J. E. Reed purchased a part of said real estate from one C. H. Houghton, and thereafter added to his property the purchase of certain cattle until there were 166 head as aforesaid, and subsequently, and after forming said partnership by said J. E. Reed and defendant J. N. Snell, an agreement was entered into by and between said firm of Reed & Snell and one P. R. Granger, by which said Granger was to have charge of said property and to keep the same at his own expense under a written contract by and between said Granger and one C. H. Houghton and by said Houghton duly assigned to the said firm of Reed & Snell, a copy whereof is hereto attached as part hereof, marked Exhibit A.

"10. And it was mutually agreed and understood by and

between the said P. R. Granger and the said Reed & Snell that no part of said personal property should be sold except certain fat cattle then being fed by said Granger under said agreement with Houghton last aforesaid.

"11. That said plaintiff Helen F. Reed had actual notice of all and singular the facts and circumstances set out and detailed in paragraphs 4, 5, 6, 7, 8, 9, and 10 hereof, and of the partnership rights and interests of this defendant in and to the real estate in her said petition set out and described, as well as of the engagements of said J. E. Reed, as the payments of the several sums of money by defendant for a half interest in said property, real and personal, as of the terms of said copartnership and the agreements referred to with said Houghton and Granger.

"12. That contrary to the terms of said several agreements, as well as the agreements of copartnership between J. E. Reed and this defendant as that with said Granger, said J. E. Reed entered upon said land and did unlawfully and fraudulently sell all cattle, horses, hogs, and other personal property hereinbefore referred to and described as the property of said firm of Reed & Snell, and the increase of said property aforesaid, and received therefor large sums of money, the exact amount whereof is unknown to this defendant, and that said Reed wrongfully and fraudulently, and with intent to cheat, wrong, and defraud this defendant, refused to account to said firm of Reed & Snell for the proceeds of said personal property so as aforesaid sold; that said personal property constituted a large part of the assets of said firm of Reed & Snell, of all which said plaintiff Helen F. Reed had actual knowledge.

"Wherefore this defendant prays that the said J. E. Reed and Helen F. Reed be made a party defendant to this cross-petition and be required to answer the same; that an account may be taken of the partnership affairs between J. E. Reed and this defendant John N. Snell, under the direction and decree of this court; that the said J. E. Reed be

decreed to pay to this defendant John N. Snell such sums as he may be entitled to receive of said partnership assets; that the action of Helen F. Reed v. John N. Snell and Isabel Snell be consolidated with this bill, and that it may be declared that said deed from J. E. Reed for a pretended interest in the lands described in plaintiff's petition be declared null and void and held for naught; that said partnership be dissolved between J. E. Reed and John N. Snell, and that said real estate of said firm be sold, and upon an accounting that the proceeds of the assets of said firm be equally divided, and that said J. E. Reed be required to account for all property and money of said firm which he has had and received; that should it appear that said J. E. Reed has received all of his share of the property of said firm, then that said real estate of said firm, being the same described in plaintiff's petition, is the property of this defendant John N. Snell, and that the title thereof be quieted in him; and for the purpose of clearing the cloud from the title to said lands that said Helen F. Reed be required to reconvey said real estate, its tenements and hereditaments, to J. E. Reed, as a member of said firm of Reed & Snell, and in case she shall fail or refuse to so convey for a period of twenty days after such order, then that a commissioner be appointed by this court to make such conveyance for her, and for such other, full, and complete relief in the premises as equity and good conscience may require."

The answer of Isabel Snell need not be noticed.

The reply of the plaintiff is a general denial.

On the trial of the cause the court found the issues in favor of the defendant; that a partnership had existed between Snell and J. E. Reed, and that he was a necessary party to the action, and that the plaintiff, having purchased the land from her husband with the notice of these contracts, acquires no title or interest in the property, and the action was dismissed as to her. From the judgment an appeal was taken.

It appears from the testimony that in 1883 one Houghton leased of P. R. Granger 314 acres of land in Howard county for five years; that he was to furnish to Granger 100 head of cows, heifers, steers, and bulls, etc., and Granger was to care for the same for five years at his own expense, at the end of which time Houghton was to receive the same number and kind of cattle he had delivered to Granger and one-half the increase, and Granger to have the residue. Soon after this contract was made J. E. Reed, husband of the appellant, purchased of Houghton the land leased to Granger and Houghton's interest in the cattle contract. Several months afterwards Reed sold the undivided one-half of the land in controversy and one-half interest in the cattle and the Granger lease to Snell. Soon afterwards Reed sold and conveyed to Snell an undivided one-half of an additional 160 acres of land now in controversy. In February, 1885, Snell and wife gave a mortgage on the undivided one-half interest of the land purchased of Reed. Three months later Reed conveyed an undivided one-half interest in the land, of which Snell had purchased the one-half interest, to the plaintiff and she claims title.

The testimony tends to show that the conveyance from Reed to his wife was made in good faith, as the land originally had been paid for with her money. The testimony also tends to show that Reed & Snell were in partnership, at least in the buying and selling of stock and of the improvements made on the land. There is no partnership shown in the land itself. As to the land, they seem to be joint owners. There are some charges of fraudulent misrepresentations on the part of Reed to induce Snell to enter into the contract, but so far as we can see the representations were made in good faith but colored with the enthusiasm which is sometimes indulged in by those who have no experience in the business in which they are about to engage and reason from mere theory colored by bright

anticipations. Both parties seem to have been ignorant of the business. No losses or reverses were expected by either party, hence no precautions taken to guard against the same. Snell was upon the ground, saw the land and the stock, and evidently was not deceived by the representations of Reed. It is evident that there must be an accounting between Reed and Snell and that Reed is a proper party to be made a defendant. It is also apparent that the plaintiff is entitled to a subdivision of the land, but that any partnership improvements made thereon should be deducted and paid for by her. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

HARRY T. JONES ET AL. v. THEODORE O. BIVIN.

FILED MAY 1, 1893. No. 4968.

Order Discharging Attachment: EVIDENCE: REVIEW. Where an order discharging an attachment is against the clear weight of evidence, it will be reversed and the attachment sustained.

ERROR from the district court of Seward county. Tried below before BATES, J.

E. C. Biggs and *D. C. McKillip*, for plaintiffs in error.

R. P. Anderson and *George H. Terwilliger*, *contra*.

MAXWELL, CH. J.

The plaintiffs began an action by attachment against the defendant and levied upon lots 9 and 10, in block 67, in

Harris, Moffitt & Roberts' addition to Seward. There were three grounds of attachment, namely, that the defendant is about to convert a part of his property into money for the purpose of placing it beyond the reach of his creditors. 2. The defendant has property and rights in action which he conceals. 3. The defendant has disposed of part of his property with the intent to defraud his creditors. The defendant denies the facts stated in the affidavit for attachment. Whereupon a large number of affidavits in support of and opposed to the attachment were filed. It is conceded that the defendant conveyed the lots in question to his brother, John Bascolm Bivin, on or about the 30th day of June, 1891, and the question presented is, was the latter a *bona fide* purchaser? A number of witnesses filed affidavits stating that the defendant had said to them that there was no consideration for the conveyance to his brother, but that he had placed the property in his hands so that creditors could not reach it. This he denies and claims that the sale to his brother was a *bona fide* transaction. There is also an affidavit of the brother wherein he says:

"That on the 12th day of July, 1888, said Theodore O. Bivin became indebted to this affiant in the sum of $1,000 for money loaned by this affiant to said Theodore O. Bivin at his request, for which said Theodore O. Bivin made, executed, and delivered to this affiant his promissory note of that date for the sum of $1,000, a copy of which, with all the indorsements thereon, is hereto attached, marked Exhibit A, and made a part of this affidavit; that on the 30th day of June, 1891, this affiant purchased of said Theodore O. Bivin certain real property described as follows, to-wit: lots 9 and 10, block 67, Harris, Moffitt & Roberts' addition to the original town, now the city of Seward, Nebraska; that this affiant paid said Theodore O. Bivin, as consideration of and as payment for said premises, the sum of $800, by giving said Theodore O. Bivin, at his request, credit on said note for said $800 and by indorsing thereon

as paid the sum of $800 as shown by the indorsement on the back of said Exhibit A, hereto attached, said indorsement being marked Exhibit B, and made a part of this affidavit; that the said indorsement on the back of said note was made in consideration of and in payment to said Theodore O. Bivin for the above described premises and for no other purpose whatever."

It will be seen that there is no statement of the amount of money he loaned his brother, or that he desired a conveyance, and the suggestion in the affidavit that the credit was given at the request of the defendant is very suggestive.

The case is very similar in some of its features to that of *Omaha Hardware Co. v. Duncan*, 31 Neb., 217. In that case the mortgagors, after denying the fraud, stated: "'That on the 2d day of October, 1889, they made and executed and delivered a certain chattel mortgage to W. H. Butler and Edmund Jeffries on the stock of goods contained in the store building situate on lot 15, block 3, in Pauline, Adams county, Nebraska, being the same stock of goods taken under an order of attachment issued in this cause; that said mortgage was given to secure a valid indebtedness from these defendants to said W. H. Butler and Edmund Jeffries of $2,217.82, and that it is provided in said chattel mortgage that these affiants were to remain in possession of said goods and sell the same at public or private sale, and apply the proceeds of such sales in liquidation of the said sum of $2,217.82 so secured; that said mortgage was filed in the office of the county clerk of Adams county, Nebraska, on the 2d day of October, 1889, and these defendants have, in all respects, fulfilled the conditions of said chattel mortgage.' * * *

"This," it is said, "is substantially all the testimony upon the hearing for dissolution of the attachment, and it was insufficient for that purpose. The chattel mortgage, if valid, withdrew the property of the defendants from levy

and sale upon either an attachment or execution. The circumstances under which this mortgage was made were such as to require proof from the mortgagees as to the actual consideration paid by them to the defendants. In other words, how was the debt incurred, and for what? These questions are not answered by the allegation of the defendants that the debts were *bona fide*. They should have stated the facts in regard to the creation of the debt and the consequent giving of security for the same, and the court would have drawn conclusions of law from such facts. On the face of the papers, therefore, unless this mortgage was a *bona fide* transaction, there was an attempt on the part of the defendants to place their property beyond the reach of their creditors, which would fully justify an attachment."

In our view there is a failure to establish the *bona fides* of the conveyance to the brother. The judgment is clearly against the weight of evidence. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CHARLES G. CREWS ET AL. V. S. E. COFFMAN ET AL.

FILED MAY 1, 1893. No. 5719.

1. **County Seat:** RELOCATION: COUNTY BOARD: ELECTION: PETITION. To entitle a county board to call an election for the removal of a county seat a petition must be presented to it by resident electors of the county equal in number to three-fifths of all the votes cast in the county at the last general election.

2. ——: ——: PETITION: PETITIONERS. The petition must show the section, township, and range on which, or the town or city

in which a petitioner resides, together with his age and time of residence in the county.

3. ———: ———: SUFFICIENCY OF PETITION: OBJECTIONS: HEARING. Where objections are made by any resident elector on oath charging that a certain number of the petitioners are minors, certain other number are not electors, certain names are fictitious, a certain number have been bribed, the aggregate of which will reduce the number of petitioners below three-fifths of the votes cast at the preceding general election, it is the duty of the board to set a reasonable time for a hearing of said objections to enable parties to offer proof in support of their charges.

4. ———: ———: ———: ———: ———. Parties interested in the matter are entitled to examine the original petition in the office of the county clerk before the election is called and should have a reasonable time for that purpose. It is not sufficient to furnish a certified copy as such parties have the right to see the purported signatures of the petitioners.

ERROR from the district court of Hitchcock county. Tried below before WELTY, J.

J. W. Cole and *Reese & Gilkeson*, for plaintiffs in error.

R. O. Adams, F. M. Flansburg, and *W. S. Morlan, contra.*

MAXWELL, CH. J.

This is a proceeding in error from the district court of Hitchcock county to reverse the judgment of that court affirming the action of the board of county commissioners calling an election for a relocation of the county seat. It appears from the record that on the 23d of June, 1892, at 9 o'clock A. M., a petition for the relocation of the county seat was presented to the board of county commissioners of that county; that G. V. Hunter, an elector and resident of that county, protested against calling an election until an opportunity could be given to examine the petition. The protest was overruled. Various motions were made on behalf of the plaintiff for an opportunity to examine the petition away from the crowd that seems to have

filled the room where the board was sitting. These were overruled. Whereupon J. W. Cole, one of the attorneys for the plaintiff, filed an affidavit as follows:

"In the matter of the petition to call an election to vote to remove the county seat.

"John W. Cole, being first duly sworn, on his oath says: That he is one of the attorneys for the defendants in this case; that he has urgently and persistently sought, by every reasonable means made known to him, to procure a full, free, and complete examination of the plaintiffs' petition herein; that, in addition to asking this court and the plaintiffs' attorneys for this privilege of examining said petition privately, as shown by the records of this court, affiant and his associate counsel and defendants, all of whom are resident electors and qualified voters of Culbertson, Hitchcock county, Nebraska, asked this court for the privilege of taking the said petition to some quiet part of the court room for inspection and examination, all of which was refused by this board at the request of the petitioners; that whereas this board ruled and refused to allow this affiant, his associates, or their clients, to use, inspect, or examine said petition except in the presence of this board or of the petitioners and their attorneys, the defendants having been unable to carefully inspect said petition, or prepare a full defense thereto; that affiant, so far as his trammeled position would admit, made examination of said petition and has compared what the petitioners pretend to be a copy of said petition with the original, and affiant says that said copy is not a true copy of the original; that even if said copy was a true copy, defendants could not determine from it whether the petition had been properly signed or not; that among other discoveries of irregularities it is apparent that a large list of the names signed to said petition are fraudulent, forged, and that this, with many other facts, cannot be fully determined from the petition itself. This affiant, for himself

and his associates, says that in view of the above facts, and in view of the character and nature of the case, the time granted for the inspection of said petition in which to prepare a defense thereto is wholly inadequate, wherefore affiant, for himself and on behalf of his associates and clients, now moves the court that further time be given them in which to examine said petition and prepare their defense thereto, and they be allowed full, free, and untrammeled use of said petition for such purpose."

The other attorneys for the plaintiffs also swore that the facts stated in the affidavit of Cole are true. There is no contradiction of this in the record, so that it will be regarded as true. Being unable to obtain time to examine the names on the petition the plaintiffs filed the following answer:

"In the matter of the petition of S. E. Coffman et al., praying for a calling of a special election to vote upon the question of removing and locating the county seat of Hitchcock county, Nebraska.

"Comes now Charles G. Crews, a resident elector and taxpayer of said Hitchcock county, Nebraska, for himself and on behalf of 550 other resident taxpayers and duly qualified voters of said Hitchcock county, and objects and remonstrates against this honorable board calling or proceeding to call an election upon the petition herein filed, and for cause assigns the following grounds of objection and remonstrance:

"1. Because the pretended petition is insufficient in law to authorize the calling of an election as prayed for therein.

"2. Said pretended petition is not signed by the requisite number of qualified resident voters of Hitchcock county, Nebraska, to authorize the calling of said election.

"3. That a large number, to-wit, 111, of said pretended petitioners are minors, persons under the age of twenty-one years.

"4. Because a large number, to-wit, 358, of said pre-

tended petitioners are and were non-residents of the county of Hitchcock, state of Nebraska.

"5. Because a large number of said pretended petitioners, to-wit, 600, were procured to sign said pretended petition by being misled, and on account of facts having been misrepresented to them and by unlawful and undue influences.

"6. Because 351 of said pretended petitioners were induced to sign said pretended petition by bribery, in this, to-wit, that the residents and property holders of Trenton represented that they would build a court house free of expense to the petitioners of the county.

"7. Because a large number, to-wit, 350, of said petitioners desire to withdraw their names from said pretended petition.

"8. Because there is now pending in the supreme court of the state of Nebraska another action between substantially the same parties and upon the same cause of action as the cause attempted to be set up in the petition herein, and the said cause of action pending is still undetermined and undecided.

"9. And these remonstrators deny that any of said pretended petitioners are resident electors and qualified voters of Hitchcock county, Nebraska; deny that said pretended petitioners, or any of them, reside at or upon the lands as described in said pretended petition; deny that the age of, residence, and time of residence in the county is correctly given; and especially deny that said pretended petition is signed by a number of qualified voters, electors, equal to three-fifths of the vote of Hitchcock county cast at the last general election.

"10. These remonstrators allege that a large number of said pretended petitioners, to-wit, 326, are fictitious names, and that no such persons reside, live, or exist in Hitchcock county.

"11. These remonstrators further allege that a large

number of said pretended petitioners, to-wit, 178, are foreigners, who have never become citizens of the United States, nor have they declared their intention to become citizens as by law required.

"12. That a large number, to-wit, 130, of said names that appear upon said petition were not signed by the persons themselves, nor were they signed to said pretended petition with their knowledge or consent, and were forged thereto; these defendants especially deny that the pretended certified copy of said petition tendered defendants' attorneys is a true copy, and allege the fact to be that upon such comparison as the defendants were able to make it was evident said pretended copy was not a true copy of said petition, all of which could have been proved had this board allowed the said pretended copy filed as part of the record, and these defendants say that by reason of the facts, that this court refused to allow them or their attorneys sufficient time to examine said petition, and in view of the further fact that the only examination that these defendants have been permitted to make of said petition was in the presence of the petitioners and their attorneys, and this board, on account of the amount of matter contained in said petition, it is beyond the power of the defendants to make this answer more specific, definite, and certain.

"Wherefore your remonstrators pray that a time be set for hearing the issues raised by the remonstrance herein to said pretended petition; that a reasonable time be given these remonstrators to prepare their defense and procure their evidence to sustain the same; that upon the final hearing of said issue said pretended petition and the prayer thereof be overruled and that said pretended petition be dismissed."

This was duly verified. The answer was overruled and the election called. The case was taken on error to the district court, where a large amount of testimony was taken by the defendants in error and the action of the county commissioners affirmed.

Section 1, article 3, chapter 17, Compiled Statutes, provides: "Whenever the inhabitants of any county are desirous of changing their county seat, and upon petitions therefor being presented to the county commissioners, signed by resident electors of said county, equal in number to three-fifths of all the votes cast in said county at the last general election held therein, said petition shall contain, in addition to the names of the petitioners, the section, township, and range on which, or town or city in which the petitioners reside, their ages and time of residence in the county, it shall be the duty of such board of commissioners to forthwith call a special election in said county for the purpose of submitting to the qualified electors thereof the question of the relocation of the county seat. Notice of the time and the places of holding said election shall be given in the same manner, and said election shall be conducted in all respects the same as is provided by law relating to general elections for county purposes. The electors at said election shall designate on their ballots what city, town, or place they desire said county seat located at or in, and any place receiving three-fifths of all the votes cast shall become and remain, from and after the first day of the third month next succeeding such election, the county seat of said county." It will be observed that the petition is to be signed by "resident" electors, and in order to show that they are such the locality where each one resides must be stated in the petition. A petition signed by three-fifths of the resident electors of the county therefore is essential to give the county board jurisdiction. To be an elector of the county is not enough, he must be a resident elector. The object of this provision no doubt was to prevent any action being taken on a petition signed by persons temporarily residing in a county, such as persons engaged in constructing a railroad and who would leave as soon as the work was finished. (*Ayers v. Moan*, 34 Neb., 210.) To ascertain if the signers or any consid-

erable part of them are resident electors, where that fact is denied, may require a reasonable time to examine the names and make inquiry in regard to the same. The presentation of a petition signed by the requisite number of names, where no objection is made, no doubt will be sufficient to justify the board in calling an election. Where, however, an answer is filed containing charges of fraud that many of the names are fictitious, forged, or those of minors or persons not electors, time must be given to produce evidence of those charges.

In *State v. Nemaha County*, 10 Neb., 35, it is said: "If parties have been induced by misrepresentation to sign such petition, they may undoubtedly go before the board and state the facts as to such misrepresentations and demand that their names be stricken from the petition or not counted as petitioners. The commissioners should not call an election for such purpose, unless they find at the time of calling said election that more than three-fifths of the voters, as shown by the return of the last general election, are then petitioners in favor of such election. It is not the intention of the law to subject the people of a county to expense, annoyance, and animosities not unfrequently attending an election for the relocation of a county seat, unless it shall appear that the requisite number of voters at the time of calling the same are in favor of such election. The petition is only a means of determining that at least three-fifths of the legal voters of a county are in favor of the relocation of a county seat, and that an election called for the purpose of submitting such question to the people of the county will in all probability result in a relocation of the county seat." What is said in that case is applicable in this. If there are in fact more than three-fifths of the resident electors in favor of removing the county seat and have signed a petition for that purpose, there will be no occasion for undue haste in acting upon the petition. It will bear the closest scrutiny, and when an election is called in

pursuance thereof the result will not be uncertain. On the other hand, if the petition is signed by persons who are not resident electors, or minors, and names of fictitious persons added, it may be expected that those presenting the petition will urge haste in acting upon it, so that the names cannot be scrutinized, and false, fictitious, and fraudulent names, if such there be, stricken out. If the position contended for by the defendants' attorneys should be established as the law, viz., that there is no authority to sift out the spurious names on the petition, then it would be possible for one person to file a petition for the removal of a county seat with fictitious names and imaginary places of residence and file the same with the county board, whose duty it would thereupon be to call an election for the purpose indicated. No one will contend that such a petition would not be open to examination; yet, suppose that one-half, one-fourth, or any other number, was fraudulent or fictitious, the right and duty to strike them from the petition must exist as a means of protecting the county board from being imposed upon and the people of the county from the animosities, strife, and expense of a needless county seat election. This examination is to be made before the county board.

In *Ellis v. Karl*, 7 Neb., 388, Judge LAKE, in speaking for the court, says: "It appears that in the exercise of the jurisdiction thus conferred the commissioners received the petition for relocation, and adjudging it in all respects sufficient, made and entered of record this order: 'Whereas, on the 20th day of August, 1877, was presented by Samuel Windrom to the board of county commissioners of Saline county a petition calling for a relocation of the county seat, which said petition was signed in manner required by law by citizens of said county in number more than three-fifths of the votes cast at the last general election.' Thereupon, at the same time, they ordered in due form the calling of the first election on this question, to be held on the 4th of September, 1877.

"It does not appear that either the genuineness or the sufficiency of the petition was questioned before the com missioners, but it is alleged that all of the defects complained of were fully known to them when they made the order for the election. And it is further alleged that the plaintiffs were wholly ignorant concerning them until more than twenty days had elapsed after the decision had been made, which seems to be thought a sufficient excuse for not moving earlier in this attack upon the action of the board.

"We are of the opinion that under this statute the proper place to have raised these questions concerning the petition was before the commissioners themselves, and that, having failed to make the objections there, and no sufficient reason for the failure being shown, the plaintiffs are in no situation to ask the aid of a court of equity."

Any resident elector of a county has a right to examine a petition filed with the county clerk which purports to contain the names and places of residence of a sufficient number of resident electors to require the county board to call an election for the removal of the county seat. This, by the act of filing, becomes a public document and is open to inspection, and a reasonable time must be given when desired for that purpose. The petition is in the care of the county clerk and he is responsible for its safe keeping, but the instrument may be examined in his office at any or all times during business hours, and five days on the showing made by the plaintiffs would not seem an unreasonable time to make a thorough examination of 860 names scattered, as they purport to be, over all parts of the county. Considerable stress is laid upon the offer to furnish a certified copy of the petition to the plaintiff, but that is not sufficient. The party has the right to inspect the original, to observe the several signatures and see if they purport to have been signed by each individual; in other words, if they appear to be genuine, or are in the handwriting of a few inter-

ested persons. This is one of the means of detecting spurious signatures and a certified copy is not sufficient.

In *State v. Nelson*, 21 Neb., 572, a petition purporting to contain the names of 644 resident electors was presented to the county board asking to call a special election for the relocation of the county seat; the whole number of votes cast in said county at the preceding election was 729. A remonstrance against calling such election, signed by a very large number of persons purporting to be electors of said county, was presented to the county board, in which it was alleged that the petition was signed by non-residents, minors, and other persons not authorized to sign the same. The board thereupon investigated the matter and found that many persons who did not possess the necessary qualifications had signed said petition, and the number of resident electors who had signed the same was less than three-fifths of all the votes cast at the preceding election, and therefore refused to call the election, and this court sustained the order.

The case at bar, in many of its features, is like that of *Ayres v. Moan*, 34 Neb., 210. In that case the same undue haste was shown by the county board as in this, and a refusal of such board to permit electors to examine the petition and sift out the illegal names. The remonstrators thereupon filed an answer similar in many respects to that in this case. The county board overruled the answer and called an election, and the action of the board was sustained by the district court, but this court reversed all the proceedings and set the election aside. The same rule will be applied in this case. To justify a county board in calling an election for the relocation of the county seat it must clearly appear that the petition for such election is signed by at least three-fifths of the resident electors in the county, as shown by the votes cast at the preceding election. Good faith on the part of the county board requires it to act as an impartial tribunal, to be governed by the

evidence in the case, and to give all the resident electors in the county a reasonable opportunity to show that names signed to the petition are forgeries, fraudulent, or fictitious, or that they are those of *bona fide* resident electors of said county. The judgment of the district court and also of the county commissioners is reversed and the cause remanded to the county board of Hitchcock county for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. L. P. MAIN, V. LORENZO CROUNSE, GOVERNOR.

FILED MAY 1, 1893. No. 6067.

Statutes: ENACTMENT: APPROVAL OF GOVERNOR. **The governor is a part of the law-making power of the state, and every bill, before it becomes a law, even if passed by a two-thirds majority of each house, must be approved by him, passed over his veto, or remain in his hands more than five days, Sundays excepted.**

ORIGINAL application for *mandamus*.

L. P. Main and *R. A. Moore*, for relator.

George H. Hastings, *contra*.

MAXWELL, CH. J.

This is an action to compel the governor to appoint an additional judge in the twelfth district, notwithstanding his veto of the bill providing for such additional judge, and failure of the legislature to pass the bill over the veto. It is alleged in the petition that "The relator, L. P. Main

represents to the court that he is a citizen of the United States and of the state of Nebraska, and a resident of Buffalo county in said state; that the defendant, Lorenzo Crounse, is the governor of the said state of Nebraska, duly elected and qualified; that the twelfth judicial district in said state comprises the counties of Buffalo, Custer, Dawson, and Sherman; that on or about the 1st day of March, 1893, a bill dividing the said state of Nebraska into judicial districts and providing for the appointment of an additional judge in said twelfth district was pending in the lower house of the state legislature of Nebraska, which was then in regular session, and on or about the date aforesaid was passed by said house; that thereafter and about the 8th day of March, 1893, said bill was passed by the senate of the state of Nebraska; that upon the passage of said bill in each house of the state legislature the yeas and nays were entered on the journal and said bill received the affirmative vote of more than two-thirds of the members elected to each house as required by the constitution of said state; that said bill contained a provision whereby it became effective immediately upon its passage by said state legislature, and also contained a provision requiring the governor of said state to appoint said additional judge immediately after the passage of said act; that the defendant has failed, neglected, and refused, and does still refuse, to appoint said additional judge in said twelfth judicial district, though often requested so to do; that relator has requested George H. Hastings, attorney general of said state, to bring this action or allow it to be brought in his name and he has refused so to do. Wherefore relator prays for a writ of *mandamus* requiring said defendant, as governor of the state of Nebraska, to appoint some legally qualified person to serve as judge in said twelfth judicial district."

To this petition the governor filed an answer as follows:

"Comes now Lorenzo Crounse and answering the petition for *mandamus* filed in the above entitled cause, says:

"1. He admits the relator, L. P. Main, is a citizen of the United States, of the state of Nebraska, and a resident of Buffalo county.

"2. That Lorenzo Crounse is the duly elected, qualified, and acting governor of the state of Nebraska.

"3. That the twelfth judicial district in the state of Nebraska comprises the counties of Buffalo, Custer, Dawson, and Sherman. That on or about January 21, 1893, a bill known as house roll No. 172, for an act to amend section 226 of chapter 3 of the Consolidated Statutes of Nebraska, by providing for an additional judge in the twelfth judicial district of said state, was duly introduced in the lower house of the twenty-third legislative assembly of Nebraska, which twenty-third legislative assembly was then in regular session; that on February 28, 1893, said bill entitled house roll No. 172 passed the lower house of the said twenty-third legislative assembly of Nebraska; that thereafter and on or about March 9, 1893, the said bill known as house roll No. 172 passed the upper house or the senate of the twenty-third legislative assembly; that said bill was duly presented to the governor of the state of Nebraska on or about the 10th day of March, 1893, and that after careful consideration, this respondent, as the said governor of the said state, did, for good and sufficient reasons, veto said bill, known as house roll No. 172, and that on said 13th day of March, 1893, said bill known as house roll No 172, together with the veto message containing the objections of this respondent to the said bill, was duly returned to the lower house of the twenty-third legislative assembly of said state; that thereupon and in the manner provided by law the said bill known as house roll No. 172 was duly considered by said lower house of the twenty-third legislative assembly of Nebraska and the said veto of the said governor was by said body sustained; and thereupon and for said reasons said bill failed to become a law, and failed to pass the legislature, in the manner and as provided by the

constitution and laws of the state of Nebraska, and that it is true that this respondent has failed and refused to appoint an additional judge in the twelfth judicial district of the state of Nebraska, for the reason that there is no vacancy in said office, and no law authorizing or empowering this respondent to make such an appointment, and this respondent denies that he has any right or authority whatever for making such an appointment."

The relator demurred to the answer on the ground that the facts stated therein did not constitute a defense to the action.

Section 15, article 5, of the constitution provides: "Every bill passed by the legislature, before it becomes a law, and every order, resolution, or vote to which the concurrence of both houses may be necessary (except on questions of adjournment) shall be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections at large upon its journal, and proceed to reconsider the bill. If then three-fifths of the members elected agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by three-fifths of the members elected to that house it shall become a law, notwithstanding the objections of the governor. In all such cases the vote of each house shall be determined by yeas and nays, to be entered upon the journal."

Section 11, article 6, provides: "The legislature, whenever two-thirds of the members elected to each house shall concur therein, may, in or after the year one thousand eight hundred and eighty, and not oftener than once in every four years, increase the number of judges of the district courts, and the judicial districts of the state. Such districts shall be formed of compact territory, and bounded by county lines; and such increase, or any change in the

boundaries of a district, shall not vacate the office of any judge."

The relator's position is that the language of the section providing that the legislature may do that which in this case they have sought to do whenever two-thirds of the members elected to each house concur therein, is inconsistent with the provision requiring the executive approval of all laws, and that therefore a law of this kind can become operative upon its passage by both houses by a two-thirds majority. It is contended by him that not only would this seem to be in accordance with the constitution, but it is supported by reason, and whenever a reason for a rule ceases the rule also ceases, and certainly there can be no reason for submitting to the governor for his approval an act which to secure its original passage requires a larger number of votes than are required to pass any bill over the executive veto, and that there is authority for this position.

In *Hall v. City of Racine*, 50 N. W. Rep., 1094, the supreme court of Wisconsin discussed this question. The case arose over a municipal ordinance, which, from its peculiar nature, required a three-fourths vote of all the members elected to the council, and the court held that inasmuch as two-thirds of the members elected to the council were sufficient to pass the ordinance over the veto of the mayor, the ordinance having necessarily received a larger number of votes than were necessary to pass it over the veto of the mayor, became operative without submission to the mayor, and in discussing the question the court held that a similar provision in the state constitution will be similarly construed, saying the approved rules, both of statutory and constitutional construction, require that the special provision should be given full force whenever it is inconsistent with the general provision, and that the law would not require a useless thing, namely, the submission of a bill of this kind to the governor of a state or the

mayor of a city. We have great respect for the decisions of the supreme court of Wisconsin, and find frequent occasion to quote from and approve the same, but in the case cited it seems to us that the court overlooked an important fact, viz., that the officer whose approval is necessary in the first instance, and who has authority to veto any measure which it is proposed to enact into a general or local law is a part of the law-making power. To him as well as the deliberative body passing the law is confided the duty of scrutinizing its details and considering the effect it may have. Particularly is this true as applied to the governor of a state. To him as well as to the legislature is confided the business of making laws. He is elected by the electors of the entire state and is presumed to have been chosen because of his fitness for the position. He represents the people of the state at large, and not particularly those of any locality. He is in a position therefore to judge impartially as to the necessity or expediency of creating additional judges of the district court. While it is true that the bill providing for such judges must be approved by two-thirds of the members elected to each house, while three-fifths may pass the bill over the governor's veto, yet, when the governor returns a bill to the legislature without his approval, he is required to state his reasons for not approving the same. These reasons are presumably valid and may, and probably will, have the effect, as in this case, to convince a sufficient number of members who may have voted for it at first to refuse to vote for it against the governor's objections. In which case it would fail to become a law. An act which is demanded by the public will no doubt receive the necessary votes, while if not so required it is best that it should fail. The signature of the governor was necessary, therefore, to the bill in question, or that it should pass over his objections. The bill, therefore, did not become a law, and the writ must be denied.

It is alleged that there is a very large amount of business in the twelfth district and that another judge is necessary therein to dispose of the same. The governor in his veto message, returning the bill without his signature, calls attention to the fact that there are more judges in some of the districts than the business demands, and that the law authorizes judges of one district to hold court in another district. He also calls attention to the late case of *Tippey v. State*, 35 Neb., 368, in which it was held that different judges could hold court in the several counties of a judicial district at the same time. Our constitution and statutes place but few restrictions upon this right. There are four counties in the twelfth district. The judge of that district, therefore, may call to his aid three other judges from districts where the business is disposed of, and it is perhaps probable that the governor has power to require them to perform such duties. No doubt a request would be all that would be necessary.

WRIT DENIED.

THE other judges concur.

EDNA C. ARNOLD V. BADGER LUMBER COMPANY ET AL.

FILED MAY 2, 1893. No. 4034.

Pleading: CROSS-PETITION FILED AFTER ANSWER DAY: DEFAULT: NOTICE TO CO-DEFENDANTS. After answer day, if a defendant files a pleading, in the nature of a cross-petition, against his co-defendants who have not appeared in the action, such co-defendants can be concluded in respect thereto, only by their appearance, or after the service on them of a notice in the nature of a summons, as to such pleading.

ERROR from the district court of Lancaster county. Tried below before FIELD, J.

Ores M. Quackenbush and *J. E. Philpott,* for plaintiff in error.

B. F. Johnson, contra.

RYAN, C.

On December 26, 1889, the Badger Lumber Company filed in the district court of Lancaster county its petition for the foreclosure of its claim for a mechanic's lien on lot 10, block 5, in Sunnyside addition to the city of Lincoln. Edna C. Arnold was made defendant, as the owner of the said lot, while W. H. Tyler, F. W. Kent, S. J. Kent, George R. Miller, John Smith Sperry, B. G. Wright, and R. S. Young were joined as defendants, by reason of being claimants of liens on the same property. A summons was issued requiring the defendants to answer by the 22d day of April, 1889, which was in due time served on each of the defendants. Edna C. Arnold made no appearance and the decree complained of was rendered against her upon her default. On April 24, 1889, W. H. Tyler filed his answer, claiming the foreclosure of a mechanic's lien on the property described. On April 24, 1889, R. S. Young also answered the petition, asking the enforcement of his claim to a like lien. B. G. Wright and F. W. Kent filed a like answer, each for himself, on May 27, 1889. George R. Miller filed an answer of like purport on May 23, 1889, and on June 4, 1889, an answer and cross-petition with the same purpose was filed by J. S. Sperry. Finally, on November 21, 1889, the date of the decree, there was filed on behalf of S. J. Kent an answer and cross-petition for the same relief as had been asked by the other defendants as against Edna C. Arnold. Except as to the claim of the Badger Lumber Company no summons was issued, nor was notice of any kind served upon Edna C. Arnold, the owner of the property; neither did she in any manner appear for any purpose. The summons issued as to the

petition of the Badger Lumber Company required the defendants and each of them to answer by April 22, 1889; the first answer was filed two days afterward; from thenceforward they were dropped in until November 21, following. A decree was, on the date last named, entered in favor of each of the parties, who, as above, claimed liens against the lot in question. The judgment, in so far as it was in favor of each of the co-defendants of Edna C. Arnold, must be reversed, for reasons which will now be briefly stated.

In *Hapgood v. Ellis*, 11 Neb., 131, the rule was broadly stated that any defendant, regularly served with process, who fails to answer any material allegation contained in the answer of his co-defendant, is bound thereby, as well as by the decree founded thereon, and unless he appeals therefrom, the same becomes as to him *res adjudicata.*

In the *Cockle Separator Mfg. Co. v. Clark*, 23 Neb., 702, this broad statement was qualified thus: "While all parties to an action are bound to take notice of pleadings *properly filed within the time required by law*, yet, where a party in default obtains leave of court to file a pleading affecting other parties, the parties so affected should be notified of the filing of such pleading, unless such persons or their attorneys are present when the order is made." The decree which had been taken, as between the co-defendants, upon the answer of a co-defendant filed after the time when answers were required by law to be filed, and as to which no notice had been served or appearance made, was held properly to have been set aside in the district court. As between co-defendants, therefore, the rule is established that each is bound to take notice of such pleadings as shall be filed on or before the answer day named in the summons issued upon the original petition. After answer day, if a defendant files a pleading in the nature of a cross-petition against his co-defendants, who have made no appearance, such co-defendants can only be thereby affected by their

appearance as to such pleading, or after the service of a notice upon them in the nature of a summons, as to such pleading.

By the decree under consideration the co-defendants of Edna C. Arnold obtained affirmative relief as against herself and her property, after answer day, without her appearance, and without notice to her of the filing of the several answers asking such affirmative relief. It follows, therefore, that such part of the judgment must be and is reversed.

No objection having been made or discovered as to that part of the decree which enforces the right of the Badger Lumber Company to relief, it is affirmed.

JUDGMENT ACCORDINGLY.

THE other commissioners concur.

PALMER, RICHMAN & COMPANY V. CHARLES B. RICE.

FILED MAY 2, 1893. No. 4783.

1. **Letters of Credit:** COMPLIANCE WITH CONDITIONS: A CONTRACT TO ACCEPT DRAFTS, thereafter to be drawn upon certain conditions, can be made the basis of a recovery by the payee of such drafts, only upon showing full and exact compliance with each of said conditions.

2. ———: CONTRACT TO PAY DRAFTS: LIABILITY. A party who contracts in writing to accept and pay such drafts as shall be drawn by a party named, in favor of another party also named, upon compliance with certain conditions, is absolutely liable upon drafts drawn as contemplated, irrespective of the condition of the general account between the drawer and drawee at the time such drafts are made.

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

Chas. Offutt, for plaintiff in error, cited: *Von Phul v. Sloan*, 2 Robinson [La.], 148, 38 Am. Dec., 207; *Coolidge v. Payson*, 2 Wheat. [U. S.], 75; Story, Bills of Ex. [4th ed.], sec. 249; *Schimmelpennich v. Bayard*, 1 Pet. [U. S.], 284; *Boyce v. Edwards*, 4 Id., 118; *Franklin Bank v. Lynch*, 52 Md., 270; *Murdock v. Mills*, 11 Met. [Mass.], 14; *Potts v. Whitehead*, 23 N. J. Eq., 514; Anson, Contracts [2d Am. ed.], p. 22, 19*; *Jordon v. Norton*, 4 M. & W. [Eng. Exc. Rep.], 155; *Hutchison v. Bowker*, 5 Id., 535; Tiedeman, Commercial Paper [ed. 1889], sec. 228; *First National Bank v. Bensley*, 2 Fed. Rep., 609; *Hatfield v. Phillips*, 9 M. & W. [Eng. Exc. Rep.], 648; *Ulster County Bank v. McFarlan*, 5 Hill [N. Y.], 432; *Nixon v. Palmer*, 4 Seld. [N. Y.], 398; *Fenn v. Harrison*, 3 T. R. [Eng.], 757; *Attwood v. Munnings*, 7 Barn. & Cres. [Eng.], 278.

Gregory, Day & Day and *Charles B. Rice, contra.*

RYAN, C.

On the date therein named the plaintiffs in error executed the following instrument in writing:

"SOUTH OMAHA, NEB., April 19, 1888.

"*Chas. B. Rice, Endicott, Neb.:* Until further notice we will pay H. C. Dawson's drafts for cost of stock consigned to us, bill of lading attached when presented.

"Yours truly, PALMER, RICHMAN & Co.

"BLANCHARD."

The evidence shows that anterior to the above date Palmer, Richman & Co. had given a more unlimited letter of credit to the Endicott Bank in favor of H. C. Dawson, which was superseded by that above set out, upon the suggestion of Mr. Blanchard, a member of said firm, upon its date; that after April 19, 1888, H. C. Dawson bought and shipped cattle and hogs to Palmer, Richman & Co., a live stock commission firm doing business at South Omaha,

Nebraska; that the Endicott Bank, which was but another name for Charles B. Rice, advanced the money to pay checks issued by H. C. Dawson for stock purchased by him; that the commission upon handling said stock at South Omaha was divided between said firm and H. C. Dawson; that upon the purchases being completed it was usual for H. C. Dawson to draw upon Palmer, Richman & Co. for the amounts expended to make such purchases for each shipment, in favor of the Endicott Bank, by which such drafts were forwarded accompanied by a bill of lading, upon which the same were paid by Palmer, Richman & Co.; that upon one occasion the bill of lading was omitted, whereupon Palmer, Richman & Co. expostulated with said bank in respect to said omission. These shipments were continued until August 13, 1888, when there was drawn a draft as follows:

"$1,400. "THE ENDICOTT BANK,
"ENDICOTT, NEB., Aug. 13, 1888.

"Pay to the order of the Endicott Bank fourteen hundred and $\frac{\text{no}}{100}$ dollars. H. C. DAWSON.

"To Palmer, Richman & Co., South Omaha, Neb."

The advances covered by the above draft, it is claimed by defendant in error, were made previous to and ending with August 10, 1888. It is certain that the car of cattle and car of hogs shipped on August 10, 1888, were received by the plaintiffs in error at 6 o'clock in the forenoon of the next day, and were sold the same day for $1,604.45 net. The proceeds of this sale the plaintiffs in error applied toward the payment of a draft for $1,700 drawn upon them by H. C. Dawson, of date August 6, 1888, and accepted August 8. This draft is marked paid August 11, 1888. To this draft no bill of lading was attached. When this application of the net proceeds of the sale of the cattle and hogs had been made it left Dawson overdrawn with plaintiffs in error $656, according to the evidence of Mr. Blanchard.

About the 13th day of August, 1888, the defendant in error procured from the agent of the railroad company over whose line the above two cars of stock had been shipped, a bill of lading for the same, which, with the aforesaid draft for $1,400, was forwarded to South Omaha. On the 15th day of August, 1888, the said draft, accompanied by said bill of lading, was presented to the plaintiffs in error for payment, and payment was refused; whereupon suit was brought upon the letter of credit aforesaid for the amount of said draft and protest fees. On the 22d day of May, 1890, a verdict was found by the jury in favor of the defendant in error for the sum of $1,573.49, upon which judgment was duly rendered.

Plaintiffs in error contend that as this suit was in effect upon an agreement to accept drafts to be drawn on certain conditions, it must be shown, as a condition precedent to the right of recovery, that said condition has been fully and exactly complied with by the party claiming its benefits. Without doubt this position is correct. To entitle plaintiff to recover upon an agreement to accept future drafts for stock purchased with bill of lading attached it was incumbent upon the plaintiff to show affirmatively that the draft was for stock purchased, and such draft must have been accompanied by a bill of lading. The contract of the parties required the concurrence of these conditions—nothing could dispense with either of them—and the jury was so informed in the instructions of the court. There was evidence sufficient to sustain the verdict of the jury as to these conditions precedent; their finding, therefore, settled this fact in favor of the defendant in error.

Plaintiffs in error, however, strenuously insist that having paid the draft of $1,700 drawn by H. C. Dawson on August 6, they should be protected as against the draft of date August 13, even though the latter draft alone was accompanied by a bill of lading. It is also contended that plaintiffs in error should have been permitted to show what

was the state of the account between Palmer, Richman & Co. and Dawson just prior to the receipt of the two car loads of stock on the morning of August 11, as to which party was owing the other.

These contentions lose sight of the fact that the rights and liabilities of all the parties to the letter of credit are to be measured strictly by its terms. As counsel for plaintiffs in error has justly insisted, the plaintiff in the district court was entitled to recover only upon a strict compliance with the terms of the instrument upon which suit was brought. It devolved upon him to show affirmatively that the draft was for the cost of the stock shipped to Palmer, Richman & Co., and that a bill of lading accompanied the same. On the other hand, there was by the same agreement, devolved upon plaintiffs in error, the correlative duty of providing for payment of such drafts as should be drawn upon them within the strict terms of the letter of credit. The acceptance of all such drafts in advance was burdened with only two conditions: one that the draft should be for the cost of the stock shipped to Palmer, Richman & Co., the other was that a bill of lading should accompany this draft. Upon the one hand, plaintiffs in error could not be held to payment without strict compliance with each condition; on the other hand, upon compliance with said conditions by the defendant in error, the liability of the plaintiffs in error for the amount of the draft became absolute. If they paid a draft without requiring the bill of lading, they did not release themselves from payment of one accompanied by such bill, if it was for the cost of the stock shipped to them. Any other rule would engraft upon the letter of credit another condition. In the case at bar the engrafted condition which must of necessity be implied from the proof offered to be made as to the condition of the accounts on August 11, just before these two cars were received, was, that Dawson would not, on a general balance of account, be

found owing plaintiffs in error. The same condition must be implied if the draft for $1,700, drawn by H. C. Dawson on the 6th day of August, 1888, should have been taken into account by the jury to postpone the rights of defendant in error upon the draft of $1,400 for the cost of stock, accompanied as it was by a bill of lading. The district court properly held that the terms of the letter of credit should alone determine the rights of the parties thereto, as between themselves, regardless of whatever advances plaintiffs in error may have made to Dawson independently of compliance with such conditions precedent as they themselves had prescribed. These considerations meet the contentions of the plaintiffs in error, without cumbering the record with details which would merely serve to show how the questions arose rather than what they were. It follows that the judgment of the district court must be and is

AFFIRMED.

THE other commissioners concur.

ALFRED D. JONES v. GROVER STEVENS.

FILED MAY 2, 1893. No. 5105.

1. **Real Estate Brokers:** WHEN RIGHT TO COMPENSATION ACCRUES. Where a real estate broker is employed to procure a purchaser of real property, he is entitled to compensation when he has secured a proposed purchaser ready, able, and willing to buy the property on the terms and conditions upon which the said broker is authorized to procure such purchaser. This right to compensation will not be impaired by the subsequent inability or unwillingness of the owner to consummate such sale on the terms prescribed.

2. **Witnesses:** CROSS-EXAMINATION: EXCEPTION: DISCRETION OF TRIAL JUDGE. The presiding judge, of necessity, is vested

with a sound judicial discretion as to limiting the cross-examination of a witness, and where the same question has been three times propounded, it is not error to prohibit a like question to be again asked under penalty of forbidding further cross-examination. No exception thereto having been taken, there is in this court no reviewable question presented.

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

C. A. Baldwin, for plaintiff in error.

Switzler & McIntosh, contra.

RYAN, C.

This was an action brought by Grover Stevens against A. D. Jones, for the sum of $1,400 and interest thereon, alleged to have become due the said Stevens as compensation for having procured for Jones a purchaser for lot eight (8), in block one hundred forty (140), in the city of Omaha. The petition also alleges that said property was listed by Jones with Stevens, who was a real estate broker in Omaha, at the price of $70,000, of which $20,000 was to be paid in cash, the balance to be allowed to run at the option of the purchaser, but to draw seven (7) per cent interest per annum. It was also averred that Jones agreed that if Stevens would procure him a purchaser for said lot on said terms, Jones would pay Stevens $1,400 for such services, and that, as required, he, the said Stevens, did procure a purchaser ready, able, and willing to take the lot on the terms proposed.

The answer admitted that at the time alleged, Stevens was a real estate broker, and denied each other averment made in the petition, and denied that Jones ever employed Stevens to procure a purchaser; and denied that Stevens ever did procure a purchaser able, ready, and willing to purchase on the terms for which Jones would sell.

There was a reply in general denial of the averments of the answer.

The examination of this case has been much simplified by the admission at the close of Mr. Sweezy's testimony as follows: "It is agreed that Mr. Sweezy was ready and able to make the bargain." As the gentleman last named was the proposed purchaser of said lot, who had been procured by Stevens to agree to take the same, there was thus admitted a compliance with two of the conditions necessary to a recovery upon the theory of the plaintiff in the district court. The other condition was, whether Mr. Sweezy was willing to take the property on the terms proposed. In relation to this requirement, counsel for plaintiff in error vigorously insists that the lot was incumbered to a large amount by reason of a general judgment against Jones, and on account of specific liens decreed against the property, and contends therefore that Sweezy refused to consummate the purchase. Upon this contention there was contradictory evidence. There was, however, a preponderance sufficient to establish the facts, that these incumbrances were talked over by Jones with Stevens, and also with Sweezy, and that Jones insisted that these would not prevent the consummation of the sale, for that Jones would use the avails of the sale to place the title in a condition satisfactory to Sweezy. The manner in which this was to be accomplished was by Jones stated to Sweezy, and by him approved, upon which Sweezy offered to arrange the matter at once, but Jones deferred further action until he should see his counsel. It is also established by a preponderance of the evidence that Jones stated to Sweezy that the lot was Sweezy's, immediately thereafter saying to defendant in error that he (Jones) would close up the matter, and that he (Stevens) was entitled to his commission. Undoubtedly it was thereafter found more impracticable to arrange as to the liens than Mr. Jones had anticipated, but that does not abridge Mr. Stevens' right to a commission if he had already earned it. The instructions very aptly stated the issues and the law applicable thereto. True, the

plaintiff in error criticises these instructions and requested others, on the theory that it was necessary for Stevens to have accomplished a sale of the lot; to secure a proposed purchaser ready, able, and willing to buy on the prescribed terms, not being, in his view, sufficient in law, or within the averments of the petition. It will be observed that as to the allegations of the petition this criticism is not well founded; as to the law applicable it is equally at fault. (*Vide Potvin v. Curran*, 13 Neb., 302.)

Complaint is made that the court improperly limited plaintiff in error's cross-examination of the defendant in error. The bill of exception shows that counsel for plaintiff in error asked this question: "When did you make this contract with Mr. Jones to sell this property?" which was answered, "When he listed the property." The question was immediately repeated, and an objection thereto was sustained and an exception taken. Very soon thereafter this question was again repeated, whereupon the presiding judge said, after an objection and exception had again been noted, "If you ask another question of that kind I will stop the cross-examination of this witness." No exception was taken to this announcement and the cross-examination thenceforward proceeded in an orderly manner. There is, therefore, no question for review properly presented by the record, nor does the plaintiff in error show that this announcement of a future intention, upon the happening of an event which in fact never did happen, prejudiced his rights in any manner or degree whatever. The presiding judge must be allowed a certain discretion in the limitation of the right of cross-examination, and we fail to see that this discretion has in any manner been abused.

The verdict is fully sustained by the evidence, there was no error in the rulings of the court, and the judgment of the district court is

AFFIRMED.

THE other commissioners concur.

JACOB H. PHILLIPS, APPELLANT, V. MCKAIG & COMPANY ET AL., APPELLEES.

FILED MAY 2, 1893. No. 4702.

1. **Vendor and Vendee:** JUDGMENTS: IMPERFECT INDEX AND DOCKET ENTRY: LIEN ON REAL ESTATE: CONSTRUCTIVE NOTICE. The party's true name was Mary Ann Allely, and she held her real estate by conveyance of record under the name of Mary A. Allely. *Held*, That a judgment against her, indexed and docketed in the office of the clerk of the district court, "McKaig & Co. v. May Alley," was not constructive notice to a purchaser of the real estate from Mary Ann Allely.

2. **Deeds:** IDENTITY OF NAMES: BONA FIDE PURCHASERS: DEFECTIVE INDEX OF JUDGMENT: CONSTRUCTIVE NOTICE. The indexes in the office of the register of deeds disclosed conveyances as follows: "——— to Mary A. Allely, deed; Mary A. Allely to Hooper, mortgage; Mary A. Allely to Vickars, mortgage." *Held*, That Vickars, by taking a deed of the real estate from Mary A. Allely, so described in body and acknowledgment of the deed, but signed Mary A. Alley, was not thereby charged with notice that a judgment indexed in the office of the clerk of the district court against May Alley was against Mary A. Allely.

APPEAL from the district court of Lancaster county. Heard below before FIELD, J.

J. A. Marshall, for appellant.

H. J. Whitmore, contra.

RAGAN, C.

This case was tried in the court below on an agreed statement of facts as follows:

"On the 24th day of September, 1887, a person whose correct name is Mary Ann Allely became seized in fee-simple of lot eight (8), in block one (1), in East Park addition to the city of Lincoln, located in Lancaster county, in the state of Nebraska. The deed conveying said lot to

said Mary Ann Allely described her by the name of Mary A. Allely.

"On the 4th day of January, 1888, the said Mary Ann Allely made, executed, and delivered a mortgage on said lot to C. L. Hooper, in which she signed the instrument as Mary A. Allely, and she is described in the body of the instrument and in the acknowledgment thereof as Mary A. Allely.

"On the 11th day of April, 1888, the said Mary Ann Allely executed and delivered a mortgage on said lot to Edwin L. Vickars, which she signed by the name of Mary A. Allely, and is by that name so described in the body of the instrument and in the acknowledgment thereof.

"On the 3d of August, 1888, the said Mary Ann Allely made, executed, and delivered to the said Edwin L. Vickars a warranty deed, conveying said lot to said Vickars, which deed she signed by the name of Mary A. Alley, but in the body of the instrument and in the acknowledgment of said deed she is described as Mary A. Allely.

"On the 11th of August, 1888, the said Edwin L. Vickars and wife, by warranty deed, duly conveyed said lot to Henry D. Pierson.

"On the 13th of December, 1888, the said Henry D. Pierson and wife, by warranty deed, duly conveyed said lot to the plaintiff, who hath ever since been and still is the owner and in possession of said lot.

"Neither the said Edwin L. Vickars, Henry D. Pierson, or this plaintiff ever had any knowledge of any judgment in favor of McKaig & Co. and against the said Mary Ann Allely, except such constructive notice as they were charged with by the judgment records and index of the clerk of the district court of Lancaster county, Nebraska, nor did either of them know that the said Mary Ann Allely ever signed her name May Alley, except such constructive notice as they may be charged with by the public records of Lancaster county, Nebraska.

"The said Mary Ann Allely, when she executed said instruments, was a woman between sixty and seventy years of age, her eyesight was poor, her hand trembled, and she wrote with difficulty, and was quite illiterate.

"On the —— day of April, 1888, the defendants McKaig & Co. sued the said Mary Ann Allely by the name of May Alley on a note alleged to have been signed by her 'May Alley,' and on April 16, 1888, obtained a judgment against her by default for $46.64, and $2.75 costs, before S. T. Cochran, Esq., J. P., Lancaster county, Nebraska, of which judgment a transcript was duly filed in the office of the clerk of the district court of Lancaster county, Nebraska, on the 21st day of May, 1888, which judgment appears recorded and indexed only as a judgment against May Alley and in favor of McKaig & Co. in the records of the clerk of the district court of the said Lancaster county, Nebraska; and on the same page of the judgment index in said office of the clerk of the district court, and on the next line above appears a satisfied judgment in favor of Thomas Allely and against the said Mary Ann Allely by those names so described; but in this action she signed the petition for alimony as May A. Alley.

"On the —— day of January, 1891, the defendants McKaig & Co., by their attorney, H. J. Whitmore, caused a writ of execution to issue out of the said district court of Lancaster county, Nebraska, upon said judgment in favor of McKaig & Co. and against said May Alley, and placed said writ in the hands of Sam McClay, sheriff of Lancaster county, Nebraska, and caused him to levy upon said lot eight (8), block one (1), East Park addition to Lincoln, and to proceed to sell the same to satisfy their said judgment and execution, as provided by law for the sale of real estate upon execution, and are now only restrained from so doing by the restraint of the court in this action, alleging and claiming their said judgment is a lien prior and adverse to any title of the plaintiff to the said real estate."

The court rendered a decree dissolving the temporary injunction and dismissing the appellant's cause of action, who brings the case here on appeal.

The questions then are:

1. What notice of a judgment against Mary Ann Allely did the indexing of the judgment in favor of McKaig & Co. against May Alley afford Vickars, the intending purchaser of this property?

We answer, none.

2. What notice did the records in the office of the register of deeds impart to Vickars, the intending purchaser of this property, that Mary Ann Allely was May Alley?

(*a*) —— —— to Mary A. Allely, a deed; (*b*) Mary A. Allely to Hooper, a mortgage; (*c*) Mary A. Allely to Edwin L. Vickars, a mortgage.

"The purport of the decisions appears to be that the sufficient degree of accuracy is attained if an intending purchaser, exercising a reasonable degree of care and a reasonable amount of intelligence in making a search, could not fail to be apprised of the existence and character of the judgment." (1 Black, Judgments, sec. 406.)

In *Metz v. State Bank of Brownville*, 7 Neb., 165, the present chief justice, speaking for the court, says: "The subsequent purchaser is affected with such notice as the index entries afford, and if they are of such a character as would induce a cautious and prudent man to make an examination of the title, he must make such investigation."

Applying the rule above laid down to the facts in this case, it appears to us that Vickars, *intending* to buy this property and examining the records, would find nothing of such a character as would arouse the suspicions of a cautious and prudent man that Mary Ann Allely and May Alley were the same person; and the fact that the deed by which she finally conveyed him the property was signed by her "Mary A. Alley," instead of Mary A. Allely or Mary Ann Allely, she being then between sixty and seventy

years of age, her eyesight poor, her hand trembling, writing with difficulty, and being quite illiterate, was not of itself sufficient to put Vickars upon further inquiry. It follows, therefore, that the decree of the district court must be reversed and this case remanded thereto, with instructions to enter a decree in favor of the appellant, as prayed for in his petition. It is so ordered.

REVERSED AND REMANDED.

THE other commissioners concur.

FRED W. GRAY V. M. A. DISBROW & COMPANY.

FILED MAY 2, 1893. No. 4912.

Equity: REVIEW BY PROCEEDING IN ERROR: MOTION FOR NEW TRIAL. In order to review the proceedings in the trial of an equity case by a petition in error, a motion for a new trial must be filed, as in an action at law. (*Carlow v. Aultman*, 28 Neb., 672.)

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

Wharton & Baird, for plaintiff in error.

Montgomery, Charlton & Hall, contra.

RAGAN, C.

The decree which is sought to be reviewed in this case was rendered in the court below on the 14th of January, 1891, and a transcript of the evidence and the proceedings of the court below was filed in this court August 21, 1891. More than six months having elapsed between the date of

the rendition of said decree and the filing in this court of the transcript of the proceedings and evidence, this case cannot be tried here as an appeal. It appears also, from looking into the record, that no motion for a new trial was filed in the court below. We are, therefore, precluded from examining the testimony to see if the decree is supported by the evidence. (*Carlow v. Aultman*, 28 Neb., 672.) The judgment of the district court is therefore in all things

AFFIRMED.

THE other commissioners concur.

RIVERSIDE COAL COMPANY V. LEONIDAS K. HOLMES.

FILED MAY 2, 1893. No. 4852.

1. **Review:** SUFFICIENCY OF ASSIGNMENT OF ERROR: MOTION FOR NEW TRIAL. The statutory assignment, in a motion for a new trial, of "errors of law occurring at the trial and duly excepted to," is sufficient to present for review the ruling of the court upon a demurrer *ore tenus* interposed before the introduction of any evidence.

2. **Contract of Sale:** DAMAGES FOR BREACH: PLEADING. In an action for damages for refusing to deliver goods in pursuance of a contract of sale, where no consequential damages are claimed, it is not necessary to allege the market value of the goods.

3. **Assignment of Error.** The failure of a jury, in assessing the amount of recovery, to allow interest upon a sum due upon contract is not presented for review by the assignment, in a motion for a new trial, that the verdict is not supported by sufficient evidence.

ERROR from the district court of Lancaster county. Tried below before TIBBETS, J.

W. B. Comstock, for plaintiff in error.

H. J. Whitmore, *contra*.

IRVINE, C.

The plaintiff in error began this action to recover the sum of $68.86 with interest, for coal sold and delivered by plaintiff to defendant. The defendant by answer admitted his indebtedness to plaintiff as alleged in the petition and counter-claimed for damages, alleging that in April, 1888, a contract was entered into between the parties whereby the plaintiff agreed to furnish to defendant all coal that defendant should require in his brick yards during the season of 1888 at an agreed price of $3 per ton; that plaintiff failed and refused to furnish such coal, and that defendant was unable to obtain the same except at a much higher price; that by reason of the failure of the plaintiff to comply with his contract the defendant was compelled to pay a much greater sum for the coal required by him in his business during said year, to his damage in the sum of $200. A reply was filed which it is not necessary to set forth in order to an understanding of the questions presented for review. There was a verdict finding due the plaintiff upon its cause of action $68.86, and to the defendant upon his counter-claim $105.25, and a general finding for the defendant of the difference between these sums, $36.39.

The admission in evidence of the deposition of John Weihe is assigned as error. Objection was made to the reading of this deposition when offered, whereupon a witness was called for the purpose of proving Weihe's inability to be present at the trial. After this testimony was taken there was no further objection to the reading of the deposition. Upon the contrary, the attorney for the plaintiff said, "I suppose if that is the fact, and he is unable to come, we will have to allow his deposition in." Thereupon the deposition was read without further objection or exception. This court cannot therefore pass upon the admissibility of this evidence.

The giving of certain instructions by the court of its own motion and the refusal to give certain instructions asked by the plaintiff are also assigned as error; but these questions were not presented to the trial court in the motion for a new trial, and therefore cannot be here considered.

Upon the opening of the trial the plaintiff objected to the introduction of any evidence in support of the counter-claim, for the reason that the answer did not contain sufficient facts to constitute a defense to plaintiff's action, or a cross action against it. This objection was overruled, and this action of the trial court is assigned as error. It is urged by defendant that the motion for a new trial is not sufficient to present this question, but by section 317 of the Code, as amended in 1881, it is sufficient in assigning the grounds of a motion for a new trial to state the same in the language of the statute without further particularity. If the ruling of the court was erroneous, it was an error of law occurring at the trial, an assignment which does appear in the motion for a new trial. Upon this point the plaintiff contends that the answer was insufficient, in not alleging the market value of the coal at the time and place, when and where it should have been delivered. The case of *Denver, T. & G. R. Co. v. Hutchins*, 31 Neb., 572, is cited in support of that view. That case was, however, based upon a failure to deliver goods purchased for the purpose of resale, and the damages sought to be recovered consisted of loss of profits. The attempt was to hold the vendor liable for consequential damages, and the court held that the counter-claim, in failing to allege the contract price and the market value, was insufficient to support such damages. At the common law general damages, such as the law presumes to arise, as being the natural and necessary result of the wrong complained of, were not required to be pleaded. Damages for breach of contract to buy or sell goods were within this rule.

(*Boorman v. Nash*, 9 B. & C. [Eng.], 145 (by Lord Tenterden); 1 Chitty, Pleading, 336.) The forms of declarations on such causes of action contained no averment of market value. (2 Chitty, Pleading, 269.) The Code has not changed the rules of pleading in this regard. (Maxwell, Code Pleading, pp. 79, 113.) Even if the counter-claim had been insufficient to justify the admission of evidence as to the actual damage, it very clearly alleged a breach of contract for which defendant would be entitled to nominal damages at least, and the demurrer *ore tenus* should have been overruled for that reason.

It is argued that the verdict cannot be sustained, for the reason that the jury failed to allow interest in computing the amount due the plaintiff on its petition. The only assignment of error, either in the motion for a new trial, or in the petition in error, which by any possible construction could be made to cover this point, is that the verdict is not supported by sufficient evidence. We do not think this assignment sufficient. It is true that in the case of *Burkholder v. Burkholder*, 25 Neb., 270, it is said that it is probable that the assignment that the verdict is not sustained by sufficient evidence liberally construed will cover the point that the verdict is excessive; but in *Volker v. First National Bank*, 26 Neb., 602, and in *Everett v. Tidball*, 34 Id., 803, it is distinctly held that errors in assessment of damages must be assigned in the motion for a new trial. Section 314 of the Code, providing grounds for a new trial, gives in the fifth subdivision, "Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property." Here is a special ground assigned, evidently not meant to be included within the others; and where the error complained of was the failure to allow interest, it is very clear that such error should have been called by this appropriate assignment to the attention of the trial court, where it could have been readily

corrected. Great injustice would be done by permitting the very general assignment of insufficiency of evidence to cover such a point, and lead to the reversal of a judgment in this court without requiring the precise question to be called to the attention of the trial judge.

AFFIRMED.

THE other commissioners concur.

OLIVER MAGGARD V. CHARLES R. VAN DUYN ET AL.

FILED MAY 2, 1893. No. 4585.

1. **Appeal From County Court:** DISMISSAL IN APPELLATE COURT. An appeal from the county court to the district court should be dismissed upon proper motion when the transcript was not filed within thirty days from the date of the judgment, and no reason is shown for the delay.
2. **Record for Review:** BILL OF EXCEPTIONS: AFFIDAVITS used on the hearing of a motion in the district court cannot be considered in the supreme court unless embodied in a bill of exceptions.

ERROR from the district court of Lancaster county. Tried below before FIELD, J.

Edson Rich, for plaintiff in error.

Charles E. Magoon, contra.

IRVINE, C.

This was a case begun in the county court. A transcript for the purpose of an appeal was filed in the district court more than thirty days after judgment below. The only error assigned is the action of the district court in dismiss-

ing the appeal. According to repeated decisions of this court this action was right.

An affidavit appears in the transcript seeking to excuse the delay, but by still more numerous decisions it cannot be here considered because not preserved in a bill of exceptions.

AFFIRMED.

THE other commissioners concur.

HENRY & COATSWORTH COMPANY, APPELLANT, V. D. R. MCCURDY ET AL., APPELLEES.

FILED MAY 2, 1893. No. 4696.

1. **Mechanics' Liens:** PRIORITY: PROOF. In a suit to foreclose a mechanic's lien, where other incumbrancers by answer deny the facts necessary to create the lien, it is necessary for the mechanic's lienor, in order to establish his lien as prior to such other incumbrances, to prove such facts, including the time of commencing labor or of furnishing material.

2. **Pleading:** MORTGAGE FORECLOSURE. An objection to the omission in a petition to foreclose a mortgage, of the averment that no proceedings have been had at law for the collection of the debt secured thereby, must be made prior to the rendition of a decree, as it relates to matter in abatement, and not to a fact affecting the validity of the mortgage.

3. ———. Whether a petition may at any time be attacked because of the omission of such averment, by another incumbrancer seeking to foreclose his lien in the same action, *quære.*

APPEAL from the district court of Lancaster county. Heard below before CHAPMAN, J.

Samuel J. Tuttle, for appellant.

Leese & Stewart, H. F. Rose, and *Atkinson & Doty, contra.*

IRVINE, C.

The plaintiff commenced this action for the purpose of foreclosing a mechanic's lien which it claims upon lots 6 and 7, in block 101, of University Place, Lancaster county. The defendant, the Building & Loan Association of Dakota, filed its answer setting up a mortgage upon the same property, executed to it by the defendant Starr, to secure a loan from the association to Starr. The defendant, the Wesleyan University, filed an answer and cross-petition setting up a mortgage to it to secure unpaid purchase money upon the property, and praying a foreclosure. The defendant Starr seems to have filed an answer, but by leave of the court withdrew it before trial. The other defendants seem not to have appeared. The decree adjudges the mortgage of the building association to be a first lien upon the premises; that of the Wesleyan University a second lien, and establishes the lien claimed by plaintiff as a third lien. The plaintiff appeals, and the only questions presented relate to the priorities of these three incumbrances. A number of questions are presented in the arguments of the parties, but a consideration of two of them disposes of the case. The existence of the lien claimed by plaintiff was denied by the answers of both the Building & Loan Association and the university. The answer of the Building & Loan Association denies generally every allegation in the petition not in the answer expressly admitted, and makes no admission upon the subject except an argumentative admission that some lumber was furnished at some time for the erection of a building upon the lots described. The answer of the university in terms denies each averment of the petition in regard to the selling, furnishing and delivery of material by the plaintiff. The facts constituting a lien in favor of plaintiff were therefore put in issue by both these defendants, and it devolved upon the plaintiff to establish among other things that it furnished

the material described in its petition, or at least some portion thereof, for the erection of the house upon the premises described, and that it furnished such material, or began to furnish the same, at such a time as to entitle it to the priority claimed by it over the mortgages of the answering defendants.

Mr. Doolittle, the manager of plaintiff company, testified in direct examination that plaintiff furnished lumber to Starr & McCurdy for building houses upon the lots mentioned; that this was done during the season of 1889, "something previous to January 1. I do not remember the exact date, but I think in September, and about the commencement of the account." That this lumber was furnished according to the days and dates of the itemized account. On cross-examination he states:

A. I know the lumber was delivered there.

Q. Delivered where?

A. At the houses.

Q. At these three houses?

A. Yes, sir.

Q. How do you know that fact?

A. I know from our teamsters and delivery tickets, etc.

Q. Did you have no personal knowledge about it?

A. No, sir; no further than that.

Q. So, that so far as this material is concerned as to its getting into these houses, you have no knowledge on the subject?

A. No personal knowledge.

Again:

Q. I believe you testified in your cross-examination that you had no personal knowledge of any of this material being delivered to this property to be put into these houses?

A. I did not go with the material.

Q. You do not know whether it was taken there or not of your own knowledge?

A. No, sir; not of my own knowledge.

Q. Did you keep the books of the Henry & Coatsworth Company?

A. No, sir.

Q. Have you any personal knowledge as to whether this account, as to the items, and as to the time they purport to have been delivered—whether it is correct?

A. Nothing only as comes from my books.

Q. And you do not know whether they are kept correct or not? You did not keep them?

A. No, sir; I didn't keep them.

Q. Then, as a matter of fact, you don't know whether these items were furnished at the time the lien indicates or not?

A. Only what the books indicate.

Q. Only as you hear from others—you can't testify as to the correctness of the books?

A. No, sir; I have a book-keeper, and that is his business.

Q. Did you make out these accounts?

A. No, sir; they are made out by the book-keeper. That is supposed to be a copy of our book.

Q. Do you know whether it is a copy of your books or not—of your own knowledge?

A. I do not. I could not swear that it was.

At a later point in the trial certain books were produced by Doolittle, and, after some preliminary testimony, offered in evidence. They were excluded, and properly excluded, and no exception was taken.

There was also testimony from Mr. Doolittle showing the method of keeping the books and disclosing the fact that the plaintiff did have in its possession delivery tickets, which might, at least, have been used as memoranda to refresh the memory of the proper witnesses had they been called. Mr. Gascoigne was called and testified that it was his business to superintend all the loading and making out the dray tickets and to watch the men, and to make entries

in the books of original entries as to the lumber that goes out. His examination stops at that point and no facts relating to this transaction were sought to be elicited from him. The defendant Starr was called by the plaintiff, he being one of the persons who contracted for the lumber and built the houses. He testifies that the plaintiff rendered an account of the lumber, but that it was not correct; that it was figured too high, and there were mistakes in the items, amounting in all to three or four hundred dollars. He further testifies that he is not able to state when the lumber was delivered, or whether any of the items were correct, because lumber was being furnished for a number of houses, and the plaintiff was constantly delivering lumber to houses other than that for which it was ordered, requiring frequent interchanges of lumber delivered at one place to another. McCurdy corroborates Starr as to mistakes in the account.

The foregoing is the substance of all the testimony upon the subject. It will be seen that Mr. Doolittle's testimony was the purest hearsay and cannot be considered; and the only other testimony tends to discredit instead of to support the bill of items attached to the petition. There is an absolute and total failure of evidence to show that any particular item of material was ever furnished for this house, to say nothing of the time of delivery. The mortgages became liens upon the property upon the 6th of December, 1889, at the latest, and it was necessary for the plaintiff to prove that material was furnished before these liens were filed for record.

Another point suggested in the briefs perhaps requires notice. The cross-petition of the Wesleyan University contains no averment as to whether any proceedings had been had at law for the recovery of the debt. Such an averment is required by section 850 of the Code. No objection was raised to the cross-petition in the court below upon this ground, so far as the record discloses, and it cannot

for the first time be raised here. If there was a failure to allege a fact essential to this defendant's case, an exception to the rendition of judgment upon its cross-petition might present the question for review, but we do not regard this allegation so essential as to invalidate the judgment rendered upon a petition not containing it. In *Carlow v. Aultman*, 28 Neb., 672, it was held that the omission of this allegation was not sufficient ground to authorize the district court to open up a judgment after the term at which it was rendered. This conclusion could hardly have been reached had the court considered the averment in question one necessary to the support of the judgment. The pendency of proceedings at law to recover the debt secured by mortgage is under our law in fact merely matter in abatement, which the Code requires to be negatived in the petition. It is not matter in bar, and does not affect the validity of the mortgage. It may indeed be questioned whether an incumbrancer seeking to establish and foreclose his incumbrance in the same action could at any time raise the question, the provision being for the benefit of the mortgagor.

The lien of plaintiff stood confessed by the failure of the owners of the property to answer the petition, and there was some evidence tending to show that they had admitted the amount claimed to be correct. While these admissions could not be received as against the mortgagees, and do not affect the question first discussed in this opinion, they were sufficient to ascertain the amount due as against the owners, and the lien was therefore properly allowed as one junior to the mortgages. The decree of the district court was right and is

AFFIRMED.

THE other commissioners concur.

HENRY & COATSWORTH COMPANY, APPELLANT, V. EDWARD I. STARR ET AL., APPELLEES,

AND

HENRY & COATSWORTH COMPANY, APPELLANT, V. EDWARD I. STARR ET AL., APPELLEES.

FILED MAY 2, 1893. NOS. 4697, 4698.

APPEALS from the district court of Lancaster county. Heard below before CHAPMAN, J.

Samuel J. Tuttle, for appellant.

Leese & Stewart, H. F. Rose, and *Atkinson & Doty, contra.*

BY THE COMMISSION.

These two cases present precisely the same questions, and were submitted on the same bill of exceptions and briefs as the case of *Henry & Coatsworth Company v. McCurdy*, 36 Neb., 863, and are affirmed for the same reasons.

AFFIRMED.

ALBERT W. JANSEN ET AL. V. JOHN C. WILLIAMS.

FILED MAY 3, 1893. NO. 4820.

1. **Instructions** should be given clearly, concisely, and without contradictory statements of the rules by which the jury should be governed. If, however, the instructions are not in compliance with this requirement, the verdict will not be set aside, if, upon the evidence, no other verdict could be sustained.

2. **Principal and Agent**: SALE OF LAND: PURCHASE BY AGENT. An agent is required to disclose to his principal all the infor-

mation he has touching the subject-matter of the agency; and his relation to his principal forbids his becoming a purchaser thereof for his own benefit in any way without the full knowledge by the principal of this fact, and the principal's acquiescence therein with such knowledge. The burden of proving such knowledge and acquiescence is upon the agent.

3. ———: DUTIES OF AGENT: COMMISSION. A commission cannot be collected by the agent for his services as such if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency.

ERROR from the district court of Lancaster county. Tried below before TIBBETS, J.

Jeffrey & Rich, for plaintiffs in error.

Adams & Scott, contra.

RYAN, C.

This action was brought by the defendant in error to recover the sum of $100, retained as commission from the proceeds of the sale of real property, effected by the plaintiffs in error. The petition alleged the employment of plaintiffs in error to sell said real property for the sum of $3,000, and that the plaintiff named in said petition meantime reserved for himself the right to sell said property, if he met with an opportunity to do so, before the same should be sold by plaintiffs in error; that soon after such employment the plaintiff below entered into negotiations with one E. T. Hartley for the sale of said property, and was about to sell said property to said Hartley for the sum of $3,300; that during such negotiations with said Hartley, plaintiffs in error, for the purpose of preventing the defendant in error from making said sale, and wrongfully compelling the defendant in error to pay plaintiffs in error a commission of $100, induced said Hartley to abandon his negotiations with defendant in error and agree to pay to them, the plaintiffs in error, $3,000 for

said property; and that thereupon plaintiffs in error represented to defendant in error that they had sold said property for $3,000 to a good responsible party, and induced the defendant in error to execute a deed to Albert W. Jansen, one of the plaintiffs in error, and defendant in error executed the same believing that said grantee was another than the said plaintiff in error, and thereby plaintiffs in error deceived and defrauded the defendant in error, to defendant in error's damage in the sum of $100.

The answer admitted the placing of said property in the hands of plaintiffs in error for sale at $3,000, but alleged that said E. T. Hartley was obtained by plaintiffs in error as an original purchaser, to whom they sold the property without any knowledge of any previous negotiations with defendant in error, and that the deed was taken to said Jansen only for the purpose of securing money advanced to said Hartley, and that the acts in connection with said transaction were in good faith. To this answer there was a reply in the nature of a general denial.

The testimony was conflicting as to some matters which are deemed of minor importance, but as to such as were essential to the determination of this case the difference was but slight. It was fairly deducible from the testimony that Williams employed Jansen and Murphy to sell the real property in question; that he afterwards had negotiations with said Hartley for an exchange of said property for property owned by Mr. Hartley, of the fair value of $3,300; that Hartley, pending these negotiations, went to Messrs. Jansen and Murphy, and, learning from them that the property could be purchased from them for $3,000, he dropped the negotiations with Williams; that for some reason the title to the property was taken from Williams and wife to A. W. Jansen, one of the plaintiffs in error, whose identity with his agent of that name Williams testifies he was unaware of when said deed was executed; that Williams inquired of Murphy who was the purchaser, and

was informed by Murphy that the purchaser did not wish his name known in the matter, and therefore did not disclose it; that Jansen, in answer to the same inquiry of Williams, met it with the same refusal, at the same time saying that it made no difference, as the party was good. It was testified by Jansen and Murphy on the trial in the district court that the reason the title was taken in Jansen's name was, that Hartley was not able just then to advance the money to make the cash payment, and therefore this money was advanced by plaintiffs in error to insure the present consummation of the trade, rather than to wait ten or twelve days until Hartley would have money which would then be due him. Mr. Murphy fixed the date on which Mr. Williams consented to accept $3,000 for the property at September 7, and testifies that, on account of defects in the field notes, suggested by plaintiffs in error, the deeds were not executed and delivered until about three weeks after that date. It is not shown by the testimony when Mr. Hartley obtained his money and paid it to plaintiffs in error. The fact that the settlement of the matter was held in abeyance until the expiration of a greater time than was necessary for Mr. Hartley to obtain his money, on his own estimate, to repay Jansen and Murphy, is possibly of no significance, and yet it might have been one circumstance contributing to the injury complained of. It would not be strange, or wholly illogical, if from the circumstance that the title was not really taken in the name of Jansen until after the time Hartley's money was due, the jury should have inferred that delays were interposed by plaintiffs in error to prevent the consummation of the trade until Hartley put up his own money with eight per cent per annum for the interim to repay Jansen his advancement.

Upon the admission or rejection of evidence no serious question for our determination was presented. The scope of the cross-examination to be allowed is largely in the discretion of the trial judge, and we cannot see that such

discretion was improperly exercised. As the only alleged error upon that score is sufficiently met by this general observation, it will not receive further attention.

There were some instructions given at the request of the plaintiffs in error which presented the law more favorably to the plaintiffs in error than the facts warranted, but of these the plaintiffs in error cannot complain. These instructions based the rights of the plaintiffs in error to a commission upon but a partial statement of the facts upon which such rights depended. For instance, the first paragraph of the instructions given at the request of the plaintiffs in error was as follows: "You are instructed that if you find from the evidence that defendants Jansen and Murphy negotiated the sale of the plaintiff's property to Hartley, or to Jansen for Hartley, upon the terms stipulated by Williams at the time he placed the property in their hands for sale without any knowledge of the previous negotiations between plaintiff and Hartley, then your verdict should be for the defendants." This instruction leaves out of consideration the fact that Jansen was the agent of Williams, who, as such, was bound to obtain for his principal the best price obtainable. It further recognizes the unqualified right of an agent to purchase property of a principal placed in his hands for sale. It gives the agent authority to deal with the property absolutely as he sees fit, provided he obtains the price fixed by the principal, and has no knowledge that the principal is in negotiations for a better price, and this to the extreme of buying the property himself, provided he buys for some one else, a very slight guaranty of protection to the principal. Most likely if plaintiffs in error had been successful in the district court these considerations would have necessitated a reversal of the judgment. In this connection it might not be amiss to suggest that the trial judge has a duty to perform, as well in the refusal of pernicious instructions as in giving correct ones. The jury is supposed to obtain

its sole ideas of the law applicable to the case from the presiding judge. Upon him therefore devolves the duty of clearly and concisely instructing rather than hopelessly confusing. The statute requires the instructions to be in writing, that they may be prepared with due deliberation, and with the exactness necessary to assist jurymen unlearned in the law to apply principles perhaps for the first time brought to their attention. These instructions should therefore be clear and concise, and, above all things, should be exact, and free from contradictions. These remarks are made in this connection, for, with the instructions referred to above, there were given others entirely free from objection.

At the request of the defendant in error the court instructed the jury as follows: "An agent ought as far as possible to represent his principal, and to the best of his ability he should endeavor to successfully accomplish the object of his agency. It is also his duty to keep his principal fully and promptly informed of all the material facts or circumstances which come to his knowledge, and since he is expected to represent his principal, he cannot have a personal interest adverse to the interest of his principal, and if he deals with the subject-matter of the agency, the profits will, as a general rule, belong to the principal and not to the agent. In all things he is required to act in entire good faith towards his principal. There are duties which the law imposes upon an agent without any express stipulations on the subject, and one of these duties of an agent is to keep his principal informed of his acts, and to inform him within a reasonable time of sales made, and to give him a timely notice of all facts and circumstances which may render it necessary for him to take measures for his security. An agent cannot act for his principal and for himself in the same transaction by being both buyer and seller of property, and has no right to act as the agent for others for the purchase of property without the

knowledge or consent of such owner, nor to take any advantage of the confidence which his position inspires to obtain the title in himself. If you find that the defendants were the agents of the plaintiff for the sale of the property mentioned in the petition, and that in making the sale they purposely kept from the plaintiff any of the material facts touching said sale for the purpose of subserving their own interest, and intended to and did keep the plaintiff in the dark as to such facts until after the said sale was consummated and deed executed by said plaintiff, then I instruct you that they are not entitled to a commission for selling the same."

In *Stettnische v. Lamb*, 18 Neb., on page 627, is this language: "The rule is well settled that a party will not be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account." This statement was sustained by several authorities cited, and of its correctness there can be no doubt. In the light of adjudged cases and of the text-books, therefore, let us see what duty the plaintiffs in error had to perform towards the defendant in error in respect of the real property, which was the subject-matter of the agency between them. Upon this subject the following language is found in Pomeroy's Equity Jurisprudence, section 959: "In dealings without the intervention of his principal, if an agent, for the purpose of selling property for the principal, purchases it himself, or an agent, for the purpose of buying property for the principal, buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable; it will always be set aside at the option of the principal; the amount of consideration, the absence of undue advantage, or other similar features, are wholly immaterial; nothing will defeat the principal's right of remedy, except his own confirmation after full knowledge of all the facts."

In *Porter v. Woodruff*, 36 N. J. Eq. Reports, on page 179, *et seq.*, the following language is found: "The general interests of justice and the safety of those who are compelled to repose confidence in others alike demand that the courts shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor if employed to purchase, can he be himself the seller. The moment he ceases to be the representative of his employer and places himself in a position towards his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his service requires and his duty to his principal demands. He is no longer the agent, but an umpire; he ceases to be the champion of one of the contestants in the game of bargain, and sets himself up as a judge to decide between his principal and himself what is just and fair. The reason of the rule is apparent; owing to the selfishness and greed of our nature, there must, in the great mass of the transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and buyer, and universal experience has shown that the average man will not, where his interests are brought in conflict with those of his employer, look upon his employer's interest as more important and entitled to more protection than his own. In such cases the courts do not stop to inquire whether the agent has obtained an advantage or not, or whether his conduct has been fraudulent or not, when the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acts for himself, and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative, they do not pause to speculate concerning

the merits of the transaction, whether the agent has been able so far to curb his natural greed as to take no advantage, but they at once pronounce the transaction void, because it is against public policy. The salutary object of the principle is not to compel restitution in case fraud has been committed, or an unjust advantage gained, but to elevate the agent to a position where he cannot be tempted to betray his principal. Under a less stringent rule, fraud might be committed or unfair advantage taken and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it or prove it in such a manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed and the prohibition against the agent acting in a dual character is made broad enough to cover all his transactions. The rights of the principal will not be changed nor the capacities of the agent enlarged by the fact that the agent is not invested with a discretion, but simply acts under an authority to purchase a particular article at a specified price, or to sell a particular article at the market price. No such distinction is recognized by the adjudications, nor can it be established without removing an important safeguard against fraud. (*Benson v. Heathorn*, 1 You. & Col. [Eng.], 326; *Conkey v. Bond*, 34 Barb., 276, 36 N. Y., 427.)

In *Ruckman v. Bergholz*, 37 N. J. L., 440, is found the following language: "The judge, distinguishing this case from one where the price was left open to the negotiations of the agent, instructed the jury that though the plaintiff was interested in the purchase when it was made, he might, nevertheless, recover his commissions as agent, notwithstanding the defendant was not aware of the existence of such interest. In this there was error, for it is a fundamental rule that an agent employed to sell cannot himself be a purchaser unless he is known to his principal to be such. (Dunlap's Paley on Agency, 33; Story, Agency, sec.

210; and other cases cited.) And this rule is not inapplicable, nor is it relaxed when the employment is to sell at a fixed price, for it springs from the prohibitory policy of the law adopted to prevent the abuse of confidence and to remove temptation to duplicity. It requires a man to put off the character of agent when he assumes that of principal."

Mechem, Agency, sec. 455, states the rule as follows: "The agent will not be permitted to serve two masters without the intelligent consent of both. As is said by a learned judge, so careful is the law guarding against the abuse of fiduciary relations that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal or the like. All such transactions are void as it respects the principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds upon in holding such transactions void. *Fidelity in the agent* is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he might be tempted by his own private interest to disregard that of his principal." (Citing *People v. Township Board of Overyssel*, 11 Mich., 222.) "This doctrine, to speak again in the beautiful language of another, has its foundation not so much in the commission of actual fraud as in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation but deliver us from evil,' and that caused the announcement of the infallible truth that 'a man cannot serve two masters.'"

These quotations we shall properly close with the language of Story on Agency, sec. 210, quoted with the approval of this court in *Englehart v. Peoria Plow Co.*, 21 Neb., 48: "In this connection, also, it seems proper to

state another rule in regard to the duties of agents, which is of general application, and that is, that in matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves. This rule is founded upon the plain and obvious considerations that the principal bargains in the employment for the exercise of the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. It is a confidence necessarily reposed in the agent that he will act with a sole regard to the interests of his principal as far as he lawfully may; and even if impartiality could possibly be presumed on the part of the agent where his own interests are concerned, that is not what the principal bargains for, and in many cases it is the very last thing which would advance his interest. If then a seller were permitted, as an agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other, and thus a temptation, perhaps in many cases too strong for resistance by men of flexible morals, or hackneyed in the common devices of worldly business, would be held out, which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions that a positive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity."

It is unnecessary to quote further illustrations of the correctness of the instructions given the jury at the request of the defendant in error. The same principles announced in these instructions pervade all the text-works and the decisions of the courts which have to deal with the relations of principal and agent. In none of them is recognized the right of the suppression of important facts of which the principal had a right to be informed as a part of the "secrets of the real estate business," as was claimed by plaintiff in error Murphy in his testimony. The evidence fully sustains the verdict which was rendered by the jury.

Indeed, a verdict different would probably of necessity have been set aside, as has been shown by abundant citation of text-writers and authorities. The instructions clearly gave the law to the jury as applicable to the evidence, and the judgment of the district court must therefore be

AFFIRMED.

THE other commissioners concur.

JULIUS FREIBERG ET AL. V. JULIUS TREITSCHKE ET AL.

FILED MAY 3, 1893. No. 4630.

Promissory Note: ACTION TO RECOVER: CONSIDERATION: COMPOSITION AGREEMENT: EVIDENCE: INSTRUCTIONS. The main issue in this case being whether the note sued upon was given by the defendant as payment for the other fifty per cent due from defendant to plaintiffs (fifty per cent having already been paid upon a general composition agreement of Treitschke with his creditors), or whether said note was given plaintiffs for services by plaintiffs' agent rendered for defendant, independently of such agency; it was proper to instruct the jury: 1. That if plaintiffs with Treitschke entered into such a composition agreement, a note taken for the fifty per cent by said composition rebated would be a fraud upon the rights of the other compounding creditors, and that payment thereof would not theref re be enforced. 2. Instructions as to the rights of plaintiffs, upon plaintiffs' theory of the transaction, properly required upon the evidence adduced that the jury should "believe from the testimony that such transaction was made in good faith, and not as a device to evade the effect of a payment to the plaintiffs directly."

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

Charles Ogden, for plaintiffs in error.

Howard B. Smith and *Clinton N. Powell, contra.*

RYAN, C.

On the 5th day of January, 1889, the plaintiffs in error filed in the district court of Douglas county a petition for the recovery of the amount, with interest and protest fees thereon, of the following promissory note:

"$1,162.80. OMAHA, NEBRASKA, March 11, 1884.

Four months after date I promise to pay to the order of Mess. Freiberg & Workum eleven hundred sixty-two $\frac{80}{100}$ dollars, at the United States National Bank; value received. JULIUS TREITSCHKE."

This note was indorsed in blank by August Doll.

The defendants admit the making and indorsement of the note, but claim that the same was given under an agreement for a settlement with the defendant Treitschke with all his creditors upon the basis of a certain percentage, which is hereafter detailed in the testimony; that under such agreement the plaintiffs had bound themselves ostensibly, to accept fifty per cent of the amount of their claim, and that the agent of the plaintiffs, with full authority to act in the premises, and for the purpose of securing the claim of the plaintiffs in full, agreed, without the knowledge of the other creditors of Treitschke, to procure a settlement and release from all of his creditors of their claims against him upon the basis of a certain percentage of their claims; but that in considertion thereof the plaintiffs should be paid in full of their claim; and that the plaintiffs were paid fifty per cent of their claim in cash, and that the note in suit was given for the remaining fifty per cent in pursuance of a secret agreement made between the agent of plaintiffs and the defendant Treitschke, and for no other consideration.

The plaintiffs denied that Mr. Brecher, the alleged agent, had any authority from them to enter into negotiations

with the defendant Treitschke towards compromising their claim, except as contained in their written agreement to compromise, which was introduced in evidence, and is hereinafter referred to. They also denied that they knew of any arrangement being entered into between the said Brecher and the defendant Treitschke for the purpose of compounding with his creditors, except as shown by the agreement for compromise, and they averred that whatever Brecher did beyond that was without the knowledge, authority, or consent of plaintiffs. They also denied that they had ever received any amount of money from Treitschke upon their claim, and averred that no part of the one-half of their claim, provided for by the compromise agreement, had ever been paid to them.

The evidence was mainly directed to the terms of the arrangements entered into at the date of the above copied note. The testimony of Treitschke was, that Arnold Brecher, the agent of plaintiffs, sold him the goods from which arose his indebtedness to plaintiffs, to the amount of $2,325.62; that afterwards, to-wit, in December, 1883, the witness became financially embarrassed, his creditors commencing attachment suits against him at that time; that among these attaching creditors were the plaintiffs; that in December, 1883, Arnold Brecher came to Omaha with reference to the attachment suit of plaintiffs against the witness then pending and had a conversation with the defendant Treitschke with reference to compounding with Treitschke's creditors; this conversation, Treitschke testifies, was to the effect that Brecher thought he could get all the creditors who had made attachments on the stock of goods to settle at fifty cents on the dollar, and that he could make settlement with those who had no attachments at twenty-five cents on the dollar. With reference to the claim of plaintiffs, as testified to by Treitschke, it was agreed that Treitschke should pay their claim in full if Brecher brought about settlements with the other creditors of Treitschke on

the terms above talked of, and that this part of the agreement was made a secret, that no one was to know that plaintiffs got their full amount, while the other ones got but a half and a fourth. Brecher was advanced $200 for the expenses of the trip which he was to make for the above purpose, and for his hotel bills, etc. The amount owing by Treitschke at that time was between nine and ten thousand dollars.

On the other hand, Arnold Brecher testified as to the above conversation, that Treitschke told him that it was a pity to see all these goods go; he would be ruined, and have nothing any more; that his wife would not consent that the creditors should get the money from these attachment suits; that he would fight them, and it would take a year or so to determine whether they would be entitled to the money or the attaching creditors should, and he asked witness whether something could not be done whereby he could make a settlement with the creditors. Witness Brecher testified that he answered that he thought something might be done; that he would think it over and let him (Treitschke) know in the afternoon. The conversation which accordingly took place that afternoon was detailed by Mr. Brecher in the following language (to witness Brecher):

Q. You went up there in the afternoon; what did you then say to Treitschke?

A. I told him (Treitschke) I thought I would be able to secure him a settlement with his creditors on the basis of fifty cents on the dollar with those which were secured by the attachments, and about forty with those that did not have security that were simply suing without an attachment; that I had to go and see these parties personally in order to get a settlement with them; for that purpose he employed me to do so.

Q. What did you tell him would be your compensation, if anything, for the work you were to do?

A. I asked him to pay me one-half of the claim of Freiberg & Workum.

Q. What did you say in regard to your claim of Freiberg & Workum—in regard to the claim?

A. I told him at the time we had the conversation that he knew that I had guaranteed his account, and that I would be loser in that proportion. If he wanted me to get him a settlement I would undertake to get it, provided he paid me for my services fifty per cent of their claim, because they would agree to take fifty per cent of the other creditors.

Q. What did he say to that?

A. He accepted it very cheerfully.

Q. What else did he pay you?

A. He was to pay my traveling expenses, and he did pay me $200.

The above was the only evidence which presented direct contradictions. There was no dispute that at the time there was prepared, in writing, a form of composition agreement to be entered into by the creditors of Treitschke, which agreement was afterwards signed by the greater part of his creditors, both in number and amount. This agreement, omitting the preamble, was as follows:

"In consideration of the premises, and for the purpose of saving litigation and expense, said Julius Treitschke proposes and hereby agrees to and with all his said creditors to pay his said creditors and compromise their attachments and claims, as follows, to-wit: to such creditors as are secured by attachment or otherwise, fifty cents for and upon the dollar of their respective claims; to such creditors as are unsecured, forty cents upon the dollar of their respective claims; said amounts to be paid in two installments, for which the said Treitschke is to give good bankable notes, to-wit, one-half in sixty days, and one-half in four months with approved security; provided, however, that upon the execution and delivery to each creditor ac-

cording thereto by said Treitschke of the notes hereinbefore referred to for the amount to be paid said creditor under this agreement, if said note shall be accepted as good and bankable, then said creditors shall in writing release and discharge said Treitschke from any and all attachments or claims of every nature, except said note. We, the undersigned creditors of said Julius Treitschke, hereby accept the above proposition and agree to settle and compromise our respective claims on the terms and in the manner herein set forth."

It does not clearly appear why the percentage was fixed at forty as to the creditors who had not attached instead of twenty-five per cent as testified to by Treitschke, but that figure was acquiesced in by him without demur, so far as the evidence shows. On March 11, 1884, the composition agreement having been secured by Brecher to the satisfaction of Treitschke, the note in suit was by Treitschke made, and by August Doll indorsed for an amount equal to one-half of the claim of plaintiffs against the defendant Treitschke; the other one-half was remitted by draft to plaintiffs. One of the plaintiffs testified that this note and remittance were forwarded by Brecher in discharge of his liability as guarantor, a liability to which Brecher referred in his testimony, as will be seen by the quotation above made.

Upon the issues made up, and in the light of the above evidence, for none other of special importance was given, the court instructed the jury as follows:

"That the issue for you to pass upon in this case is, did the plaintiffs agree with the defendant Treitschke and with his other creditors that they, the plaintiffs, would with the other creditors accept one-half of the amount of their claims in full, and would, upon the receipt of such proportion of their claims, release Treitschke from his obligation thereon, and at the same time have a secret agreement with Treitschke that they, the plaintiffs, should be repaid in

full? If you find that such arrangements were made between the plaintiffs and Treitschke, that the plaintiffs received from Treitschke the one-half of their claim, and that the note in suit was given by the defendant for the other one-half at the time said compromise was made, then and in that case your verdict should be for the defendants, for the law will not permit a recovery to be had upon an obligation given under such circumstances.

"Second—If, however, you find from the testimony that the plaintiffs did not make, or authorize to be made, in their name or on their behalf any agreement by which they were to receive anything more than the proportion provided for by the compromise agreement, and that they have received nothing upon their claims but the note in suit, and that said note was given by the defendants and accepted by the plaintiffs in compliance with the agreement for compromise, then the plaintiffs are entitled to your verdict for the amount due on the note.

"Third—The plaintiffs are bound by the acts of their agent Brecher only so far as such acts were within the general scope of his authority as such agent, or were afterwards ratified and adopted by the plaintiffs. If, therefore, the plaintiffs, after hearing what had been done by Brecher in regard to the settlement of their claim against Treitschke, accepted the benefits of such settlement without objection; if you find that they did afterwards learn of the action of Brecher, and that with such knowledge they accepted the benefits of such action, they thereby adopted and ratified the action of Brecher, and are bound thereby, even though he, Brecher, was not authorized at the time by the plaintiffs to do all he did at the time the compromise agreement was made.

"Fourth—If you believe from the testimony that the defendant Treitschke agreed with Brecher to pay him, as his individual compensation for his services in procuring the signatures of Treitschke's creditors to the agreement,

an amount equal to one-half of the claim which plaintiffs held against him, such agreement would be valid and binding between Treitschke and Brecher, and if as a result of such agreement you shall find that Treitschke paid to Brecher the amount stipulated for, such payment cannot be charged against plaintiffs as a payment on their claim against Treitschke; provided you believe from the testimony that such transaction was made in good faith and not as a device to evade payment to the plaintiffs directly.

"Fifth—If, however, you find from the testimony that the purpose of such agreement between Treitschke and Brecher (if you find such agreement was made) was a device resorted to for the purpose of securing to plaintiffs payment in full of their claim and that the plaintiffs received whatever money was paid under such agreement and credited the same upon the claim against Treitschke, then you will be justified in finding that such payment was made by Treitschke to the plaintiffs in satisfaction of one-half of their claim against Treitschke, and in that case the plaintiffs would not be entitled to recover on the note in suit, and your verdict should be for the defendants."

The fourth instruction above quoted is criticised because of the following language with which it closes: "provided you believe from the testimony that such transaction was made in good faith and not as a device to evade the effect of a payment to the plaintiffs directly." In instruction five above quoted the statement of the effect of finding that the agreement between Treitschke and Brecher was a device resorted to for the purpose of securing plaintiffs, etc., is also strenuously objected to by plaintiffs in error for the reason, as alleged, that there was no proof to justify such language. The plaintiffs' contention in the district court was, that the note sued upon was taken by Brecher for services to be rendered by him for the benefit of Treitschke; that plaintiffs were unaware of this agreement; that this note was given directly to plaintiffs and not to Brecher;

that by this note, with the draft forwarded plaintiffs by Brecher at the date of the note, the full amount of plaintiffs' claim against Treitschke was realized, and that this note was taken by Brecher and forwarded to plaintiffs in satisfaction of Brecher's guaranty of the debt of Treitschke to plaintiffs. Mr. Brecher himself testified that plaintiffs requested him to go to Omaha and watch their interest as against Treitschke after the attachment suits had been instituted against him for the collection of the same, and that he thereupon went to Omaha for the purpose indicated. It was while there as agent of the plaintiffs to look after this very claim that the agreement was made between Brecher and Treitschke as to securing a compromise between Treitschke and his creditors. According to Brecher's version of the matter he acted for the plaintiffs with reference to their claims as against Treitschke, settling for fifty per cent of plaintiffs' claim; at the same time he released plaintiffs' right to the other fifty per cent, which he took himself in consideration of his services in procuring his principals and other creditors to approve of the general rebate of fifty per cent.

In view of this unfortunate combination of circumstances neither Brecher nor his principals—the plaintiffs in this suit—have just cause to complain that the court's instructions to the jury contained the language above complained of, for upon the above circumstances and the other evidence in the case the jury could not be justly criticised if they found as a fact that plaintiffs' claim was paid in full, and that the attempt to account for established facts upon a different theory was a mere device; and without doubt such fact was clearly within the scope of the issues to be tried. There were other instructions given at the request of the defendants, of which complaint is made, but as the ground of criticism is covered by the foregoing considerations, such instructions and objections will not be considered in detail.

It will be necessary upon this branch of the case to say no more than that the law, as applicable to the issues made and evidence given, was correctly and very aptly stated to the jury in the instructions above quoted.

Plaintiffs, however, claim that the instruction which led the jury to discredit Mr. Brecher was erroneous and without foundation. It was as follows:

"Seventh—You are instructed that if you believe any witness has willfully sworn falsely to a fact, in respect of which he cannot be presumed liable to mistake, you may give no credit to any alleged fact depending upon his statement alone."

In view of what has already been said it can hardly be claimed that the court in this instruction had no reference to such facts as might fairly be deduced from the evidence; whether they were properly deducible was for the jury to say. It is barely possible that the criticism that the jury should have been told that the facts as to which the witness falsely testified must have been a material fact to justify the rejection of his evidence was a just criticism, if this was an original question. But it is not, for in *Dell v. Oppenheimer*, 9 Neb., 454, the syllabus states the rule thus: "Where a party swears falsely to a fact in respect of which he cannot be presumed likely to mistake, courts are bound to apply the maxim *falsus in uno, falsus in omnibus*, and to give no credit to any fact depending upon his testimony alone." The instruction complained of very closely follows this language; it embraces the same principle, leaving the rejection of the evidence optional rather than imperatively requiring it, as in the case cited. The rule stated in *Dell v. Oppenheimer*, *supra*, was referred to with approval in *Young v. Pritchett*, 10 Neb., on page 357. In *Atkins v. Gladwish*, 27 Neb., 847, the qualifying word, "material," was used, though the question considered did not arise upon the use of that word, but as to whether or not the words "unless corroborated" were indispensable. In *Walker v. Haggerty*,

30 Neb., 120, the word "material" had been used, and the contention there was, whether there was any evidence which could be deemed material; not whether the word was indispensable. In the case at bar, the evidence of Brecher was, without question, material. Indeed, without it plaintiffs' theory as to Brecher's having earned the note sued upon would have been entirely without support. Under these circumstances we cannot say that the district court erred in giving the instruction omitting the word "material." This disposes of all the questions raised, and it results that the judgment of the district court is

AFFIRMED.

THE other commissioners concur.

THOMAS SPELLMAN V. LINCOLN RAPID TRANSIT COMPANY.

FILED MAY 3, 1893. No. 4997.

1. **Street railway companies** are common carriers of passengers, and are liable as other common carriers upon common law principles.

2. **Common carriers,** for the protection of their passengers, are bound to the exercise of more than ordinary care; they are bound to exercise extraordinary care and the utmost skill, diligence and human foresight, and are liable for the slightest negligence.

3. **Street Railway Companies:** INJURY TO PASSENGER: PRESUMPTION OF NEGLIGENCE: BURDEN OF PROOF. Where a street railway car is derailed and a passenger injured thereby, the presumption is that the casualty was due to the negligence of the carrier, and the burden is on it to rebut that presumption.

4. ——: ——: ——: ——. Where a passenger, without negligence on his part, is injured by the derailment of the car in

which he is traveling, the carrier, to overcome the presumption of negligence caused by such derailment, must show that the accident was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented.

ERROR from the district court of Lancaster county. Tried below before TIBBETS, J.

Charles A. Burke and *Stearns & Strode*, for plaintiff in error.

Webster, Rose & Fisherdick, contra.

RAGAN, C.

Thomas Spellman brought suit in the district court of Lancaster county, Nebraska, against the Lincoln Rapid Transit Company, alleging that it was a corporation owning and operating a street railroad in the city of Lincoln, and that on the 23d of May, 1890, while he, Spellman, was a passenger upon one of the transit company's cars, the defendant, its agents and servants, so negligently and carelessly used, managed, and controlled the said car and the engine by which it was drawn, and so negligently and carelessly managed, used, looked after, and repaired said road and the tracks and switches connected therewith, that the car in which the plaintiff was carried, and the engine drawing the same, were allowed to run off the track; that in consequence of the car running off the track plaintiff was thrown with great force and violence against the seat and the railing thereof in front of him, and then back on the seat and edges thereof behind him, and was thereby permanenly injured, and that the plaintiff was careful and did not contribute to the injury in any degree whatever, and prayed for damages against the transit company.

The answer of the defendant denied all negligence of

itself or servants; admitted that the car was derailed as claimed by the plaintiff; denied that the plaintiff's injuries were permanent, and alleged that the plaintiff was suffering from a rupture of old and long standing. To this there was a reply, consisting of a general denial, by the plaintiff.

There was a trial to a jury and a verdict for the transit company, and Spellman brings the case here on error.

On the trial it was admitted that the transit company was a corporation and engaged in the carrying of passengers for hire. There was no pleading or proof that Spellman was guilty of any contributory negligence whatever. The motive power of the cars was a dummy steam engine. The evidence in the record does not afford any precise explanation for the cause of the car's leaving the track.

The trial judge, at the request of the transit company, gave the jury the following instruction:

"While it is the duty of the defendant, as a carrier of passengers, to exercise proper care for their safety, yet the defendant is not an insurer of the safety of its passengers and not liable to them for injuries resulting from such defects in its means of transportation as could not have been guarded against by the exercise of care on its part, and which are not due in any way to negligence on its part.

"The test of negligence in such cases is whether the defects ought to have been observed practically and by the use of ordinary and reasonable care."

The giving of this instruction is here assigned for error. It will be observed that the test submitted by the learned judge to the jury was whether the transit company used ordinary and reasonable care. The defendant in error was a common carrier of passengers for hire, and the question to be determined in passing upon the correctness of this instruction is, what degree of care is due from a common carrier of passengers to its passengers?

In Rorer, Railroads, vol. 2, p. 1434, it is said: "For njuries occasioned by negligence, street railways are liable,

as others are, upon common law principles, and no more so." And on page 1436 the same authority says: "The company is bound to the highest degree of care and utmost diligence to prevent their (passengers) injury." To the same effect, see Shearman & Redfield, Negligence, sec. 226.

In *Smith v. St. Paul City Street R. Co.*, 32 Minn., 1, the court say: "Street railway companies, as carriers of passengers for hire, are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence."

In *Sales v. Western Stage Coach Co.*, 4 Ia., 546, the rule is thus laid down: "Carriers of passengers for hire are bound to exercise the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill in either themselves or their servants." (See also *Bonce v. Dubuque Street R. Co.*, 5 N. W. Rep. [Ia.], 177.)

In *Derwort v. Loomer*, 21 Conn., 245, the supreme court of that state laid down the rule thus: "In the case of common carriers of passengers, the highest degree of care which a reasonable man would use is required by law."

This is also the doctrine of the supreme court of California. See *Wheaton v. North Beach & M. R. Co.*, 36 Cal., 590, where it is said: "Passenger carriers, by their contract, bind themselves to carry safely those whom they take into their coaches or cars, as far as human foresight will go; that is, for the utmost care and diligence of very cautious persons."

This is also the rule in New York. See *Maverick v. Eighth Ave. R. Co.*, 36 N. Y., 378, where it is said: "Passenger carriers bind themselves to carry safely those whom they take into their coaches, to the utmost care and diligence of very cautious persons." (See also *Carroll v. Staten Island R. Co.*, 58 N. Y., 126.)

This is also the doctrine of the supreme court of Colorado. (See *Denver, S. P. & P. R. Co. v. Woodward*, 4 Col., 1.)

This is the doctrine of the supreme court of the United States. In *Philadelphia & R. R. Co. v. Derby*, 14 How. [U. S.], 485, it is said: "When carriers undertake to convey persons by the powerful, but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence." This doctrine is reaffirmed by the same court in *Steamboat New World v. King*, 16 How. [U. S.], 469. See these cases cited and approved in *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S., 291, where the court say, in reviewing the cases cited above: "We desire to reaffirm the doctrine, not only as resting on public policy, but on sound principles of law." They also cite *New York C. R. Co. v. Lockwood*, 17 Wall. [U. S.], 357, and quote and affirm that case as saying: "The highest degree of carefulness and diligence is expressly exacted." Continuing, the court say: "The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it. The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business; but it does emphatically require everything necessary to the security of the passenger, and reasonably consistent with the business of the carrier and the means of conveyance employed.

"The rule, as gathered from the foregoing authorities, requires that a common carrier of passengers shall exercise more than ordinary care; it requires the exercise of extraordinary care; the exercise of the utmost skill, diligence, and human foresight; and makes the carrier liable for the slightest negligence."

It follows from the foregoing that the giving of the instruction complained of was error.

Spellman also assigns as error the giving by the court below, at the request of the transit company, instructions Nos. 2 and 3. They are as follows:

"2. If the jury find from the evidence that the defendant constructed and laid its track in a proper manner, and had the same made safe and in good condition at the place of the accident complained of before it was put into use, and from time to time since, at reasonably short intervals, had the same inspected and repaired by competent track men, specially employed for that purpose, and that the car upon which the plaintiff was riding at the time of the accident was derailed without any fault or neglect of the person or persons in charge thereof for defendant, and the same is not shown to have been caused by any defect in said road or car, then the plaintiff could not recover for any injuries caused thereby, and the jury should find for the defendant.

"3. Unless the jury find that the cause of the accident was some definite and proven defect of defendant's road, engines or cars, or negligence on the part of defendant's employes in operating the same, and could have been avoided by exercise of proper care in inspection and repair and operation, then the jury will find for the defendant. The mere fact that the defendant's car left the track and that plaintiff thereby sustained injury, is not sufficient to sustain a verdict for the plaintiff. To find a verdict for the plaintiff the jury must find that the defendant was in some way negligent in the care of its track or the running of its train, and the accident was caused by such negligence."

We shall consider these two instructions together. The court, in effect, told the jury by these instructions that, though Spellman might have been injured by the derailing of the car, that fact did not raise a presumption of negligence against the transit company; and further, it put the burden on Spellman of proving the particular cause of the derailment of the car.

In Rorer, Railroads, vol. 2, p. 1434, it is said: "In actions against * * * (street railways) for personal injuries caused by the cars leaving the track, the burden of proof is on the company to show that there was no fault or want of care on its part." See the same doctrine in Patterson's Railway Company Accident Law, sec. 439.

The supreme court of the United States in *Stokes v. Saltonstall*, 38 U. S., 181, decided: "In an action against the owner of a stage coach used for carrying passengers for an injury sustained by one of the passengers by the upsetting of the coach, the owner is not liable, unless the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage. * * * The fact that the carriage was upset * * * is *prima facie* evidence that there was carelessness or negligence or want of skill upon the part of the driver, and casts upon the defendant the burden of proving that the injury was not occasioned by the driver's fault." This case was affirmed by the same court in *New Jersey R. Co. v. Pollard*, 22 Wall. [U. S.], 341.

In *Cleveland, C., C. & I. R. Co. v. Walrath*, 38 O. St., 461, the supreme court of Ohio thus announces the rule: "On proof of injury sustained by a passenger on a railroad train by the falling of a berth in a sleeping car, and that the passenger was without fault, a presumption arises, in the absence of other proof, that the railroad company is liable;" citing and affirming *Iron R. Co. v. Mowery*, 36 O. St., 418.

The supreme court of Colorado in *Denver, S. P. & P. R. Co. v. Woodward*, 4 Col., 1, adopted the rule in this language: "If a passenger is killed in consequence of the overturning of a car, a presumption arises that the casualty was the result of negligence, but such presumption may be rebutted."

The supreme court of Minnesota in *Smith v. St. Paul C. R. Co.*, 32 Minn., 1, formulates the rule as follows:

"Where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises from the happening of the accident, and upon such proof the burden will devolve upon the defendant to exonerate himself by showing the existence of causes beyond his control, unless evidence thereof appears as part of the plaintiff's case."

In the course of the opinion the learned judge who delivered it said: "The severe rule which enjoins upon the carrier such extraordinary care and diligence is intended, for reasons of public policy, to secure the safe carriage of passengers, in so far as human skill and foresight can affect such result. From the application of this strict rule to carriers, it naturally follows that where an injury occurs to a passenger through a defect in the construction, or working, or management of the vehicle, or anything pertaining to the service, which the carrier ought to control, a presumption of negligence arises. The rule is therefore frequently stated, in general terms, that negligence on the part of the carrier may be presumed from the mere happening of the accident. The reason of the rule seems to be that from the very nature of things the means of proving the specific facts are more in the power of the carrier. The latter owning the property and controlling the agencies, is presumed to have peculiarly within his own knowledge the cause of the accident, which he might be interested to withhold, and might himself be unable to prove."

Such is the doctrine of the supreme court of Illinois as expressed by that court in *Peoria, P. & J. R. Co. v. Reynolds*, 88 Ill., 418, where it is said: "Where a railway car is thrown from the track whereby a passenger for hire is injured, the presumption is that the accident resulted either from the fact that the track was out of order, or the train badly managed, or both combined, and the burden is on

the company to show it was not negligent in any respect." This is also the rule in Indiana. (See *Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind., 462.) It is also the rule in New York. (See *Seybolt, Administratrix v. New York, L. E. & W. R. Co.*, 95 N. Y., 562.)

In *Feital v. Middlesex R. Co.*, 109 Mass., 398, the action was against a street railway company for injuries resulting to plaintiff from an accident that happened while she was traveling in one of the defendant's cars. The plaintiff, to prove her case against the street car company, called the conductor and the driver of the car as witnesses, and they testified that the car ran off the track, one wheel inside and one outside of the track; that they with others left the car in question; that there was no defect in the car, the wheels, or the track; that the car was going about five miles an hour; that when they lifted the fore-wheels on the track, everything was right, and the car went on; that the cars went over this place just before and just afterwards without trouble and they did not know what made the car run off.

At the close of plaintiff's case defendant requested a ruling that the plaintiff could not recover, because she had failed to show negligence on the part of the street railway company. This motion was overruled. The railway company then introduced evidence that the road where the accident occurred had been gone over by their superintendent the day before the accident, and that there was no defect in it; that the day after the accident he saw the place where it occurred, and that there was nothing the matter with the road then and had not been since. The railway company then requested the court to instruct the jury as follows:

"The plaintiff received her accident from the fact of the car's running off the track while traveling at a moderate rate. There is no evidence that the car was out of order. It is not claimed that the driver did anything wrong, or

that the rails were before, or then, or afterwards out of order. * * * Under these circumstances the plaintiff cannot recover. That there was no evidence of any negligence on the part of the railway company. That the burden of proof is upon the plaintiff to show how the accident happened, and what was the particular negligence that caused the same; and that, unless the plaintiffs had done so they could not recover."

The trial court refused to so instruct, and this refusal was assigned as error. On appeal to the supreme court it said: "On the trial of an action against a street railway corporation for injuring a passenger, proof that the injury was caused by a car's running off the track at a place where the track and the car were under the exclusive control of the defendants is sufficient to charge them with negligence, in the absence of any evidence that the accident happened without their fault."

In the light of the foregoing authorities the court erred in giving the instructions complained of.

In our review of this case we have not been unmindful of the suggestion of the counsel for defendant in error that the trial court cured instruction No. 3 complained of by instructing the jury of his own motion: "A train of cars, similar to that operated by the defendant, is presumed to stay upon the track, and if such train should, for any reason, leave the track, the presumption is that it left the track through some fault of the defendant." It is not necessary to determine now whether this construction conflicted with the ones complained of, nor whether one cured the other. The greatest difficulty with the instruction complained of lies in this: "Unless the jury find that the cause of the accident was some definite and proven defect of defendant's road, engine, or cars, or negligence on the part of the defendant's employes in operating the same, and could have been avoided by the exercise of proper care in inspection, repairing, and operation, then the jury will,

find for the defendant." Here the jury were told in effect that the burden was on the plaintiff below to prove the cause of the derailment. This is not the rule. There is no claim by any one, nor is there a word of evidence, that Spellman was guilty of any negligence whatever. The transit company was a common carrier of passengers. Spellman was a passenger on its train. The car on which he was riding was derailed. He alleged he was injured thereby, and there was evidence to support the allegation. He alleged that the derailment of the car was through the carrier's negligence. The law by presumption supplied that proof for him. This was enough. The burden was then on the carrier to rebut this presumption of negligence by showing that it was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented.

The judgment of the district court is reversed, and the cause remanded with instructions to the court below to grant the plaintiff in error a new trial.

REVERSED AND REMANDED.

THE other commissioners concur.

C. R. BATES ET AL. V. DIAMOND CRYSTAL SALT COMPANY.

FILED MAY 3, 1893. No. 4737.

Breach of Contract: MEASURE OF DAMAGES. In a suit for violation of a contract the courts will not, for the measure of the damages, apply a rule which would give plaintiff a greater compensation for a breach of the contract than he could receive had it been performed.

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

Fawcett, Churchill & Sturdevant, for plaintiffs in error.

Leavitt Burnham and *Kennedy & Learned, contra.*

RAGAN, C.

The Diamond Crystal Salt Company sued Bates, Wilcox & Streeter. The petition alleged that the salt company sold and delivered to Bates, Wilcox & Streeter, at their request, 375 cases of Diamond Crystal salt at an agreed price of eighty-five cents per case, amounting to $318.75, and that the defendants were entitled to a credit of $45 commission earned by them on the sale of salt, and prayed judgment for $273.75, with seven per cent interest from the 30th day of August, 1887, the day of the sale and delivery of the salt.

Bates, Wilcox & Streeter answered this petition, admitting the purchase and price of the salt, but alleged that the sale of the salt sued for was made by one Canan, the agent of the salt company, who, as an inducement for the defendants to purchase said salt, then and there gave them, Bates, Wilcox & Streeter, the exclusive agency for the sale of the plaintiff's salt in the state of Iowa and in all the states and territories in the United States west of the Missouri river, and then and there agreed to allow the defendants a commission of $45 per car load on all of said salt sold by them, Bates, Wilcox & Streeter, within said territory; that said agency should continue as long as the defendants, Bates, Wilcox & Streeter, faithfully represented the plaintiff and endeavored to sell its salt.

The defendants also alleged that the said Canan assured them that their commissions on the sale of salt would pay for the car load purchased long before the same would be due and payable; and that they, Bates, Wilcox & Streeter, relying upon the assurances and promises of the

said agent, bought the car load of salt sued for, accepted the agency, and at once commenced a canvass for the sale of salt and spent twenty-three days' time, paying their own expenses, and that they made sale of three car loads of salt, one to Witner Bros., one to Shenkberg & Co., and one to Warfield, Howell & Co., and had arrangements almost completed for the sale of seven other car loads of salt; that the salt company failed and refused to fill the orders for salt sold to Shenkberg & Co. and Warfield, Howell & Co., and without any notice to the defendants refused longer to recognize them as agents; and that by reason of the salt company's failure to deliver the car load of salt sold by plaintiffs in error to Warfield, Howell & Co., that firm lost confidence in plaintiffs in error and countermanded an order which they had given them for a car load of starch, on which the plaintiffs in error would have realized a profit of $60.

The plaintiffs in error counter-claimed, under said contract, as follows:

Commission on sale of car load of salt to Witner Bros.	$45 00
Commission on sale of car load of salt to Shenkberg & Co.	45 00
Commission on sale of car load of salt to Warfield, Howell & Co.	45 00
To time and expenses in soliciting orders for salt for plaintiff, for twenty-three days at $10 per day	230 00
To loss of profit on car of starch sold to Warfield, Howell & Co., said sale having been countermanded on account of failure of plaintiff to ship salt as agreed	60 00
	$425 00

and prayed that the $318.75 due to the salt company from them for the car load of salt purchased and sued for might be deducted from the counter-claim of $425, and that they, Bates, Wilcox & Streeter, have judgment for the difference.

To this answer there was a reply filed, consisting of a general denial.

It appears from the briefs on file that this action was originally brought in the county court, and then taken by appeal to the district court, where, on the issues stated above, trial was had, the jury finding a verdict for the defendant in error for the sum of $183.75 and $34.29 interest, or a total of $218.05.

Bates, Wilcox & Streeter bring the case here on error.

There is no error in this case of which the plaintiffs in error should complain. If there is any error, it is to the prejudice of the defendant in error.

The jury by its verdict allowed the plaintiffs in error a commission for the sale of three car loads of salt at $45 per car. This was all the salt that they had sold, and under the contract they pleaded they were only to have commissions on the amount of salt actually sold by them.

There was no error in the court's refusing to permit the plaintiffs in error to put in testimony to prove their counterclaim for hotel bills, traveling expenses, time spent in canvassing, and profits on the car load of starch. If the contract which they plead was made as they claim, they were not entitled under that to anything but commissions on sales actually made; they were not entitled to commission and time and traveling expenses too.

To measure the plaintiffs in error's damage by the rules contended for by them would be to give a plaintiff who sued for a breach of contract a greater compensation than he would have received had the contract been performed.

We do not assent to the contention of the plaintiffs in error that the consideration for the purchase by them of the car load of salt sued for was that they were to be appointed the agents of the salt company. In fact, the plaintiffs in error did not so plead it. It is very likely that Canan's representations to plaintiffs in error in regard to the agency was one of the motives that influenced them to purchase,

but we do not think the evidence shows that that was the consideration.

Complaint is made because the court gave instructions Nos. 6, 7, and 8.

Instruction No. 6 told the jury that, under the evidence, Canan had no authority to appoint the plaintiffs in error agents for the sale of the salt company's salt in the state of Iowa. There was no error in giving this instruction; it was conceded by plaintiffs in error that Canan had no such authority.

The seventh instruction told the jury that the salt company's shipping a car load of salt sold by plaintiffs in error to Witner Bros. was a ratification of that sale by the salt company, and that they were liable for the commissions on that sale. The instruction also left it to the jury to say whether, from all the testimony, the salt company, by any word or act, had recognized the defendants as their agents in the sale of the other two car loads of salt, and if they found it had, the plaintiffs in error should be allowed commissions for them. There was nothing in this instruction to the prejudice of the plaintiffs in error.

The eighth instruction complained of told the jury that their verdict must, in any event, be for the salt company for something, as none of the set-offs pleaded by the plaintiffs in error could be considered, except those in regard to the commissions on the sales of salt. There was no error in this instruction.

Plaintiffs in error also complain that there was error in the court's allowing the salt company to recover its costs. In order for the plaintiffs in error to have that reviewed here they must file in the court below a motion to retax the costs, and bring the ruling of the court on that motion up.

The judgment of the district court is in all things

AFFIRMED.

THE other commissioners concur.

J. FRANK BARR ET AL. V. OBADIAH S. WARD.

FILED MAY 3, 1893. No. 4884.

1. **Action on Bond:** TRIAL: ADMISSIBILITY OF EVIDENCE. Plaintiffs in error, as sureties, signed a bond to a manufacturing company that one W. would pay for all goods to be furnished him by the manufacturing company; one Ward brought suit on this bond against the sureties, alleging that on the date thereof the manufacturing company sold a bill of goods to W.; that he had not paid for the same, and that the manufacturing company had assigned the account to Ward. To sustain this allegation at the trial he offered in evidence a note made by W. to the manufacturing company of the same date as the bond, with evidence that the note was given "for goods delivered, or to be delivered," by the manufacturing company to W. *Held*, Irrelevant under the pleadings.

2. ——: ——: ——: PLEADING: SURETIES: REVIEW. The petition against the sureties also contained a second cause of action, claiming damages for expenses Ward had been put to in prosecuting his claim against W. to judgment. *Held*, Not to state a cause of action against the sureties. On the trial plaintiff was permitted to read in evidence to the jury protest of the note, showing protest charges, and a transcript of a judgment rendered on said note in favor of Ward, showing constable and justice of the peace costs. *Held*, Error.

ERROR from the district court of Lancaster county. Tried below before FIELD, J.

W. Henry Smith, for plaintiffs in error.

Abbott, Selleck & Lane, contra.

RAGAN C.

Obadiah S. Ward sued J. Frank Barr and F. L. Everts and E. J. Witte in the district court of Lancaster county. The substance of his petition was as follows: That on the 7th day of February, 1889, the defendant Witte, as principal, and Barr and Everts, as sureties, executed and

delivered a bond to the Western Manufacturing & Novelty Company in the penal sum of one thousand dollars, conditioned that the said Witte should pay for all goods bought by him of said novelty company. A copy of the bond is set out in the petition, the important clauses of which are as follows:

"Whereas, The Western Manufacturing & Novelty Company * * * has entered into a contract with E. J. Witte to furnish and sell him from time to time goods, wares, and merchandise on credit: * * *

"Now, therefore, the said E. J. Witte, as principal, and J. Frank Barr and F. L. Everts, as sureties, are held and firmly bound unto the said Western Manufacturing & Novelty Company in the penal sum of one thousand dollars, * * * that the said E. J. Witte will well and faithfully pay for said goods, wares, and merchandise so to be furnished and sold to him under said contract, and that he will do so within the time agreed upon between himself and said company."

The petition also contained a copy of the contract mentioned in the bond, but it is not quoted, as it is not material here. The petition further alleged that, in pursuance of the contract, the novelty company did, on the 7th day of February, 1889, sell to E. J. Witte a bill of goods amounting in value to the sum of $188.50; that afterwards, to-wit, on or about the —— day of February, 1889, the Western Manufacturing & Novelty Company assigned the account for said goods to the plaintiff; that Witte had not paid said sum, or any part thereof; that the plaintiff had prosecuted a suit to judgment against Witte, and execution had been returned, "No property found."

For a second cause of action the plaintiff alleged that his necessary costs and expenses incurred in the prosecution of said claim against the said Witte amounted to the sum of $65, with the usual prayer for judgment against the defendants.

The answer was in effect a general denial.

There was a trial to a jury, verdict and judgment for the plaintiff, and the sureties, Barr and Everts, on whom alone there was service, bring the case here for review.

In order for the plaintiff to recover on his first cause of action it was necessary for him to prove by competent testimony that the Western Manufacturing & Novelty Company had, since the execution of said bond, sold to Witte a bill of goods; that the right of action of the Western Manufacturing & Novelty Company therefor had been assigned to the plaintiff, and that the goods were unpaid for. There is no proof in this record that the Western Manufacturing & Novelty Company sold a bill of goods to Witte after the execution of the bond and assigned the account therefor to the plaintiff.

As to the second alleged cause of action in the petition, it does not state a cause of action against the plaintiffs in error, and no evidence whatever of any character was competent to be introduced under the said second alleged cause of action.

On the trial the plaintiff offered in evidence a note bearing date February 7, 1889, for $188.50, payable to the order of the Western Manufacturing & Novelty Company, and signed by E. J. Witte. This note bore an indorsement without date as follows: "The Western Manufacturing & Novelty Company, G. B. Cameron, Sec'y." To the introduction in evidence of this note the defendants objected on the ground of its being incompetent testimony. The court overruled the objection and permitted the note to be read in evidence to the jury. This was error. If the note was offered for the purpose, as it seems to have been, of showing that Witte bought goods of the Western Manufacturing & Novelty Company after the date of the bond, and gave this note therefor, then it was incompetent under the pleadings. It did not meet the allegation of the petition, as that does not declare on a note at all, but on an as-

signed account for goods sold and delivered. If it was claimed that Witte had bought goods of the Western Manufacturing & Novelty Company after the execution of the bond, that he had given this note for those goods, and the note had been sold to the plaintiff, the petition should have so alleged, and until the pleadings were amended the note could not go in evidence. The counsel for plaintiff, so far as this record discloses, made no application to the court for leave to amend his petition.

It was incompetent for another reason. Assuming it to be an account against Witte for goods sold and delivered to him by the Western Manufacturing & Novelty Company, and there is some testimony which tends to show that it was given for goods, there is no evidence in the record to show when the goods were sold to Witte, if at all, and there is no evidence whatever that the indorsement on the back of this note was made by G. B. Cameron, the secretary of the company, to say nothing about the lack of proof as to Cameron's authority to sell the company's notes.

There is still another error in admitting this note in evidence. The note was offered, together with the protest of the same, and they all went in together. I do not know under what theory the plaintiff could have offered in evidence this protest, except it was to sustain his allegation of damages in his second cause of action; and as we have already seen, no evidence could be adduced under that cause of action. The contract of the sureties on Witte's bond was not to pay costs and expenses incurred by anybody in suing Witte for goods sold to him by the Western Manufacturing & Novelty Company, nor was their contract to pay protest fees on notes given by Witte to that company. Their contract was to pay for the goods that he bought, and being sureties, they are entitled to have this contract construed with the greatest strictness, and it can be extended in no particular to make them liable beyond the very letter of their contract.

On the trial the plaintiff also put in evidence, over the objection of the defendants, a transcript of the proceedings before a justice of the peace in a suit brought by the plaintiff against Witte and a large number of others on the note above referred to. This was error. First, it was incompetent under the pleadings, as this suit is not a suit upon a judgment, and there is no foundation laid for the introduction of any such transcript. It was probably introduced in evidence to support the damages alleged by the plaintiff in his second cause of action.

The court below, notwithstanding the pleadings, tried this case upon the theory that the note above mentioned was given by Witte to the Western Manufacturing & Novelty Company after the execution of the bond sued on for goods purchased by Witte, and that the note stood for an account, and the indorsee of the note stood in the place of the assignee of the account. Aside from the fact that this theory was wholly incompetent under the allegations of the plaintiff's petition, there is absolutely no proof in this record as to when, if ever, the Western Manufacturing & Novelty Company sold any goods to Witte. There was some testimony which tended to show that the note was given for goods delivered, or to be delivered, by the novelty company to Witte.

The plaintiff in his direct testimony testified that he had a talk with Barr, one of the defendant sureties, "and Mr. Barr admitted that it (the note) was given for goods delivered, or to be delivered." This testimony was not competent as against the other surety, Everts, and counsel for defendants should have objected to it on that ground. It was probably competent to go to the jury for whatever it was worth as against Barr; and even this admission is denied by Barr. And the so-called admission and its denial constitute all the evidence on the subject as to the consideration for the note. The plaintiff was also asked:

Q. Did you ever, at any time, have a conversation with Witte regarding the payment of this note?

A. Yes, sir.

Q. State what was said, if anything, in regard to the signature on the note.

This was objected to by defendants' counsel on the ground that Witte was not a competent witness. The objection was overruled, and the witness answered:

A. Mr. Witte said he gave this note for the purpose of getting goods.

This answer was not responsive to the question and could have been struck out, and probably would have been if counsel for the defendants had asked it.

The court then asked this question of the plaintiff:

Q. That is, the note was for the purpose (of getting goods)?

A. Well, yes.

This testimony was clearly incompetent and its admission was highly prejudicial to the defendants, but strange enough there was no objection made by their counsel to the question of the court.

As the case has to be tried again, it may be well to observe that the admissions or declarations of Witte, the principal, are not competent evidence against the sureties.

For the foregoing reasons the judgment of the district court is reversed and the cause remanded to the court below with instructions to grant the plaintiffs in error a new trial.

REVERSED AND REMANDED.

THE other commissioners concur.

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Ballots. See ELECTIONS.

Bank Checks. See NEGOTIABLE INSTRUMENTS, 9–11.

Banks and Banking. See CORPORATIONS, 4. EVIDENCE, 16. INTEREST. NEGOTIABLE INSTRUMENTS, 9–11. STATUTE OF LIMITATIONS, 1. VOLUNTARY ASSIGNMENTS, 4.

1. Where the officers of an insolvent bank, by willful false representations as to the amount of paid up stock of the bank, induce persons to deposit money therein, they will be personally liable therefor. *Porter v. Sherman County Banking Co*..... 279
2. A national bank received certain real estate mortgages and notes for collection, the proceeds to be sent to the owner when collected. The bank made the collections, but failed before all remittances were made. *Held*, That the bank was the agent of the owner of the securities, and that the money derived therefrom was a trust fund which did not become a part of the assets of the bank. The receiver had no right to such fund. *Griffin v. Chase*..... 328
3. In an action to wind up the affairs of an insolvent bank it appeared that a claimant held certain certificates of deposit which he received as the purchase price of securities delivered to the president of the bank. The certificates were never entered as a liability of the bank on its books. The president testified that he did not represent the bank in the transaction; that the purchase was his individual venture; and that the certificates were accepted as his personal obligation. This was denied by the claimant, who testified that his agreement was with the bank alone. The bank books showed that a portion of the certificates was paid by the bank as they matured and the amount thereof charged to the president's account. *Held*, That the certificates are *prima facie* indebtedness of the bank, and the receiver having failed to establish the contrary, a finding of a referee in favor of the validity of the claim will be sustained. *State v. Farmers & Drovers Bank*..... 675

Bastardy.

1. In a prosecution for bastardy the guilt of the defendant is not required to be established beyond a reasonable doubt. In such a proceeding a preponderance of the evidence is sufficient. *Dukehart v. Coughman*..... 412
2. The evidence set out and discussed in opinion *held* sufficient to support a verdict finding defendant to be the

father of plaintiff's bastard child. The rulings of the trial court on admission of testimony approved. *Id.*

Bidders. See TAX SALES, 3.

Bill of Exceptions.

1. Must be filed in the district court of the proper county. *First National Bank of Denver v. Lowrey* 290
2. No notice of an application to the judge for an order extending the time for preparing and serving a bill of exceptions is necessary. *Id.*
3. On the granting of such an order, the proper practice is to file the same with the clerk of the district court. *Id.*
4. A bill of exceptions duly allowed and certified by the trial judge imports absolute verity and its truthfulness cannot be assailed collaterally. *Gregory v. Kaar* 533
5. Where no amendments are proposed to a bill of exceptions, no notice of the presentation of the bill to the judge for allowance is required to be served on the adverse party. *First National Bank of Denver v. Lowrey* 290
6. Section 311 of the Code makes it the duty of a party to whom is submitted a draft of a bill of exceptions for examination to return it with his proposed amendments, if any, within ten days. *Fitzgerald v. Brandt* 683
7. Certificate of the trial judge attached to the bill in this case as follows: "February 26, 1890. All evidence. True bill. Ordered part of record in this case," although informal, is sufficient. *First National Bank of Denver v. Lowrey* 290
8. In a case where appellees with adverse interests were represented by different counsel, the appellant left the draft of a proposed bill of exceptions at the office of one of appellees' counsel and notified the attorneys for the others that it was there for inspection. *Held*, Not a sufficient submission under sec. 311 of the Code; and that the bill would be quashed as to all appellees to whom it had not otherwise been submitted. *Fitzgerald v. Brandt*, 683
9. The cause was tried in the district court on the 17th day of December, 1889, and forty days given to reduce the exceptions to writing. The term of court adjourned without day December 23, and on the 29th day of the following month the trial judge, on a showing of diligence, granted an extension of thirty days' additional time in which to complete and serve a bill of exceptions. A draft of the bill was served on the attorneys of the successful party on February 19, 1890. *Held*, That the same was

presented in time. *First National Bank of Denver v. Lowrey* 290

Bill of Exchange. See NEGOTIABLE INSTRUMENTS, 9, 11.

Bill of Sale. See FRAUDULENT CONVEYANCES, 6. SALES, 5.

Bona Fide Holder.
Reuber v. Crawford 334

Bona Fide Purchasers. See NEGOTIABLE INSTRUMENTS, 8, 13. VENDOR AND VENDEE, 2, 3, 4.

Bonds. See APPEAL BONDS. ATTACHMENT, 3. INDEMNITY. SHERIFFS AND CONSTABLES.

1. The defendant signed a bond which provided that the principal thereon would pay a manufacturing company for all goods sold by it to him. Suit was brought on this bond against the sureties, the plaintiff alleging that on the date of the bond the company sold a bill of goods to the principal; that same had not been paid, and that the account had been assigned to plaintiff. To sustain his allegation at the trial he offered in evidence a note made by the principal to the company of the same date as the bond, with evidence that the note was given "for goods delivered, or to be delivered" by the company to the principal. *Held*, Irrelevant under the pleadings. *Barr v. Ward* 906
2. The petition referred to above contained a second cause of action, claiming damages for plaintiff's expenses in prosecuting his claim to judgment. *Held*, Not to state a cause of action against the sureties. On the trial plaintiff was permitted to read in evidence to the jury protest of the note, showing protest charges, and a transcript of a judgment rendered on said bond in his favor, showing costs. *Held*, Error. *Id.*
3. Under such circumstances it was incompetent for the plaintiff to testify to statements made by the principal concerning the purpose for which the note was given. *Id.*, 910

Book Entries. See EVIDENCE, 16.

Boyd County. See ELECTIONS, 8, 9.

Breach of Contract. See CONTRACTS, 3, 5. SALES, 1.

Bridges.

A person injured by the failure of a county board to keep a public bridge in repair may maintain an action against the county under chap. 7 of the Laws of 1889. *Hollingsworth v. Saunders County* 147

Brokers. See REAL ESTATE BROKERS.

Burden of Proof. See APPEARANCE. CARRIERS, 1, 10. CORPORATIONS, 1–3. LIQUORS, 6. PRINCIPAL AND AGENT, 3.

Burglary.

1. Under sec. 48, Criminal Code, the breaking and entering in the night season is an essential element of the crime. *Ashford v. State* 38
2. In a charge of breaking and entering a dwelling house with intent to commit the crime of larceny, the intent must be proved as laid in the information. *Id.*

Capital Stock. See CORPORATIONS, 8.

Carriers. See MASTER AND SERVANT, 2, 3. RAILROAD COMPANIES, 6, 7. STREET RAILWAYS.

1. Where a street railway car is derailed and a passenger injured thereby, the presumption is that the casualty was due to the negligence of the carrier, and the burden is on it to rebut that presumption. *Spellman v. Lincoln Rapid Transit Co* 890
2. When a train has made a reasonable stop and passengers have not given notice or other evidence of their intention to alight, the starting of the train is not *per se* negligence for which the company will be held liable. *Chicago, B. & Q. R. Co. v. Landauer* 643
3. Common carriers, for the protection of their passengers, are bound to the exercise of more than ordinary care; they are bound to exercise extraordinary care and the utmost skill, diligence and human foresight, and are liable for the slightest negligence. *Spellman v. Lincoln Rapid Transit Co* 890
4. The term criminal negligence, as used in sec. 3, art. 1, ch. 72, Comp. Stats., means gross negligence, such as amounts to reckless disregard of one's own safety and a willful indifference to the consequences liable to follow. *Chicago, B. & Q. R. Co. v. Landauer* 643
5. It is not such contributory negligence for a passenger to jump from a moving train as will in every case prevent a recovery under the statute above cited; but where the circumstances are such as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby, such act amounts to criminal negligence as above defined. *Id.*
6. It is the duty of railroad companies to stop their trains

at stations a sufficient length of time for passengers to get on and off, and it is negligence for the conductor or other servant of the company to start a train while passengers are obviously in the act of getting on or alighting therefrom. *Id.* 642

7. Are liable for damages to live stock in addition to the penalty under sec. 4386, Rev. Stats. U. S., if the animals are kept in cars more than twenty-eight consecutive hours, unless prevented from unloading by storm or other accidental causes, or unless the animals have proper food, water, space, and opportunity to rest on the cars, but to state a cause of action the petition must show that the case is not within the exceptions named. In case discussed in opinion it was *held* that neither the allegations nor proof justified a verdict for general damages. *Hale v. Missouri P. R. Co.* 266

8. In an action to recover damages for injury to stock occasioned by the negligence of a railroad company in shipping the same, it was *held* that the company was not liable because a conductor failed to fulfill a promise to awaken the plaintiff at a station where it was proposed to stop and feed, and the stock was carried by. *Id.* 270

9. In an action to recover for personal injuries sustained by the plaintiff in jumping from a moving train, the facts stated in the syllabus, *held*, not to sustain the charge that the defendant company negligently started the train without giving plaintiff sufficient or reasonable time to alight. *Held, further*, That plaintiff was guilty of such contributory negligence as will prevent a recovery for the injuries received in jumping from the train. *Chicago, B. & Q. R. Co. v. Landauer* 643

10. Where a passenger, without negligence on his part, is injured by the derailment of the car in which he is traveling, the carrier, to overcome the presumption of negligence caused by such derailment, must show that the accident was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented. *Spellman v. Lincoln Rapid Transit Co.* 890

Certificate of Acknowledgment. See ACKNOWLEDGMENT. DEEDS, 2, 3.

Certificate of Appointment. See COUNTIES, 5.

Certificates of Deposit. See BANKS AND BANKING, 3. INTEREST.

Challenge. See JURY, 3.

Character. See CRIMINAL LAW, 3.

Chattel Mortgages. See ATTACHMENT, 4. FRAUDULENT CONVEYANCES, 2, 5, 6, 8. INSURANCE, 4. JUDGMENTS, 6. SALES, 3. VOLUNTARY ASSIGNMENTS, 2.

1. In the action of an attachment creditor against the debtor the validity of chattel mortgages made by the debtor to other parties cannot, as against such mortgagees, be adjudicated. *McCord v. Krause* 764
2. Debtor in failing circumstances may prefer one or more creditors by execution of mortgage or conveyance absolute, if done in good faith and not to defraud other creditors. *Costello v. Chamberlain* 45
3. Instrument in form of mortgage or bill of sale will not be held to be an assignment for benefit of creditors unless it creates a trust in favor of some person other than mortgagor or vendor. *Id.*
4. A mortgage upon a stock of merchandise, under that general description, attaches only to such merchandise as was in the stock when the mortgage was executed, and not to any afterwards purchased. *Rockford Watch Co. v. Manifold* 802
5. The first paragraph of the syllabus in *Henry v. Vliet*, 33 Neb., 130: "A pre-existing debt is a valuable consideration for a chattel mortgage and protects the mortgagee to the same extent as had he paid a new consideration," is overruled. *Henry v. Vliet* 138
6. Unsecured creditors of a mortgagor of chattels are entitled to have the mortgages foreclosed as required by law, and a sale otherwise than as the law provides, although in accordance with an agreement of the mortgagor and mortgagees, is no protection to those participating in the proceeds of the sale. They are liable to account to such creditors for the value of the goods, less the valid liens thereon. *Rockford Watch Co. v. Manifold* 802
7. A junior mortgagee of chattels, who agrees with the senior mortgagee and the mortgagor that the goods mortgaged may be sold and the proceeds applied to the payment of the mortgages in the order of their priority as disclosed by the records, cannot, after such sale and appropriation of the proceeds, maintain an action to avoid the senior mortgage for fraud in its inception without proof

that the facts constituting the fraud were discovered after the agreement and sale. *Id*..... 801

8. A mortgage upon growing corn is not constructive notice to a dealer in grain who, in good faith, in open market purchases such corn from the mortgagor after the same has been husked by the latter and placed in a pile or crib. But the rule does not prevail when the person who assisted in husking the corn afterwards becomes the purchaser, while it is yet in the same pile or crib, and receives it there, having at the time actual knowledge that it is the same corn he helped harvest. In such case the purchaser will take the corn subject to the lien of the mortgage. *Fines v. Bolin*..... 621

Checks. See NEGOTIABLE INSTRUMENTS, 9, 11, 12.

Cities. See MUNICIPAL CORPORATIONS.

Cities of Second Class. See SCHOOLS AND SCHOOL DISTRICTS.

City Council. See MUNICIPAL CORPORATIONS, 3.

Claims. See BANKS AND BANKING, 3. COUNTIES, 3. CREDITOR'S BILL. HOLIDAYS. VOLUNTARY ASSIGNMENTS, 3, 5.

Clergymen. See RELIGIOUS SOCIETIES.

Collateral Attack. See BILL OF EXCEPTIONS, 4. COUNTY BOARD. GUARDIAN AND WARD, 2.

Collections. See BANKS AND BANKING, 2. NEGOTIABLE INSTRUMENTS, 16.

Commencement of Action. See ACTIONS.

Commission. See PRINCIPAL AND AGENT, 1. REAL ESTATE BROKERS.

Common Carriers. See CARRIERS.

Commutation Tickets. See STREET RAILWAYS, 3.

Competency. See CRIMINAL LAW, 7. WITNESSES, 3, 4.

Competition. See TAX SALES.

Composition in Insolvency. See NEGOTIABLE INSTRUMENTS, 17.

Compromise.

A borrower conveyed certain real estate by absolute deed to secure a loan. The grantee afterwards recognized the trust character of the deed and promised to pay the grantor the excess of the debt upon a sale of the land. An action

to redeem was brought by the grantor who offered to pay the loan and interest. Before trial the parties entered into a stipulation as to the amount plaintiff should pay defendant, whereupon plaintiff was to recover the premses. *Held*, That in the absence of fraud or misrepresentation the agreement was binding and would be enforced. *Hamley v. Doe*..... 398

Condemnation Proceedings. See EMINENT DOMAIN, 1, 3, 4.

Confessions. See CRIMINAL LAW, 5.

Conflict of Laws.

In a real estate mortgage foreclosure on property in this state it appeared that a resident of Nebraska executed the note and mortgage and agreed in the note to pay an attorney's fee for collection in case of foreclosure. The payee was a resident of Iowa. The papers were executed and delivered and the money paid to the borrower in this state. The note was payable in New York. The provision for payment of attorney's fee is binding in Iowa. It was stipulated in the note and mortgage that those instruments were made and executed in, and are to be construed by, the laws of Iowa. *Held*, That the law of the place of the forum governs the application of the remedy, such as the recovery of costs, and that the said provision in the note for attorney's fee, being contrary to the settled law of this state, will not be enforced. *Security Company of Hartford v. Eyer*..... 507

Confusion of Goods. See SALES, 5.

Where wheat has been delivered to a mill and wrongfully converted into flour and stored with other flour belonging to the mill owner, the owner of the wheat will be entitled to such portion of the flour as the wheat would probably produce. *First National Bank of Denver v. Scott*..... 607

Congress. See CONSTITUTIONAL LAW.

Consideration. See CHATTEL MORTGAGES, 5. MORTGAGES, 6. NEGOTIABLE INSTRUMENTS, 12, 17. SALES, 3.

Constables. See SHERIFFS AND CONSTABLES.

A constable is not entitled to fees for serving a writ placed in his hands, where he fails to return upon the process the particular items of costs. *Van Etten v. Selden*..... 210

Constitutional Law.

By the apportionment act of February 7, 1891, Nebraska is entitled to six representatives in congress after the 3d

day of March, 1893. In an action to compel the governor to call an election for three additional members of congress to fill a vacancy caused by the want of representation in the present congress, *held*, that the question was a political and not a judicial one; that by reason of improved methods the census was more rapidly taken and the returns classified than formerly, so that the population of each state was known a few months after the enumeration was made, and that to deprive those states entitled to increased representation for two years was unjust, but congress should provide the remedy. *State v. Boyd*..... 181

Constructive Notice. See FRAUDULENT CONVEYANCES, 10, 11. REGISTRATION. VENDOR AND VENDEE, 2-4.

Contest of Will. See WILLS.

Continuance. See REVIEW 11.

1. Permitting counter-affidavits to be used on a motion for continuance is improper. *Barton v. McKay* 633
2. An affidavit based upon the absence of a witness, which fails to show that either the personal attendance of the witness or his evidence would probably be obtained, if the trial should be postponed or cause continued, is insufficient. *Id*..... 635
3. Where a justice of the peace continued a case for more than ninety days on application of defendant with consent of plaintiff and subsequently overruled defendant's objection to jurisdiction, it was *held* that the adjournment did not operate as a discontinuance of the action under sec. 961 of the Code, and that defendant could not claim a dismissal by reason of the postponement of the trial at his own instance. *Fischer v. Cooley*..... 626

Contractors.

Who furnish the labor and services of others are not entitled to the benefit of the statute which excepts execution for wages from exemption. *Henderson v. Nott*..... 154

Contracts. See CONFLICT OF LAWS. CORPORATIONS, 1, 9. INFANTS. INSURANCE, 1. MARRIAGE. REPLEVIN, 12. SALES, 1, 4. SPECIFIC PERFORMANCE, 2, 3, 4. STATUTE OF FRAUDS. VENDOR AND VENDEE, 1. USURY, 1-3. WAGES.

1. A written contract embodied in a receipt cannot be contradicted by parol testimony. *Morse v. Rice*..... 212
2. In a suit for breach of contract, the instruction referred to in the opinion on the question of ratification, *held*, to be without error. *Bates v. Diamond Crystal Salt Co*..... 904

3. In an action by an employe for a wrongful discharge he must allege and prove that he is willing and ready to complete his contract. *Hale v. Sheehan*..... 439

4. A contract to accept drafts thereafter to be drawn upon certain conditions, can be made the basis of a recovery by the payee of such drafts, only upon showing full and exact compliance with each of said conditions. *Palmer v. Rice*..... 844

5. In a suit for violation of a contract the courts will not, for the measure of damages, apply a rule which would give plaintiff a greater compensation for a breach of the contract than he could receive had it been performed. *Bates v. Diamond Crystal Salt Co*..... 900

6. The contract set out at length in opinion construed, and *held*, that the promise to pay off and discharge incumbrances on real estate covered by plaintiff's mortgage was not absolute, but conditional. *Security Company of Hartford v. Eyer*..... 507

7. A person who contracts in writing to accept and pay such drafts as shall be drawn by a party named, in favor of another party also named, upon compliance with certain conditions, is absolutely liable upon drafts drawn as contemplated, irrespective of the condition of the general account between the drawer and drawee at the time such drafts are made. *Palmer v. Rice*..... 844

Contributory Negligence. See CARRIERS, 5, 9, 10. NEGLIGENCE.

Conversion. See CHATTEL MORTGAGES, 6, 7. TROVER AND CONVERSION.

Conveyances. See CHATTEL MORTGAGES. DEEDS. FRAUDULENT CONVEYANCES. MORTGAGES. SALES. VENDOR AND VENDEE.

Corporations.

1. Contracts of a corporation which are not contrary to the express provisions of its charter are presumed to be within its powers, and the burden is upon one denying their validity to prove the facts which render them *ultra vires*. *Gorder v. Plattsmouth Canning Co*..... 548

2. Evidence discussed in opinion in a foreclosure proceeding *held* to sustain the findings of the district court that the indebtedness secured by the mortgage of the defendant corporation was not in excess of the limitation named in its charter. *Id.*

3. In order to recover from stockholders of a corporation on account of a failure to give the statutory notice of its indebtedness, it must affirmatively appear that the credit was given to such corporation while it was in default of the required notice. *Id*..... 549

4. The stockholders are not liable under the provisions of secs. 136, 139, ch. 11, Gen. Stats., for a debt which was not incurred while the officers of the bank were in default in publishing notice of the condition of the bank. *Porter v. Sherman County Banking Co*..... 271

5. Where there was a substantial compliance with the law requiring the articles of incorporation to be filed and published, mere defects, even if they existed, did not render the articles void, and it was *held* that the company was a *de facto* corporation. *Id*..... 275

6. Where a deed or mortgage purporting to have been executed by a corporation is signed and acknowledged in its behalf by the president and secretary thereof, with the corporate seal attached, the presumption is that it was executed by authority of such corporation and the burden of proof is upon one who denies such authority. *Gorder v. Plattsmouth Canning Co*..... 548

7. In a foreclosure proceeding the evidence referred to in opinion examined and *held* to sustain the finding that the indebtedness of the defendant company to the plaintiffs, directors thereof, was contracted with the knowledge and approval of the intervenors who were stockholders, and that the execution of certain mortgages to secure such indebtedness was sanctioned by such stockholders. *Id*... 549

8. Two persons were conducting a private bank, and organized a corporation with an alleged capital of $50,000, of which they retained a controlling interest. They turned over the deposits and assets of the private bank to the new corporation, and notes were taken from a number of the stockholders for the amount of their stock. *Held*, That the stockholders were liable for the unpaid stock held by each, and for a sum equal to the shares so held by each for all liabilities of the bank accruing while he was a stockholder. *Porter v. Sherman County Banking Co*..... 272

9. The relation of the directors to stockholders of a corporation is of a fiduciary character and their contracts and dealings with respect to the corporate property will be carefully scrutinized by the courts. Such contracts are not, however, necessarily void. Where it is clear that the transaction is in good faith on the part of the director and

beneficial to the corporation which has with the sanction of the stockholders received and appropriated the consideration without offering to make restitution, it may be upheld when assailed even in a court of equity. *Gorder v. Plattsmouth Canning Co.* 548

Costs. See CONFLICT OF LAWS. JUSTICE OF THE PEACE, 1. REPLEVIN, 8.

Where a party, against whom there is an order to pay costs, desires to review the same on error in the supreme court he must file a motion to retax and bring up the ruling thereon. *Bates v. Diamond Crystal Salt Co.* 904

Co-Tenants. See REPLEVIN, 10.

Council. See MUNICIPAL CORPORATIONS, 5.

Counter-Affidavits.

Should not be permitted on motion for continuance. *Barton v. McKay* 633

Counties. See COUNTY CLERKS. COUNTY SEAT. OFFICE AND OFFICERS, 3.

1. Where a county has once made payment of the salary of a county officer to one actually in possession of the office, performing its duties with color of title, before his right to the office has been determined against him by a competent tribunal, it cannot afterwards be compelled to pay the same salary to the *de jure* officer. *State v. Milne* 301
2. Where a county board negligently fails to keep a public bridge in suitable repair so as to be in a safe condition for travel, and damages have been occasioned by reason thereof, under the act of the legislature of 1889, the county is liable therefor to the person sustaining the damages, unless he has been guilty of contributory negligence. *Hollingsworth v. Saunders County* 141
3. The person sustaining such damages may maintain an original action against the county whose duty it was to keep the bridge in repair. He is not required to present his claim to the county board for allowance or rejection, since the provisions of sec. 37, ch. 18, Comp. Stats., do not apply to demands arising upon torts. *Id.* 142
4. A county board is not authorized to declare vacant a county office and make an appointment to fill such vacancy on the sole ground that an officer elect is ineligible and therefore unable to qualify. The incumbent of such office has a right to qualify within ten days after it is ascertained that his successor elect is ineligible, and upon qualifying in the manner provided by law will be entitled to

hold over until a successor is elected and qualified. *Richards v. McMillin* 352

5. Dodge county is under township system of government. The territory comprising the city of Fremont constitutes a township in said county by said name, and is entitled to, and has been represented in the county board by, two supervisors chosen by the electors of said city. A vacancy having occurred in the office of one of the supervisors of said city, the relator was appointed by the mayor and city council of said city to fill such vacancy, who took the oath of office, executed a bond in due form with sufficient sureties and tendered the same within the time fixed by law to the respondent as county judge for approval. *Held*, That the certificate of appointment of the relator was *prima facie* evidence of his right to the office, and that it was the duty of the respondent to approve said bond and the sureties thereon. *State v. Plambeck* 401

County Board. See COUNTIES. COUNTY CLERKS. COUNTY SEAT.

Where the county board has before it a matter which it may reject or allow, and its action thereon will be final unless appealed from, its order in the premises cannot be attacked collaterally, except for fraud. *Ragoss v. Cuming County* ... 376

County Boundaries. See ELECTIONS, 8.

County Clerks. See COUNTY SEAT, 3.

Under sec. 42, ch. 28, Comp. Stats., where the fees of the county clerk exceed $1,500, the county board may appoint such number of deputies as may be necessary and fix their salary at not to exceed $700, the same to be paid out of the fees received by the clerk. In an action on the clerk's official bond to recover fees collected by him, where the county board has appointed a deputy and fixed his salary and the deputy has actually rendered the services, those facts may be proved even if there is no record of the order in the minutes of the county board. *Ragoss v. Cuming County* 376

County Commissioners. See SCHOOLS AND SCHOOL DISTRICTS.

County Courts. See APPEAL, 4. JUDGMENTS, 7. PRACTICE, 3. VOLUNTARY ASSIGNMENTS, 3, 4.

1. A judgment rendered in a county court in the absence of the defendant may be set aside under section 1001 of the Code, although the amount claimed exceeds $200. *McCormick Harvesting Machine Co. v. Schneider* 206

2. A county court has jurisdiction of an action brought upon a party wall agreement to recover one-half the expense of building the wall, where the amount sought to be recovered does not exceed the jurisdictional limit of such court. *Garmire v. Willy* 340

County Judges. See COUNTIES, 5.

County Officers. See COUNTIES, 4.

County Organization. See ELECTIONS, 8, 9.

County Seat.

1. The petition for an election for the relocation of a county seat must show the section, township, and range on which, or the town or city in which a petitioner resides, together with his age and time of residence in the county. *Crews v. Coffman* 824

2. To entitle a county board to call an election for the removal of a county seat a petition must be presented to it by resident electors of the county equal in number to three-fifths of all the votes cast in the county at the last general election. *Id.*

3. Persons interested in the removal of a county seat are entitled to examine the original petition in the office of the county clerk before the election is called and should have a reasonable time for that purpose. It is not sufficient to furnish a certified copy as such parties have the right to see the purported signatures of the petitioners. *Id.*, 825

4. Where objections are made, by any resident elector on oath, to the petition for calling an election to remove a county seat, charging that a certain number of the petitioners are minors, certain other number are not electors, certain names are fictitious, a certain number have been bribed, the aggregate of which will reduce the number of petitioners below three-fifths of the votes cast at the preceding general election, it is the duty of the board to set a reasonable time for hearing said objections to enable parties to offer proof in support of their charges. *Id.*

County Supervisors. See COUNTIES.

County Treasurers. See COUNTIES, 1. PARTIES, 4. TAX SALES.

Courts. See COUNTY BOARD. COUNTY COURTS. COUNTY SEAT, 4. EVIDENCE, 16. JUSTICE OF THE PEACE. RECEIVERS. RELIGIOUS SOCIETIES. SUPREME COURT.

Creditor's Bill. See FRAUDULENT CONVEYANCES, 9-12. STATUTE OF LIMITATIONS, 6, 7.

A person was worth $5,000 in 1882, and at that time erected

a house and made improvements which cost $2,000 on the lands of his mother. He continued to assist her until 1886, when he died insolvent. *Held*, That the mother's estate would not be subjected to the payment of the residue of a debt of the son contracted since 1882, where the creditor received payment of her share of the assets of decedent's estate *pro rata* with other creditors, and the proof failed to show that decedent was insolvent when he assisted his mother, or that his assistance caused his insolvency. *Johnson v. Johnson*..... 700

Criminal Law. See EVIDENCE, 12. FALSE PRETENSES. HABEAS CORPUS. INDICTMENT AND INFORMATION. JUSTICE OF THE PEACE, 2. NEW TRIAL, 2, 5. RAPE. WITNESSES, 1.

1. A defect in the verification of an information is waived by pleading to the information. *Bailey v. State*..... 808
2. The rulings of the district court in a criminal case cannot be reviewed by the supreme court prior to the rendition of a final judgment in the prosecution. *Gartner v. State*..... 280
3. Where a person on trial for a crime has not himself put his general character in issue, the state cannot do so on the pretext of impeaching a witness by disproving the statements of the witness. *Carter v. State*..... 481
4. An order of the district court overruling a plea in abatement to an indictment is not a final order within the meaning of the statute, and a petition in error cannot be prosecuted therefrom previous to the prisoner's conviction. *Gartner v. State*..... 280
5. Confession or admission of accused is not alone sufficient to convict; but commission of crime being established by other evidence, confession may be proved to connect accused with offense. *Ashford v. State*..... 38
6. Intoxication is no justification or excuse for crime; but evidence of excessive intoxication, by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime has been committed, or to determine the degree, where the offense consists of several degrees. *O'Grady v. State*..... 320
7. In a criminal prosecution, evidence which on its face is clearly incompetent and prejudicial to the accused should not be introduced, and if the prosecution, without a promise to prove other facts to render it competent, is permitted

to introduce such evidence and it is thus placed before the jury, an order of the court to strike it out does not wholly cure the wrong, and may be cause for reversing the judgment. *Bedford v. State* 702

Criminal Negligence. See CARRIERS, 4, 5.

Crops. See CHATTEL MORTGAGES, 8. REPLEVIN, 10.

Cross-Examination. See WITNESSES, 2.

Crossings. See RAILROAD COMPANIES, 5-7.

Cross-Petition. See PLEADING, 13.

Damages. See CARRIERS, 7, 8. COUNTIES, 2. EMINENT DOMAIN, 3, 4. MASTER AND SERVANT, 5. SALES, 1.

1. In a suit for breach of contract the courts will not, for the measure of damages, apply a rule which would give plaintiff a greater compensation than he could receive had the contract been performed. *Bates v. Diamond Crystal Salt Co.* 900
2. The measure of damages for injury to plaintiff's property caused by the building of a viaduct in front of his lot is the difference between the value of the property immediately before and after the construction of the same, and disregarding public benefit. *City of Omaha v. Hansen*, 135

Days of Grace. See NEGOTIABLE INSTRUMENTS, 3.

Death. See EVIDENCE, 13.

Decedents. See CREDITOR'S BILL. WITNESSES, 3, 4.

Declarations. See EVIDENCE, 14.

Decrees. See DEEDS, 3. JUDGMENTS. REVIEW, 23.

Deeds. See ACKNOWLEDGMENT. CORPORATIONS, 6. EVIDENCE, 13. FRAUDULENT CONVEYANCES, 9-12. MORTGAGES, 3. QUIETING TITLE. VENDOR AND VENDEE, 3, 4.

1. Sufficiency of proofs to show delivery. *Stuart v. Hervey*.... 1
2. A deed in other respects sufficient and regular is effective, as between the grantor and grantee therein, to pass complete title even though executed in a foreign state it is there acknowledged before only a purported justice of the peace as to whose genuine signature, official character and power, there is no accompanying certificate of a proper officer having a seal. *Connell v. Galligher* 749
3. A decree obtained for the purpose of obviating the objection that the acknowledgment of a deed was not shown to have been proved by the certificate of a duly authorized

officer is operative only against parties to the action and others in privity with such parties. Whatever rights are held by a stranger to such a suit are unaffected by such a decree. *Id.*

Deeds as Mortgages. See COMPROMISE.

De Facto Corporations. See CORPORATIONS, 5.

De Facto Officers. See COUNTIES, 1. OFFICE AND OFFICERS, 2.

Default. See JUDGMENTS, 9. MORTGAGES, 8. PLEADING, 13. PRACTICE, 3.

Defect of Parties. See PARTIES.

Defective Appliances. See MASTER AND SERVANT, 2, 3.

Deficiency Judgment. See MORTGAGES, 7.

Definitions. See WORDS AND PHRASES.

Degree of Skill. See PHYSICIANS AND SURGEONS, 2.

Delinquent Taxes. See TAX SALES.

Demand. See NEGOTIABLE INSTRUMENTS, 10, 11. REPLEVIN, 9, 12.

Demurrer. See PLEADING, 4, 9. REVIEW, 29.

Description of Real Estate. See POWER OF ATTORNEY.

Directors. See CORPORATIONS, 7, 9.

Disbursement. See LEGISLATIVE APPROPRIATIONS.

Discipline. See RELIGIOUS SOCIETIES.

Discovery of Fraud. See FRAUDULENT CONVEYANCES, 10–12.

Discretion of Trial Court. See EVIDENCE, 14. REVIEW, 32. WITNESSES, 2.

Dishonor. See NEGOTIABLE INSTRUMENTS, 11, 16.

Dismissal. See APPEAL, 1. CONTINUANCE, 3. RES ADJUDICATA, 2, 3.

Where testimony has been introduced justifying the granting of any relief, and in support of any issue, the court cannot dismiss the action because of a failure of proof upon other issues. *Westover v. Lewis* 692

Distribution. See MORTGAGES, 1, 2.

Drafts. See CONTRACTS, 4, 7.

Drunkenness. See CRIMINAL LAW, 6.

Ecclesiastical Proceedings. See RELIGIOUS SOCIETIES.

Ejectment.

The evidence in case stated in opinion *held* not sufficient to show title in defendant by adverse possession. *Sprague v. Fuller* 220

Elections. See COUNTY SEAT.

1. Canvassing board has no authority to go behind the returns and inquire into legality of votes. *State v. Van Camp*, 91
2. A certificate of election issued upon a canvass of a part of the vote of a representative district is without authority of law and void. *Id.*
3. Provisions of the election law which are not essential to a fair election will be held to be formal and directory only unless declared to be mandatory by the law itself. *Id.*
4. The vote for a candidate should not be rejected for the reason that his name was written on the sample and official ballots by the clerk after they had been printed and were ready for distribution. *Id.*
5. Votes for representative will not be rejected because the number of the representative district is not designated upon the official ballot in counties included in one district only. *Id.*
6. At the general election held in 1883 the proposition for the annexation to Hall county of the territory organized as Boyd county failed to receive one-half the total vote cast, and was held to have been defeated. *Id.*
7. Neither a canvassing board nor a court in a *mandamus* proceeding will inquire into the regularity of the nomination of candidates, nor the sufficiency of their certificates of nomination. *Id.*
8. Holt county boundaries are clearly defined, do not include any part of the territory organized as Boyd county, and there is no *de facto* attachment of the latter territory to Holt county for election purposes. *Id.*
9. Within the meaning of sec. 146, ch. 18, Comp. Stats., the territory comprising Boyd county was while unorganized territory attached to Knox county for election purposes, and hence included within the twentieth representative district. *Id.*
10. Canvassing officers may be required by *mandamus* to issue certificate of election to the person appearing from the returns to have been elected member of the legislature, but such certificate will not conclude the legislature in contest proceedings. *Id.*

11. The constitution and laws contemplate that every qualified elector shall be entitled to vote at each election for state and county officers; and a construction will not be adopted that will disfranchise a considerable number of voters and deprive a county of representation, unless rendered necessary by express and unequivocal language. *Id.*

Elective Franchise. See ELECTIONS, 11.

Eminent Domain. See HIGHWAYS. MUNICIPAL CORPORATIONS, 2.

1. The word "non-resident," in sec. 100, ch. 16, Comp. St., relating to condemnation proceedings for right of way for a railroad, means a non-resident of the state and not of the land affected, or of the county where it is situate. *Pacific R. Co. v. Perkins* 456
2. Evidence referred to in opinion in trial of a condemnation proceeding, *held*, to prove a mere expression of opinion of parties named in the record, and not an offer of compromise, and is therefore admissible under the issues. *Omaha S. R. Co. v. Beeson* 366
3. On trial of a condemnation proceeding proof of annoyance by smoke and ashes from passing trains is admissible where the railroad track is constructed near the dwelling of the property owner, not as an independent element of damage, but as evidence tending to prove the value of the property after the construction of the track. *Id.* 361
4. On trial of a condemnation proceeding it was not error to admit evidence tending to prove that the property in question was susceptible of subdivision into smaller lots, by reason of which it was more valuable, and that in consequence of the construction of the railroad track subdivision thereof was rendered impossible, whereby the value of the tract was greatly impaired. *Id.*

Emoluments. See OFFICE AND OFFICERS, 2, 3.

Employment. See MASTER AND SERVANT.

Enactment of Laws. See STATUTES, 1.

Equity. See CORPORATIONS, 9. CREDITOR'S BILL. INJUNCTION, 1. PARTNERSHIP. QUIETING TITLE. REVIEW, 23, 24. SPECIFIC PERFORMANCE, 3. VENDOR AND VENDEE, 2.

A plaintiff filed a petition to remove a cloud from his title caused by an outstanding contract for the sale of the land and also to remove a cloud caused by a mortgage, which it was alleged was barred by the statute of limitations.

Held, That to entitle him to affirmative relief he must do equity by paying the amount due on the mortgage; but as the court had dismissed his petition for want of equity, he would not be required to pay the amount due on the barred mortgage. *Merriam v. Goodlett*..... 384

Error. See APPEAL. ASSIGNMENTS OF ERROR. MALICIOUS PROSECUTION. REVIEW.

Error Proceedings. See CRIMINAL LAW, 2. REVIEW.

1. Where parties to a proceeding in error submit the controversy upon its merits, they will be held to have waived the objection that there is a defect of parties. *Curtin v. Atkinson* 111
2. A motion for new trial and ruling thereon are necessary to obtain a review of the proceedings of the district court on error in the supreme court. *Jones v. Hayes*..... 526

Error Without Prejudice. See PLEADING, 14.

Estimates. See SCHOOLS AND SCHOOL DISTRICTS.

Estoppel. See CONTINUANCE, 3. HOMESTEADS, 2.

Evidence. See ADULTERY. BANKS AND BANKING, 3. BASTARDY. BONDS. CREDITOR'S BILL. CRIMINAL LAW, 5, 7. EMINENT DOMAIN, 3, 4. EXECUTORS AND ADMINISTRATORS. FALSE PRETENSES. FRAUDULENT CONVEYANCES, 3, 8. MALICIOUS PROSECUTION. MARRIAGE. MASTER AND SERVANT, 3. NEGOTIABLE INSTRUMENTS, 7, 14. NEW TRIAL, 2, 5. PHYSICIANS AND SURGEONS, 3, 4. QUIETING TITLE. RAILROAD COMPANIES, 2, 4. RAPE, 3-5. REVIEW, 17, 30, 39, 42. TROVER AND CONVERSION, 1. USURY, 5. WAGES. WILLS. WITNESSES, 3, 4.

1. In charge of rape proof of deformity of prosecutrix is proper, as tending to show diminished power of resistance. *Richards v. State*..... 17
2. Evidence in an action on a promissory note, discussed in opinion, *held* not to sustain the defense of alteration of the instrument. *Reuber v. Crawford*..... 334
3. The evidence referred to in opinion is sufficient to sustain a verdict for defendant in an action upon a written guaranty. *Wyeth Hardware & Manufacturing Co. v. Shearer*..... 5
4. Where on a trial an inspection of the premises in question is proper, but impracticable or impossible, a photographic view thereof is admissible. *Omaha S. R. Co v. Beeson*..... 361
5. Of insanity from intoxication may be submitted to the

jury for it to consider whether a crime has been committed or to determine the degree of the crime. *O'Grady v. State* 320

6. *Ex parte* affidavit referred to in the opinion *held* inadmissible under the rules of evidence, and that it was properly excluded from the jury. *Barton v. McKay* 638

7. A written receipt may be explained or contradicted by parol testimony; but when it embodies a contract it cannot be contradicted, but is conclusive upon the parties in the absence of fraud or mistake. *Morse v. Rice* 212

8. Referred to in opinion in trial of a condemnation proceeding *held* to prove a mere expression of opinion of parties named in record, and not an offer of compromise, and is therefore admissible under the issues. *Omaha S. R. Co. v. Beeson* 366

9. In a charge of rape where complaint is not made till seven months, when, by reason of pregnancy, concealment is no longer possible, the statements of the prosecutrix are not admissible; but *aliter* as to independent facts, such as the condition of her clothing. *Richards v. State* 17

10. Referred to in opinion was *held* sufficient to establish the the fact that a servant who sued a firm for wages, was employed by, and rendered services for, his father, a member of the firm, and that the other member was not liable. *Glade v. White* 172

11. In an action on a county clerk's official bond to recover fees collected by him while in office he may prove that the county board appointed a deputy and fixed his salary, and that the deputy actually rendered the services, even if there is no record of such order in the minutes of the county board. *Ragoss v. Cuming County* 376

12. Letters written by third parties in another state to third parties in this, but not in answer to letters written by the accused nor connected therewith, are not admissible in evidence against the accused in a criminal prosecution to prove a material fact in the case. *Bedford v. State* 702

13. A recital in a deed of recent date that the grantors are the heirs at law of a former owner of the lands therein described, is not sufficient evidence, as against a stranger to the instrument, of the death of the supposed ancestor, or that the persons who executed the deed are his heirs. *McMurtry v. Keifner* 522

14. Declarations of a party to a suit, explanatory of his physical condition at the time the declarations are made, are

admissible where the circumstances warrant the inference that they were made spontaneously and not with a view to their effect upon the controversy. Whether or not they fall within this rule must be left largely to the discretion of the trial court. *Hewitt v. Eisenbart*..... 794

15. In an action to redeem land where the debtor gave an absolute deed as security it was *held* proper, in the absence of fraud, to admit in evidence a stipulation of the parties as to amount due defendant whereupon the plaintiff was to recover the land, the agreement having been made while the suit was pending. *Hamley v. Doe*..... 398

16. Where the plaintiff in a civil action to recover the penalty for taking usurious interest makes a written demand for an inspection of a book in possession of defendant containing certain specified entries relating to the merits of the suit, and the demand is not complied with in four days the court, or a judge in vacation, may, on motion and notice, make an order for inspection, or permission to take a copy of the book entries, and on failure of defendant to comply with the order the court may exclude the entries from being given in evidence, or if wanted as evidence by the plaintiff, may direct the jury to presume them to be such as the plaintiff by affidavit alleges them to be. *First National Bank of Dorchester v. Smith*..... 199

Examination. See WITNESSES, 2.

Exceptions. See BILL OF EXCEPTIONS. INSTRUCTIONS, 9. REVIEW, 27.

Excuse for Crime. See CRIMINAL LAW, 6.

Executions. See EXEMPTIONS.

Where an officer levies an execution on personal property as the property of the debtor, and the property is replevied by another claimant who, on the trial of the replevin suit fails to maintain title, and returns the property to the officer after an adverse judgment, the lien of the levy is not divested; and on such facts an officer levying a subsequent execution on the same property, and applying the proceeds of sale thereon, is liable to the first execution creditor. *Bowman v. First National Bank of Nelson*..... 117

Executors and Administrators. See PLEADING, 14. WITNESSES, 3, 4.

1. An action was brought against a sheriff and was twice reversed in the supreme court. Before the third trial the plaintiff died, and the cause was revived in the name of his executrix, who states in her petition that she sues as

such. *Held*, Sufficient to show that she brought the action in her representative capacity. *Williams v. Eikenbary*..... 478

2. On the trial of the case the plaintiff sought to disprove the allegations of her petition by showing that her duties as executrix had ceased, and she had been discharged. *Held*, That she should have pleaded the facts by supplemental petition, and not having done so the testimony was properly excluded. *Id*..... 479

Exemptions. See HOMESTEADS, 2.

1. A person who contracts to furnish all help and make and burn brick for a certain price per thousand, and also agrees to keep the machinery furnished by the other party in good repair, to supply oil for the same, and feed and care for the team furnished by the other party, is not entitled to the benefit of sec. 531 of the Code, which excepts execution for wages from exemption. *Henderson v. Nott*..... 154

2. Persons who contract for and furnish the labor and services of others, whether with or without their own services, for a stipulated price for the joint labor of all, are not entitled to the benefit of the statute. *Id.*

Expert Testimony. See REVIEW 39, 41.

Expert Witnesses. See PHYSICIANS AND SURGEONS, 4.

Factors and Brokers. See PRINCIPAL AND AGENT. REAL ESTATE BROKERS.

False Pretenses.

1. In a prosecution for obtaining money by false pretenses the gist of the offense consists in obtaining the money of another by false pretenses with the intent to cheat and defraud. *Ketchell v. State*..... 324

2. In such a case, where the money was obtained upon a draft and the proof tended to show that when the defendant drew the draft he had reason to believe it would be accepted and paid, a conviction cannot be sustained. *Id.* 327

False Representations.

Aultman v. Finck..... 680

Fees. See CONFLICT OF LAWS. COUNTY CLERKS. JUSTICE OF THE PEACE, 1, 2.

Fences. See RAILROAD COMPANIES, 5–7.

Fiduciary Relationship. See CORPORATIONS, 9.

Final Order.

Order overruling plea in abatement is not. *Gartner v. State*, 280

Findings. See ACCOUNTING. JUDGMENTS, 6. PARTNERSHIP. REVIEW, 30, 35.

Fire Insurance. See INSURANCE.

Fires. See RAILROAD COMPANIES, 2–4.

Fiscal Year. See LEGISLATIVE APPROPRIATIONS, 4.

Forcible Entry and Detainer.

In an action for the recovery of possession of farm lands and a dwelling house from defendant's alleged forcible detention of both conjunctively, plaintiff's request for an instruction which defined the rights of defendant to the whole subject of controversy, as though to be tested by his right to the possession of the dwelling house alone, was properly refused. *Wagner v. Haines* 769

Foreclosure. See CHATTEL MORTGAGES, 6. CONFLICT OF LAWS. MECHANICS' LIENS, 4. TAX LIENS.

Foreign Laws. See STATUTE OF LIMITATIONS, 2, 3, 5.

Forgery. See QUIETING TITLE.

Fraud. See CHATTEL MORTGAGES, 5. FRAUDULENT CONVEYANCES. PRINCIPAL AND AGENT, 2. SALES, 2, 3. STATUTE OF FRAUDS. STATUTE OF LIMITATIONS, 6, 7.

Fraudulent Conveyances. See CHATTEL MORTGAGES, 7. STATUTE OF LIMITATIONS, 9–12. VOLUNTARY ASSIGNMENTS, 2.

1. Fraud, within the meaning of section 12 of the Code, is discovered when the fraudulent deed is recorded in the county where the debtor lives. *Gillespie v. Cooper* 776
2. In an action to avoid a conveyance or mortgage for fraud the facts constituting the fraud must be specifically pleaded; a general allegation of fraud is insufficient. *Rockford Watch Co. v. Manifold* 801
3. The presumption of fraud arising from the want of change of possession of mortgaged chattels is not conclusive, but may be entirely rebutted by proof of good faith. *First National Bank of Denver v. Lowrey* 291
4. The fact that a chattel mortgage was executed a few hours previous to the making of a voluntary assignment by the mortgagor for the benefit of creditors is not conclusive evidence of fraud so as to entitle the assignee to recover the mortgaged property as a part of the assigned estate. *Brown v. Farmers & Merchants Banking Co* 434
5. An instruction in a suit between the creditors of the mortgagor and the mortgagee which requires the latter, in addition to proof of good faith and absence of a fraud-

ulent intent, to satisfactorily explain why there was not an immediate delivery of the property and an actual and continued change of possession thereof is erroneous. *First National Bank of Denver v. Lowrey*..... 291

6. A mortgage or bill of sale given by a failing debtor to secure an honest debt is not fraudulent, although the parties to the transaction knew that the claims of other creditors would be thereby defeated, provided the fair value of the property pledged as security does not greatly exceed the amount of the debt, interest, and probable expenses of foreclosure. *Id.*

7. Where a merchant in failing circumstances, intending to prefer certain creditors, executed a bill of sale, the vendee paying the preferred claims out of the consideration named in the bill of sale, it was *held* not to be an assignment for the benefit of creditors; that the vendee was the only person beneficially interested, and that the transfer was valid. *Costello v. Chamberlain*..... 45

8. In an action by a chattel mortgagee to recover possession of the property after it had been attached by certain creditors of the mortgagor it is error to instruct the jury that certain things particularly mentioned "are strong evidence of a secret trust," as it is for the jury to determine what weight should be given to the different items of evidence. *First National Bank of Denver v. Lowrey* 299

9. October 28, 1884, a debtor of various persons conveyed all her property, four lots, with a secret agreement that the grantee should sell the lots, retain the amount of debt due him from the grantor, and return the surplus property or proceeds thereof to her or the person she might designate. *Held*, A fraud upon other creditors. *Gillespie v. Cooper*... 776

10. It was *held*, that the above fraudulent conveyance was discovered by the creditors on the date it was recorded, and their suit commenced more than four years thereafter was barred; but it also appeared that while the grantee held the title to said four lots, he agreed with the fraudulent grantor, if she would find a purchaser for, or sell them, he would pay her, as commissions, all that remained of the lots or their proceeds after the payment to him of her debt. Two of the lots were sold, the grantee's debt paid, and at her request the remaining two lots were conveyed to her husband without consideration. *Held*, That the two lots thus conveyed were her property, acquired from the former grantee by purchase, and were conveyed to the husband for the purpose of defrauding her creditors. *Id.*

11. Under such state of facts, *held further*, that the latter conveyance was not a continuation or consummation of the former fraud, but a new and independent one, and as the suit of the creditors to set aside the former conveyance also assailed the latter one, and was commenced within four years from the recording of the latter, it was not barred as to the two lots last fraudulently conveyed. *Id.*

12. Where a party known by her creditors to have recently failed in business and to be insolvent, conveyed all her real estate by deed recorded October 28, 1884, in the county where she resided; and she, in conversation with her creditors at that time, said that the object of the conveyance was to beat her foreign creditors; that she had been advised to put her property out of her hands; that she intended to put her property in other hands until she could settle matters; that she had made arrangements by which she could pay all her home creditors; that there were some debts she did not feel bound to pay; that the object of the deed was to secure a debt to the grantee, and the surplus to be paid her; it was *held*, that these facts were a discovery by the creditors on the date of the recording of said deed that the same was fraudulent. *Id.*

General Denial. See PLEADING, 6.

Gift. See CREDITOR'S BILL.

Governor. See CONSTITUTIONAL LAW. STATUTES, 1.

1. It was *held* to be the governor's duty to apply unexpended balance of appropriation for books, blanks, and printing to payment of books and stationery ordered by him. *State v. Boyd* 60

2. Is vested with discretion in the use of the contingent fund appropriated by the legislature; and will not be required by *mandamus* to approve a voucher drawn against it for books and stationery ordered by him. *Id.*

Guaranty.

1. Recovery on guaranty of spring wagons for period of one year, *held* proper under facts stated in opinion. *Kansas Manufacturing Co. v. Lumry* 123

2. The testimony referred to in opinion is sufficient to sustain a verdict for defendant in an action upon a written guaranty. *Wyeth Hardware & Manufacturing Co. v. Shearer*... 5

Guardian and Ward.

1. Proof by affidavit of posting public notice is not exclusive. The statute merely provides a mode which is sufficient,

but does not provide that it shall supersede all other forms of proof. *Larimer v. Wallace* 444

2. In a collateral attack on a guardian's sale of real estate, where all the steps required have been taken, a sale made and confirmed, and a deed made to the purchaser, the sale will be sustained if the court had jurisdiction, although there may be irregularities which in a direct proceeding would render the sale erroneous. *Id.*

Habeas Corpus.

Mere errors and irregularities in a judgment or proceeding of a court in a criminal case, under and by virtue of which a person is imprisoned, which are not of such a character as render the proceedings void, cannot be reviewed on an application for a writ of *habeas corpus.* That writ cannot operate as a writ of error. *In re Betts* 282

Harmless Error. See INSTRUCTIONS, 8. PLEADING, 14. REVIEW, 11, 33.

Highways.

Where a public highway is vacated and abandoned as such by lawful authority, the land included therein reverts to the abutting proprietors and cannot be appropriated by a railroad company for right of way without making compensation to such proprietors. *Omaha S. R. Co. v. Beeson,* 362

Hold-Over Officers. See OFFICE AND OFFICERS, 3.

Holidays.

1. An order made by a judge on Sunday or a legal holiday, allowing an attachment in an action on a debt not due is void. *Merchants National Bank v. Jaffray* 218

2. An order of attachment on a claim past due is a ministerial act and may be made on a legal holiday. *Whipple v. Hill* 720

Holt County.

Boundaries clearly defined and do not include any part of the territory organized as Boyd county. *State v. Van Camp* 91

Homesteads.

1. A homestead may be claimed in lands held in joint-tenancy. *Giles v. Miller* 346

2. Neither the husband nor wife can be estopped by the acts of the husband alone from asserting homestead rights. *Id.*

3. An undivided interest in real estate accompanied by the exclusive occupancy of the premises by the owner of such

interest and his family as a home, is sufficient to support a homestead exemption. *Id.*

4. Courts will not specifically enforce a contract for the sale of the homestead of a married person, unless it is executed by both husband and wife. The value of the property does not change this rule. *Clarke v. Koenig*..... 572

5. Under the homestead law of 1879, the purchaser of land held and occupied at the time of the conveyance as the homestead of the grantor, and which does not exceed in value the sum of $2,000, takes the same free from the lien of a judgment docketed prior to such purchase, but during the existence of the homestead right. *Giles v. Miller*, 346

Horse Railways. See MASTER AND SERVANT, 2, 3. STREET RAILWAYS.

Husband and Wife. See HOMESTEADS, 4.

Under the provisions of sec. 1, ch. 53, Comp. Stats., which declare "that all property of a married woman not exempt by law from sale on execution or attachment shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against her husband for such indebtedness has been returned unsatisfied," the wife is in fact surety for her husband and judgment must be recovered against her before her separate estate can be levied upon and sold for such necessaries. *George v. Edney*..... 604

Hypothetical Questions. See REVIEW, 39, 41.

Identification. See POWER OF ATTORNEY.

Identity of Names. See VENDOR AND VENDEE, 3, 4.

Impeachment. See ACKNOWLEDGMENT. SUMMONS, 3. WITNESSES, 1, 3.

Indemnity. See ATTACHMENT, 3.

1. Where an officer, by collusion and fraud, permits a judgment to be wrongfully rendered against him for levying upon goods under a writ of attachment, these facts may be pleaded in an action on the indemnity bond, together with a statement of the plaintiff in attachment that the property levied upon was that of the debtor in attachment. *Mihalovitch v. Barlass*..... 491

2. In an action upon an indemnity bond the fact that an officer permits judgment to be rendered against him for an alleged wrongful levy without making a defense, although a circumstance which with others may show fraud, yet in order to do so it must appear that a defense was available. *Id.*

Indexes. See VENDOR AND VENDEE, 3, 4.

Indictment and Information.

1. A defect in the verification of an information is waived by pleading to the information. *Bailey v. State*..... 808
2. Objection to an information on the ground that it was verified before a notary public instead of a magistrate should be made before going to trial, otherwise it will be held to have been waived. *Hodgkins v. State*..... 160
3. It is not necessary in an information or indictment to use the precise words of the statute. It is sufficient if the words used are identical in meaning with those used in the statute. *Id.*
4. In charging an offense under a statute the general rule is that a negative averment of the matter of a proviso is not required in an information, unless the matter of such proviso enters into and becomes a part of the description of the offense, or is a qualification of the language defining or creating it. *Gee Wo v. State*..... 241
5. Where, however, the matters of the proviso point directly to the character of the offense, or where the statute includes two or more classes which will be effected thereby, such as physicians who remove into the state to practice after the passage of an act to regulate the same, and persons who were residing in the state and practicing under a former act, in such cases the information must show on its face that the accused does not belong to either class. *Id.*

Indorsers. See NEGOTIABLE INSTRUMENTS, 11.

Infants.

One who elects to disaffirm a contract on the ground that at date of execution he was an infant is required to return so much of consideration as remains in his hands at time of such election, but not an equivalent for what he disposed of during his minority. *Bloomer v. Nolan*..... 51

Information. See INDICTMENT AND INFORMATION.

Injunction. See REVIEW, 30.

1. A court of equity will not enjoin the collection of a judgment at law on account of mere irregularities or errors on the part of the trial court. *Pollock v. Boyd*..... 369
2. A judgment of revivor not appealed from will not be enjoined upon the same grounds that were set forth in the answer in the case where it was rendered. *Haynes v. Aultman*..... 257

3. Cannot be maintained by owner of property against adjoining lot owner, to restrain interference with barriers erected and maintained by plaintiff to prevent flow of surface water on plaintiff's lot, where it appears the defendant's acts were in rightful defense of his own possession. *Davis v. Sullivan*..... 69

4. In an action to enjoin certain taxes assessed by the local assessor upon material for the construction of a railroad which was piled up near Central City, and had so remained for a long time, *held*, that the material was taxable, and in the absence of proof that it had been assessed by the state board, there was no presumption to that effect and that the taxes assessed by the local assessor would not be enjoined. *Chicago, B. & Q. R. Co. v. Merrick County*..... 176

Injuries. See CARRIERS, 5, 9. PHYSICIANS AND SURGEONS, 1, 3.

Inland Bills of Exchange. See NEGOTIABLE INSTRUMENTS, 11.

Insanity from Intoxication. See CRIMINAL LAW, 6.

Insolvency. See BANKS AND BANKING. CREDITOR'S BILL. FRAUDULENT CONVEYANCES, 6. NEGOTIABLE INSTRUMENTS, 17. PREFERRED CREDITORS.

Inspection of Books. See EVIDENCE, 16.

Instructions. See CRIMINAL LAW, 6. DAMAGES. EVIDENCE, 16. FORCIBLE ENTRY AND DETAINER. FRAUDULENT CONVEYANCES, 8. MUNICIPAL CORPORATIONS, 7. NEGOTIABLE INSTRUMENTS, 14. QUANTUM MERUIT. RAILROAD COMPANIES, 6. REVIEW, 27.

1. Given in replevin case approved. *Hakanson v. Brodke*..... 42

2. It is proper for a court to refuse an instruction covered by one already given. *Barton v. McKay*..... 633

3. In case stated relative to computation of interest on a demand certificate of deposit approved. *Morse v. Rice*..... 212

4. In trial of person charged with commission of rape set out in opinion approved. *Richards v. State*.....23-26

5. Where the instructions, considered as a whole, fairly state the law, they are sufficient. *Barton v. McKay*..... 641

6. An erroneous instruction is not cured by merely giving another on the same subject contradicting it. *First National Bank of Denver v. Lowrey*..... 290

7. It is reversible error for the court, in its charge to the jury,

to give undue prominence to a portion of the testimony by special reference thereto, or to direct the jury what weight shall be given to particular items of the evidence. *Id.* 291

8. Should be given clearly, concisely, and without contradictory statements of the rules by which the jury should be governed. If, however, the instructions are not in compliance with this requirement, the verdict will not be set aside, if, upon the evidence, no other verdict could be sustained. *Jansen v. Williams* 869

9. A general exception to instructions, as "to the giving of the above instructions the plaintiff then and there excepted," is insufficient to lay the foundation for their review in the supreme court. Exception should be specifically taken to each paragraph of the charge claimed to be erroneous. *First National Bank of Denver v. Lowrey*, 290

Insurance.

1. A contract of fire insurance is one of indemnity in case of loss or damage by fire. Like any other contract, it should be sustained if possible. *Union Ins. Co. v. Barwick* 223

2. A provision in a policy of insurance for arbitration is of no force where the insurance company denies its liability. *Id.*, 224

3. Where proof of loss is furnished to the insurance company to which it objects, it must return the same with its objections within a reasonable time or its objections will be unavailing. *Id.*

4. A mortgage of chattels to secure a contingent liability of the mortgagee as indorsee and under which the mortgagee does not take possession is not such change of title as to avoid the policy. *Id.* 224

5. Provisions of a policy in conflict with the valued policy act of 1889 are inoperative. This applies to a provision in case of loss for the appointment of arbitrators. *German Ins. Co. v. Eddy* 461

6. Where all the combustible material in a building is destroyed by fire, although portions of the brick walls are left standing, but are so injured by the fire that they must be torn down, for the purpose of insurance the property is totally destroyed. *Id.*

7. Under the issues made by the pleadings in case considered in opinion the principal question was whether or not the property had been "totally destroyed," and this question was fairly submitted to the jury and the verdict is supported by the evidence. *Id.*

8. An action was properly brought in the name of the insured where he had made an assignment of the policy with the consent of the company to secure the assignee upon a contingent liability as indorser of notes, and gave a chattel mortgage upon the insured goods for the same purpose, and afterwards paid the notes and released the assignee from liability. *Union Ins. Co. v. Barwick* 223

Interest.

A demand certificate of deposit, in the absence of any agreement as to interest, draws interest at the rate of seven per cent from the time payment is demanded; and in case no demand has been made, then from date of commencement of suit. *Morse v. Rice* 212

Interlocutory order.

Cannot be reviewed in supreme court until after final judgment. *Gartner v. State* 280

Interpleader. See INTERVENTION.

Interpretation of Contract. See CONFLICT OF LAWS.

Intervention.

To entitle a third party to intervene in an action he must have some interest in the subject of the controversy. A mere contingent liability to answer over to the defendant, without any privity with the plaintiff, is not sufficient. *Omaha S. R. Co. v. Beeson* 361

Intoxicating Liquors. See LIQUORS.

Intoxication. See CRIMINAL LAW, 6.

Joint Owners. See REPLEVIN, 10.

Joint Tenancy. See HOMESTEADS, 1, 3.

Judgments. See APPEAL, 4. APPEARANCE. DEEDS, 3. HOMESTEADS, 5. HUSBAND AND WIFE. MORTGAGES, 1, 2, 7. RES ADJUDICATA. REVIEW, 23, 31. VENDOR AND VENDEE, 3–5. VOLUNTARY ASSIGNMENTS, 3.

1. Cannot be reviewed by *habeas corpus*. *In re Betts* 282
2. Of revivor, will not be enjoined, where no appeal was taken, upon the same grounds set forth in the answer. *Haynes v. Aultman* 257
3. A judgment rendered in the county court on default may be set aside under section 1001 of the Code, though the amount exceeds $200. *McCormick Harvesting Machine Co. v. Schneider* 206
4. A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any

statement or claim of the parties, and is foreign to the issues submitted for its determination, is a nullity. *Lincoln National Bank v. Virgin* 735

5. Appearance in an action in the county court for the sole purpose of objecting to the jurisdiction does not deprive a party of the right to have judgment rendered against him by default set aside under section 1001 of the Code. *McCormick Harvesting Machine Co. v. Schneider* 206

6. The findings and judgment in a case must be based upon the pleadings. A decree in an action between a mortgagor and certain mortgagees of chattels, whereby a mortgage not attacked by the pleadings, and the holder thereof is not a party to the action, is declared void, is erroneous. *Rockford Watch Co. v. Manifold* 802

7. Where, in an action brought in the county court within the jurisdiction of a justice of the peace, the defendant enters his appearance, but absents himself on the day of trial, he is not entitled to have the judgment against him set aside under the provisions of section 1001 of the Code, but may prosecute an appeal to the district court. *Sullivan v. Benedict* 409

8. Where service upon a defendant is made by leaving a copy of a summons at his residence and judgment is taken against him thereon by default, he may, in an action to revive the judgment, show that the place of service was not his place of residence; that he nor any member of his family had notice of the action until after judgment had been rendered against him, together with any other defense to the judgment. *Haynes v. Aultman* 257

9. The petition to foreclose a first mortgage, against a junior mortgagee, and the common mortgagor alleged that the junior mortgagee "claims some interest in the premises, the nature and extent of which is to plaintiff unknown, but is subordinate to plaintiff's claim, wherefore plaintiff asks that it be compelled to set the same up or be forever barred." All the defendants having made default a decree of foreclosure was entered in which it was found the junior mortgagee had no right, title, or interest in the mortgaged property. In a subsequent action by the junior mortgagee to foreclose its mortgage, *held*, that the former decree cannot be pleaded in bar by the mortgagor or his grantees. *Lincoln National Bank v. Virgin* 735

Judicial Acts. See HOLIDAYS.

Judicial Interpretation. See SUPREME COURT.

Jurisdiction. See APPEAL, 2. APPEARANCE. CONSTITUTIONAL LAW. COUNTY COURTS. JUSTICE OF THE PEACE, 2. MUNICIPAL CORPORATIONS, 3. PRACTICE, 3. RECEIVERS. RELIGIOUS SOCIETIES. TAX LIENS, 1.

Jury. See REVIEW, 32. TRIAL, 3.

1. A juror is not permitted to state to fellow jurors, while considering verdict, facts within his personal knowledge; but should make the same known during trial and testify as a witness. *Richards v. State* 17
2. A juror will not be permitted to state to his fellow-jurors, while they are considering their verdict, facts in the case within his own personal knowledge but not given in evidence. He should make the same known during the trial and, if desired, testify as a witness in the case. *Wood River Bank v. Dodge* 708
3. It is sufficient cause of challenge to any person called as a juror in the district court that he has been summoned and attended that court as a juror at any term held within two years prior to the time of such challenge, and this rule applies to talesmen who were summoned and served as jurymen. *Wiseman v. Bruns* 467

Jury Trial.

On appeal by the executor or heir at law from an order of the county court making an allowance out of the funds of the estate of a deceased person for the support of his widow, the district court will try and determine the issues involved in the same manner as on appeal in civil cases. It is error in such case to refuse a jury trial upon the demand of either party to the controversy. *Sheedy v. Sheedy.* 373

Justice of the Peace. See CONTINUANCE, 3.

1. Justice of the peace is not allowed to charge a fee for entry of default of a defendant. *Van Etten v. Selden* 212
2. A justice of the peace has no jurisdiction to sit as a trial court in a criminal case where the statute creating the offense provides that the punishment may be both a fine and imprisonment. In such case the justice can proceed only as an examining magistrate. *State v. Yates* 287
3. Under sec. 32, ch. 28, Comp. Stats., a justice of the peace before bringing suit for fees must, when requested, make and furnish the party for whom the services were rendered an itemized bill of his costs in order to maintain an action therefor; but such statement may be waived by the party entitled thereto. *Van Etten v. Selden* 209

Laborers. See EXEMPTIONS.

Laches. See APPEAL, 2. EQUITY. SPECIFIC PERFORMANCE, 4.

Lapse. See LEGISLATIVE APPROPRIATIONS, 4.

Larceny.

Evidence set out and discussed in the opinion *held* insufficient to support a verdict of guilty. *Carter v. State* 481

Legislative Apportionment. See ELECTIONS, 9.

The legislature never having attached the territory comprising Boyd county to any representative district, it remains a part of the 20th district, notwithstanding its organization as a county. *State v. Van Camp* 92

Legislative Appropriations. See GOVERNOR.

1. Under the provisions of the act making an appropriation for the current expenses of the state for the years ending March 31, 1892, and March 31, 1893, approved April 6, 1891, whereby an appropriation of $37,000 was made for fire-proof library building at the state university, no part of said appropriation can be drawn except upon proper vouchers filed with the auditor of public accounts. *State v. Moore* 579
2. The term voucher, when used in connection with the disbursement of money, means a written or printed instrument in the nature of a bill of particulars, which shows on what account and by what authority a particular payment has been made. *Id.*
3. There is no authority for the secretary of the board of regents of the state university to draw any money appropriated for the university or any of its buildings except upon vouchers duly certified. *Id.*
4. No appropriations made by the legislature will lapse before the end of the first fiscal quarter after the adjournment of the next regular session, unless there is a special provision in the act itself providing that if it is not used by a certain time that it shall lapse. The fiscal year begins on the first day of December of each year. *Id.*

Letters. See EVIDENCE, 12.

Letters of Credit. See CONTRACTS, 4, 7.

Levy. See INDEMNITY.

Lex Fori. See CONFLICT OF LAWS.

Liability of Stockholders. See CORPORATIONS, 3–5.

License. See LIQUORS.

License Bond. See LIQUORS, 3–5.

Lien of Judgment. See HOMESTEADS, 5.

Lien on Crop. See CHATTEL MORTGAGES, 8.

Liens. See CHATTEL MORTGAGES, 4. REPLEVIN, 12. VENDOR AND VENDEE, 3, 4.

Limitation of Actions. See EQUITY. FRAUDULENT CONVEYANCES, 9-12. MECHANICS' LIENS, 4. STATUTE OF LIMITATIONS.

Liquors. See MUNICIPAL CORPORATIONS, 4, 5.

1. It is not necessary to state in a petition for a liquor license whether the applicant desires to sell at wholesale or retail. *Brown v. Lutz* 528
2. No license for the sale of intoxicating liquors issued by a city of the second class containing a population of less than five thousand can extend beyond the municipal year in which it shall be granted. *Id.*
3. An undertaking will be strictly construed in favor of sureties, and their liability will not be extended by construction beyond their specific agreement; rule applied to sureties on statutory bond of vendor of liquors. *Curtin v. Atkinson* 110
4. The term traffic in intoxicating drinks, as used in sec. 15, ch. 50, Comp. Stats., will in an action on a license bond be *held* to mean the sale or furnishing of liquors to third persons, and not the use thereof by the saloon-keeper. *Id.*
5. A saloon-keeper while intoxicated in his own saloon shot and killed plaintiff's husband: *Held*, That the drinking of the liquor by the saloon-keeper was not traffic in intoxicating liquor within the meaning of the law, or such as will render his sureties liable in an action upon his bond. *Id.*
6. Where a remonstrance in opposition to an application for a liquor license denies that the petition is signed by the requisite number of resident freeholders, the burden is upon the applicant to prove by competent evidence that the same is signed by the required number of qualified petitioners, and if he fails so to do, a license should be refused. *Brown v. Lutz* 528
7. Action cannot be taken by a city council on an application for a liquor license until at least two weeks' notice of the filing thereof has been given in the mode provided by law. *Id.* 532
8. Notice was *held* sufficient, where publication was made for two consecutive weeks commencing June 2, 1892, and it appeared that a remonstrance was filed June 16, and by

stipulation of counsel no action was taken thereon until June 21, though the paper containing the notice was not deposited in the post-office until June 3, since more than two weeks elapsed after that date before the city council took any action upon the application. *Id.*

Live Stock. See CARRIERS, 7, 8. RAILROAD COMPANIES, 5-7.

Malicious Prosecution.

1. On the trial of the accused charged with the commission of a criminal offense, by a jury in justice court, the jury found specially "that the complaint was made without probable cause." In an action for malicious prosecution subsequently brought by the accused against the person filing the criminal complaint, such special finding should not be set forth in the petition, and having been copied therein should be stricken out on motion. *Obernalte v. Johnson* 772
2. On the trial of the case last stated the verdict of the jury in justice court acquitting plaintiff was offered in evidence. *Held*, That part of the verdict acquitting plaintiff was admissible, although the answer admitted plaintiff had been tried and acquitted. *Held, further*, It was error to permit the special finding to be read in evidence to the jury. *Id.*
3. The foregoing errors were, however, cured by the instructions of the court, and were held to be without prejudice. *Id.*

Malpractice. See PHYSICIANS AND SURGEONS.

Mandamus. See CONSTITUTIONAL LAW. GOVERNOR, 2. PRACTICE, 2.

1. The writ of *mandamus* will not be used to control an officer in the exercise of his discretion. *State v. Boyd* 60
2. A relator having a personal right to be enforced by *mandamus* may bring an action in the name of the state on his relation. *State v. Spicer* 469
3. Will lie on relation of school district in cities of second class to compel county commissioners to levy school tax. *State v. Paddock* 263
4. Court in *mandamus* proceeding to require county clerk to issue certificate of election will not inquire into the regularity of the nomination, or certificates of nomination of the candidates. *State v. Van Camp* 91
5. Writ will lie to compel county clerk to issue a certificate of election to the person appearing from the face of the

returns to have been elected a member of the legislature, but the certificate will not conclude the legislature in contest proceedings. *Id.*

6. Will issue to compel an ex-county treasurer to pay into the treasury money retained by him for salary during the time the duties of the office were performed by a *de facto* officer who had been paid his salary by the county before the *de jure* officer assumed the duties of the office. *State v. Milne*..... 301

7. While *mandamus* is not the appropriate mode of trying the question of strict title to an office, yet, in such a proceeding brought to compel the respondent to approve the official bond, tendered by the relator, sufficient inquiry may be made to ascertain whether or not the relator's certificate of election or appointment is *prima facie* evidence of title to the office. *State v. Plambeck*..... 401

8. One who in good faith attends upon a public sale of property for delinquent taxes at the time named in the advertisement and requests the treasurer to offer the delinquent property for sale, and demands the right to bid therefor, has such an interest therein as will entitle him to prosecute proceedings by *mandamus* to compel the treasurer to discharge his duty by offering said property for sale. *State v. Farney*..... 538

9. Where in a partition suit the real estate has been sold, the sale confirmed, deeds made to the purchaser, the proceeds paid by a referee to the clerk of the district court as trustee, and the referee relieved of his trusteeship under an order of the court, *mandamus* will lie on relation of a person entitled to a portion of the proceeds, consisting of money and notes, to compel the clerk to make payment. *State v. Spicer*.....477-8

Marriage. See NEW TRIAL, 5.

Marriage is a civil contract requiring in all cases for its validity only the consent of parties capable of contracting. The fact of marriage may be proved by the testimony of one of the parties. *Bailey v. State*..... 808

Married Women. See HUSBAND AND WIFE.

Master and Servant.

1. The question presented by the pleadings was whether or not the servant was employed by a firm and rendered services for it, or whether he was employed by one of the partners, his father, and represented him as a member of the firm. The evidence referred to in the opinion was

held to establish the fact that the servant was employed by and r. presented his father, and that the firm was not liable for the services. *Glade v. White*..... 172

2. It is the duty of a master to furnish his servants with such appliances for his work as are suitable and may be used with safety, and if the servant is injured by reason of defective appliances furnished by his master, the latter will be liable for damages unless he can show that he used due care in the selection of the same. *Leigh v. Omaha Street R. Co* 131

3. The driver of a street car propelled by horses was given a span of horses to propel the car, one of which was a broncho and would kick when struck, which fact was known to the master, but of which the driver was not aware and was not informed by the master. The car was under the care of a conductor, who permitted the same to be overcrowded, every available foot of space, both in the car and on the platform, being filled. On attempting to start the car the broncho refused to pull, whereupon the driver, who was crowded close to the broncho, slapped it with the lines, when it kicked him in the abdomen, causing death in a few hours. *Held*, That there was sufficient testimony to submit the questions of fact to a jury. *Id*..... 132

4. A servant was employed for one year at a salary as superintendent and general manager of a packing house, but was discharged before the expiration of the year. In an action to recover salary for the unexpired term of employment, testimony showing that he did not attend to his duties faithfully and efficiently; that he used intoxicating liquor in considerable quantities and permitted foremen immediately under him to use it; and that it was constantly kept on hand and continually used, was sufficient to justify the discharge. *Armour-Cudahy Packing Co. v. Hart*..... 166

5. In an action for wrongful discharge before the termination of employment it appeared that the plaintiff contracted for the service of himself and son for a given time at a certain rate per month. He alone went into the service, and was discharged before the expiration of the time fixed by the contract. It did not appear that he ever tendered the services of his son, or that the latter was ready or willing to enter the employment of defendant. *Held*, That the discharge was not a breach of the contract for which he could recover in an action for being wrongfully discharged, although he may recover in a proper action for the value of his services. *Hale v. Sheehan*..... 439

Measure of Damages. See DAMAGES.

Mechanics' Liens.

1. In a foreclosure proceeding the proof referred to in the opinion failed to show a new promise of the purchaser of the property to pay the debt. *Burlingim v. Cooper*..... 73
2. The property of an infant is not subject to a mechanic's lien for material purchased during infancy; and retaining property after attaining majority is not such ratification as gives validity to the lien. *Bloomer v. Nolan*..... 51
3. In a suit to foreclose a mechanic's lien, where other incumbrancers by answer deny the facts necessary to create the lien, it is necessary for the mechanic's lienor, in order to establish his lien as prior to such other incumbrances, to prove such facts, including the time of commencing labor or of furnishing material. *Henry & Coatsworth Co. v. McCurdy*..... 863
4. Continue in force for two years after the date of filing the lien, and, in case an action is brought to foreclose the same, until judgment is recovered and satisfied. If a summons is issued before the expiration of the two years from the filing of the lien, it may be served afterward within the statutory time, but if not issued until after the expiration of two years, an action to enforce the lien will be barred. *Burlingim v. Cooper*..... 73

Medicine. See PHYSICIANS AND SURGEONS.

Memorandum of Contract. See STATUTE OF FRAUDS.

Merchandise. See CHATTEL MORTGAGES, 4.

Metropolitan Cities. See MUNICIPAL CORPORATIONS.

Ministerial Act. See HOLIDAYS.

Ministers. See RELIGIOUS SOCIETIES.

Misconduct of Jury. See JURY, 1, 2.

Misjoinder of Causes of Action. See PLEADING, 9.

Mixtion. See CONFUSION OF GOODS.

Mortgages. See CONFLICT OF LAWS. CORPORATIONS 6, 7. JUDGMENTS, 9. STATUTE OF LIMITATIONS, 4.

1. Where several notes, secured by one mortgage, are transferred to different persons, such transfer amounts to an assignment *pro tanto* of the mortgage, and the several holders thereof will be entitled to share *pro rata* in the proceeds of the mortgaged property. *Todd v. Cremer*..... 430
2. A decree of foreclosure, to which the holders of the other

notes secured by the same mortgage is not made a party, is not a bar to a subsequent foreclosure proceeding by the holder of such notes. *Id.*

3. Liability of grantee of mortgaged premises, under deed requiring him to pay mortgaged debt, should be established by very clear proof, where he denies the debt and the delivery of the deed, and the premises are of less value than the incumbrance. *Stuart v. Hervey* 1

4. An objection to the omission in a petition to foreclose a mortgage, of the averment that no proceedings have been had at law for the collection of the debt secured thereby, must be made prior to the rendition of the decree, as it relates to matter in abatement, and not to a fact affecting the validity of the mortgage. *Henry & Coatsworth Co. v. McCurdy* 863

5. Whether a petition may at any time be attacked because of the omission of such averment by another incumbrancer, seeking to foreclose his lien in the same action, *quære.* *Id.*

6. The owner of securities sent them to a bank for collection. The president of the bank personally received the proceeds. He subsequently executed a mortgage in his individual capacity to the owner of the securities, and it was *held* that the consideration was sufficient. *Griffin v. Chase,* 334

7. Under the pleadings and proof discussed in opinion, *held,* that the plaintiff is not entitled to a deficiency judgment against certain parties who had made a conditional contract to discharge incumbrances upon the real estate. *Security Company of Hartford v. Eyer* 507

8. The rule is that a default by a party defendant is a confession only of such matters as are properly alleged in the petition or complaint; but a recognized exception to that rule is that where, in a foreclosure or other kindred proceeding, a defendant, who is called upon to disclose or set up his supposed but unknown interest in the subject of the action, makes default, he will be *held* to have admitted that his interest therein is subject to that of the plaintiff. *Lincoln National Bank v. Virgin* 735

Motions. See ATTACHMENT, 4. REVIEW, 9.

Affidavits used in the district court on the hearing of a motion, to be available in the supreme court, must be preserved in a bill of exceptions. *Barton v. McKay* 634

Motions for New Trial. See REVIEW, 24, 26, 28.

Municipal Corporations. See LIQUORS, 2, 7. STATUTES, 2, 3. STREET RAILWAYS, 3.

1. The property of the state, counties, or school districts is not liable for special assessments for paving or otherwise improving the streets of cities of the second class having over 5,000 and less than 25,000 inhabitants. *Von Steen v. City of Beatrice* 421
2. It is proper to admit evidence to show that the rental value of plaintiff's property has been depreciated by the construction of a viaduct in front of plaintiff's lot in an action against the city for damages. *City of Omaha v. Hansen* 135
3. A petition to confer jurisdiction upon the city council to order the paving of streets in any paving district of cities having over 5,000 and less than 25,000 inhabitants must be signed unconditionally by the owners of a majority of the feet fronting thereon. *Von Steen v. City of Beatrice*... 421
4. A section of a city ordinance regulating the license and sale of liquors is not invalid as unreasonable and unjust because it provides that no chairs or seats of any kind shall be placed in any saloon, and fixes a penalty for violation thereof. *Brown v. Lutz*..... 527
5. In a city of the second class, containing a population of less than 5,000, an ordinance of a general character may be presented, read, and adopted by the city council thereof on the same day, provided the rule requiring such ordinance to be fully read on three different days is dispensed with by a vote of three-fourths of the members of the council. *Id.*
6. In an action against a city for damages caused by constructing a viaduct thirty feet above plaintiff's lot it was *held* not error to instruct the jury that the general increase of travel upon the street caused by the erection of the viaduct is not a special benefit, and cannot be deducted from the amount of damages sustained. *City of Omaha v. Hansen*.....137, 138
7. In an action for personal injuries caused by a fall resulting from a defective sidewalk it was not error to instruct the jury that it is the duty of the city to keep and maintain its sidewalks in good repair for the safe and convenient use of the traveling public walking and passing thereon. *City of Grand Island v. Oberschulte*..... 696
8. A non-resident, in passing from the Union Pacific station in South Omaha to Twenty-third and P streets in the night season, went east on N to Twenty-fourth street, then south

on Twenty-fourth street nearly to O, when he noticed stairs about ten feet in height in front of a private residence. He ascended the stairs which he mistook for those on a block near the point of his destination, and continuing fell into an excavation caused by grading O street, and was injured. *Held*, That the proof failed to show negligence on the part of the city. *Gilchrist v. City of South Omaha* 163

National Banks. See BANKS AND BANKING, 2. STATUTE OF LIMITATIONS, 1.

Negative Averment. See INDICTMENT AND INFORMATION, 4, 5.

Negligence. See CARRIERS. COUNTIES, 2, 3. MASTER AND SERVANT, 2, 3. MUNICIPAL CORPORATIONS, 8. NEGOTIABLE INSTRUMENTS, 15. RAILROAD COMPANIES.

Where different minds may draw different inferences from the same state of facts, as to whether such facts establish negligence, it is a proper question for the jury and not for the court. But that rule is subject to the qualification that the inference of negligence must be a reasonable one. Where it is impossible to infer negligence from the established facts without reasoning irrationally and contrary to common sense and the experience of average men, it is not a question for the jury, and the court should direct a verdict for the defendant. *Chicago, B. & Q. R. Co. v. Landauer* 642

Negotiable Instruments. See ASSIGNMENTS. CONTRACTS, 4, 7. INTEREST. SUBROGATION. USURY, 4, 5.

1. *Clapham v. Storm* 499
2. Sufficiency of proof to show authority of corporation to execute. *Metropolitan Building & Loan Ass'n v. Van Pelt*, 3
3. Bank checks are due upon presentation, and not entitled to days of grace. *Wood River Bank v. First National Bank of Omaha* 744
4. A provision in a note executed since June 1, 1879, for the payment of attorneys' fees for collection is invalid. *Security Company of Hartford v. Eyer* 507
5. The failure of consideration for a negotiable instrument is no defense to an action by *bona fide* purchasers without notice. *Lanning, Antram & Co. v. Burns* 236
6. Where note was given for purchase of spring wagon, sold on written guaranty, the failure to comply with guaranty under facts stated, *held*, a good defense. *Kansas Manufacturing Co. v. Lumry* 123

7. The possession of a promissory note by the maker after maturity thereof is *prima facie* evidence of payment. *Smith v. Gardner* 741

8. In action on negotiable instrument, as between the parties to the instrument and persons not *bona fide* purchasers for value before maturity, a partial defense is available. *Lanning, Antram & Co. v. Burns* 236

9. The term "protest," as applied to inland bills of exchange, includes only the steps essential to charge the drawer and indorser. *Wood River Bank v. First National Bank of Omaha* 744

10. The general rule is that where a bank delivers a note or bill to a notary public for demand, protest, and notice, it will not be liable for the default of the latter. *Id.* 745

11. Bank checks in this country are regarded as inland bills of exchange for the purpose of presentment and demand, and notice of dishonor, and do not require a formal protest in order to charge the indorsers. *Id.* 744

12. Where, in an action on a negotiable check, payment of which had been stopped by the drawer, the answer admitted a portion of the indebtedness, and alleged a partial failure of consideration, the plaintiff should recover the amount admitted to be due, and judgment in favor of defendant could not be sustained. *Lanning, Antram & Co. v. Burns* 236

13. Where undisputed proof showed a want of consideration for a promissory note, and the proof failed to clearly establish the fact that the plaintiff was a *bona fide* purchaser for value before maturity, a verdict and judgment in favor of the defendant will not be set aside. *Hooper v. Grewell*, 595

14. The force of the presumption of payment from the possession of a note by the maker depends upon the circumstances of the particular case. It is error, therefore, to instruct the jury that possession of a note raises a strong presumption of payment or is a strong circumstance to prove payment. *Smith v. Gardner* 741

15. Where a bank delivers a note or bill to a notary public for demand, protest, and notice, and such note or bill remains in the bank to be protested for non-payment by the president and manager thereof, a notary public, and who, although aware of the instructions to the contrary, delays noting for protest or giving notice, in consequence of which the indorsers are discharged, such notary will be held to be the agent of the bank, and the latter will be liable for

his negligence. *Wood River Bank v. First National Bank of Omaha* 745

16. A bank receiving for collection from a correspondent checks drawn upon it by a customer, with instructions to protest in case of non-payment, is required, in case payment is refused for want of funds, to give notice to the bank from which they were received not later than the next day after the dishonor. And when they are held for two days in order to enable the drawer to provide funds for payment thereof a jury would be warranted in finding that the bank intended to accept them and become liable thereon. *Id.* 744

17. The main issue in the trial of an action on a note being whether the note sued upon was given by the defendant as payment for the other fifty per cent due from defendant to plaintiffs (fifty per cent having already been paid upon a general composition agreement of the maker of the note with his creditors), or whether said note was given plaintiffs for services by plaintiffs' agent rendered for defendant, independently of such agency, it was proper to instruct the jury: 1. That if plaintiffs with the maker of the note entered into such a composition agreement, a note taken for the fifty per cent by said composition rebated would be a fraud upon the rights of the other compounding creditors, and that payment thereof would not therefore be enforced. 2. Instructions as to the rights of plaintiffs, upon their theory of the transaction, properly required upon the evidence adduced that the jury should "believe from the testimony that such a transaction was made in good faith, and not as a device to evade the effect of a payment to the plaintiffs directly." *Freiberg v. Treitschke* 880

New Promise.

In a proceeding to foreclose a mechanic's lien the proof referred to in the opinion failed to show a new promise of the purchaser of the property to pay the debt. *Burlingim v. Cooper* 73

New Trial. See REVIEW, 25, 27.

1. Should be allowed when it is clear that material uncontradicted evidence has been disregarded by the jury, and which, if considered and given due weight, would have required a different verdict from that returned. *Chicago, B. & Q. R. Co. v. Landauer* 642

2. A motion for a new trial should be granted on the ground of newly discovered evidence tending to impeach a witness by showing declarations contradicting his testimony,

where such evidence is of so controlling a character that it would probably change the verdict. *Bailey v. State*..... 809

3. To entitle a party to a new trial on account of newly discovered evidence, it is not enough that the evidence is material and not cumulative; it must further appear that the applicant for the new trial could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial. *Fitzgerald v. Brandt*..... 683

4. A motion for a new trial on the ground of newly discovered evidence was properly denied, when such new evidence was competent under the pleadings in the case; and the witness who was to furnish the new evidence testified on the trial, was examined by the applicant for the new trial, and in which examination no effort was made to elicit any of the facts now claimed to be newly discovered evidence. *Id.*

5. In a prosecution for adultery the only evidence of defendant's marriage was that of the complaining witness, the woman alleged to be defendant's wife. The marriage relied upon was by words of consent without the presence of a solemnizing officer or of witnesses. A new trial was asked on the grounds of newly discovered evidence, the affidavits removing every question of negligence in procuring the evidence. The newly discovered evidence alleged consisted of the declaration of the complaining witness contradicting her testimony as to the marriage. *Held*, That under these circumstances the motion should have been sustained. *Bailey v. State*..... 809

Newly Discovered Evidence. See NEW TRIAL, 2–5.

Non-Resident. See EMINENT DOMAIN, 1. STATUTE OF LIMITATIONS, 4.

Notary Public. See NEGOTIABLE INSTRUMENTS, 15.

Notice. See BILL OF EXCEPTIONS, 2. CHATTEL MORTGAGES, 8. CORPORATIONS, 3, 4. FRAUDULENT CONVEYANCES, 9–12. GUARDIAN AND WARD. LIQUORS, 7, 8. NEGOTIABLE INSTRUMENTS, 10–16. REGISTRATION.

Objections. See COUNTY SEAT, 4. INDICTMENT AND INFORMATION, 2. INSURANCE, 3. PLEADING, 11. REVIEW, 38. TRIAL, 4. WITNESSES. 4.

Occupancy. See HOMESTEADS, 3.

Office and Officers. See COUNTIES, 1, 4, 5. COUNTY CLERKS. GOVERNOR. MANDAMUS, 7. STATUTES, 1. TAX SALES, 2, 3.

1. The title to an office cannot be tried and determined on an application for a writ of *mandamus*. *State v. Plambeck*..... 401

2. Where a claimant of an office sues a *de facto* officer to recover the emoluments thereof received by the latter, the plaintiff's title to the office is put in issue, and in order to recover he is required to prove that he is the *de jure* officer. *Richards v. McMillin*..... 352

3. Where an officer who is entitled to hold over fails to qualify as his own successor within ten days after it is ascertained that the person who was elected to succeed him is ineligible, he loses his title to the office and he cannot recover the emoluments thereof. *Id*.....357, 358

Officers. See BANKS AND BANKING, 1.

Officer's Return. See SUMMONS, 3.

Official Capacity. See DEEDS, 2.

Onus Probandi. See APPEARANCE. CORPORATIONS, 1, 6. LIQUORS, 6.

Opening and Closing. See TRIAL, 2.

Orders. See COUNTY BOARD. EVIDENCE, 16. FINAL ORDER.

Ordinances. See MUNICIPAL CORPORATIONS, 4, 5.

Parol Contracts. See STATUTE OF FRAUDS, 2.

Parties. See CHATTEL MORTGAGES, 6, 7. DEEDS, 3. INSURANCE, 8. JUDGMENTS, 6. MANDAMUS, 8. MORTGAGES, 1, 2. PARTITION, 2 PLEADING, 13. RECEIVERS.

1. Submission of error proceeding on merits is waiver of defect of parties. *Curtin v. Atkinson*..... 111

2. Where a plaintiff transfers his interest in the subject of the action to another during the pendency of the cause, the suit may be prosecuted to final termination in the name of the original plaintiff; or the person to whom the transfer is made may be substituted as plaintiff. *Howell v. Alma Milling Co*..... 80

3. A railroad company which has appropriated private property for right of way purposes, on appeal to the district court from an award of damages, is not entitled to have a third party substituted and made a party in its stead, on the ground that such person has agreed to indemnify it for money expended for right of way. *Omaha S. R. Co. v. Beeson*..... 361

4. In an action against a county treasurer and his bondsmen for a wrongful sale of land it was shown that a person pur-

chased certain lands at tax sale and had the certificates and deeds made to his sister. He testified that he had money belonging to her to invest and that he purchased the property in question. It was sought to impeach this testimony by showing that after the purchase he had made statements that on account of domestic difficulties he had taken the title in the name of his sister. *Held*, That as the money paid purported to be that of the sister and the titles were taken in her name she could maintain such an action. *Alexander v. Overton* 503

Partition. See EVIDENCE, 13.

1. A party out of possession of real estate, whose title is denied, cannot maintain an action of partition against one in possession, claiming title to said land. *McMurtry v. Keifner* 522

2. In an action for partition the defendant alleged a partnership between himself and the plaintiff's husband who had conveyed the land to her. The trial court found such partnership to exist and that the plaintiff had no rights in the premises, and that the plaintiff's husband was a necessary party for an accounting. *Held*, That the testimony failed to show a partnership in the land but merely in the stock and improvements, and that the plaintiff could maintain the action subject to the payment of the improvements made by the firm. *Reed v. Snell* 815

Partnership. See ACCOUNTING. MASTER AND SERVANT, 1. PARTITION, 2. REPLEVIN, 12.

In an action by a member of a partnership against the others for an accounting, the finding was in favor of the plaintiff. The testimony showed that one of the defendants had previously conveyed to plaintiff, to satisfy his claim, property which he claimed was worth $8,000, and by the plaintiff admitted to be of the value of $2,000. The finding failed to fix the value of this property, or make a deduction therefor. Upon appeal to supreme court, *held*, that plaintiff might reconvey the property within thirty days, and in case he failed to do so, a reference would be ordered to ascertain the value thereof. *Gerber v. Jones* ... 126

Party Walls. See COUNTY COURTS. VENDOR AND VENDEE, 7.

Passengers. See CARRIERS, 5, 6.

Paving Streets. See MUNICIPAL CORPORATIONS, 1, 3.

Payment. See NEGOTIABLE INSTRUMENTS, 7.

Personal Injuries. See CARRIERS. MASTER AND SERVANT, 2, 3. MUNICIPAL CORPORATIONS, 7.

Petition. See COUNTY SEAT.

Photograph of Premises. See EVIDENCE, 4.

Physicians and Surgeons. See INDICTMENT AND INFORMATION, 4, 5.

1. In a malpractice case there can be no recovery for expense incurred in efforts to cure an injury, unless it be shown that the expense so incurred was reasonable and necessary. *Hewitt v. Eisenbart* 794
2. The law requires of a surgeon in the treatment of his patient the exercise of that degree of knowledge and skill ordinarily possessed by members of the medical profession. *Id.*
3. Testimony as to the physical condition of a plaintiff in a malpractice case just before the trial, and two or more years after undergoing the treatment complained of, is competent where such condition is shown to be the result of the injury in question and is of a permanent nature. *Id.*
4. In a malpractice case it is not necessary to sustain a verdict for the plaintiff, that all the expert witnesses called should consider the treatment pursued by defendant improper; nor will the fact that all such witnesses agree that a portion of such treatment is proper under some circumstances, in itself defeat a recovery. *Id.*

Pleading. See BONDS. CARRIERS, 7. CONTRACTS, 3. EXECUTORS AND ADMINISTRATORS. FRAUDULENT CONVEYANCES, 2. INDEMNITY, 1. JUDGMENTS, 6. LIQUORS, 1. QUANTUM MERUIT. SALES, 1. STATUTE OF LIMITATIONS, 2. TROVER AND CONVERSION.

1. Petition set out in opinion *held* to state a cause of action in replevin. *McKinney v. First National Bank of Chadron*, 629
2. The petition in an action on a replevin bond, set out in the opinion, *held* to state a cause of action. *Shoning v. Coburn*, 76
3. The answer discussed in the opinion does not allege sufficient facts to constitute the defense of usury. *Rose v. Munford* 151
4. If from the facts stated in a petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie. *George v. Edney* 604
5. Where the allegations of a pleading are indefinite, the

remedy is by motion to have the same made more definite and certain. *First National Bank of Dorchester v. Smith*, 199

6. Where the answer to a petition is a general denial, and it appears from the pleadings themselves that it is false, it may be stricken from the files as sham. *Upton v. Kennedy*, 66

7. A new cause of action should not be presented in the reply, but where no objection is made it will be *held* to have been waived after submission of case on merits. *Gregory v. Kaar*..... 533

8. Where a general denial is sufficient in form and there is nothing on the face of the pleadings to show that it is false, the court will not enter into an examination of the merits of the defense upon affidavits. *Upton v. Kennedy*, 67

9. Where there is a misjoinder of causes of action which plainly appears on the face of the petition, the adverse party should demur for that cause. If he fails to do so he will waive the defect. *Porter v. Sherman County Banking Co*..... 272

10. The petition to recover damages from a county for injuries resulting from a failure of the county board to keep a public bridge in repair, set out in the opinion, *held* to state a cause of action. *Hollingsworth v. Saunders County*...142–147

11. Where the averment that no proceedings have been had at law, for the collection of the debt, has been omitted from a petition to foreclose a mortgage, the objection must be made before rendition of decree. *Henry & Coatsworth Co. v. McCurdy*..... 863

12. A petition in an action of replevin by a mortgagee of chattels is not objectionable because it fails to allege that the note, for payment of which the mortgage was given to secure, was due, where the date of maturity, which is prior to bringing suit, is set forth. *Rodgers v. Graham*..... 730

13. After answer day, if a defendant files a pleading, in the nature of a cross-petition, against his co-defendants who have not appeared in the action, such co-defendants can be concluded in respect thereto, only by their appearance, or after the service on them of a notice in the nature of a summons, as to such pleading. *Arnold v. Badger Lumber Co*..... 841

14. An action was twice reversed in the supreme court. Before the third trial the plaintiff died and the cause was revived in the name of his executrix. To her petition the defendant filed an answer in which the title of the cause was stated as it appeared before the revivor. Suffi-

cient appeared in the answer to show to what petition it applied, and it was in fact filed in the proper case. No motion was made and filed to strike it from the files. *Held*, Error without prejudice. *Williams v. Eikenbary*..... 478

Policies. See INSURANCE.

Possession. See PARTITION, 1. REPLEVIN, 12.

Power of Attorney.

In a power of attorney to convey real property the true function of the description is not necessarily to identify the land, but may be only to furnish the necessary means of identification. If such description can be made complete by an examination of the public records and the records of judicial proceedings clearly indicated in such description, it is a sufficient identification of the subject-matter of such power of attorney. *Connell v. Galligher*..... 750

Practice. See ASSIGNMENTS OF ERROR. BILL OF EXCEPTIONS, 2, 3. DISMISSAL. EVIDENCE, 16. INDICTMENT AND INFORMATION, 2. PLEADING, 5, 11. REMITTITUR.

1. A party desiring to review on error an order allowing costs must file a motion to retax and bring up the ruling thereon. *Bates v. Diamond Crystal Salt Co*..... 904
2. In an original application for *mandamus* before the supreme court, where a demurrer to the relation was overruled, the defendant was permitted to file an answer in five days. *State v. Spicer*..... 478
3. The action of a county court in setting aside a judgment under sec. 1001 of the Code upon a petition instead of a motion is a mere irregularity, and an order so made is not void for want of jurisdiction. *Pollock v. Boyd*..... 369

Preachers. See RELIGIOUS SOCIETIES.

Preferred Creditors. See VOLUNTARY ASSIGNMENTS, 3, 4.

A debtor in failing circumstances may lawfully prefer one or more of his creditors and secure such creditors by mortgage or conveyance absolute, provided the transaction is in good faith and not made with intent to defraud other creditors. *Costello v. Chamberlain*..... 45

Presumption. See CORPORATIONS 1, 6.

Presumption of Fraud. See FRAUDULENT CONVEYANCES, 3, 5, 8.

Presumption of Negligence. See CARRIERS, 1. RAILROAD COMPANIES, 4.

Presumption of Payment. See NEGOTIABLE INSTRUMENTS, 7, 14.

Principal and Agent. See POWER OF ATTORNEY. REAL ESTATE BROKERS.

1. A commission cannot be collected by an agent for his services as such if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency. *Jansen v. Williams* 869
2. An agent for the purpose of selling goods will not be permitted to sell to himself, even though the sale be public, and no actual fraud appear. In case he do so, he will be required to account to his principals for any profit he may have realized. *Rockford Watch Co. v. Manifold* 802
3. An agent is required to disclose to his principal all the information he has touching the subject-matter of the agency; and his relation to his principal forbids his becoming a purchaser thereof for his own benefit in any way without the full knowledge by the principal of this fact, and the principal's acquiescence therein with such knowledge. The burden of proving such knowledge and acquiescence is upon the agent. *Jansen v. Williams* 869

Principal and Surety. See HUSBAND AND WIFE. SUBROGATION.

1. An undertaking will be strictly construed in favor of sureties, and their liability will not be extended by construction beyond their specific agreement. *Curtin v. Atkinson* 110
2. The mere continuance of a cause in an appellate court by stipulation of the parties, without the consent of the surety on the appeal bond, will not operate to discharge such surety. *Howell v. Alma Milling Co.* 80
3. In the absence of proof of fraud or collusion between the principal and the creditor, a stipulation in the appellate court for judgment, without the knowledge or consent of the surety, will not release the surety on an appeal bond from liability thereon. *Id.*

Priority. See CHATTEL MORTGAGES, 6, 7. MECHANICS' LIENS, 3.

Private Banks. See CORPORATIONS, 4, 5, 8.

Probate of Wills. See WILLS.

Proceedings in Error. See ERROR PROCEEDINGS. REVIEW.

Promissory Notes. See MORTGAGES, 1, 2. NEGOTIABLE INSTRUMENTS. SUBROGATION.

Proof of Loss. See INSURANCE, 3.

Proof of Publication. See GUARDIAN AND WARD.

Property Rights. See RELIGIOUS SOCIETIES.

Protest. See NEGOTIABLE INSTRUMENTS, 9, 11.

Public Highways. See HIGHWAYS.

Public Improvements. See DAMAGES, 2.

Public Money. See LEGISLATIVE APPROPRIATIONS.

Public Property. See MUNICIPAL CORPORATIONS, 1, 3.

Publication. See CORPORATIONS, 3, 4. GUARDIAN AND WARD. LIQUORS, 7, 8.

Qualification. See OFFICE AND OFFICERS, 3.

Quantum Meruit.

Allegations of value in a pleading are not to be taken as true by a failure to deny them; and in all cases founded upon a *quantum meruit*, where the value of the services is not expressly admitted, the question of value is in issue and must be proved and submitted to the jury. *Campbell v. Brosius* 792

Question for Jury. See NEGLIGENCE.

Quia Timet. See QUIETING TITLE.

Quieting Title. See EQUITY.

In an action to set aside a deed as a forgery the plaintiff testified that she did not execute the deed. The original deed and plaintiff's signature admitted to be genuine were introduced in evidence. A number of experts were called, compared the signatures and pronounced the one on the deed genuine. In addition to this testimony there was the certificate of the notary before whom the deed purports to have been acknowledged. In a trial upon the record in the supreme court the genuine signature and alleged forgery were examined with a good microscope, without detection of forgery. *Held*, That a finding for the defendant was sustained by the evidence. *Barker v. Avery* 599

Railroad Companies. See CARRIERS. EMINENT DOMAIN, 2. INJUNCTION, 4.

1. Petition to recover value of stock injured and killed on track by negligence of the company in maintaining gateway at farm crossing, set out in opinion, *held* to state a cause of action. *Fremont, E. & M. V. R. Co. v. Pounder* ... 247

2. In an action to recover damages for loss occasioned by railway fires it devolves on the plaintiff to prove by a preponderance of the evidence that the fire was communicated by sparks or cinders from the railway engines. *Union P. R. Co. v. Keller* 189

3. It need not be proved that any particular engine was at fault, but it will be sufficient if it is proved that the fire was set by any engine passing over the defendant's railway, and the evidence may be wholly circumstantial, as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines, and, second, facts tending to show that it probably originated from that cause and no other. *Id.*

4. Where the proof shows that a fire originated from an engine running over the defendant's railway, it is unnecessary for the plaintiff to show affirmatively any defect in the construction or condition of the engine, or any negligence in its management. Negligence will be presumed from the fact that fires were set out. *Id.*

5. Under the statute, where a railway has been in operation in any county of the state for six months, it is its duty to erect and maintain on the sides of its road, except at crossings of public roads and within the limits of cities and villages, suitable and amply sufficient fences to prevent stock from getting on the railroad. Gates at farm crossings are a part of the inclosure of the railroad and must be suitable and amply sufficient to prevent stock from getting on the track. *Fremont, E. & M. V. R. Co. v. Pounder* 247

6. On the trial of an action to recover for injury to plaintiff's horses which the evidence showed had escaped through a gateway where a fence and gate had been negligently constructed and maintained by the company along plaintiff's land, and that the stock was injured on the track, it was *held* proper to instruct the jury as follows: "If you find from the evidence that defendant, when it fenced its road through plaintiff's land, put in a gate, but so negligently and carelessly kept up and maintained such gateway across its right of way that plaintiff's horses passed through such gateway upon said defendant's right of way and railroad and were killed or injured in consequence thereof, then you should find for plaintiff." *Id.* 252

7. In such a case the court did not err in refusing to instruct the jury that the company was not liable unless the injury was caused by actual collision with defendant's locomotive, engine, or trains. *Id.*

Rape.

1. Instructions to jury, set out in opinion, approved. *Richards v. State* 23–26
2. Where accused admits sexual intercourse but denies use of force, jury must find the fact. *Id.* 17
3. Proof of deformity of prosecutrix, as by want of a hand, is proper as tending to show diminished power of resistance. *Id.*
4. Where complaint is not made till seven months, when concealment, by reason of pregnancy, is no longer possible, the statements of the prosecutrix are not admissible; but independent facts, as the condition of her clothing, are admissible. *Id.*
5. Charge made months after commission of crime, where there are no marks of violence on person or clothing, or evidence of excitement or change in demeanor, cannot be sustained without very strong corroborating proof of the commission of the crime. *Id.*

Ratification.

Bates v. Diamond Crystal Salt Co. 904

Real Estate Brokers. See POWER OF ATTORNEY. PRINCIPAL AND AGENT, 1, 3.

When a real estate broker is employed to procure a purchaser of real property, he is entittled to compensation when he has secured a proposed purchaser ready, able, and willing to buy the property on the terms and conditions upon which the said broker was authorized to procure such purchaser. This right to compensation will not be impaired by the subsequent inability or unwillingness of the owner to consummate such sale on the terms prescribed. *Jones v. Stevens* 849

Receipt.

A written receipt may be contradicted or explained by parol testimony. *Morse v. Rice* 212

Receivers. See BANKS AND BANKING, 2.

A receiver appointed by a court of record of another state to take charge of the business of a partnership there and wind up its affairs may take charge of the property of the firm in this state, but in such a case there is a mere substitution of parties and the receiver has no greater rights in such property than the parties themselves. *Ogden v. Warren* 715

Recitals. See EVIDENCE, 13.

Record for Appeal. See APPEAL, 3.

Redemption. See TAX LIENS, 1.

Registration. See FRAUDULENT CONVEYANCES, 9–12.

The proper registration of a party wall agreement is constructive notice to all purchasers of the real estate affected by the agreement; and such notice is as effectual and binding as actual notice. *Garmire v. Willy*..... 340

Religious Societies.

1. The proceeding set out and discussed in the opinion, whereby it was sought to exclude a preacher from his clerical functions, examined and *held* not to be in accordance with the procedure established by the church discipline of the Evangelical Association of North America. *Pounder v. Ashe*..... 564
2. When rights of property are in question, civil courts will inquire whether or not the organic rules and forms of proceedings prescribed by the ecclesiastical body have been followed. *Id.*
3. When tested by such organic rules and forms, it is found that the proceedings of an ecclesiastical tribunal were without jurisdiction, such proceedings will be held void in so far as such proceedings necessarily and directly involve property rights. *Id.*

Relocation. See COUNTY SEAT.

Remittitur. See REVIEW, 6.

In a malpractice case against a physician the plaintiff was permitted to testify over defendant's objection that his expenses for medicine and treatment in efforts to be cured were about $85. It was not shown that the expenses were reasonable and necessary. Otherwise the proceedings were without error. *Held*, That a judgment in favor of plaintiff would be reversed in case he failed to file a remittitur for said sum in thirty days. *Hewitt v. Eisenbart*..... 801

Remonstrance. See LIQUORS, 6–8.

Repeal by Implication. See STATUTES, 2, 3.

Replevin. See ATTACHMENT, 6. FRAUDULENT CONVEYANCES, 4. PLEADING, 12. RES ADJUDICATA. SALES, 2, 3. VOLUNTARY ASSIGNMENTS, 1.

1. Action on bond. *Shoning v. Coburn*..... 76
2. Instruction set out in opinion approved. *Hakanson v. Brodke*..... 42
3. Petition set out in opinion *held* to state a cause of action in replevin. *McKinney v. First National Bank of Chadron*, 629

4. Where a defendant lawfully in possession of property denies the title and right of possession of the owners, no demand is necessary. *Ogden v. Warren* 715

5. Mortgagee of chattels in possession is entitled to hold same as against an officer holding a writ of attachment that runs against his mortgagor. *Hakanson v. Brodke* 42

6. Replevin of personal property from officer holding on an execution does not divest the lien of the levy where the claimant in the replevin suit fails to maintain title. *Bowman v. First National Bank of Nelson* 117

7. The petition by mortgagee of chattels, in action of replevin need not allege specifically that the note, to secure payment of which the mortgage was given, is due, where the date of maturity, which is prior to bringing suit, is stated. *Rodgers v. Graham* 730

8. Where, in an action by a mortgagee against the mortgagor to recover the mortgaged chattels, it is established that the mortgage was given to secure a usurious loan of money, the defendant is entitled to recover costs, although the verdict is in favor of the plaintiff. *Id.*

9. When the defendant in an action of replevin contests the case in the trial court on the merits, wholly on an affirmative claim of ownership and right of possession of the property in himself, no proof of demand and refusal is necessary to entitle the plaintiff to recover costs in case the verdict is in his favor. *Id.*

10. Where corn in a single pile or crib owned by two tenants in common is in the exclusive possession of one of such owners, but both being equally entitled to the possession thereof, the other joint owner, if his co-tenant refuses a division when properly demanded, may recover his portion of the grain by an action of replevin. *Fines v. Bolin*, 621

11. Where a merchant in failing circumstances, intending to prefer certain creditors, executed a bill of sale, the vendee paying the preferred claims out of the consideration named in the bill of sale it was *held*, in an action of replevin by the vendee against the sheriff who had seized the goods on an order of attachment in favor of an unsecured creditor, that the transfer was not an assignment for benefit of creditors, that the vendee was the only person beneficially interested, and that the transfer was valid, regardless of whether the bill of sale was intended as a mortgage or an absolute transfer. *Costello v. Chamberlain* 45

12. Two firms entered into a contract to deal in corn. The

parties of the first part were to furnish the money and the parties of the second part were to buy the corn, place it in cribs, insure it, and incur all lawful expenses of buying, cribbing, shelling, and preparing for market. The corn was to be the property of parties of the first part and at all times under their control. The profits above the actual cost of the corn and expenses were to be equally divided. A large quantity of corn was purchased under this agreement, and while it was in the cribs the partnership of which the parties of the second part was composed was dissolved by an order of court, and a receiver appointed, who took possession of the corn. In an action of replevin by the parties of the first part, *held* that they had a lien upon the corn for the purchase money and half the profits, and were entitled to immediate possession. *Ogden v. Warren*..... 715

Replevin Bonds. See SHERIFFS AND CONSTABLES.

Representative District.

The twentieth district includes the territory now comprising Boyd county. *State v. Van Camp*..... 91

Res Adjudicata. See MORTGAGES, 2.

1. *Richards v. McMillin*..... 352
2. A judgment of dismissal in an action of replevin entered because the plaintiff has no legal capacity to sue will not bar a future action for the same property. *Rodgers v. Levy*, 601
3. Where a cause is dismissed because the plaintiff has not legal capacity to sue, and the defendant thereupon has a jury impaneled to try the right of property which is awarded to him, he thereby cannot bar the plaintiff from maintaining a second action of replevin for the same goods. *Id.*

Rescission. See INFANTS. SALES, 2–4.

Resolutions. See MUNICIPAL CORPORATIONS, 4, 5.

Revenue. See TAX SALES.

Reversion. See HIGHWAYS.

Review. See ACCOUNTING. APPEAL, 1. ASSIGNMENTS OF ERROR. BILL OF EXCEPTIONS. BONDS. CARRIERS, 7. CRIMINAL LAW, 7. ERROR PROCEEDINGS. HABEAS CORPUS. INSTRUCTIONS, 8. NEGOTIABLE INSTRUMENTS, 13. NEW TRIAL, 3, 4. PARTITION, 2. PRACTICE, 3. RELIGIOUS SOCIETIES. REMITTITUR. TRIAL, 4.

1. Evidence *held* to sustain the verdict. *Cortelyou v. Hiatt*... 584
   Costello v. Chamberlain..... 45

Garmire v. Willy 340
Morse v. Rice 212
Union P. R. Co. v. Keller 190
Williams v. Eikenbary 479

2. Evidence *held* insufficient to sustain the judgment. *Ashford v. State* 38
Bloomer v. Nolan 51

3. Where from an examination of the evidence it is apparent that the verdict is wrong, it will be set aside. *Richards v. McMillin* 352
Wood River Bank v. Dodge 708

4. Where the testimony is conflicting and the verdict not against the clear weight of evidence the judgment will be affirmed. *Metropolitan Building & Loan Association v. Van Pelt* 3
Wyeth Hardware & Manufacturing Co. v. Shearer 5

5. Where a case is submitted under proper instructions, and the verdict conforms to the proof, the judgment will be affirmed. *City of Grand Island v. Oberschulte* 696
Kansas Manufacturing Co. v. Lumry 123

6. Where verdict is excessive the judgment will be reversed unless a remittitur is filed. *Van Etten v. Selden* 210

7. Order overruling plea in abatement cannot be reviewed in supreme court until after final judgment. *Gartner v. State*, 280

8. A judgment will not be reversed for want of evidence unless the burden of proof is plainly opposed to it. *Flannagan v. Edwards* 360

9. Affidavits used on the hearing of a motion in the district court cannot be considered in the supreme court unless embodied in a bill of exceptions. *Maggard v. Van Duyn*, 862

10. Affidavits used in support of a motion for a continuance in the district court, to be available in the appellate court, must be made a part of the record by a bill of exceptions. *Barton v. McKay* 632

11. Where counter-affidavits have been used on a motion for continuance, and the continuance is denied, the judgment will not be reversed for that reason, where the showing of the party making the application, when considered alone, is insufficient to entitle him to a continuance. *Id.* 633

12. Where an order discharging an attachment is against the clear weight of evidence, it will be reversed and the attachment sustained. *Jones v. Bivin* 821

13. Where a motion to discharge an attachment on the ground that the facts stated in the affidavit are untrue is heard

upon conflicting affidavits, the decision of the trial court on the motion will not be disturbed unless it is clearly against the weight of the evidence. *Whipple v. Hill* 720

14. Evidence *held* sufficient to sustain a finding and judgment foreclosing a mechanic's lien. *Gregory v. Kaar*..... 533

15. In case stated evidence found to sustain finding and decree of trial court. *Sprague v. Fuller* 220

16. Evidence discussed in opinion *held* not sufficient to sustain an order for an allowance to widow out of decedent's estate. *Sheedy v. Sheedy*..... 373

17. The evidence being in writing and practically undisputed as to the amount due the plaintiff, a verdict for a sum greatly less cannot be sustained. *Porter v. Sherman County Banking Co*..... 271

18. Where the principal error relied upon is that the verdict is against the weight of evidence the verdict will not be set aside, unless it is clearly wrong. *Clapham v. Storm* ... 499

19. Upon the main issues in the pleadings the findings and judgment in an action by a partner for an accounting in case discussed in opinion are sustained by the evidence. *Gerber v. Jones*..... 126

20. Where a bill of exceptions has been quashed and the court below correctly applied the law to the facts found by a referee, that being the only question for review, the judgment will be affirmed. *Brown v. Farmers & Merchants Banking Co*..... 438

21. In an action on a note, where the preponderance of evidence shows that the plaintiff is a *bona fide* holder and entitled to recover, a judgment for the defendant will be reversed. *Reuber v. Crawford*..... 334

22. Upon conflicting evidence in a case involving only the question whether or not, justifiably relying upon the representations of plaintiff's agent as to the contents of a written contract, the defendants signed the same, and whether or not said representations were false, the verdict of the jury in favor of the defendants will not be disturbed. *Aultman v. Finck*..... 680

23. When it is sought to review a decree in equity by error proceedings, and the only error alleged is that the pleadings do not support the decree, every reasonable presumption must be indulged in support of the correctness of the decree; and unless it certainly appears that no such decree as rendered could lawfully be pronounced on the pleadings, it will not be disturbed. *Fitzgerald v. Brandt*, 684

24. In order to review the proceedings in the trial of an equity case by a petition in error, a motion for a new trial must be filed, as in an action at law. *Gray v. Disbrow* 857

25. The supreme court will not review the proceedings of the district court by petition in error, unless a motion for a new trial was made in the trial court and a ruling obtained thereon. *Jones v. Hayes* 526

26. Unless a motion for a new trial is made within three days after the verdict or decision, the supreme court cannot examine any of the errors which it is alleged occurred at the trial. *Fitzgerald v. Brandt* 683

27. The supreme court will not review the instructions given to the jury by the court below, nor those asked and refused, where its attention has not been called to them in the motion for a new trial. *Barton v. McKay* 633

28. The failure of a jury, in assessing the amount of recovery, to allow interest upon a sum due upon contract is not presented for review by the assignment, in a motion for a new trial, that the verdict is not supported by sufficient evidence. *Riverside Coal Co. v. Holmes* 858

29. The statutory assignment, in a motion for a new trial, of "errors of law occurring at the trial and duly excepted to," is sufficient to present for review the ruling of the court upon a demurrer *ore tenus* interposed before the introduction of any evidence. *Id.*

30. A judgment containing a finding that a temporary injunction was properly allowed will not be reversed where such finding does not prejudicially affect the rights of the party complaining, and the judgment is otherwise correct. *Westover v. Lewis* 692

31. A court of equity will not enjoin the collection of a judgment at law on account of mere irregularities or errors on the part of the trial court. Errors at the trial or in the proceedings must be corrected in the trial court or by direct proceeding in the appellate court. *Pollock v. Boyd*... 369

32. In superintending the impaneling of a jury some discretion is necessarily confided to the court, and the excusing of a juror for cause will not be held ground for reversal, unless there appears to have been an abuse of discretion. *Omaha S. R. Co. v. Beeson* 361

33. Where the proof on the essential facts in the case is practically undisputed and the verdict conforms to the proof, the verdict will not be set aside even if some of the instructions are not entirely accurate. *First National Bank of Denver v. Scott* 607

34. The giving of the instructions in an action involving the rescission of a sale, set out at length in the opinion, is not reversible error, since the verdict of the jury is the only one which should have been rendered under the testimony. *Babcock v. Purcupile* 417

35. The finding of a court, in a case tried without the intervention of a jury, has the same force as a verdict and will not be disturbed where the evidence is conflicting. *Westover v. Lewis* 692

36. In a cause tried to the court without a jury, in order to raise objection in supreme court that no waiver of jury is shown it must appear that the objection was made and overruled in trial court; objection made for first time in supreme court is unavailing. *Shoning v. Coburn* 76

37. In an action to revive a judgment where a demurrer to the answer has been sustained and judgment rendered, the remedy is by proceeding in error. The judgment will not be enjoined upon the same grounds set forth in the answer. *Haynes v. Aultman* 257

38. A new cause of action should not be presented in the reply, but when no objection is made on that ground in the district court and the issues presented are submitted on their merits, the objection that the cause of action was first stated in the reply will be *held* to have been waived. *Gregory v. Kaar* 533

39. It is not prejudicial error to permit an expert to state what steps he would take in a given case if the question does not refer to any matter in dispute but is merely introductory in its character. *Hewitt v. Eisenbart* 794

40. On the cross-examination of a witness the same question was repeated several times, whereupon the court said "if you ask another question of that kind I will stop the cross-examination of this witness." No exception was taken and it was *held* that the statement could not be reviewed. *Jones v. Stevens* 852

41. A judgment will not be set aside because an expert witness was permitted to answer a hypothetical question assuming a fact unsupported by the evidence, where such fact was the only hypothesis of the question, not combined with others based upon evidence, and the answer could not mislead the jury. *Hewitt v. Eisenbart* 794

42. The rulings of the trial court in not permitting the defendant to answer certain questions propounded to him by his counsel on direct examination cannot be reviewed by the supreme court, where no offer was made in the trial

court to prove the facts which the party complaining assumes the questions would have elicited. *Barton v. McKay* 633

43. An order allowing costs against a party can only be reviewed on error in the supreme court after a motion to retax has been filed and a ruling obtained thereon. *Bates v. Diamond Crystal Salt Co.* 904

Revivor. See EXECUTORS AND ADMINISTRATORS. JUDGMENTS, 8.

Right of Way. See EMINENT DOMAIN.

Salaries. See COUNTIES, 1. COUNTY CLERKS.

Sales. See CHATTEL MORTGAGES, 6, 8. CONFUSION OF GOODS. GUARDIAN AND WARD. PARTIES, 4. PRINCIPAL AND AGENT, 2. TAX SALES. VENDOR AND VENDEE.

1. In an action for damages for refusing to deliver goods in pursuance of a contract of sale, where no consequential damages are claimed, it is not necessary to allege the market value of the goods. *Riverside Coal Co. v. Holmes*, 858

2. Where goods are sold upon credit induced by the fraudulent representations of the vendee as to his solvency, or ability to pay for the goods bought, the vendor may rescind the sale upon the discovery of the fraud and replevy the goods. *McKinney v. First National Bank of Chadron*, 629

3. Where goods were sold to be paid for on delivery, either in cash or secured note payable in thirty days, but the purchaser fraudulently managed to obtain possession of the property without complying with the conditions, the purchaser was insolvent and mortgaged the property in question to secure pre-existing debts, *held*, that the seller, upon discovery of the fraud, could rescind the sale and reclaim the goods from the mortgagee. *Henry v. Vliet*..... 138

4. A sale and delivery were made of eleven cases of eggs. It was claimed by the seller that the sale was unconditional, and by the buyer that the sale was upon condition that he be allowed to apply purchase price to payment of an account due him from a third person. The seller subsequently refused to allow such application of purchase money. The purchaser having resold part of the eggs, shipped the remainder to the seller and paid for the part used. In an action to recover the value of the eggs, *held*, that the buyer could not rescind the contract, and that the seller was entitled to recover the unpaid price. *Babcock v. Purcupile* 417–421

5. The owner of a mill executed a bill of sale to a bank on a large quantity of flour, feed, and other property in the mill. Prior to the execution of the bill of sale the mill owner had ordered several cars of wheat from a warehouseman in another county, and one car so ordered was shipped one day after the execution of the bill of sale and two days thereafter received at the mill and a portion or all ground into flour and mixed with the stock in the mill. *Held*, That in no event did the bill of sale cover that wheat, and the person who claimed to be the owner of the mill was liable for the value of the wheat. *First National Bank of Denver v. Scott* 607

Schools and School Districts.

South Omaha is a city of the second class. Its school board on the 6th day of June, 1892, made an estimate of the amount of school tax to be levied in said city for that year. This estimate was imperfect in its statements and details. The county commissioners held the same until July 14, 1892, when they refused to levy the tax. Afterwards proceedings in *mandamus* were instituted and the court rendered judgment in their favor. Corrected estimates were then filed. *Held*, That such estimates related back to June 6 and that it was the duty of the commissioners to levy the tax. *State v. Paddock* 263

Seal. See DEEDS, 2.

Servant. See MASTER AND SERVANT.

Service. See JUDGMENTS, 2, 8. SUMMONS, 2, 5.

Settlement. See COMPROMISE.

Sham Pleadings. See PLEADING, 6.

Sheriffs and Constables. See ATTACHMENT, 3, 6. EXECUTIONS. INDEMNITY.

At common law an officer was liable for the sufficiency of the sureties on a replevin bond; but under sec. 189 of the Code he is liable after twenty-four hours only where the defendant in replevin has excepted to the sufficiency of the sureties, and they or new sureties have failed to justify. *Thomas v. Edgerton* 254

Sidewalks. See MUNICIPAL CORPORATIONS, 7.

Skill. See PHYSICIANS AND SURGEONS, 2.

Solemnization. See NEW TRIAL, 5.

South Omaha.

Is city of second class. *State v. Paddock* 263

Special Appearance. See JUDGMENTS, 5.

Special Assessments. See MUNICIPAL CORPORATIONS, 1, 3.

Specific Performance.

1. Is not generally a legal right, but rests in the sound, legal, judicial discretion of the trial court. *Clarke v. Koenig*..... 572
2. He who asks a court of equity to specifically enforce what he claims are his rights under a contract must not himself be in default in his promises in the same contract. *Id.*
3. A party invoking the equity powers of a court to enforce specific performance of a contract, which he claims is for the sale to him of real estate, must exhibit a contract unambiguous and certain. *Id.*
4. A person purchased certain real estate and in pursuance of the contract entered into possession of the property and made improvements thereon. It was stipulated that time should be of the essence of the contract. *Held*, That his failure to perform at the day fixed would not prevent the specific performance of the contract. *Merriam v. Goodlett*, 384

State. See LEGISLATIVE APPROPRIATIONS.

State Board of Health.

Act creating, *held* to be within the power of the legislature, and in its general scope not in conflict with the constitution. *Gee Wo v. State*..... 241

State University. See LEGISLATIVE APPROPRIATIONS.

Statute of Frauds.

1. A memorandum of an agreement in the form of a receipt which describes the land sold, the price and time of payment, with an admission of a receipt of $25 on the contract, and duly signed by the vendors, is sufficient under the statute. *Gardels v. Kloke*..... 493
2. Prior to the statute of frauds a parol contract for the sale of land with delivery of possession was valid. The statute has merely changed the common law so that it is only necessary for the party to be charged to sign the memorandum. The vendee accepting the same is bound as at common law. *Id.*

Statute of Limitations. See FRAUDULENT CONVEYANCES, 9-12. MECHANICS' LIENS, 4.

1. The limitation of two years within which suit may be brought against a national bank under Rev. Stats. U. S., sec. 5198, for taking usurious interest begins to run from the time when the usurious interest is paid. *First National Bank of Dorchester v. Smith*..... 199

2. In pleading the statute of limitations of a foreign state it is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on. The petition set out in the opinion *held* to state a cause of action. *Minneapolis Harvester Works v. Smith* 617

3. In December, 1881, the defendant, a resident of the state of Iowa, gave the plaintiff his promissory note due January 1, 1884, and payable in that state. He removed to Nebraska in 1888, and suit was commenced on the note in this state on July 13, 1891. *Held*, The action was not barred. *Id.* 616

4. An action to foreclose a mortgage is barred in ten years from the time the debt becomes due, or from the date of the last payment or a new promise to pay the same, and under sec. 17 of the Code the time is not extended by the absence of the defendant from the state. *Merriam v. Goodlett* 384

5. Where a person is a resident of another state when a cause of action accrued against him, and afterwards, but before the debt has become barred by the statute of such state, he becomes a resident of Nebraska, statute of limitations will commence to run in his favor here from the date of his coming into the state, and not before. *Minneapolis Harvester Works v. Smith* 616

6. Under sec. 12 of the Code an action for relief on the ground of fraud can only be commenced within four years after the discovery of the facts constituting the fraud. *Gillespie v. Cooper* 775

7. The cause of action mentioned in above section is the fraudulent act complained of and accrues when discovered. It is discovered when the party seeking relief is in possession of sufficient facts to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to a discovery of the fraud. The statute begins to run against a creditor from the discovery of the fraudulent act on the part of his debtor, whether the creditor's claim has been reduced to judgment or not, as he is not limited to a creditor's bill in order to obtain relief on the ground of fraud, but may attach the property fraudulently conveyed. *Id.*

Statutes. See LEGISLATIVE APPROPRIATIONS. STATE BOARD OF HEALTH. TABLE, *ante*, p. xliii.

1. The governor is a part of the law-making power of the

state, and every bill, before it becomes a law, even if passed by a two-thirds majority of each house, must be approved by him, passed over his veto, or remain in his hands more than five days, Sundays excepted. *State v. Crounse* 835

2. The act of March 30, 1887, entitled "An action to amend secs. 27 and 58, and to add subds. 58 and 59 to sec. 52, art. 2, ch. 14, Comp. Stats., relating to cities of the second class having over 5,000 inhabitants," etc., is a complete act covering the entire subject of the power of the class of cities designated with respect to the opening and improving of streets and alleys, and by implication repeals all prior acts in conflict therewith. *Von Steen v. City of Beatrice* 421

3. The provision of subd. 4 of sec. 52, art. 2, ch. 14, Comp. Stats., for the paving of streets in cities of the second class having over 5,000 and less than 25,000 inhabitants, without petition of the owners of property to be charged therefor, is in conflict with the provisions of the act of March 30, 1887, and is repealed thereby. *Id.*

Statutory Construction.

The constitution and election laws contemplate that every qualified elector shall be entitled to vote for state and county officers at each election; and a construction will not be adopted that will have the effect to disfranchise a considerable number of voters, and deprive a county of representation in the legislature, unless rendered necessary by express, unequivocal language. *State v. Van Camp* 91

Stipulation. See COMPROMISE.

Stock. See CORPORATIONS, 8.

Stockholders. See CORPORATIONS.

Street Railways. See CARRIERS. MASTER AND SERVANT, 2, 3.

1. Are common carriers of passengers, and are liable as other common carriers upon common law principles. *Spellman v. Lincoln Rapid Transit Co* 890

2. A street railway should keep tickets for sale upon the cars where it transacts its business with the public. *Sternberg v. State* 307

3. The street railway of the city of Lincoln is so far under the control of the municipality that the latter may fix the rates of fare for passage over said railway, and may require tickets, six for twenty-five cents, to be kept for sale by each conductor of a car. *Id.*

Streets. See MUNICIPAL CORPORATIONS, 3, 7, 8.

Subrogation.

A person mortgaged her separate estate to secure loans from a bank in favor of a private corporation. It was agreed that as each loan was effected the corporation should deposit notes held by it as collateral security for the loan, the security given by it to be merely contingent. A large number of loans were made in this way and notes as collateral deposited with the bank. Afterwards the bank required her to pay the amount due to it. This she did by mortgaging her separate estate, and she thereupon received from the bank the collateral notes. *Held*, That the testimony clearly established the fact that the notes were held by the bank in good faith before due to secure a loan and debt, and that as she had paid the same as surety, she was subrogated to the rights of the bank. *Guthrie v. Ray*..... 612

Substitution. See PARTIES, 2, 3. RECEIVERS.

Summons. See JUDGMENTS, 8. PLEADING, 13.

1. A mistake in the title of an affidavit for service by publication is immaterial after judgment. *Majors v. Edwards*.... 56
2. The filing of a motion to set aside a default is a waiver of all defects and irregularities in the service of the summons. *McCormick Harvesting Machine Co. v. Schneider*..... 206
3. To impeach the return of an officer of the due service by him of a summons the evidence must be clear and satisfactory. *Connell v. Galligher* 749
4. Issued before the expiration of two years from the filing of a mechanic's lien may be served afterward within the statutory time. *Burlingim v. Cooper*..... 73
5. An affidavit, in an action for the foreclosure of a mortgage on real estate, for service by publication, will not be held insufficient, after decree, unless there is an entire omission to state the material facts showing a right to make service by publication. *Majors v. Edwards*..... 56

Sunday. See HOLIDAYS.

Supreme Court.

An interpretation given to a statutory or constitutional provision by the court of last resort becomes a standard to be applied in all cases, and is binding upon all departments of the government, including the legislature. *State v. Van Camp*..... 91

Sureties. See BONDS. PRINCIPAL AND SURETY. SHERIFFS AND CONSTABLES.

Surface Water. See INJUNCTION, 3.

Surgeons. See PHYSICIANS AND SURGEONS.

Talesmen. See JURY, 3.

Tax Liens.

1. On foreclosure, if the parties affected are not before the court, the remedy is an action to redeem. If the court had jurisdiction the decree cannot be treated as void. *Merriam v. Goodlett*..... 384
2. A tax lien on the land itself takes precedence of all other liens, and a decree foreclosing the same, and a sale thereunder, where all persons affected thereby are before the court, transfers to the purchaser under the decree an absolute title in fee to the land. *Id.*

Tax Sales. See MANDAMUS, 8. PARTIES, 4.

1. It is the policy of the law to encourage competition at the sale of property for delinquent taxes. *State v. Farney*..... 537
2. The provision of the revenue law for the keeping open of the public sale of lands for delinquent taxes is mandatory, and a substantial compliance therewith is demanded of the officer conducting such sale. *Id.*
3. Where the public sale for delinquent taxes was opened at nine o'clock A. M., and adjourned *sine die* at the expiration of an hour and a half thereafter, the property all remaining unsold for want of bidders, and the treasurer in charge thereof refused to entertain bids for the property advertised which were tendered at three o'clock P. M. of the same day, *held* not a compliance with the statute which requires the sale to be kept open from nine o'clock A. M. until four o'clock P. M. *Id.*

Taxes. See INJUNCTION, 4. MUNICIPAL CORPORATIONS, 1. SCHOOLS AND SCHOOL DISTRICTS. TAX LIENS. TAX SALES.

Tenants in Common. See REPLEVIN, 10.

Testators. See WILLS.

Testimony. See JURY, 1, 2.

Tickets. See STREET RAILWAYS, 3.

Time. See APPEAL, 2.

Time Essence of Contract. See SPECIFIC PERFORMANCE, 4.

Title. See INSURANCE, 4.

Title to Office. See COUNTIES, 5. MANDAMUS, 7.

Titles. See TAX LIENS.

Torts. See MUNICIPAL CORPORATIONS, 7. PHYSICIANS AND SURGEONS.

A person injured by the failure of a county board to keep a public bridge in repair may maintain an original action for damages against the county in any court of competent jurisdiction. He is not required to present his claim to the county board for allowance or rejection. *Hollingsworth v. Saunders County* 147

Traffic. See LIQUORS, 4, 5.

Transcript. See APPEAL, 3, 4.

Treasurers. See COUNTIES, 1. PARTIES, 4. TAX SALES.

Trespass. See EMINENT DOMAIN, 1.

Trial. See ASSIGNMENTS. BONDS. CRIMINAL LAW, 6, 7. DISMISSAL. EVIDENCE, 14, 16. EXECUTORS AND ADMINISTRATORS. FORCIBLE ENTRY AND DETAINER. FRAUDULENT CONVEYANCES, 5, 8. INSTRUCTIONS. JURY TRIAL. MALICIOUS PROSECUTION, 2. MUNICIPAL CORPORATIONS, 6, 7. NEGLIGENCE. NEGOTIABLE INSTRUMENTS, 14, 17. NEW TRIAL. QUANTUM MERUIT. RAILROAD COMPANIES, 6, 7. REVIEW, 35. WITNESSES, 2.

1. Refusal of court to direct verdict, *held*, proper. *Hakanson v. Brodke* 42
2. Where it is necessary for the plaintiff to introduce any evidence in order to maintain his action he is entitled to open and close. *Cortelyou v. Hiatt* 584
3. Trial by jury should be claimed in lower court before error can be predicated in supreme court on fact of a cause being tried to court without jury. *Shoning v. Coburn* 76
4. Where a witness volunteers testimony not responsive to any questions, and which is immaterial under the issues, the complaining party should object thereto or move to strike it out of the record. A new trial will not be allowed on account of such volunteer evidence when no objection is made to it at the time of the trial. *Omaha S. R. Co. v. Beeson* 362

Trover and Conversion.

1. In the trial of an action for the conversion of a note the purpose for which the note was assigned may be proved to show the nature of the transaction. *Cortelyou v. Hiatt* 584
2. The evidence, discussed in the opinion in an action against

a sheriff for the conversion of a stock of goods seized on writs of attachment, *held* sufficient to sustain a verdict in favor of the plaintiff. *Barton v. McKay*..... 633

3. The allegations in a petition that plaintiff was the owner and in the possession of a note and assigned the same as collateral security for a certain debt, and that defendants wrongfully sold the same and converted the proceeds to their own use, are sufficient. *Cortelyou v. Hiatt*..... 584

Trust Funds. See BANKS AND BANKING, 2. MANDAMUS, 9. VOLUNTARY ASSIGNMENTS, 3, 5.

Ultra Vires. See CORPORATIONS, 1, 2.

Usury. See EVIDENCE, 16. REPLEVIN, 8. STATUTE OF LIMITATIONS, 1.

1. An agreement to pay annually in advance the highest legal rate of interest for the use of money does not make the contract usurious. *Rose v. Munford*..... 148

2. Where a party loans money at the maximum rate allowed by statute and coupon notes are taken for the interest, which stipulate that interest shall be allowed thereon after maturity, at ten per cent, the contract is not thereby tainted with the vice of usury. In such case no interest will be allowed on such coupons. *Id.*

3. Where a loan was made at the highest legal rate of interest, the fact that the money was not turned over until after the interest began to run does not make the contract usurious, where the delay was caused by a failure of the borrower to procure, according to agreement, releases of prior incumbrances upon the property which was to secure the loan. *Id.*..... 153

4. In an action on a note the evidence showed that the money was actually loaned by the plaintiff in good faith for the purpose of paying defendant's note at a bank and that the money was so applied. *Held*, That the fact plaintiff was a director in the bank and loaned defendant the money to pay his usurious debt to the bank, which was known by plaintiff at the time to be usurious, is not alone sufficient to authorize the defendant to set up as a defense to such action the usurious transaction between himself and the bank. *Yeiser v. Fulton*..... 521

5. In such a case it was admitted by the plaintiff that he had received $11.25 usurious interest, and it was proper for the jury in arriving at a verdict to apply that sum on the principal; but where it appears from special findings that the jury also deducted the amounts of interest for-

merly paid by defendant to the bank upon the theory that the note was taken in plaintiff's name pursuant to some agreement between him and the bank to evade the usury laws, a judgment rendered upon such a verdict will be reversed. *Id.*

Vacancy of Highway. See HIGHWAYS.

Valued Policy Act. See INSURANCE, 5, 7.

Vendor and Vendee. See HOMESTEADS, 5. PRINCIPAL AND AGENT, 2, 3. SALES. SPECIFIC PERFORMANCE, 4.

1. Where time is of the essence of a contract for the sale of real estate, and it is agreed that payment is to be made on a certain day, the vendor waives his right to insist on the stipulation by accepting interest after that time. *Merriam v. Goodlett* 384

2. Where a purchaser of property pays the grantor the consideration therefor after he has received actual or constructive notice of a prior right or equity, he is not entitled to the protection which the law affords an innocent purchaser for value. *Garmire v. Willy* 340

3. A person's true name was Mary Ann Allely, and she held her real estate by conveyance of record under the name of Mary A. Allely. *Held*, That a judgment against her, indexed and docketed in the office of the clerk of the district court, "McKaig & Co. v. May Alley," was not constructive notice to a purchaser of the real estate from Mary Ann Allely. *Phillips v. McKaig* 853

4. The indexes in the office of the register of deeds disclosed conveyances as follows: "——— to Mary A. Allely, deed; Mary A. Allely to Hooper, mortgage; Mary A. Allely to Vickars, mortgage." *Held*, That Vickars, by taking a deed of the real estate from Mary A. Allely, so described in body and acknowledgment of the deed, but signed Mary A. Alley, was not thereby charged with notice that a judgment indexed in the office of the clerk of the district court against May Alley was against Mary A. Allely. *Id.*

5. An action will lie to foreclose the rights of a purchaser in a contract for the sale of real estate, and the court by its judgment may direct the purchaser to comply with the terms of the contract within a reasonable time to be named by the court, or order the premises sold and the proceeds applied to the payment of the judgment. *Gardels v. Kloke* 494

6. In such a case the justice and equity of the case will determine the character of the judgment. *Id.*

7. Where a party purchases a lot on which there is a party wall built by the owner of the adjoining lot, with notice, either actual or constructive, of a contract between his grantor and such adjoining lot owner, that the grantor will pay one-half the costs of constructing the wall whenever he shall use it, the agreement further stipulating that the covenants therein shall extend to and be binding upon each party, his heirs, administrators, and assigns, such purchaser is liable for the amount agreed to be paid by his grantor in case he makes use of the wall. *Garmire v. Willy*, 340

Verdict. See JURY, 1, 2.

1. Cannot be sustained where the evidence in writing shows that it is for a sum much less than the amount due. *Porter v. Sherman County Banking Co*..... 271
2. The verdict was *held* sufficient in form and substance in a case where it appeared that the name of a defendant had been omitted from the title; that the title was sufficient to identify the verdict with the case; that it was returned and filed in the proper action, and that no objection was made until after the jury had been discharged. *Parrish v. McNeal* 730

Verification. See INDICTMENT AND INFORMATION, 1, 2.

Voluntary Assignments. See FRAUDULENT CONVEYANCES, 4. PREFERRED CREDITORS.

1. Under the provisions of secs. 42 and 43 of the assignment law, the rights of the assignee to recover property fraudulently transferred by the assignor are similar to those of a judgment creditor and must be enforced according to the forms of law. He is not authorized to forcibly seize and take property on the assumption that it was transferred by his assignor in fraud of the rights of creditors. *Brown v. Farmers & Merchants Banking Co*..... 434
2. Where a chattel mortgage was made and taken by a creditor of the mortgagor upon all his property, its purpose being not only to secure a debt due the mortgagee, but also to secure other creditors of the mortgagor not named therein, whose rights are not expressly reserved from the operation of the assignment law of this state, such mortgage is *held* void as an irregular, prohibited voluntary assignment. *Stewart v. Stewart*..... 558
3. It is the duty of the county judge at the same time he audits and allows a claim against an assigned estate to determine whether or not it is entitled to preference, and if he finds that it is, to order the same paid as a preferred

claim. His decision is, in effect, a judgment, which is conclusive, unless appealed from. *Anheuser-Busch Brewing Association v. Morris* 31

4. Where a bank collects money for another, it holds the same as trustee of the owner, and on the making of an assignment by the bank for the benefit of its creditors the trust character still adheres to the fund in the hands of the assignee, and the owner is entitled to have his claim allowed by the county court as a preferred claim. *Id.*

5. In such a case, where the owner files his claim with the county judge in the regular way, which is allowed like that of an ordinary creditor, no preference being given, from which allowance no appeal is taken, and he afterwards accepts from the assignee two dividends declared, he waives his right to afterwards insist upon the payment of his claim in full. *Id.*

Volunteer Evidence. See TRIAL, 4.

Vouchers. See LEGISLATIVE APPROPRIATIONS, 2, 3.

Wages. See EXEMPTIONS. MASTER AND SERVANT, 1. QUANTUM MERUIT.

The evidence in an action for services rendered was insufficient to support a verdict against officers of a company, individually, where the testimony showed that the contract was made with and the work performed for the company. *Imhoff v. House* 28

Waiver. See INDICTMENT AND INFORMATION, 1, 2. INSURANCE, 3. PLEADING, 9. REVIEW, 38. VENDOR AND VENDEE, 1. WITNESSES, 4.

1. Submission of error proceedings on merits is waiver of defects of parties. *Curtin v. Atkinson* 111

2. A claimant waives his right to have his claim preferred by neglecting to appeal from the order of a county judge allowing it as ordinary claims and accepting dividends from the assignee. *Anheuser-Busch Brewing Association v. Morris* 31

Wills.

1. In an action to contest a will, the issue being the capacity of the testator, the evidence discussed and set out in the opinion, *held* sufficient to support a verdict sustaining the will. *James v. Sutton* 393

2. In a contest over the probate of a will the parties objecting to such probate offered evidence tending to show that the testator many years before his death had given one of his children certain lands, describing them, but had failed

to convey the same. *Held*, Properly excluded, because it did not relate to the questions at issue, and if such gift had been made and possession given in pursuance thereof and the conditions complied with, those facts might be shown in a proper case to enforce, quiet, or confirm the title. *Id.* 394

Witnesses. See REVIEW, 39, 41, 42. TRIAL, 4.

1. To justify the proving of contradictory statements of a witness for the purpose of impeaching him, the answer of the witness on cross-examination must be material so that the cross-examining party would be allowed to give it in evidence. *Carter v. State* 481
2. The presiding judge, of necessity, is vested with a sound judicial discretion as to limiting the cross-examination of a witness, and where the same question has been three times propounded, it is not error to prohibit a like question to be again asked under penalty of forbidding further cross-examination. *Jones v. Stevens* 849
3. A person having a direct legal interest in the result of an action in which the adverse party is an administrator of a deceased person is not precluded by section 329 of the Code from testifying to a transaction between himself and such deceased person in case such administrator has first introduced a witness who has testified in regard to the same transaction. *Parrish v. McNeal* 727
4. When a person, who is precluded by the provisions of sec. 329 of the Code from testifying against the representative of a deceased person, is permitted, without objection, to testify to a conversation or transaction had with such deceased person, it is a waiver of the benefit of the statute. *Id.*

Words and Phrases.

1. "Convenient." *City of Grand Island v. Oberschulte* 699
2. "Crime." *Pounder v. Ashe* 570
3. "Criminal negligence." *Chicago, B. & Q. R. Co. v. Landauer* 643
4. "Fiscal year." *State v. Moore* 579
5. "Non-resident." *Pacific R. Co. v. Perkins* 456
6. "Protest." *Wood River Bank v. First National Bank of Omaha* 744
7. "Totally destroyed." *German Ins. Co. v. Eddy* 461
8. "Traffic in intoxicating drinks." *Curtin v. Atkinson* 110
9. "Vouchers." *State v. Moore* 579

Writs. See JUDGMENTS, 8. SUMMONS.